

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM**

APPEAL CASE NO. 15 OF 2013-14

BETWEEN

**M/S EQUITY AVIATION SERVICES (T) LIMITED
AND 4 OTHERS.....1ST APPELLANTS**

**AVIATION HANDLING SERVICES (T)
LIMITED.....2ND APPELLANT**

AND

**TANZANIA AIRPORTS
AUTHORITY.....RESPONDENT**

DECISION

CORAM

- | | |
|------------------------------|----------------|
| 1. Mr. Kesogukewe M. Msita | -Chairman |
| 2. Mr. Haruni S. Madoffe | -Member |
| 3. Mrs. Nuru S. N. Inyangete | -Member |
| 4. Ms. Esther Manyesha | -Member |
| 5. Mr. Ole-Mbille Kissioki | -Ag. Secretary |

SECRETARIAT.

- | | |
|---------------------------|----------------|
| 1. Mr. Hamisi O. Tika | -Legal Officer |
| 2. Ms. Violet S. Limilabo | -Legal Officer |

FOR THE 1ST APPELLANTS

1. Mr. Joseph Ngiloi, Advocate, -Makoa Law Chambers(Advocates)
2. Mr. Imafon Akpabio, Fiona, Advocate, -Makoa Law Chambers(Advocates)
3. Mr. Elias Kissamo, Legal Officer, Makoa Law Chambers(Advocates)
4. Ms. Rosemary Kacungipa, CEO, Equity Aviation Services
5. Mr. Elias Moshi, General Manager, Precision Air Ground Handling Co. Limited
6. Mr. Osborne Mutumira, Operations, Equity Aviation Services
7. Mr. Tadayo Kikuyu, Operations ,Equity Aviation Services
8. Mr. Winifred Komba, Legal Unit, Precision Air Ground Handling Co. Limited.
9. Mr. Elias Mwashuuya, Advocate, Precision Air Ground Handling Co. Limited.

FOR THE 2ND APPELLANTS

1. Mr. D.K.Mollel, Director, Aviation Handling Services (T) Limited
2. Mr. John Lotuno, Consultant Advisor, Aviation Handling Services (T) Limited

FOR THE RESPONDENTS

1. Mr. Joachim E. Maambo, Legal Officer and Counsel
2. Mr. Mtengela L.Hanga, Head PMU
3. Mr. Oswald B.Nyanda, Procurement Officer.

This decision was scheduled for delivery today 9th October, 2013 and we proceed to deliver it.

The Appeal at hand was lodged by M/s **EQUITY AVIATION SERVICES (T) LIMITED AND 4 OTHERS (M/s ENTEBBE HANDLING SERVICES LTD, PRECISION AIR GROUND HANDLING LTD, WINGS FLIGHT SERVICES LTD, NATIONAL AVIATION SERVICES LTD)** (hereinafter referred to as "**the 1st Appellants**") against the **TANZANIA AIRPORTS AUTHORITY** commonly known by its acronym **TAA** (hereinafter referred to as "**the Respondent**").

Following notification of the Appeal lodged by the 1st Appellants to the other tenderers, M/s **AVIATION HANDLING SERVICES (T) LIMITED** opted to join this Appeal as a co-Appellant (hereinafter referred to as "**the 2nd Appellants**") and M/s Mwanza Ground Handling Limited opted to join as an interested party (hereinafter referred to as "**the Interested Party**")

The said Appeal is in respect of Tender **No. AE-027/2011-12/JNIA/68** for **the Provision of Ground Handling Services at the Julius Nyerere International Airport** (hereinafter referred to as "**the JNIA**") and (hereinafter referred to as "**the tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Authority**"), the facts of the Appeal may be summarized as follows:

The Respondent vide the East Africa newspaper and the Daily News dated 6th May, 2012 invited tenders for the tender under appeal.

The said tender was conducted through International Competitive Tendering procedures specified in the Public Procurement (Goods, Works, Non-consultant Services and Disposal of Public Assets by tender) Regulations, 2005, GN. 97 of 2005 (hereinafter referred to as "**the GN.97/2005**")

The deadline for the submission of the tenders was initially set for 1st June, 2012; but was later on extended to 29th June, 2012; whereby eight tenders were received from the following firms;

S/NO	Tenderer's Name
1.	M/s Mwanza Ground Handling Company Limited
2.	M/s National Aviation Services JV Trade Winds Aviation Services
3.	M/s Trans –Global Cargo Centre Limited.
4.	M/s Equity Aviation Services Limited JV Aero Services Egypt for Aviation Services
5.	M/s Aviation Handling Services(T) Limited(AHS/Menzies)
6.	M/s Entebbe Handling Services Limited
7.	M/s Wings Flight Services JV World Wide Flight Services
8.	M/s Precision Air Ground Handling Limited JV Kenya Airways Limited

The tenders were subjected to three stages of evaluation namely; preliminary, detailed and post qualification.

At the preliminary evaluation stage, six tenders were found to be non responsive to the requirements of the Tender Document.

