

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY**

APPEAL NO. 101 OF 2011

BETWEEN

M/S MANTRAC TANZANIA LTD.....APPELLANT

AND

**TANZANIA PORTS
AUTHORITY.....RESPONDENT**

DECISION

CORAM:

- | | | |
|----|-----------------------------|---------------|
| 1. | Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. | Mr. F.T. Marmo | - Member |
| 3. | Mr. H.S. Madoffe | - Member |
| 4. | Mr. K.M. Msita | - Member |
| 5. | Mrs. N.S.N. Inyangete | - Member |
| 6. | Ms. E.J. Manyesha | - Member |
| 7. | Ms. B.G. Malambugi | - Secretary |

SECRETARIAT:

Ms. E.V.A. Nyagawa – Principal Legal Officer

FOR THE APPELLANT:

1. Mr. Thomas M. Sipemba – Advocate from IMMMA Advocates
2. Mr. Felix Clemence – Machine Sales Representative

FOR THE RESPONDENT

1. Mr. Elisa A. Msuya – Advocate from Trustmark Attorneys
2. Ms. Anna Kessy – Legal Officer – TPA
3. Mr. Theophil Kimaro – Head of Procurement Management Unit
4. Mr. Richard Biramata – Principal Procurement Officer

This decision was scheduled for delivery today 21st June, 2011 and we proceed to deliver it.

This appeal was lodged by **M/S MANTRAC TANZANIA LTD**, (hereinafter to be referred to as **“the Appellant”**) against **TANZANIA PORTS AUTHORITY** commonly known by its acronym **TPA** (hereinafter to be referred to as **“the Respondent”**).

The said Appeal is in respect of Tender No. AE/061/10-11/CTB/G/03 for Supply and Commissioning of 10 units of 3Tons and 10 units of 5Ton Forklift Trucks for Dar es salaam and Tanga Ports (hereinafter to be referred to as **“the Tender”**).

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

On 13th September, 2010, the Respondent invited tenders *vide* newspapers as well as TPA and PPRA Websites.

On 4th October, 2010, the Respondent issued Addendum No. 2 which changed, *inter alia*, the quantity pertaining to Lot No. 1 to be 12 instead of 10.

The tender opening took place on 21st October, 2010, whereby ten tenders were submitted as follows:

	Tenderer	Lot No	Currency	Tender Price
1.	M/s Bethels Enterprises Ltd	1	USD	634,560.00
		2		877,652.00
2.	M/s Cosmos Investment	1	EURO	551,236.80
		2		762,117.95
3.	M/s Ramada Trading	1	USD	518,767.20
		2		882,743.40
4.	M/s Incar (T) Ltd	1	EURO	479,220.00
		2		565,900.00
5.	M/s Joh Achelis & Sohne GmbH	1	EURO	262,640.00
		2		354,100.00
6.	M/s Godrej & Boyce	1	USD	381,132.00
		2		758,683.00
7.	M/s Panafrican Equipment	1	JPY	32,100,000.00
		2		54,910,000.00
8.	M/s Mantrac Tanzania Ltd	1	USD	303,072.00
		2		505,860.00
9.	M/s Intraco S.p.A	1	EURO	350,000.00
		2		570,000.00
10	M/s Jungheinrich	1	EURO	291,140.00
		2		336,400.00

Thereafter tenders were subjected to evaluation (hereinafter to be referred to as the "**1st Evaluation**") whereby two tenderers were disqualified during preliminary evaluation. M/s Incar (T) Ltd was disqualified for submitting a bid security which was less than 3% of their bid price contrary to Clause 18.1 of the ITB, while the Appellant was disqualified for indicating a bid validity period of 30 days instead of 90 days contrary to Clause 17.1 of the ITB. The other eight tenderers were found to be substantially responsive and subjected to detailed evaluation and the Evaluation Committee recommended that award to be made to M/s Jungheinrich at a contract price of Euro 609,394.40 equivalent to Tshs. 1,242,756,281.75 and Euro 6,092.90 equivalent to Tshs. 12,425,433.75 for special tools to be delivered in 22 weeks.

The Evaluation Report was submitted to the Respondent's Procurement Management Unit (hereinafter to be referred to as "**PMU**") and after reviewing it they observed, among other things, that:

- M/s Mantrac Tanzania Ltd was erroneously regarded as non responsive during Preliminary Evaluation, allegedly for indicating a tender validity of 30 days instead of 90 days. Further that, it was an oversight on the part of the Evaluators since the PMU satisfied itself that the said tenderer had indicated a tender validity period of 90 days, hence qualified for detailed evaluation.

- The delivery period of 22 weeks indicated by M/s Jungheinrich was too long compared to that proposed by the second lowest evaluated tenderer M/s Joh Achelis & Sohne GmbH and was well beyond the period stated in the Tender Document. The eight months difference between the delivery period indicated in the Tender Document vis-à-vis that indicated by M/s Jungheinrich translated into a considerable cost as the delay would affect the operations at the designated Ports.

