

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

APPEAL CASE NO. 122 OF 2012

BETWEEN

**M/S OCEANIC GENERAL
DISTRIBUTORS..... APPELLANT**

AND

**MINISTRY OF AGRICULTURE,
FOOD SECURITY AND
COOPERATIVES.....RESPONDENT**

DECISION

CORAM

- | | |
|---------------------------------|---------------|
| 1. Hon. Augusta Bubeshi, J(rtd) | - Chairperson |
| 2. Mrs. Rosemary Lulabuka | - Member |
| 3. Mrs. Nuru Inyangete | - Member |
| 4. Eng. Francis Marmo | - Member |
| 5. Ms. Bertha Malambugi | - Secretary |

SECRETARIAT

| | | |
|---------------------|---|-------------------------|
| Ms. Esthery Nyagawa | - | Principal Legal Officer |
| Ms. Florida Mapunda | - | Legal Officer |
| Ms. Violet Simeon | - | Legal Officer |
| Mr. Hamisi Tika | - | Legal Officer |

FOR THE APPELLANT

1. Mr. Dickson Mtogesewa - Advocate, Dickson Consulting (Advocates)
2. Mr. Samuel Chitalilo – Managing Director
3. Mr. Milton M. Obunde – Director of Marketing
4. Mr. Benson Butoto – Financial Officer
5. Mr. Gerald Msegeya – Legal Officer, Consulting (Advocates)

FOR THE RESPONDENT

1. Mr. George Mandepo – Senior Legal Officer
2. Ms. Theresia Mbelle - Legal Officer
3. Mr. Moris O. Abayo - Supplies Officer
4. Mr. Benedict Mbatia - Supplies Officer

This decision was scheduled for delivery today 25th July, 2012, and we proceed to deliver it.

The Appeal at hand was lodged by **M/s OCEANIC GENERAL DISTRIBUTORS** (hereinafter to be referred to as "**the Appellant**") against the **MINISTRY OF AGRICULTURE, FOOD SECURITY AND COOPERATIVES** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. ME 012/2010-11/DASIP/G/59 for the Supply of Power Tillers for the District Agricultural Sector Investment Project popularly known by its acronym DASIP (hereinafter to be referred to as "**the tender**").

According to the documents submitted to the Authority, as well as oral submissions by parties during the hearing, the facts of the appeal may be summarized as follows:

The Respondent advertised an invitation to tender vide the Daily News and the Guardian newspapers of 23rd May, 2011.

The tender opening took place on 6th July, 2011 whereby the following thirteen tenderers submitted their tenders:

| S/ No | Tenderer's Name | Quoted Price | Bid Security |
|--------------|----------------------------------|---------------------------------------|---------------------|
| 1 | M/s Bhaganga General Supplies | Tshs. 385,000,000 VAT inclusive | Tshs. 15,000,000 |
| 2 | M/s mn Machinery Mart Ltd | Tshs. 310,542,506.40 VAT exclusive | Tshs. 15,000,000 |
| 3 | M/s QT Italia | Euro 370,540.80 VAT exclusive | Euro 6,646 |
| 4 | M/s Mwandoya Oil Mill Company | Tshs.370,000,000 VAT exclusive | Tshs. 15,000,000 |
| 5 | M/s Oceanic General Distributors | Tshs.455,000,000 VAT exclusive | Tshs. 15,000,000 |
| 6 | M/s Agricom Africa Ltd | Tshs.413,000,000 VAT inclusive | Tshs. 15,000,000 |
| 7 | M/s Kishen Enterprises Ltd | Tshs.357,000,000 VAT inclusive | Tshs. 15,000,000 |
| 8 | M/s Seftech India PVT Ltd | Tshs.278,110,000 VAT exclusive | USD 9,500 |
| 9 | M/s Noble Motors Ltd | Usd 529,480 VAT exclusive | Tshs. 15,000,000 |
| 10 | M/s Muhoji General Supplies | Tshs.504,000,000 VAT exclusive | Tshs. 15,000,000 |
| 11 | M/s Farm Equip(T) Co Ltd | Tshs. 494,532.50 VAT inclusive | Tshs. 15,000,000 |
| 12 | M/s Quality Motors | Tshs.289,240 VAT inclusive | Not available |
| 13 | M/s Incar (T) Ltd | USD 339,999.80 | USD 8,500 |

The tenders were subjected to preliminary evaluation which was divided into two stages namely; commercial responsiveness and technical responsiveness. During the first stage, three tenders were disqualified for non compliance. The remaining ten tenders were checked for technical responsiveness and eight of them were found to be non-responsive.