The two remaining tenders by M/s Mwanza Ground Handling Company Limited and that by M/s Aviation Handling Services (T) Limited (AHS/Menzies) were found to be substantially responsive and were subjected to detailed evaluation. Thereafter, the Evaluation Committee ranked the two tenders as hereunder;

S/N	NAME OF THE BIDDER	TOTAL SCORE FOR BIDDER	RANKING
1.	Mwanza Ground Handling Co.Ltd.(AIRCO)	66.9	2 nd
2.	Aviation Handling Services Ltd(AHS/MENZIES)	80.1	1 st

The Evaluation Committee thereafter conducted post qualification of M/s Aviation Handling Services (T) Ltd (AHS/MENZIES) who was ranked No 1 and found them

to have the requisite financial and equipment capability. Thus, they recommended award of the tender to M/s Aviation Handling Services (T) Ltd (AHS/MENZIES for a concession period of five years subject to successful contract negotiations.

The Tender Board at its meeting held on 20th December, 2012, observed that the qualifications used to evaluate the tenderer were of another company and not of the firm which submitted the tender; and that there was no clear and direct legal relationship between the two companies. Thus, the Tender Board did not approve the recommendations of the Evaluation Committee.

The Tender Board observed further that, the 2nd ranked tenderer did not have the requisite experience of handling international airports. The firm's demonstrated experience was based on its operation at Mwanza Airport which is not an international airport.

On 21st December, 2012, the Respondent vide a letter referenced ED.32/208/01F/12 informed all tenderers that their tenders were found to be non responsive.

Having received the Respondent's letter, many tenderers orally expressed their dissatisfaction for rejection of their tenders.

After receiving the oral complaints, the Respondent decided to communicate to each firm, the areas of weaknesses for which they were not responsive and requested each tenderer to submit its complaints officially if they were dissatisfied with the reasons given.

Four tenderers, namely; M/s Aviation Handling Services (T) Ltd (AHS/MENZIES, M/s Wings Flight Services Limited, M/s Mwanza Ground Handling Company Limited and M/s Entebbe Handling Services Limited wrote to the Respondent complaining, amongst other things, that they were eligible and capable firms to execute the contract. Thus, the Respondent's reasons for rejection of their tenders were not correct. They therefore, requested the Respondent to reconsider them.

Following the above complaints, the Respondent's Accounting Officer decided to form a technical team to review the entire procurement process and provide him

with a full picture of the matter to enable him to decide the matter appropriately.

The Technical Team reviewed the tender process and came up with the following findings;

- i. That, the Evaluation team erred in carrying out detailed evaluation to the tender by M/s Aviation Handling Services (T) Limited /AHS Menzies since they ought to have been disqualified at the preliminary evaluation stage.
- ii. That, only the tender by M/s Mwanza Handling Company Limited (AIRCO) complied with all the requirements of the Tender Document. Thus, the Tender Board erred by disqualifying them.
- iii. That, it was true that M/s Mwanza Handling Company Limited (AIRCO) had no international experience in providing ground handling services; however, international experience was just part of the evaluation

criteria in the detailed evaluation and not a disqualification criterion.

- iv. The Tender Document did not indicate the minimum score below which a tenderer would not be awarded. In absence of a minimum score experience criterion should have been considered during contract negotiations.

The Technical Team therefore, recommended to the Accounting Officer that, their findings be tabled to the Tender Board for consideration. Indeed, the Accounting Officer forwarded the said recommendations to the Tender Board as advised.

The Tender Board at its meeting held on 16th June, 2013, deliberated on the recommendations by the Technical Team and approved award of the tender to M/s Mwanza Handling Company Limited.

The Respondent vide a letter referenced CED.32/208/06A/27 dated 21st June, 2013, informed M/s Mwanza Handling Company Limited about their intention to award the contract subject to successful

pre-contract negotiations on a number of issues observed in their tender.

On 17th July, 2013, the Respondent and the successful tenderer held the negotiation meeting in which they agreed on a number of issues observed in their tender.

On 23rd July, 2013, the Respondent communicated the award of the tender to M/s Mwanza Handling Company Limited.

On 27th August, 2013, the Respondent vide a letter referenced ED.208/01F/12 informed the remaining tenderers that their tenders were unsuccessful.

Upon being dissatisfied with the conflicting decisions of the Respondent and the award of the tender thereof, the 1st Appellants on 11th September, 2013, lodged their Appeal to the Authority.

On receiving notification of the Appeal that required them to submit their written replies, the Respondent and the Interested Party raised a point of preliminary objection that **the Appeal before this Authority is incurably defective and incompetent for being filed pre-maturely in contravention of Sections**

80(6), 81(1),(2),(3) and (4), 82(1),(2),(3),(4) of the Public Procurement Act, No. 21 of 2004 (hereinafter referred to as "**the Act**").

As a matter of procedure, the Authority is obliged to resolve the Preliminary Objection raised before addressing the merits of the Appeal.

THE RESPONDENT'S AND THE INTERESTED PARTY'S SUBMISSIONS ON THE PRELIMINARY OBJECTION.