- The tender submitted by M/s Panafrican Equipment (T) Ltd had the highest evaluated price as it did not

include the cost of spare parts, parts and maintenance manual, and the cost of inspection visit.

- The Respondent had a long working experience with Hyster Forklift Trucks which were indicated in the tender submitted by the second lowest evaluated tenderer; namely, M/s Joh Achelis & Soehne GmbH and had never used the equipment to be supplied by M/s Jungheinrich. Further that, the Respondent focused on standardization of equipment as it provided cost relief in maintenance.
- The price quoted by the lowest evaluated tenderer and that of the second lowest evaluated tenderer were almost equal. However, if inspection costs of Euro 8,300 were added to the latter's price it would have come to Euro 618,772.00 instead of the recommended award price of Euro 610,477.00 which was higher than the price quoted by the second lowest evaluated tenderer.

The PMU returned the Evaluation Report to the Evaluation Committee for review (hereinafter to be referred to as **“the Re-evaluation Report”**).

The Evaluation Committee acting in consideration of the observations made by the PMU, disqualified one tender submitted by M/s Incar (T) Ltd during the preliminary stage for submitting a bid security of less than 3% of their quoted price. The remaining nine tenders, the Appellant’s inclusive, qualified for detailed evaluation whereby the Evaluators noted that the quantities quoted by the tenderers differed, in that, they ranged from 10, 11 and 12 units. However, due to budgetary constraints, the evaluation was based on 10 units as a benchmark. The nine tenders were subjected to correction of errors whereby the tenderers’ quoted prices (in case they exceeded 10 units) were reduced to cater for 10 units for each Lot. The tenderers’ prices after the said adjustments were as indicated in the Table below:

TENDERER	LOT NO	CURRENCY	ORIGINAL TENDER PRICE	ADJUSTED PRICE	ADJUSTED PRICE CONVERTED INTO TSHS
M/s BETHELS ENTERPRISES LTD	1	USD	634,560.00	538,510.00	750,182,648.50
	2		877,652.00	877,652.00	1,287,822,662.20
M/s COSMOS INVESTMENT	1	EURO	551,236.80	459,364.00	936,794,786.12
	2		762,117.95	692,834.50	1,412,918,180.89
M/s RAMADA TRADING	1	USD	518,767.20	The correction was not made as the specifications made did not match the equipment offered	
	2		882,743.40		
M/s JOH ACHELIS & SÖHNE GMBH	1	EURO	262,640.00	237,130.70	483,587,750.43
	2		354,100.00	372,644.00	759,944,088.52
M/s GODREJ & BOYCE	1	USD	381,132.00	The correction was not made as the specifications for the equipment offered did not comply fully with TPA's	
	2		758,683.00		
M/s PANAFRICAN EQUIPMENT	1	JPY	32,100,000.00	26,900,000.00	486,083,000.00
	2		54,910,000.00	50,000,000.00	903,500,000.00
M/s MANTRAC TANZANIA LTD	1	USD	303,072.00	The correction was not made as the specifications for the equipment offered did not comply fully with TPA's	
	2		505,860.00		
M/s INTRACO S.P.A	1	EURO	350,000.00	<u>352,163.50</u>	<u>718,177,590.46</u>
	2		570,000.00	<u>575,716.00</u>	<u>1,174,074,910.28</u>
M/s JUNGHEINRICH	1	EURO	291,140.00	255,808.85	521,678,662.07
	2		336,400.00	353,585.55	721,077,619.68

Four tenders, including that submitted by the Appellant, were disqualified at that particular stage for failure to meet the technical specifications. The qualified tenders were thereafter ranked as indicated hereunder:

Tenderer	Total Quoted Price in Tshs.	Ranking
M/s Bethels Enterprises Ltd	2,038,005,310.70	5
M/s Intraco S.P.A	1,892,252,500.74	4
M/s Panafrican Equipment	1,389,583,000.00	3
M/s Joh Achelis & Söhne GmbH	1,245,802,255.04	2
M/s Jungheinrich	1,244,965,487.94	1

The Evaluation Committee having considered the PMU's observations, recommended the award of the tender to M/s Joh Achelis & Söhne GmbH at a contract price of Euro 610,888.00 CFR Dar es salaam equivalent to Tshs. 1,245,802,225.04 for a delivery period of 14 weeks.

The PMU reviewed the Re-evaluation Report and submitted the same to the Tender Board together with their previous observations in the 1st Evaluation Report, except for the disqualification of the Appellant.

On 26th January, 2011, the Respondent *vide* letter referenced SU/3/3/01 communicated their intent to award the tender to M/s Achelis Tanganyika Ltd, who is the agent of M/s Joh Achelis & Söhne GmbH, subject to

the latter's endorsement of the reduction of quantities from 12 to 10 units for the 3Ton Forklift Trucks.