Only two tenders were found to be substantially responsive whereby they were subjected to detailed evaluation and thereafter ranked as follows:

| Name of the Tenderer | Price read out Tshs. | Position |
|----------------------------------|-----------------------------|-----------------|
| M/S Bhaganga General Supplies | 385,000,000 | 1 |
| M/S Oceanic General Distributors | 455,000,000 | 2 |

The said two tenderers were thereafter post-qualified whereby M/s Bhaganga General Supplies was disqualified for submitting an uncertified Bank Statement and unsigned Audited Accounts. The Evaluation Committee

recommended the award to be made to M/s Oceanic General Distributors.

The Tender Board meeting held on 20th July, 2011, deliberated on the Evaluation Report. During the said meeting the PMU recommended re-evaluation of the tenders as the Preliminary Evaluation and Post-qualification were not carried out in accordance with the criteria set forth in the Tender Document. The Tender Board concurred with the PMU and directed a re-evaluation of the tenders.

The Evaluation Report dated 4th August, 2011, indicates that having re-evaluated the tenders, out of thirteen only three tenderers, namely, M/s Bhaganga General Supplies, M/s Agricom Africa Ltd and the Appellant were found to be substantially responsive. The three tenderers were subjected to post-qualification whereby two tenderers were disqualified. M/s Bhaganga General Supplies was disqualified for failure to satisfy the financial capability criteria as they had an overdraft of Tshs.119,684,622.32. M/s Agricom Africa Ltd was

disqualified for submitting an uncertified Bank Statement and failure to provide evidence that the type of Power Tiller quoted has been in use in Tanzania for the past three years.

In the same Re-Evaluation Report the evaluators observed that, though Appellant's tender was found to be the lowest evaluated, generally the tender specifications were inadequate, hence, there was a need of reviewing the same and the tender be re-advertised.

The Tender Board meeting held on 5th August, 2011, approved the Evaluation Committee's recommendation for re-tendering and directed the Secretariat to consult the Division of Mechanization (D-Mech), DASIP and Tanzania Bureau of Standards (TBS) for technical specifications.

On 13th October, 2011, the Project Coordinator sent a written opinion to the Secretary of the Tender Board, on the Tender Board's decision to re-tender. The Project Coordinator, advised, inter alia, that it was not proper to

reject the Appellant's tender on the ground that the Power Tillers quoted had a record of poor performance, without having documentary evidence thereof. He therefore, recommended that the Appellant be awarded the tender.

The Tender Board meeting held on 20th December, 2011, accepted the recommendation of Project Coordinator, and it was resolved that the award be made to the Appellant.

On 7th March, 2012, the Respondent wrote a letter referenced CEA 19/93/59/38 to the Appellant notifying them that they had been awarded the tender. The Appellant was also required to submit within thirty days a Performance Security of 10% of the contract amount in the form of Bank guarantee.

On the 08th March, 2012, the Appellant confirmed the award of the said tender and on 17th April, 2012, they submitted the Performance Security of Tshs. 45,500,000/=.

The Respondent inquired the authenticity of the Appellant's Bank Statement through a letter referenced CEA 19/93/059/46 dated 10th May, 2012, which was addressed to the Appellant's bank (National Microfinance Bank hereinafter to be referred to as "**NMB Bank**").

The said Bank informed the Respondent through letter referenced NMB/Mwenge/01/2012, dated 15th May, 2012, that neither the Bank Statement nor the stamp used on the said document originated from them.

The Appellant wrote to the Respondent on the 7th June, 2012, through a letter referenced OGD 01/06/2012, reminding them about the signing of the contract and that they had already ordered the Power Tillers.

In reply to the Appellant's letter, the Respondent vide letter referenced CEA 121/499/01 dated 9th June, 2012, informed the Appellant that the signing of contract was delayed due to differences of the information contained in their Bank Statement submitted at the time of tendering vis-à-vis the information availed to the Respondent by

the Appellant's Banker. The Appellant was further informed that the award of the tender had been revoked.

Having been dissatisfied by the Respondent's decision, the Appellant sought for clarification on the cancellation of the award vide letter dated 13th June, 2012, referenced OGD 01/07/2012.

On 18th June, 2012, the Respondent vide letter referenced CEA 19/93/59 informed the Appellant that, the Bank Statement contained in their bid differed from the one received by the Respondent from the Appellant's Banker.

Being dissatisfied with Respondent's decision, on 28th June, 2012, the Appellant filed an Appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**").

SUBMISSIONS BY THE APPELLANT

The Appellant's arguments as deduced from documents availed to this Authority, as well as oral submissions and responses to questions raised by the Members of the Authority during the hearing may be summarized as follows:

That, they were awarded the tender under Appeal at a contract price of 455,000,000/=.

That, prior to award of the tender, there was a delay which prompted the Appellant to inquire the status of the tender vide letter without reference dated 18th November, 2011. Also the said letter addressed their doubts in relation to the influence of some tenderers in said process. They suspect that the rejection might have been caused by the same doubts they had earlier rather than the issue of Bank Statement.