The Respondent and the Interested Party's submissions may be summarized as follows;

That, Section 80(6) of the Act provides avenues in which aggrieved tenderers can follow. The law requires aggrieved tenderers to lodge their complaints to the accounting officer or an approving authority except for complaints or disputes made against the Public Procurement Regulatory Authority (hereinafter referred to as "**the PPRA**").

That, the word accounting officer or the approving authority provided under S.80 (6) does not include this

Authority (PPAA) as per definitions provided under Section 3 of the Act.

That, the Appellants were required to lodge their complaints to the accounting officer, then to PPRA pursuant to Section 81 of the Act before coming to this Authority as the law requires.

That, since, the contract had entered into force by virtue of Section 55(7) of the Act; and since the accounting officer or an approving authority had been ousted by the law to entertain the complaints, the Appellants ought to have followed the hierarchy by lodging their complaints to PPRA and not this Authority.

That, Rule 4 of GN. NO.205 of 2005 identified the persons who may appeal to this Authority; to include those aggrieved by a decision of PPRA or the Minister responsible for Local Government. The Appellants in this Appeal are not disputing PPRA's or Minister's decisions. They are disputing the accounting officer's decision. It is therefore, pre-mature for this Authority to entertain their Appeal since it has not followed the review channels provided under the law.

On the strength of these submissions, the Respondent and the Interested Party prayed that this appeal be dismissed with costs.

APPELLANT'S REPLIES ON THE PRELIMINARY OBJECTION.

The Appellants' replies on the Preliminary Objection may be summarized as follows;

That, Section 80 (1) and (2) of the Act relied by the Respondent is not applicable in the circumstances since the award of the tender has been communicated to the successful tenderer.

That, Section 80 (3) of the Act read together with Regulation 111(4) of GN.NO.97/2005, bars a procuring entity or approving authority to entertain a complaint upon entry into force of the procurement contract. Thus, the sections cited by the Respondents apply only where the contract has not entered into force.

That, on the strength of Sections 80(3), 82(1) (a) and Regulation 111(4), they were right to lodge their complaint to this Authority.

In conclusion, they prayed that the Preliminary Objection be dismissed and the matter be heard on merits.

ANALYSIS BY THE AUTHORITY ON THE PRELIMINARY OBJECTION.

Having gone through the documents submitted and having heard the oral submissions by the parties, the Authority is of the view that, the Preliminary Objection is based on the issue **whether the Appeal is properly before it.** Having formulated the issue, the Authority proceeded to resolve it as follows:

As clearly discernable from arguments by parties there are conflicting views about the jurisdiction of this Authority in this Appeal. In resolving the conflicting arguments, the Authority revisited Sections 79, 80, 81 and Section 82 of the Act which provide guidance on review mechanisms together with Regulation 111(4) of GN.NO.97/2005 and Rule 4 of the Appeals Rules, GN.NO. 205/2005 relied upon by the parties.

The Authority observed that, Section 79 provides for the tenderers' rights to seek review, while Sections 80, 81 and 82 provide specifically for the two alternative

avenues which may be followed when a supplier, contractor, or consultant wants to seek a review of a procurement process.

a) The first avenue

Under this avenue, a tenderer who seeks review of a procurement process is obliged to start by firstly, invoking the provisions of Section 80(1) and (2) of the Act, which stipulates that all complaints or disputes arising during the procurement process have to be submitted to the Accounting Officer within twenty eight days of becoming aware of the circumstances giving rise to the complaint. Additionally, Section 80(4) of the Act requires the Accounting Officer to issue a written decision within thirty days from the date the complaint was filed.

If a tenderer is dissatisfied with the decision of the Accounting Officer or if the Accounting Officer fails to issue a decision within thirty days, a tenderer has the right to apply for review to PPRA as per Section 81 of the Act. The Authority reproduces Section 81(1), (2) and (3) of the Act as follows;

S.81 (1) "A supplier, contractor or consultant who is aggrieved by the decision of the procuring entity or an approving authority **may refer the matter to the Authority for review and administrative decision.**

81(2) where:-

a) the accounting officer does not make a **decision within the period specified in section 80(4) of the Act;**

b) the tenderer is **not satisfied** with the decision of the accounting officer;

the tenderer may make a complaint to the Authority **within fourteen working days from the date of communication of the decision by the accounting officer.**

81(3) The Authority shall within thirty days after the submission of a complaint or dispute deliver a written decision ..."

It should be noted that the word "**Authority**" in the above quoted provisions refers to PPRA.

Upon being dissatisfied with the decision of PPRA, a tenderer has the right to appeal to this Authority as per Section 82(1) of the Act which states as follows;

S.82 (1) "Complaints or disputes not amicably settled by the Authority shall be referred to the Public Procurement Appeals Authority".

Furthermore, Section 82(6) of the Act provides that the decision of this Authority is final unless the matter is submitted to the High Court for Judicial Review under Section 85 of the Act.