On 27th January, 2011, the Respondent's Central Tender Board (hereinafter to be referred to as "**CTB**") deliberated on the recommendations of the Evaluation Committee and PMU's comments thereof, and observed as follows:

- TPA has no written policy on standardization of equipment and the large number of their existing fleet of Forklift Trucks was 'Hyster' with satisfactory after sales service.
- TPA had no experience with Caterpillar Forklift Trucks.
- M/s Jungheinrich indicated that the product required special tools, and these have to be obtained only from the Supplier.

Having so observed, the CTB approved award in favour of M/s Joh Achelis & Söhne GmbH at a contract price of Euro 610,888.00 equivalent to Tshs. 1,245,802,225.04 for a delivery period of 14 weeks.

On 2nd February, 2011, the PMU submitted a Report pertaining to the procurement of the tender under Appeal and the award thereof to the Respondent's Director General for approval.

On 14th February, 2011, the award notification was communicated to the M/s Joh Achelis & Söhne GmbH (hereinafter to be referred to as "**the Successful Tenderer**") *vide* letter referenced PMU/3/3/01.

The tender results were communicated to the Appellant *vide* letter referenced PMU/2010-11/G/03 dated 28th February, 2011, whereby the name of the Successful Tenderer and the awarded price were disclosed.

Having been aggrieved by the tender results, the Appellant on 7th March, 2011, applied for administrative

review to the Respondent which was copied to the Public Procurement Regulatory Authority (hereinafter to be referred to as **"PPRA"**).

Acting on the copy availed to them, PPRA advised the Appellant on 11th March, 2011, to lodge their complaints to the Public Procurement Appeals Authority (hereinafter to be referred to as **"the Authority"**) as the procurement contract had already entered into force by virtue of Section 55(7) of the Public Procurement Act, Cap. 410 (hereinafter to be referred to as **"the Act"**).

On 18th March, 2011, the Appellant submitted their complaints to this Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant's arguments as deduced from 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, during the tender opening the read out price quoted by the Successful Tenderer was **Euro 653,548.00** while the awarded price as per the Respondent's letter dated 28th February, 2011, which communicated the tender results to unsuccessful tenderers was **Euro 610,888.00**.

That, the required quantity for Lot No. 1 was 12 units of 3Ton Forklift Trucks while the quantity indicated in the above cited letter was 10 units. This was contrary to the Respondent's Addendum No. 2 dated 4th October, 2010, which increased the said quantity to 12 units.

That, the tender should have been awarded to the tenderer who offered the lowest evaluated costs pursuant to Section 59 of the Act. However, the Respondent contravened the said provision by awarding the tender to M/s Joh Achelis & Söhne GmbH whose price was higher than the Appellant's.

The Appellant therefore prayed for one or more of the remedies provided for under Section 82(4) of the Act as well as compensation for reasonable costs incurred as a

result of the Respondent's unlawful act of awarding the tender to a tenderer who was not the lowest evaluated in terms of price, as itemized in the Table below:

S/ No.	Item	Cost
1.	Purchase of tender document	Tshs. 100,000.00
2.	Preparation of tender documents (typing, printing, lamination etc)	Tshs. 150,000.00
3.	Interest for the Bid Security (USD 29,550.00) for a period of 4 months	USD 2,462.50
4.	Legal Fees	USD 5,000.00
5.	Negotiation and consultation with a Supplier of the Caterpillar Units	USD 10,000.00

THE RESPONDENT'S REPLIES

The Respondent's arguments as deduced from documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing were as follows:

That, the number of 3Ton Forklift Trucks was reduced from 12 to 10 units during the evaluation process due to budgetary constraints. This was discussed and agreed

upon between the Respondent and the lowest evaluated tenderer pursuant to Clause 37(b) of the Special Conditions of Contract. Having reduced the quantity the price quoted by the said tenderer was accordingly adjusted.

That, the price quoted by the Successful Tenderer changed following the adjustments made.

That, the lowest evaluated tenderer is not necessarily the tenderer who offered the lowest price. It is true that the price offered by the Appellant was the lowest compared to that offered by the Successful Tenderer, but the Appellant's tender did not comply with the technical specifications. The Appellant was disqualified for failure to provide the required data as evidenced in Item 1.28 appearing on page 32 of their tender.

That, the Respondent is not bound to accept any tender pursuant to the applicable law.

That said, they requested the Authority to dismiss the Appeal with costs.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral submissions from parties, the Authority is of the view that, this Appeal is centred on the following issues;

- **Whether the disqualification of the Appellant was justified**
- **Whether the award of the tender to the Successful Tenderer, namely, M/s Joh Achelis & Sohne GmbH 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. Whether the disqualification of the Appellant was justified

In its endeavour to resolve this issue the Authority, revisited the Appellant's grounds of Appeal and noted that, they are basically contesting their disqualification which was done during detailed evaluation of tenders. In this case therefore, the Authority deemed it necessary to examine how the detailed evaluation was conducted so as to ascertain whether it complied with the Tender Document and the applicable law.