That, the Respondent communicated the award to the Appellant, which they confirmed and later on submitted the Bank Guarantee.

That, acting on the award of the tender, the Appellant ordered from the People's Republic of China the goods that were being assembled in Mwanza ready for delivery and the Respondent was notified.

That, despite notifying the Respondent that the goods had already arrived, they proceeded to reject the award of the tender on 18th June, 2012.

That, the Appellant had incurred expenses to finance goods, tender security and performance guarantee in the tender under Appeal.

That, the rejection of the award of tender was made without according the Appellant the right to be heard, hence, this shows that the Respondent did not act in a transparent manner.

That, the Respondent reached a decision to award tender to the Appellant after being satisfied that all criteria set out in Tender Document had been complied with.

That, the issue of Appellant's Bank Statement not being in order ought to have been raised during the evaluation process.

That, there was no need of submitting any fraudulent Bank Statement while they have a well performing NMB Account reflecting adequate financial capability to perform the awarded contract.

That, the Bank Statement which the Respondent claimed that it has been forged is disputed as it does not belong to them and they suspect that the same might have been tampered with by the Respondent during evaluation process.

That, the financial capability is usually checked historically and the Appellant had attached the Audited Accounts which show the company's financial status.

Thus, if the bank statement were doubtful, the Audited Account could have been used to prove the financial capability.

That, the Respondent does not have the power to reject the award after the same have been issued to a tenderer as their rejection powers ends at the bidding stage.

That, Section 72 of the Public Procurement Act, Cap 410 (hereinafter to be referred to as "**the Act**") requires thorough investigation to be done before rejection of the proposed award. Under the Appeal at hand there were no investigations which had been made that warrants the Respondent to reject the awarded tender.

That, the Respondent's rejection had no basis or legal justification.

Finally, the Appellant, requested the Authority to do the following:

- quash the Respondent's order of rejecting the award of tender to the Appellant;

- order the Respondent to accept delivery of the goods;
- the Respondent be ordered to pay the Appellant a sum of Tshs. 455,000, 000/= being special damages for the value of the goods delivered at Mwanza;
- the Respondent be ordered to pay compensation of Tshs. 20,000,000/-.

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 award of tender to the Appellant was vitiated by fraud contrary to the requirements of the Act and its Regulations.

That, the Appellant's claim that they had already complained about the procurement process after suspecting that it had some element of unfairness is

disputed as what had transpired during the procurement process was communicated to the Appellant vide letter dated 21st November, 2011 and the Appellant responded on 02nd December, 2012, that they were satisfied with the Respondent's reply to their queries. Thus, the same issue cannot be raised at this point as it was already concluded.

That, the award was subject to signing a formal contract by the parties and the Appellant had to submit a Performance Security of 10% of the contract price within thirty days.

That, the notification of award to the Appellant was clear in terms and conditions and in no way could the Appellant rely on that letter to order the goods without signing a formal contract.

That, the Appellant's conduct of ordering goods without signing the contract which stipulates the terms and conditions governing quality and delivery schedule of required goods, was done at their own risk.

That, the Appellant's attachment of the Bill of Lading, does not disclose that the purported goods were meant for the Respondent and for the implementation of the project in the tender under Appeal taking into account that they have been doing such a business, hence, the order could be for other customers.

That, the Respondent decided to nullify the awarded tender after realizing that they had submitted a forged/misleading Bank statement during the tender process contrary to the requirement of the law.

That, the rejection of award was made pursuant to Section 72(1) of the Act read together with Regulation 100(1) and (2) of the Public Procurement (Goods, Works, Non Consultant Services and Disposal of Public Assets by Tender) Regulations (hereinafter to be referred to as "**GN. NO 97 of 2005**").

That, the Appellant was given the reasons as to why their award was rejected following their inquiry made vide

letter referenced OGD 01/07/2012 dated 13th June, 2012, hence, they cannot claim that they were not accorded the right to be heard.

That, the tender process was conducted in accordance with the law and the Appellant's incurred loss was at their own risk for failure to comply with procurement laws.

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

ANALYSIS BY THE AUTHORITY

According to the Appellant's written and oral submissions as well as correspondences between the Appellant and the Respondent during the tender process, the Appellant contends, among other things, that the tender process was not conducted in a transparent manner and there were indications of favouritism prior to the award of the tender. Furthermore, during the hearing the Appellant insisted that, even the rejection of the tender already

awarded to them was a result of foul play, as they suspect that their tender was tampered with.

The Authority observes that the allegations raised by the Appellant are serious and need to be addressed thoroughly, for the dispensation of justice.