It should be noted that this avenue is only applicable where a procurement contract has not yet entered into force.

b) The Second Avenue

Section 82(2) of the Act provides for circumstances under which an appeal may be filed directly to this Authority without exhausting other stages as it has been elaborated under the first avenue. The said Section 82(2) provides as follows:-

S. 82(2) A supplier, contractor or consultant entitled under section 79 to seek review may submit a complaint or dispute to the Public Procurement Appeals Authority;

a) **if the complaint or dispute cannot be entertained under section 80 or 81 because of entry into force of the procurement contract** and provided that the complaint or dispute is submitted within fourteen days from the date when supplier, contractor or consultant submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when supplier, contractor or consultant should have become aware of those circumstances.”
(Emphasis added)

Furthermore, the Authority revisited Section 55(7) of the Act which stipulates as to when a procurement contract enters into force. The said sub-section provides as follows:

“S. 55(7) the procurement contract shall enter into force when a written

acceptance of a tender has been communicated to the successful supplier, contractor or consultant”.

The above quoted Section connotes that, an appeal can be filed directly to this Authority once the notification of award has been communicated to the successful tenderer, whereby the procurement contract is considered to have entered in force. That means this Authority has sole original jurisdiction on complaints where a procurement contract is already in force.

According to the facts of this Appeal, the Authority observed that the Appellants lodged their appeal to this Authority after being dissatisfied with the tender results. According to the documents submitted, the award of the tender was communicated to the successful tenderer on 27th August, 2013, while the information that the Appellants' tenders were not successful was communicated to them on 03rd September, 2013.

Thus, the Authority is of the firm view that, by the time the Appellants were informed of the tender results, the contract was already in force.

The Appellants' arguments in this regard that, by the time they were informed of the tender results, they could neither submit their complaints to the Accounting Officer nor to PPRA as the only recourse open for them was to appeal directly to this Authority.

On the other hand, the Respondent contended that entry into force of a procurement contract does not oust the jurisdiction of PPRA to entertain complaints. In support of their position they relied on Authority's decision in Appeal Case No 123 of 2012.

With regard to the decision of this Authority in Appeal Cases No. 123 of 2012 cited by the Interested Party, the Authority wishes to agree with them that, this Authority may depart from its decisions if circumstances so allow. However, the Authority wishes to distinguish the said decision with the Appeal at hand. The distinction lies on the fact that, in Appeal Case No. 123 the Appellant therein lodged their complaint directly to PPRA before coming to this Authority. Had the Appellants in this case opted for PPRA, according to that decision, this Authority would have nothing to stop PPRA from making a decision from the complaints

lodged. However, the said decision was superseded by this Authority's decision in Appeal case No 139 of 2012 on page 23, in which the Authority re-iterated its former position that, it has sole original jurisdiction to entertain complaints upon entry into force of a procurement contract.

In view of the above findings, the Authority's conclusion on the main issue in dispute, is that, the Appeal is properly before it and the hearing of the Appeal should proceed on the merits thereof.

SUBMISSIONS BY THE 1ST APPELLANTS ON THE MERIT.

The 1st Appellant's documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing may be summarized as follows;

That, they were among the tenderers who participated in the tender under Appeal.

That, the Respondent vide a letter referenced 21st December, 2012 informed them that all tenderers who

participated in the disputed tender process were unsuccessful and that they were planning to invite them to clarify the areas of non compliance before re-issuance of a refined Tender Document.

That, despite, the promise they had made, the Respondent wrote another letter informing them that M/s Mwanza Handling Company Limited had been awarded the same tender.

That, the contents of the two letters from the Respondent were contradictory.

That, the entire tender process lacked transparency.

That, the reasons for award of the tender to the successful tenderer were also not apparent.

That, they wondered as to how a non responsive tender can become a responsive tenderer in the same tender process.

That, they further wondered as to how a tender that had already been rejected (***functus officio***) could lead to an award.

That, the award of the tender to the successful tenderer had been made outside the bid validity period specified in the Tender Document.

The 1st Appellants therefore prayed for the following orders;

- i. Respondent's decision of award to be quashed
- ii. Costs of this Application as per the following break down;
 - a) Appeal filling fees Tshs.120,000/-
 - b)Legal fees Tshs. 25,000,000 (Tshs. 5,000,000 per tenderer)
 - c)General damages Tshs. 30,000,000/-

SUBMISSIONS BY THE 2ND APPELLANT ON THE MERIT.

The 2nd Appellants' documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing may be summarized as follows;

That, they were informed by the Respondent that their tender was unsuccessful and they were promised to be invited and to get clarifications on the areas in which

they were non compliant prior to re-issuance of a refined Tender Document.

That, to date, the Respondent had neither given them clarifications nor has a refined Tender Document been issued as promised.

That, the Respondent conducted this tender process in an unprofessional and biased manner without transparency.

That, the principle of equity was deliberately flouted by the Respondent.

That, the Respondent's evaluation method lacked transparency including the matrix that grades all tenderers in defined, known values or criteria.

That, the Respondent ought to have listed all the variables needed in the Evaluation exercise, weighted them, allotted marks and all tenderers should have been evaluated on the basis of variables pursuant to Section 46(4) of the Act. To the contrary, the Respondent did not do so.