According to the facts of this Appeal, the evaluation was conducted twice, that is, in the first evaluation the Appellant was wrongly disqualified at the preliminary stage for indicating a shorter bid validity period instead of 90 days. However, the PMU discovered this error and other deficiencies which were later corrected by the Evaluators. Since the first Evaluation Report was not availed to this Authority by the Respondent, the analysis will be based on the Re-evaluation Report wherein the PMU's observations had been taken care of.

To start with, the Authority revisited provisions which guide the manner in which detailed evaluation was supposed to be done. According to Clauses 29 to 34 of the ITB, detailed evaluation was to be conducted through various stages, namely, technical evaluation, correction of errors, commercial evaluation and thereafter determination of the lowest evaluated tender. The Authority noted that, Clause 29.2 of the ITB indicated that the first stage of detailed evaluation was technical evaluation whereby tenders were to be checked for conformance with all the requirements specified in the Schedule of Requirements and Technical Specification. The Authority noted that, the Evaluators wrongly did not start with this stage.

According to the Re-evaluation Report, the first stage of detailed evaluation involved '**correction of arithmetic errors**' whereby '**an error**' was corrected in the tender submitted by M/s Panafrican Equipment (T) Ltd. Surprisingly, the said exercise did not involve the other tenders whose prices were adjusted as a result of the

reduction in quantities. The Authority noted further that, the said correction involved reduction of the units from 12units to 10units in Lot No. 1, and from 11 to 10 for Lot No. 2 which resulted into price adjustment from **JPY 32,000,000.00** to **JPY 26,000,000.00** for Lot 1 and **JPY 54,910,000.00** to **JPY 50,000,000.00** for Lot No. 2.

In order to ascertain whether what was done by the Evaluators amounted to correction of errors or not, the Authority revisited Clause 30.1 of the ITB read together with Regulation 90(11)(a) of GN. No. 97 of 2005 which provide as follows:

“Clause 30.1 Bids determined to be substantially responsive will be checked for any arithmetic errors. Errors will be corrected as follows:-

(a) if there is a discrepancy between unit prices and the total price that is obtained by multiplying the unit price and quantity, the unit price shall prevail,

and the total price shall be corrected, unless in the opinion of the Procuring Entity there is an obvious misplacement of the decimal point in the unit price, in which the total price as quoted shall govern and the unit price shall be corrected;

(b) if there is an error in a total corresponding to the addition or subtraction of subtotals, the subtotals shall prevail and the total shall be corrected; and

(c) Where there is a discrepancy between the amounts in figures and in words, the amount in words will govern.”

“Reg. 90(11)(a) Notwithstanding sub-regulation (6), the procuring entity shall correct purely arithmetical errors that are discovered during the examination of tenders and the procuring entity shall give prompt notice of any such correction to the

supplier, contractor, service provider or asset buyer that submitted the tender.”

(Emphasis supplied)

The Authority observes that, Clause 30.1 quoted above, gives three scenarios through which the said corrections may be made, none of which fits the description of what was done by the Evaluators. The Respondent conceded to this fact during the hearing. The Authority observes that, the changes made by the Evaluators related to **'reduction of quantities'** which is not envisaged under the above quoted provisions. The Authority is thus of the considered view that, the Evaluators contravened Regulation 90(11)(a) of GN. No. 97/2005 which requires the corrections to be purely on arithmetic errors and not otherwise.

Assuming the so-called price adjustment was proper, the Respondent did not provide any proof to indicate that, the said tenderer was duly informed of the change in accordance with Regulation 90(11)(a) of GN. No. 97/2005, read together with Clause 30.2 of the ITB which

require the said adjustment to be endorsed by a tenderer and in case of refusal to do so, their tender will be rejected. For purposes of clarity the Authority reproduces Clause 30.2 hereunder:

“The amount in the bid will, be adjusted by the Procuring Entity in accordance with the above procedure for the correction of errors and, **with the concurrence of the Bidder, shall be considered as binding upon the Bidder.** If the Bidder does not accept the corrected amount, its Bid will then be rejected, and the bid security may be forfeited or the bid securing declaration may be executed in accordance with sub-Clause 18.9.” (Emphasis supplied)

The Re-evaluation Report also indicates that, the evaluation of tenders was based on 10 units for both Lots instead of 12 units for Lot 1 and 10 units for Lot 2 due to budgetary constraints. This resulted in price adjustments of the prices quoted by the five tenderers who had qualified to the price comparison stage. The Authority

noted that, this fact formed part of the Appellant's grounds of Appeal whereby their basic contentions may be summarized as follows:

- The contract price awarded to the Successful Tenderer differed from the total price read out during tender opening for the two Lots.
- The adjustment of quantities though permitted under Regulation 95(1)(b) of GN. No. 97/2005, is prohibited under Regulation 95(2)(b) and (c) of the same Government Notice.
- Since the increase of quantities for Lot 1 was communicated to all tenderers through an addendum, the subsequent reduction of quantities should have been similarly communicated to them. Failure to inform the tenderers contravened Sections 60 and 71(2) of the Act read together with Clause 9 of the ITB.