In view of the above, the Authority is of the view that the Appeal is centred on the following issues:

- **whether the procurement process was conducted in accordance with the law;**
- **whether the rejection of the tender awarded the Appellant was proper at law; and**
- **to what reliefs, if any, are the parties entitled to.**

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

1.0 Whether the procurement process was conducted in accordance with the law

In order to resolve the Appellant's concerns on the fairness of the tender process, the Authority deems it necessary to review the said process in light of the applicable law and the Tender Document. Additionally, since the Appellant also claims that the tender was awarded to them after they had met all the requirements of the law, the Authority is of the view that it is **plausible** to ascertain if the Appellant's claims are correct. In the course of reviewing the tender process, the Authority will confine itself to some of the provisions in the Tender Document, the Evaluation Report and the post award transactions. It is also worth mentioning that, in the course of resolving this particular issue, the bone of contention between parties as to whether the Bank Statement which was attached to the Appellant's tender was tampered with or otherwise, will be addressed.

To start with, the Authority revisited the Tender Document and considered the Appellant's submissions

during the hearing that, Item 2(a)(i) of the Evaluation Criteria contained under Section III of the Tender Document required a tenderer to have a bank balance of 10% of the bid value in any one month. It should be noted that, this assertion was not disputed by the Respondent and also it was applied in the same manner in the evaluation of tenders. For purposes of clarity, the Authority reproduces the said provision:

“(a) Financial Capability

The Bidder shall furnish documentary evidence that it meets the following financial requirement(s):

- (i) To confirm the firm’s financial capability, bidders must submit copies of certified bank statement covering the period of 12 months ending one month before the deadline for submissions of bids **indicating that the bidder had a balance of at least 10% of the bid value in any one month of the last year** for each lot tendered. Alternatively, bidders **may** provide evidence to have access to credit facilities of at least 80% of the bid

value, from reputable bank acceptable to the employer.” (Emphasis added)

The Authority agrees with the Appellant’s interpretation of the said provision that, if the Respondent’s intent was to ascertain the tenderer’s financial capability to successfully execute the contract, then such a provision could not serve that purpose. **This is due to the fact that the bank balance appearing in a single month cannot be a good measure of one’s financial ability as the amount could have been borrowed and deposited into bank for purposes of improving the balance in one month. If this were to be checked against pending short term liabilities one might find that the Appellant was financially not sound as the balance in question was already tied to the liabilities in question. The more reliable way of ascertaining a businesses financial capability would be through looking at the business performance as a whole through Audited Accounts the Bank references whereby an entity would receive**

assurance that credit facilities would be available to the Tenderer to enable them to perform the contract successfully.

With regard to the Technical Specifications contained in the Tender Document, the Authority observes that, they were unclear for three reasons. Firstly, out of the ten tenders which were checked for technical responsiveness, only three qualified for detailed evaluation. This shows that, the specifications were not clear, hence the disqualification of the majority of the tenderers. Secondly, the Evaluation Committee having disqualified the seven tenders, recommended that the specifications be reviewed and re-tendering be done. For purposes of clarity, the relevant part of the Re-evaluation Report is reproduced hereunder:

“Basing on this, the evaluation team recommends that this tender should be repeated and **the technical specifications to be adjusted.**” (Emphasis supplied)

Thirdly, the Minutes of the Tender Board meeting dated 1st November, 2011, indicate that **“all the tenderers did not qualify as the technical specifications were not of the required standard”**.

In view of the above findings, it is the settled opinion of the Authority that, the **Tender Document** did not meet the required standards.

Having analyzed the shortfalls in the Tender Document, the Authority reviewed the evaluation process. However, since submission of a Bank Statement formed part of the evaluation criteria, the Authority deemed it necessary to tackle first, the issue of the authenticity of the disputed Bank Statement. In resolving this particular point in dispute, the Authority revisited submissions by parties before analyzing the validity thereof.

The Appellant’s submissions were as follows:

- The Bank Statement claimed by the Respondent that it was submitted by the Appellant as part of their

tender, does not belong to them and they had suspicion that their tender might have been tampered with during the procurement process.

- The Bank Statement which they had actually attached to their tender was similar to that obtained by the Respondent from NMB and a copy of which was produced by the Appellant during the hearing.
- The Respondent did not have the mandate to communicate directly to the Appellant's Banker without the consent of the latter.

Replying to Appellant's contentions, the Respondent submitted that;

- The Appellant's Bank Statement was not tampered with by the Respondent as claimed.
- Having requested the Appellant's Banker to confirm the Authenticity of the Appellant's Bank Statement, the said banker denied having issued such a

statement and that even the stamp used on the said document did not belong to them.

- The said information led the Respondent to realize that, the Appellant's Bank Statement which was attached to their bid contained fraudulent information in relation to their financial status.
- The Respondent was authorized to seek reference from the Appellant's Banker through a letter attached to their tender, thus, there was no need of obtaining the Appellant's consent to that effect.