That, the evaluation undertaken was not fair since the Respondent did it the way they wished in order to favour one tenderer.

That, the experience of the tenderer to operate in a big international airport ought to have been one of the criterion for the award.

That, they had been arbitrarily demoted to the second position by a firm that lacks experience while they were the ones who deserved to be awarded the tender.

That, the reasons for rejection of their tender were not correct.

That, they are members of Menzies Aviation World Wide under Middle East and Africa Region.

That, the Respondent requested for their operating licence and other necessary documents related to their firm as they had indicated in their tender that their firm was owned by Menzies Afrique. That, AHS is a subsidiary company in which it has legal and financial connections.

That by being a subsidiary company they enjoy all the technical, financial and operational experience of Menzies World Wide.

That, the Respondent rejected their tender while in a previous tender in which they had participated, they used the same method and their legal relationship was accepted and were awarded the contract by the Respondent.

Finally, the 2nd Appellant prayed for the following;

- i. That, the entire tender process be nullified
- ii. That, a new and well defined tender be started afresh.
- iii. That, the Respondent pay them costs as per the following break down;
 - a. Legal and other administrative expenses
Tshs. 12,000,000/-
 - b. financial losses they had incurred to the tune of Tshs, 20,000,000/-

- c. Interest at 22% for the Bid Security and other costs.

REPLIES BY THE RESPONDENT

The Respondent's documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing may be summarized as follows;

That, the tender under Appeal had gone through two stages and not two evaluations as contended by the first Appellants. At the first stage, no tenderer was found to be responsive to the requirements of the Tender Document.

That, after the said process all tenderers were notified that their tenders were non responsive.

That, having received the Respondent's letters that their tenders were non responsive, four tenderers complained over the tender process.

That, the Respondent's Accounting Officer's action of reviewing the tender process was necessitated by complaints raised by some of the tenderers.

That, for purposes of transparency, the Respondent's Accounting Officer through powers vested unto him under Section 33(i) of the Act, decided to form a technical team which reviewed the tender process and came up with recommendations that assisted him to make decisions.

That, the approval of the tender by the Tender Board and subsequent award to the successful tenderer was an outcome of the findings of the technical team.

That, there was no contradiction or indicators entailing lack of transparency between the letters communicated to the Appellants.

That, the first letter written to the Appellants by the Respondent did not communicate award of the tender rather communicated rejection of their tenders.

It was not correct that, the Respondent was functus officio since the law under Section 80(1) allows them to

entertain complaints before award has been communicated to the successful tenderer.

That, letters were written to tenderers in observance of the law and the said letters were self explanatory.

That, the tender was awarded within the Bid Validity period specified in the Tender Document after it had been extended twice.

That, they complied with the law in awarding the tender to the successful tenderer.

That, the 2nd Appellants lacked legal capacity to be awarded the tender since there was no legal back up to support their tender.

That, the experience they had indicated in their tender was from another firm and not theirs.

Finally, the Respondent prayed for dismissal of the Appeal with costs.

REPLIES BY THE INTERESTED PARTY ON MERITS.

The Interested Party's documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing may be summarized as follows;

That, they possess a Class I License to operate ground handling services in international airports.

That, they are the leading firm in this business in Tanzania.

That, they had 14 years relevant experience for the tender under Appeal.

That, their firm is now operating in Juba, South Sudan. This means that they are a capable firm and deserved to be awarded this tender.

Finally, the Interested Party prayed for dismissal of the Appeal with costs.

ANALYSIS BY THE AUTHORITY

Having gone through the documents and having heard the oral arguments from the parties, the Authority is of

the view that the Appeal is centered on the following issues:

- **Whether the tender process was conducted in accordance with the law.**
- **Whether the 2nd Appellant was unfairly disqualified**
- **Whether the award of the tender to the successful tenderer was proper at law**
- **To what reliefs, if any, are the parties entitled to.**

Having identified the issues in dispute, the Authority proceeded to resolve them as follows:

1. Whether the tender process was conducted in accordance with the law.

In resolving this issue, The Authority considered the Appellants contentions that the tender process and the award made thereof lacked transparency; and that there was no basis for the Respondent to award the tender to the purported successful tenderer prior to re-

advertisement of the same as promised. In the cause of doing so, the Authority examined the oral and the documentary evidence at its disposal vis-a-vis the applicable law and the Tender Document in order to ascertain whether the tender process and the award thereof was conducted in accordance with the law or not. In so doing, the Authority deemed it necessary to frame the following sub issues as guidance.

- **Whether the Evaluation process was conducted in accordance with the requirements of the Tender Document.**
- **Whether the Accounting Officer had powers to review complaints after rejection of all the tenders.**
- **Whether the award of the tender based on the recommendations of the Technical team was proper at law.**
- **Whether the award of the tender was made within bid validity period specified in the Tender Document.**

Having framed the sub-issues the Authority proceeded to resolve them as follows;

i. Whether the Evaluation process was conducted in accordance with the requirements of the Tender Document

In resolving this sub issue, the Authority revisited the Tender Document and the Evaluation Report. In doing so, the Authority observed that, Clauses 26, 27, 31 and 32 of the ITB, identified the stages under which tenders were to be evaluated.