- Reduction of units was a substantial change and not a minor change.

In their replies, the Respondent stated as follows:

- Reduction of prices for budgetary reasons is allowed under Regulation 95(1)(b) of GN. No.97/2005 and therefore their action was justified.
- Clause 39 of the ITB empowers a procuring entity to increase or decrease the quantity as long as it does not exceed 15% as per Item 46 of the Bid Data Sheet.

In order to resolve the conflicting submissions by parties, the Authority started by revisiting sub-Regulations (1)(b) and 2(b) and (c) of Regulation 95 of GN. No. 97/2005 which were relied upon by parties, provide as follows:

“95(1) Negotiations may be undertaken with the lowest evaluated bidder relating to the following areas:

(b) reduction of quantities for budgetary reasons, where the reduction is in excess of any provided for in the solicitation documents;

(2) Negotiations shall not be conducted

(b) to materially alter the terms and conditions of contract stated in the solicitation document;

(c) primarily for the purpose of reducing prices in case of procurement of goods, works or services;” (Emphasis supplied)

Based on the above quoted provisions, the Authority is of the firm view that, while both parties are right in as far as the interpretation of each of the provision is concerned, there is an apparent contradiction therein. On the one hand, the quoted Regulation 95(1)(b) allows reduction of quantities to be made during negotiations, while on the other hand, Regulation 95(2)(c) prohibits negotiations for purposes of price reduction. The reduction of quantities as per Regulation 95(1)(b) definitely has effect on the price quoted by a tenderer

which is prohibited under Regulation 95(2)(c). As it was evident in the tender under Appeal, the reduction of quantities resulted in the reduction of prices.

Additionally, the Authority observes that, Regulation 95(2)(e) of GN. No. 97/2005 prohibits negotiations which **“substantially alter anything which formed a crucial or deciding factor in the evaluation of tender”**. The Authority is of the view that, price was a crucial factor in the evaluation of the disputed tender and reduction of quantities altered the prices quoted by the tenderers.

Notwithstanding the said contradiction, the Authority observes that, the reduction of quantities is applicable at the time of negotiations with the lowest evaluated tenderer. In the disputed tender, the reduction of quantities was done during the evaluation process and not during negotiations contrary to Regulation 95 of GN. No.97/2005. The Authority is of the settled view that, the Evaluators erred in reducing the quantities during the evaluation process.

Furthermore, the Authority observes that, since the valid quantity for Lot 1 at the time of evaluation of tenders was 12 units, the evaluation process should have been conducted on the basis of those units as they were the ones known to the tenderers. This is in accordance with Regulation 90(4) of GN. No. 97/2005 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 added)

The Authority further considered the Respondent’s contention that, they evaluated the tenders on the basis of 10 units for each lot, because they deemed that the discrepancies in the number of units quoted by the tenderers as being attributed to failure to receive the addendum that was sent to them via email and telefax. The Respondent further stated that, they gave the

tenderers the benefit of doubt since disqualifying them would have minimized competition.

The Authority does not accept the Respondent's contention for two reasons. Firstly, the competition envisaged in the Act is not dependant on the number of the tenderers as per Section 46(3) of the Act which provides that **“lack of competition shall not be determined solely on the basis of the number of tenderers”**. Indeed, a non responsive tenderer cannot be allowed to proceed to subsequent stages of evaluation merely to enhance competition. Secondly, the above quoted Regulation 90(4) of GN. No. 97/2005 requires the evaluation to be conducted in accordance with the terms contained in the tender document.

Moreover, had the Respondent's contention been correct, the units quoted by the tenderers should have been 10 and 12 only. The Authority's position is derived from the fact that, according to the tender advertisement the original quantity for Lot 1 was 10 which was later changed to 12. Thus, tenderers who had quoted for 11

units did not have any basis and should have been disqualified. Surprisingly, the Evaluators' basis for evaluating on 10 units is well stated on page 3 of the PMU's Report to the Respondent's Director General dated 2nd February, 2011, titled **"Report of 119th Special Meeting of the TPA Central Tender Board Held on 27th January 2011"** (hereinafter to be referred to as **"PMU's Report"**) which reads as follows:

"...during evaluation it was noted that some bidders quoted for 12 units, some for 11 units and some for 10 units. However, the evaluation was based on 10 units as the quantity required."