In resolving the issue of the authenticity of the Bank Statement, the Authority noted that, the Appellant's Bank Statement obtained from NMB Bank Mwenge Branch by the Respondent indicates that at the time of bidding the Appellant's account had a credit balance of Tshs. 8,389,706.74 vis-à-vis a balance of Tshs. 338,557,600.00 shown in the Bank Statement attached to the Appellant's tender.

The Authority observes that, having disputed that the Bank Statement claimed by the Respondent that it was attached to Appellant's tender was not theirs; and having submitted that they had attached a different Bank Statement, the Appellant was expected to produce a copy of the latter which was actually attached to their tender. Upon being requested by the Authority to produce a copy of the Bank Statement which they had actually attached to their tender, the Appellant replied that, they neither had a copy of that Bank Statement nor a copy of their tender document. They still maintained that the Bank Statement in dispute did not originate from them.

In view of the above the Authority observes that, having failed to prove that their Bank Statement was tampered with and in the absence of any other evidence to the contrary, the Authority is inclined to agree with the Respondent that, the Bank Statement contained in the Appellant's tender originated from the Appellant. The Authority's position is cemented by the fact that, in their letter to the Respondent referenced OGD/01/08/2012 dated 20th June, 2012, the Appellants wrote as follows;

“... please take note that the discrepancy mentioned in your letter in regard to the bank discrepancies of the bank statement is minor case which can be easily negotiated and settled by the bank through our performance Bond...”

Based on the above quotation, the Authority is of the view that, the fact that the Appellant acknowledged the discrepancies, indicate that the Bank Statement contained in their tender originated from them. Furthermore, the content of the disputed Bank Statement was intended to benefit the Appellant as it indicated they had a balance of Tshs. 338,557,600.00 an amount that would have made them comply with Item 2(a)(i) of Section III of the Tender Document which required a tenderer to have a balance of 10% of the contract value. Had the Appellant’s tender contained the correct Bank Statement as produced by the NMB and acknowledged by the Appellant, indicating a balance of Tshs. 8,389,706.74 at the time of tendering, the said tender would have been

disqualified for failure to comply with Item 2(a)(i) of Section III of the Tender Document.

With regard to the Appellant's contention that, the Respondent did not have the mandate to seek reference from the Appellant's Banker, the Authority concurs with the Respondent that the permission was given vide Part C of the Appellant's tender document, which was signed by the Appellant's Managing Director. The said document reads in part as follows;

"SUB: AUTHORITY TO SEEK REFERENCE FROM OUR BANKER (ACCOUNT)

We, **Oceanic General Distributors** kindly authorize you to seek reference from our banker with regard to Account No. **CA.2226600007** at **NMB** Bank Mwenge Branch for matters concerned with the above named Tender evaluation".

Based on the above quotation, the Authority is satisfied that the Respondent's act of seeking bank reference from

the Appellant's banker was done with due authorization from the Appellant.

Having established that the Bank Statement contained in the Appellant's tender originated from them and that the Respondent had the mandate to inquire from the Appellant's Banker, the Authority proceeded to review the evaluation process. In doing so, the Authority reviewed both the first and second Evaluation Reports which have mostly similar shortfalls as indicated herein below:

(i) The 1st evaluation was carried out without observing the criteria provided for in the Tender Document contrary to Regulation 90(4) of GN No. 97/2005 which requires evaluation to be carried in accordance with terms and conditions set out in the Tender Document For instance, the Tender Document did not specify the type of business which is relevant to this tender. However, during evaluation process the Evaluators identified the relevant business license to be that for Agricultural

Machinery/Equipment. Six tenderers were disqualified for amongst other, this particular omission, out of which two of them had attached Business Licenses for Agricultural Inputs and one tenderer had a Business License for motor vehicles.

The Authority observes that, had the tender advertisement as well as the Tender Document specified clearly that, the tender was open to only those who hold Business Licenses for Agricultural Machinery/Equipment, it would have saved money and time of those who were ineligible. Furthermore, Section 63(2) of the Act requires the tender document to set forth clearly and precisely all the information necessary for a prospective tenderer to prepare tender for the goods to be provided. It was therefore wrong for the Evaluators to evaluate the tenders using a criterion which was not specified in the Tender Document pursuant to Regulation 90(4) of GN 97 of 2005 which states as follows:

“The tender evaluation shall be consistent with the terms and conditions set forth in the tender

documents and **such evaluation shall be carried out using the criteria explicitly stated in the tender documents.**" (Emphasis supplied)

(ii) According to the information retrieved from the Appellant's tender, they had tendered as "M/s Oceanic General Distributors which is a mere business name registered under the Business Names Registration Act, Cap. 213 of the Revised Laws. The Authority is of the considered view that, a business name is not a legal personality and therefore does not have neither the capacity to enter into contract nor to sue or be sued. The Respondent erred in awarding the tender to the Appellant. For educational purposes, the Appellant's Managing Director should have tendered in his individual capacity trading as (T/A) Oceanic General Distributors.