According to the ITB, Clause 26 formed the basis for preliminary evaluation; Clause 27 was the basis for the detailed evaluation while Clause 31 was used in determining the highest ranked tenderer. The Authority observed further that, after the determination of the highest ranked tender, the tenderer was to be post-qualified pursuant to the requirements of Clause 32 of the ITB before the award of the tender.

The Authority revisited the Evaluation Report and observed that the Respondent did preliminary evaluation of all tenders as required by clause 26. In

that, process, the Authority observed that, six tenderers were found to be non responsive for various reasons indicated therein. The Authority concurs with these findings of the Evaluation Committee.

The remaining two tenders by M/s Aviation Handling Services Limited and the tender by M/s Mwanza Ground Handling Limited were subjected to detailed evaluation.

The Authority noted further that during the detailed evaluation stage, the two tenders were given scores for each item depending on the scores indicated in Evaluation Framework sheet. The Authority noted that the tender by M/s Aviation Handling Services Limited scored 80.1% while the tender by the successful tenderer scored 66.9%.

Having identified the highest ranked tenderer M/s Aviation Handling Services Limited, the Evaluation Committee conducted post qualification for the said tenderer pursuant to Clause 32.1 of the ITB.

Following post qualification, the Evaluation Committee found the tenderer to be qualified to be awarded the tender, thus, they recommended award of the tender to them.

The recommendations which were then rejected by the Tender Board on the ground that, the tenderer had used qualifications which did not belong to them while there was no clear and direct legal relationship existing between their company and the firm they had used their qualifications.

The Authority observed further that, the Tender Board did not award the tender to the 2nd ranked tenderer M/s Mwanza Ground Handling Services Limited for lack of the requisite experience of provision of ground handling services for international airports as required in the above cited clause. Hence it ordered for re-tendering. However, the said order was not implemented after the Accounting Officer had received the complaints and decided to review them.

The Authority concurs with the rejection made by the Tender Board as will be elaborated later.

However, the Authority is of the view that the findings of the Tender Board should have been established by the Evaluation Committee during evaluation. If that were done, Aviation Handling Services (T) Limited (AHS/Menzies) would not have been recommended for award.

Accordingly, the Authority is of the settled view that, up to this point, the evaluation of the tenders was not conducted in accordance with the requirements of the Tender Document.

ii. Whether the Accounting Officer had powers to review complaints after rejection of all tenders

In resolving this sub issue the Authority revisited the 1st Appellants arguments that the Respondent was ousted by the law to entertain the complaint after the award had been communicated. Thus, they became *functus officio*.

In reply thereof, the Respondent submitted that the Accounting Officer had powers to entertain the

complaints submitted before him since there was no award communicated to tenderers.

Having considered the arguments by both parties, the Authority revisited Sections 33(i) and 80(1) relied upon by the Respondent and observed that the said sections empower accounting officers or chief executive officers to investigate or entertain complaints submitted by suppliers or consultants in respect of procurement proceedings and award of contracts which cannot be resolved by mutual agreements.

The Authority further revisited Section 80(3) of the Act relied upon by the Appellants and observed that it only prohibits accounting officers to entertain complaints or disputes upon entry into force of a procurement contract.

The Authority is of the view that, much as there was no award of the tender which was communicated to tenderers, the Accounting Officer had powers to entertain complaints submitted since the law does not oust his jurisdiction.

Consequently, the Authority's conclusion with regard to this sub-issue is that the Accounting Officer had powers to review complaints after rejection of all tenders.

iii. Whether the award of the tender based on the recommendations of the Technical Team was proper at law.

In resolving this sub issue, the Authority took cognizance of its findings in the above sub-issue. However in order to ascertain contentions by the Appellants that there was no legal basis for award of the tender to the successful tenderer, the Authority revisited the Evaluation Report and the Technical Team's Report and observed that, the successful tenderer was not recommended for award of the tender by the Evaluation Committee. It was the Technical Team constituted by the Accounting Officer which recommended the award of the tender to them. The Tender Board's decision was made on the basis of the said recommendations.

The Authority revisited Section 37 of the Act which provides for the organ vested with powers to evaluate

tenders. In so doing, the Authority observed that, it is the evaluation committee which has been empowered by the law to do so. The law provides, inter-alia, for the number of members of the Evaluation Committee, their qualifications and experience and obliges them to sign code of ethics (personal covenants).

For purposes of clarity, the Authority reproduces the said Section which reads as follows;

Sec.37 (1) "All evaluations shall be conducted by an evaluation committee, which shall report to the Procurement Management Unit.

(2) The membership of the evaluation committee shall be recommended by the procurement management unit, in accordance with Regulations made under this Act, and approved by the Accounting Officer.

(4) The members shall be of an appropriate level, of seniority and experience, depending on the

value and complexity of the procurement requirement

(5)...