It is evident from the above quotation that, the basis of evaluation was **"the required quantity"** and was not to intended to accord tenderers the benefit of doubt as the Respondent wanted this Authority to believe.

The Authority considered further the Respondent's reasons for the reduction of quantities in Lot 1, as it was

evident during the hearing that, they had three conflicting reasons as indicated herein below:

- (i) According to the Re-evaluation Report and the Replies to the Appellant's Statement of Appeal, the reduction of quantities was caused by budgetary constraints.
- (ii) In their oral submissions during the hearing, they stated that they had purchased Forklift Trucks through a separate arrangement, which were sent to Tanga Port following a directive from the Minister responsible for transport who was told about the shortage of the said equipment during his visit to the said port.
- (iii) PMU's Report stated the reason thereof to be:

“Initially, the requirement was 10 units for each capacity (i.e. 5 Ton and 3 Ton FLTs) but when the need was raised for provision of the equipment for ex-NASACO Yard, the

requirement was consolidated to 12. However, after procuring locally the FLT's for ex-NASACO Yard, the quantity required was brought back to the initial 10 units."

In view of the above quoted reasons, the Authority is of the view that, items (ii) and (iii) seems to be persuasive while item (i) is not, as the issue of budgetary constraints was ruled out by the CTB. The Authority is concerned that, the misleading information contained in item (iii) above was sent to the Respondent's Director General. Furthermore, during the hearing of this Appeal, the head of the PMU from whose Office the said Report originated was not aware of the misinformation.

With regard to the Technical Evaluation, the Evaluators examined the tenderers compliance to the technical specifications. The Authority noted that, it was at this stage that the Appellant was disqualified for failure to attach the data sheet. However, as it was evident during the hearing, the actual reason for the said disqualification

is not apparent as there are three versions thereof as shown herein below:

- (i) According to the Respondent's Written Replies to the Appellant's Statement of Appeal, the reason for disqualification of the Appellant is stated as hereunder:

“One of the most important part of technical specifications for cargo lifting equipment is the Data Sheet (Please refer to item 1.28 of the technical specifications at page 37 of the bidding document). M/s Mantrac did not provide the required data and therefore, did not meet the important requirements of the specifications. [See item 1.28 on page 37 of their bid). (see also page 4 of 15 of Appendix II, and page 5-6 of 24 of Appendix III of the evaluation report)]. For this reason, M/s Mantrac was disqualified from consideration of award of the tender.” (Emphasis added)

The Authority noted that, this reason is also contained in the Re-evaluation Report.

- (ii) Page 7 of the Internal Memorandum No. 3/2011 (DOC. NO. CTB/117/4/2011 addressed to the Chairman of the CTB, in addition to the above stated reasons indicate another reason for the Appellant's disqualification as:

“The Bidder also did not quote or propose to supply any manuals (Operator, Maintenance and Parts manuals). These manuals are necessary for efficient operation of the equipment to be supplied.”
(Emphasis added)

The Authority noted that this requirement was not stated anywhere in the Tender Document.

- (iii) According to PMU's Report, the Appellant was disqualified because of the following reasons:

“The bidder quoted a total of USD 834,174.00 (TZS 1,224,025,567.08) CFR Dar es salaam. This amount is exclusive of costs for operator manual and parts & maintenance manuals. The price is slightly lower than that of the recommended bidder, but if the omitted costs are included M/s Mantrac cost (sic) will go up. **Further PMU noted that TPA has no experience with the type of F/Lift trucks proposed by M/s Mantrac (Caterpillar). Besides, for sake of standardization, it would be prudent for TPA to buy trucks which are already in the current operating fleet. M/s Mantrac was not recommended/considered for award.**” (Emphasis supplied)

The Authority noted lack of consistency on the reasons for disqualification of the Appellant, as the reason seems to change from one document to the other. Moreover, had the Respondent wanted a specific brand of Forklift Trucks they should have opted for single source procurement instead of inviting open tenders and

thereafter claiming that they do not have experience with certain brand names.

With regard to the Technical Evaluation, the Authority revisited submissions by parties on this point. While the Appellant conceded that they did not submit a summary data sheet as it was required under Item 1.28 of the Technical Specifications, they stated that the specifications for all items contained therein were indicated in the Caterpillar Specifications brochure as well as the Proforma Invoice which was attached to their tender. They therefore argued that, all the required information was provided. With regard to the Respondent's contention that, the type of 5 Ton Caterpillar appearing in the brochure was **DP50K** while that indicated in the tender was **DP50N**, the Appellant clarified that, those made in the Netherlands used the letter '**N**' while those from Japan use '**K**' but they are similar in every respect.