(iii) Despite noting that a tender security submitted by one of the tenderer's, namely, M/s Muhoji General Supplied was 'doubtful' as it was signed by an official of the said tenderer instead of the Banker, the Report does not show that the matter was pursued by either

contacting the Banker or seeking explanation from the said Tenderer.

(iv) In checking technical responsiveness, for some of the items specified, the Evaluators did not indicate if the tenderers had complied with them and no explanation was given. For instance, Table 3 of the Evaluation Report does not show whether M/s Kishen Enterprises Ltd had indicated the '**Type of travelling**' and '**applicable field**'. Furthermore, the said Table does not show if the Appellant had indicated the '**number of gears**'.

(v) According to Item 2 (a)(i) of Section III of the Tender Document which required the tenderers to submit a Bank Statement covering a period of twelve months ending one month before the deadline for submission of tenders. The Authority noted that, the Appellant's Bank Statement which was attached to their tender and the one produced during the hearing lacked the information for the months of December 2010 and January to April 2011. This

means, the Appellant did not comply with this requirement.

(vi) During Post-qualification of the first evaluation, two tenderers, were evaluated while in the second evaluation three tenderers were post-qualified contrary to Regulation 94(5) of GN No. 97 of 2005 read together with Clause 38.1 of the ITB, which require post qualification to be conducted to the lowest evaluated tenderer only. The said provisions are reproduced hereunder:

“Reg. 94(5) Post-qualification shall be undertaken for the lowest evaluated tenderer only.”

“Clause 38.1 The Purchaser shall determine to its satisfaction whether the Bidder that is selected as having submitted the lowest evaluated and substantially responsive bid is qualified to perform the Contract satisfactorily.” (Emphasis supplied)

The Authority also noted that, at this stage, the Appellant was recommended for award in both the first and second evaluation processes for being financially sound, as the wording of the Evaluators, so suggests:

The First Evaluation Report:

“The bidder submitted a bank statement ending 05/07/2011 which was certified by NMB Bank, Mwenge Branch. **The bidder has a balance of Tshs. 338,557,600.**” (Emphasis supplied)

The Second Evaluation Report:

“The bidder has a balance of Tshs. 338,557,600. Which is over 10% of the bid value.” (Emphasis added)

The Authority observes that, had the Appellant been evaluated on the basis of the true Bank Statement, they would have been disqualified as they did not a balance of 10% of the contract sum which is Tshs. 45,500,000/= at any given month. It was also noted that, M/s Bhaganga

General Supplies was disqualified during post-qualification as their Bank Statement indicated a negative balance. Furthermore, during another post-qualification which was not dated, M/s Agricom Africa Ltd was disqualified for what the Evaluators explained in the following words:

“The bidder has a balance of 8,589,260.30 which is less than 10% of the bid value.” (Emphasis added)

It is the considered view of this Authority that, since the Appellant admitted during the hearing that, at the time of tendering their bank account had a balance of Tshs. 8,389,706.74, it goes without saying that, they did not have a balance equivalent to 10% of the tender value, which in their case is Tshs. 45,500,000/=. Moreover, the Bank Statement produced by the Appellant indicated that they never had a balance equivalent to 10% of the contract value at any given month as stipulated under Item 2(a)(i) of Section III of the Tender Document. This means, they did not comply with this particular criterion.

The shortfalls pertaining to the Appellant's tender as pointed out above, indicate that their tender was substantially not responsive. Had the evaluators been diligent they would have disqualified the Appellant's tender during the evaluation process as they were not qualified to be awarded the tender.

In view of the shortfalls detected in the Evaluation Reports, the Authority doubts the competence of the evaluators as well as the PMU who failed to detect them and rescue the situation.

The Authority noted and the Respondent conceded during the hearing that, the award of the tender under Appeal was made after the expiry of the tender validity period contrary to 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.**" (Emphasis added)

Relating the above quoted provision with the facts of this Appeal, the tender opening took place on 6th July, 2011, and therefore the tender validity period of 90 days expired on 3rd October, 2011. According to the records, on 28th September, 2011, the Respondent requested the tenderers to extend the validity of their tenders for thirty days. In response to the said request, the tenderers extended the validity of their tenders for different periods ranging from thirty to ninety. Assuming that, it was correct to extend the tender validity for ninety days, the said extension expired on 2nd January, 2012, that is, before the award of the tender was made on 7th March, 2012. The Authority observes that, the Respondent erred in awarding the tender after the expiry of the tender validity period contrary to Section 64 of the Act.