(6) all members of the evaluation committee shall sign the code of Ethics provided under the Regulations made under the Act, declaring that they do not have a conflict of interest in the procurement requirement”.

The above notwithstanding, the Authority observed further that Section 68 of the Act requires Tender Boards to award tenders on the basis of the recommendations of the evaluation committee constituted under Section 37 cited above.

Contrary to the above requirements, the Technical Team’s recommendations were used as the basis for Tender Board’s award decision. The Authority is of the considered view that, the Technical Team was alien to the above requirements of the law. Thus, making an award decision based on their recommendations was to

usurp the powers of the Evaluation Committee and was contrary to the law. Consequently, the Tender Board's decision was against the law.

The Authority's is of the view that, the Respondent ought to have taken the findings of their Technical Team to PPRA for considerations and guidance pursuant to Section 33(j) of the Act, considering that, the Tender Board had already decided re-tendering.

It was not proper for the Tender Board to make decisions based on the recommendations of the Technical Team since the law does not provide so. The law under above named section 68 empowers the Tender Board to make decisions based on the recommendations made by procuring entity who does so through an Evaluation Committee.

The Authority is of the further considered view that, even assuming that the Technical team was legally empowered to do so, it ought to have advised a re-evaluation of the tenders of the successful tenderer pursuant to Clause 32 of the ITB which reads as follows;

Clause 32 (1) "if specified in the Bid Data Sheet, post qualification shall be undertaken.

(2) the procuring entity will determine to its satisfaction whether the Bidder that is selected as having submitted the **Highest Ranked responsive Bid is qualified to perform the contract satisfactorily,** in accordance with the criteria listed in sub-clause 12.3

(3) **The determination will take into account the Bidder's financial, technical, and managerial capabilities.** It will be based upon an examination of the documentary evidence of the Bidder's qualifications submitted by the Bidder pursuant to sub-clause 12.3 ...

(4) **"An affirmative determination will be a pre-requisite for award of the contract to the Bidder. A**

negative determination will result in rejection of the Bidder's bid, in which..." (Emphasis Added).

The Authority further revisited Clause 12.3 referred to above and observed that, it required the successful tenderer to have the minimum experience in services of similar nature and size and to submit financial reports for the past five years and also to have the working capital. For purposes of clarity the Authority reproduces part of the said Clause as hereunder;

Clause 12:3 "The information required from the Bidders in ITB 12.3 is modified as follows: **None**

12.3(b) Minimum number of experience in services of similar nature and size: **Five years.**

12.3(c) Contact information of the clients for past **five years.**

12.3(f) Financial reports for the past **five years ..."**

Having revisited the said Clauses, the Authority revisited the successful tenderer's tender and noted that they did not meet the criteria provided above. That is, five years experience, financial and equipment capability.

The Authority noted further that, while the Tender Document required the highest ranked tenderer to have a specific experience as a prime service provider in at least one international airport with similar nature and size for three consecutive years during the last five years, the successful tenderer had not indicated such experience in their tender. To the contrary, the tenderer indicated to have experience in handling Mwanza airport only which is certainly not similar in nature and size with Julius Nyerere International Airport.

With respect to financial capability, the required average annual turnover was USD, 5,000,000 while the successful tenderer indicated a total value of services within the last five years worth USD.550, 000 only.

Furthermore, the Authority noted that, while the Tender Document required for a minimum cash flow of USD

1,000,000 the tender by the successful tenderer did not indicate their minimum cash flow. During the hearing, the Respondent failed to give evidence of compliance to these requirements.

The Authority finds the Respondent to have contravened ITB Clause 32 quoted above and Section 48 of the Act with respect to post qualification.

In view of the above findings, the Authority's conclusion with regard to this sub issue is that the award of the tender to the successful tenderer based on the recommendations of the Technical Team was not proper at law.

iv. Whether the award of the tender was made within bid validity period specified in the Tender Document.

In resolving this sub issue, the Authority considered the Appellants' arguments that, the award of the tender was made outside the Bid Validity period specified in the Tender Document and the Respondent's replies that the award was made within the specified Bid Validity period.

In order to ascertain the validity of the parties arguments the Authority revisited the availed documents, the Tender Document vis-à-vis the applicable law. In so doing the Authority observed that Clause 15.1 of the Bid Data Sheet provided for a Bid Validity period of 120 days.

The Authority revisited the Tender Document and observed that the deadline for the submission of the tenders was 29th June, 2012. Counting from 29th June, 2012, the Authority is of the view that the award of the tender ought to have been communicated by 25th October, 2012.

The Authority observed however, that, the Respondent vide letters referenced ED.32/208/01.I/75 dated 25th October, 2012 and ED.32/208/01.I/92 dated 26th November, 2012 respectively, extended the Bid Validity period for sixty days to 27th December, 2012.