With regard to the Appellant's contention that there was favouritism in this tender, the Authority concurs with them, in that, they were awarded the tender despite their failure to comply with some of the mandatory requirements of the Tender Document. That said, the Authority is satisfied that the tender process was marred by irregularities.

The Authority's conclusion in the first issue is that, the tender process was not conducted in accordance with the law.

2.0 Whether the rejection of the award of the tender to the Appellant was proper at law

In resolving this issue the Authority revisited the Appellant's submissions which resulted in the formulation of the following sub-issues:

- **Whether the Respondent does not have powers to reject an award once it is made; and**

- **Whether the Appellant was not accorded the right to be heard prior to the rejection of the award of the tender made to them.**
- **Whether the Respondent is responsible for the Appellant's financial loss arising from to order the goods before**

Having identified the sub-issues, the Authority proceeded to resolve them as follows:

2.1 Whether the Respondent does not have powers to reject an award once it is made

In their submissions the Appellant argued that, the Respondent does not have the power to reject an award once it is made, as their rejection powers ends at the tendering stage. They further argued that, Section 72(2) which was relied upon by the Respondent is not relevant to the circumstances of this Appeal as it talks about a proposed award vis-à-vis an award of tender which has been already communicated to the successful tenderer. Additionally, they submitted that if the Respondent

believes that the Appellant had acted fraudulently, they should have proceeded in accordance with sub-section (3) of Section 72 of the Act.

In reply thereof the Respondent submitted that:

- The rejection of the Appellant's award was made after requesting the Appellant's Banker to confirm the Authenticity of the Appellant's Bank Statement where by the said banker denied having issued such a statement. The said information led the Respondent to realize that, the Appellant's Bank Statement which was attached to their tender contained fraudulent information in relation to their financial status.
- Acting on the information received from the Appellant's banker, the Respondent rejected the Appellant's award in accordance with Section 72(2) of the Act read together with Regulation 100 of GN. 97/2005 and Clause 3 of the ITB.

In order to ascertain the validity of the arguments by parties on this sub-issue, the Authority deems it necessary to start by revisiting sub-sections (1) and (2) of Section 72 of the Act which were the basis for the rejection of the award of the tender to the Appellant. The said provisions state as follows:

S. 72 (1) "**Procuring and approving entities** as well as tenderers, **suppliers**, contractors and consultants under the public financed contracts shall proceed in a **transparent and accountable manner during the procurement and execution of contract**".

(2) Where a procuring entity or an approving authority is, after appropriate investigations, satisfied that any person or firm to which it is proposed that a tender be awarded, has engaged in corrupt or fraudulent practices in competing for the contract in question, the entity or authority may:-

- a) reject a proposal for award of such contract;
- b) declare any person or firm ineligible for a period of ten years to be awarded a public financed contract”

The Authority agrees with the Appellant’s interpretation of Section 72(2) of the Act, in that, the applicable provision in this case should have been section 72(3) of the Act which states as follows:

“S.72(3) The procuring entity or an approving authority may, after determination by a court of law or following a special audit by the Controller and Auditor-General, that corrupt or fraudulent practices were engaged in by any person or firm during the procurement, award of contract or the execution of that contract:-

- (a) cancel the portion of the funds allocated to a contract for goods, works or services; and

(b) declare any person or firm ineligible for a period of ten years to be awarded a public financed contract.”

Given the circumstances of this Appeal, it is the view of this Authority that, having suspected that the Appellant have acted fraudulently, the Respondent should have reported the matter to the relevant authorities so that criminal proceedings could have been instituted, since the said Section 72(3) of the Act requires the matter to be determined by a court of law. Much as the Authority understands that, the said provision also gives an option of requesting the Controller and Auditor-General to conduct a special audit, the Authority opines that the circumstances of this case requires interference by a court of law.

The Authority shares the Respondent’s concern, in that, having detected some fraudulent practices on the part of the Appellant, as a procuring entity they were obliged to act promptly, as the said Section 72(3) of the Act does not provide any guidance as to the status of the tender

during the period when criminal proceedings are invoked. It is the view of the Authority that, this *lacunae* need to be worked upon by the relevant authorities.

Taking cognizance of the Authority's findings on the first issue, it is obvious that, had the tender process been conducted in accordance with the law the Appellant's tender should have been disqualified for non compliance. In this case therefore, the issue of the rejection of award of tender is no longer valid since it was wrong for the Respondent to award the tender to the Appellant as they were not qualified. That said, the Authority cannot conclude this sub-issue as it has been overtaken by events.

2.2 Whether the Appellant was not accorded the right to be heard prior to the rejection of the award of the tender made to them

In their submissions the Appellant had contended that, it was wrong for the Respondent to reject the award of the tender made to them without giving them an opportunity

to defend themselves. The Respondent, in their replies, submitted that the said right was accorded the right to be heard through written communication between Respondent and them.

In resolving this sub-issue the Authority observes that, the correspondences between the two parties which were availed to this Authority indicate that the Appellant was only informed that of the existence of the discrepancies in the Bank Statement which was attached to their tender vis-à-vis the Bank Statement obtained from the Appellant's Banker by the Respondent. However, given the nature and seriousness of the allegations against the Appellant's tender, the Respondent ought to have disclosed the nature of discrepancies and requested the Appellant to submit a written response in accordance with the rules of natural justice. The Authority therefore concurs with the Appellant that, the right to be heard was not adequately accorded to them. However, denial of this particular right in itself did not prejudice the Appellant since the award of the tender was improper as it has already been established under the first issue.

2.3 Whether the Respondent is responsible for the Appellant's financial loss arising from costs relating to ordering and transportation of the goods, tender security and performance security

The Authority further revisited the Appellant's claim that, based on the letter of award they ordered Power Tillers and the same were ready for delivery and the Respondent was duly informed. They contended further that they had incurred costs in relation to the said goods as well as the Bank guarantee, hence, revoking the award at that stage would cause them financial loss.

In reply thereof, the Respondent wondered how the Appellant could have ordered the said goods prior to the signing of the contract and furnishing the Performance Security. The Respondent submitted further that, by ordering the goods before finalization of the procurement process, the Appellant acted at their own peril and therefore the Respondent is not responsible. In addition,

the Respondent submitted that the Appellant did not produce any proof to show that the goods ordered were specifically for the Respondent as the Bill of Lading does not so indicate and that for business oriented entities like the Appellant, it is possible that the goods were ordered for other purposes.

Having summarized submissions by parties on this point the Authority concurs with the Respondent that, it was wrong for the Appellant to order the goods before finalization of the procurement process for the following reasons:

- The contract between the parties had not been signed to date.
- The Bill of Lading indicates that the goods were loaded on 13th March, 2012, which is, six days after the award, while the Performance Security was furnished on 17th April 2012. This means the goods were ordered before fulfilling the conditions

pertaining to furnishing Performance Security and contract signing.

- The Delivery and Completion Schedule contained under the General Conditions of Contract stipulates that the delivery period shall be twelve weeks from the date of contract signing. The said document further states that “the delivery period shall start running as of the **Date of Contract Signing.**”
- According to the documents availed to this Authority by the Appellant, the Respondent was informed by the Appellant on the shipment of the said goods on 20th June, 2012, vide letter referenced ODG/01/08/2012. The said letter was written after the rejection of the award of the tender was communicated to the Appellant, reads in part as follows:

“In addition the goods have already been shipped and transported the (sic) place of destination Mwanza and the assembling process is already done.” (Emphasis supplied)

- Where a tenderer decides to start execution of a contract prior to furnishing the Performance Security, does so at his own risk as failure to furnish it constitutes sufficient grounds for annulment of the award pursuant to Clause 44.2 of the ITB.
- According to the award letter, the Appellant was obliged to furnish the Performance Security within 30 days from the date of receipt of notification of award. The Authority noted that, the Performance Security was issued by NMB Bank on 17th April, 2012, that is forty one (41) days from 8th March, 2012 the date when the Appellant acknowledged the receipt of the award letter. This means the performance security was submitted after the expiry of thirty days. The Authority does not comprehend the Respondent's reasons for accepting the said security after such a delay, as neither of the parties submitted any evidence to show that the thirty day period stated in the award letter was extended.

In view of the above findings, the Authority's conclusion in the third sub-issue is that, the Respondent is not responsible for the Appellant's financial loss arising from costs relating to ordering and transportation of the goods, tender security and performance security.

Having resolved the three sub-issues, the Authority need not make any conclusion on the second issue as it has already been overtaken by events.

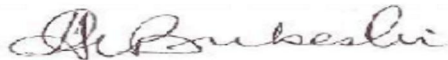
3.0 To what reliefs, if any, are the parties entitled to

Having resolved the contentious issues and having satisfied itself that the award of the tender to the Appellant contravened the law, the Authority is of the settled view that the Appellant is not entitled to any relief. That said, the Appellant's prayers are rejected in their entirety and each party is ordered to pay their own costs.

On the basis of the aforesaid findings and conclusions, the Authority dismisses the Appeal for lack of merit and orders each part to bear its own costs.



Right of Judicial Review as per Section 85 of the Act explained to parties.

Decision delivered in the presence of the Appellant and the Respondent this 25th day of July, 2012.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MR. MARMO 
2. MRS. N.S. INYANGETE 
3. MRS. ROSEMARY LULABUKA 