The Authority observed that the award of the tender to the successful tenderer was communicated on 27th August, 2013 which was about eight months beyond the extended Bid Validity period. Upon being asked by the Members of the Authority of such an anomaly, the

Respondent failed to substantiate the basis for the award outside the Bid Validity period. The Authority finds the Respondent's act to be in contravention of Section 64 of the Act which provides as follows;

S.64 "the procuring entity shall require tenderers to make their tenders and tender securities valid for periods specified in the tendering documents, and such periods shall be sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders and for the appropriate tender board to review the recommendations and give its approval for the contract or contracts to be awarded whilst the tenders are still valid.

In view of the above findings, the Authority's conclusion with regard to this sub-issue is that the award of the tender was not made within the bid validity period specified in the Tender Document.

Taking cognizance of the Authority's conclusions in sub issues above, the Authority's conclusion with regard to the main issue is that the tender process was not conducted in accordance with the law.

2. Whether the 2nd Appellant was unfairly disqualified

In resolving this issue, the Authority revisited the 2nd Appellants tender and observed that, the same was submitted in the name of Aviation Handling Services Tanzania Limited (AHS/Menzies). The Authority observed further that the Certificate of Incorporation issued by the Registrar of Companies No. 82788 dated 18th April, 2011 bears the name of Aviation Handling Services Tanzania Limited only. So does Licence No. GH 36/2011 issued by the Tanzania Civil Aviation Authority dated 8th March, 2012, to operate ground handling services at airports.

The Authority observed further that the 2nd Appellant's tender contained the Certificate of Incorporation of Menzies Aviation PLC together with other information of the said company with regard to financial statements,

experience, management structure and staff which were highly relied by the Evaluation Committee to evaluate M/s Aviation Handling Services Tanzania Limited and their recommendations for the award of the tender to them.

The Authority concurs with the Respondent that there was no clear relationship indicated in their tender between the 2nd Appellant and Menzies. They never tendered as a joint venture. The second Appellant's submitted that they are a subsidiary of Menzies. It is clear that the tenderer in this case was not a parent company but the said subsidiary. Since a subsidiary company has a separate legal existence from that of the parent company and it is a distinct legal personality, it is the subsidiary company which should have met the tender requirements as specified in the Tender Document in order to qualify. Thus, the qualification and experience of the parent company belong to the parent company and vice versa. Therefore, the qualification and experience of the parent company cannot be used to assess the subsidiary company.

It should be noted further that the 2nd Appellant's did not submit the annual turnover, cash flow statements and experience of their own. To the contrary they used Menzies' documents in their tender. Furthermore, they did not meet the other requirements provided in the Tender Document. For example, they were issued a license in 2011; clearly at the time of this tender, they did not have the requisite minimum 5 years experience specified in the Tender Document

The Authority therefore, is of the firm view that it was proper for the Tender Board to reject their tender.

From the above findings, the Authority's conclusion with regard to this issue is that the 2nd Appellant was fairly disqualified.

3. Whether the award of the tender to the successful tenderer was proper at law

In resolving this issue, the Authority relied on its findings in sub-issues three and four in issue number

one above that, the award of the tender to the successful tenderer based on the recommendations of the Technical Team; and that the award of the tender was made outside the Bid Validity Period specified in the Tender Document, that, the tender process was not conducted in accordance with the law, accordingly, the Authority conclusion with regard to this issue is that, the award of the tender to the successful tenderer was not proper at law.

4.To what reliefs, if any, are the parties entitled to.

Having resolved the contentious issues in dispute, the Authority revisited the prayers by the Appellants and resolved them as hereunder:

- a) Firstly, the Authority was requested to nullify the award of the tender to the successful tenderer.

In resolving this issue, the Authority took cognizance of its findings and conclusion in the first, second and third issues and orders the Respondent to re-start the Tender process afresh in observance of the law.

b). With regard to cost, the Authority orders the Respondent to compensate the 1st Appellants a sum of Tshs. 7,500,000/- only being Appeal filing fees, Legal fees and transport costs as costs incurred in relation to this Appeal.

The Authority also orders the Respondent to compensate the 2nd Appellant a sum of Tshs. 500,000/- only as costs incurred.

With regard to general damages prayed by the Appellants, the Authority cannot grant them for want of jurisdiction. The law requires this Authority to grant only actual costs incurred by the parties specifically the Appellants in relation to the Appeal they had lodged.

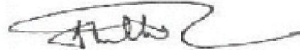
The Authority also considered the prayer by the Respondent and the interested party that the Appeal be dismissed with costs and observes that, the Appeal has merit. Therefore, their prayers are rejected.

On the basis of the aforesaid findings, the Authority upholds the Appeal and orders the Respondent to:

- Re-start the tender process in observance of the law and;
- Compensate the 1st Appellants a sum of Tshs. 7,500,000/-
- Compensate the 2nd Appellant a sum of Tshs 500,000/- only being costs incurred in relation to this Appeal.

Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

Decision delivered in the presence of the Appellants,
the Interested Party and the Respondent this 9th
October, 2013.



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MR. K.M. MSITA
CHAIRMAN

MEMBERS:

MR. H.S. MADOFFE 

MRS.N.S.INYANGETE..... 

MS. E.J. MANYESHA 