In reply thereof, the Respondent submitted that, the brochure submitted by the Appellant indicated a different

type of equipment (DP50K) to be supplied compared to that indicated in their tender (DP50N). They contended that these were different products and that is why the Evaluators did not consider the brochure in the evaluation process. The Respondent picked three items which they claimed were missing in the Appellant's tender, to wit, maximum ground pressure, stability compliance and maximum gradeability loaded/unloaded. In their rejoinder, the Appellant pointed out each of the items which the Respondent claimed were not shown in their tender, as they were all listed on page 1 of the Pro - forma Invoice which formed part of their tender.

In analyzing the submissions by parties on this point, the Authority observes that, first of all, the Respondent's contention that the type of Caterpillar products provided for in the brochure differed from what was quoted in the Appellant's tender is an afterthought as it neither appeared in the Re-evaluation Report nor in the their Written Replies. Further, the Respondent's submission that, the Evaluators did not review the said brochure which was contained in the Appellant's tender, is not

corroborated as no such information was found in the Re-evaluation Report.

The Authority is of the view that, given the fact that the items that were supposed to form part of the summary data sheet were contained in the tender submitted by the Appellant, the Evaluators could have treated this as a minor deviation pursuant to Clause 28.4 of the ITB which states as follows:

“The Procuring Entity may waive any minor informality, non conformity, or irregularity in a Bid which does not constitute a material deviation, provided such waiver does not prejudice or affect the relative ranking of any Bidder.” (Emphasis added)

The Authority’s observation that, the Appellant’s omission should have been treated as a minor deviation is in line with the Evaluator’s comment on the intent of the summary data sheet as they appear on page 7 of the Re-evaluation Report which reads:

“In essence, the data sheet section contains information that enables the purchaser get a technical overview of what is being proposed for sale. Without the data sheet information the purchaser cannot make an informed decision about the technical suitability of the proposed equipment.” (Emphasis supplied)

As it was evident during the hearing, the items required under Item 1.28 were contained in the Pro-forma Invoice and the brochure. The Authority is therefore of the view that, the intent envisaged in the above quoted statement could have been met had the Evaluators reviewed those documents. Moreover, the Respondent conceded during the hearing, and it is evident in the Re-evaluation Report that, some deficiencies in the other tenders were treated as minor deviations. For instance, the Evaluators’ comments on **M/s Cosmos Investment** and **M/s Bethels Enterprises Ltd** appearing on page 6 of the Re-evaluation Report read as follows:

“...The specifications for the offered equipment have complied with TPA technical specifications **save for minor deviations which are technically acceptable...**” (Emphasis supplied)

“...The specifications for the offered equipment have complied with TPA technical specifications **save for minor deviations such as driving speed and lowering speed. The deviations are technically acceptable...**” (Emphasis supplied)

Thus, the omission by the Appellant should have been treated in the same manner because the items which the Evaluators claimed were not indicated, were actually shown somewhere within that particular tender. The Authority is of the firm view that, the Appellant was unfairly disqualified.

The Authority also noted that, the tender submitted by M/s Jungheinrich was found to have complied with all requirements and recommended for award despite their

failure to indicate the cost for inspection visits contrary to Item 17 of the Bid Data Sheet which provides as follows:

“... The price quoted shall also indicate clearly estimated costs for the following:

- (i) Price/cost of recommended spare parts
- (ii) Cost for installation, if any
- (iii) Cost for commissioning
- (iv) Cost for inspection visits**
- (v) Cost for training
- (vi) Cost for other incidentals, if any ...” (Emphasis added)

The Authority observes that, this was a mandatory requirement and it was one of the reasons which made the Evaluators refrain from recommending M/s Panafrican Equipment (T) Ltd for award of the tender as they were found to be the highest evaluated tenderer for the following reasons:

“(a) The quoted price is exclusive of spare parts

- (b) Parts and Maintenance manual not included in the total bid price
- (c) **Cost of inspection visit not included in the total bid price**” (Emphasis supplied)

The Authority is again of the firm view that, M/s Jungheinrich should have been disqualified at that stage for failure to comply with Item 17 of the Bid Data Sheet; instead the Evaluators loaded the said cost (Euro 8,300.00) to their quoted price. The Authority is appalled by the discriminatory treatment of the tenderers for similar shortcomings which defeats the spirit of Section 43 of the Act. The said provision reiterates the basic principles to be observed by tender boards and procuring entities in the following words:

“ In execution of their duties, tender boards and procuring entities shall strive to achieve the highest standards of equity, taking into account:-

- (a) equality of opportunity to all prospective suppliers, contractors or consultants;
- (b) **fairness of treatment to all parties**; and

(c) the need to obtain the best value for money in terms of price, quality and delivery having regard to set specifications and criteria.” (Emphasis added)

The Authority further noted that, delivery period was supposed to be costed and added to the tender price as per Clause 32.5(b) of the ITB read together with Item 36 of the Bid Data Sheet which provide as follows:

“Clause 32.5 The Procuring Entity requires that the goods under the Invitation for Bids shall be delivered (shipped) at the time specified in the Schedule of Requirements. **The estimated time of arrival of the goods at the Project Site will be calculated for each Bid after allowing for reasonable international and inland transportation time. Treating the Bid resulting in such time of arrival as the base, a delivery “adjustment” will be calculated for other Bids by applying a percentage, specified in the Bid Data Sheet, of the EXW/CIF/CIP price for each week of delay beyond the base, and will be added to the Bid**

price for evaluation. No credit shall be given to early delivery.” (Emphasis supplied)

“Item 36 Delivery schedule: Earliest delivery 6 weeks

Latest delivery: 12 weeks

Relevant parameters in accordance with option selected: adjustment expressed as a percentage. **A sum equal to 1.0% of contract price per week will be added to each bid for each week of delay beyond the earliest delivery date.”**

The Authority observes that, the Evaluators erred by failing to cost and add to the tender price, the delivery period as it was conceded to by the Respondent during the hearing. Had they done so, it would have impacted on the evaluated costs and the ranking of the tenderers would accordingly have been different as the delivery period indicated in their tenders differed as shown herein below:

- M/s Jungheinrich - 22 weeks
- M/s Panafrican Equipment (T) Ltd - 8 weeks

- M/s Intraco S.P.A – 12 – 16 weeks
- M/s Joh Achelis & Söhne GmbH – 14 weeks
- M/s Bethels Enterprises Ltd – 6 months.

Based on the above list, it is obvious that only M/s Panafrican Equipment (T) Ltd was within the delivery period required by the Respondent, and the period indicated by M/s Intraco S.P.A was uncertain as it ranged between 12 to 16 weeks. With regard to the other three tenderers, the Successful Tenderer inclusive, had the delivery period been costed, their quoted prices were bound to increase.

The Authority noted further that, another stage of detailed evaluation involved price comparison; whereby the prices quoted by tenderers who were substantially responsive were compared and duly ranked. The Authority noted that, despite the disqualification of the Appellant, they were subjected to price comparison where they ranked number 1. This connotes failure by the Evaluators to comply with Clause 32 of the ITB on Commercial evaluation. Furthermore, and as already

indicated above, had the delivery period been costed, some of the prices quoted by the tenderers would have been adjusted and the ranking should have been made after the said cost adjustments. In the absence of a proper ranking, the Authority in essence notes that, the Evaluators did not determine the lowest evaluated price pursuant to Clause 34 of the ITB for recommendation of award. The said Clause reads:

“The bid with the lowest evaluated price, from among those which are eligible, compliant and substantially responsive shall be the lowest evaluated bid.” (Emphasis added)

Since the determination of the lowest evaluated price was not done by the Evaluators, the Authority considers the basis for award of the tender to the purported Successful Tenderer was not in accordance with Clause 36.1 of the ITB which states as follows:

“Subject to ITB Clause 35 and 37, the Procuring Entity will award the Contract to the Bidder

whose bid has been determined to be substantially responsive to the bidding documents and who has offered the lowest Evaluated Bid Price ...” (Emphasis added)

During the hearing the Members of the Authority asked the Respondent on the reasons for non inclusion of Post-qualification as per Item 35 of the Bid Data Sheet. The Respondent submitted that, it has been their practice neither to pre-qualify nor to post-qualify tenderers who had been in similar business with them; as they know that they had the required capability to execute the contracts. The Authority does not agree with the Respondent for two reasons. Firstly, the reason given is not relevant to the tenderers who have not worked with them and that even for those who had previously worked with them the legal as well as technical competence of a tenderer may change from time to time. Secondly, Section 48(1) of the Act does not accord such an option on the basis of past experience, as it provides as follows:

“48(1) If tenderers have not been pre-qualified, the procuring entity and the tender board shall determine whether the tenderer whose tender or proposal has been determined to offer the lowest evaluated tender, in the case of procurement or the highest evaluated tender in the case of disposal of public assets by tender, has the capability and resources to carry out effectively the contract as offered in the tender.”

(Emphasis supplied)

In view of the above findings, the Authority is of the settled view that, the evaluation process was marred by a myriad of irregularities and it was not in accordance with the law. Accordingly, the Authority concludes that the disqualification of the Appellant was not justified.

2. Whether the award of the tender to the Successful Tenderer, namely, M/s Joh Achelis & Söhne GmbH was proper at law

In resolving this issue, the Authority considered its findings and conclusion in the first issue, that the evaluation process was not conducted in accordance with the law. It is the considered view of this Authority that, the erroneous evaluation resulted in an equally erroneous award of the tender. In addition thereto, Item 21 of the Bid Data Sheet indicated the tender validity period to be 90 days, which started to run on **21st October, 2010**, when the tenders were opened and thus expired on **19th January, 2011**. It is not disputed that, the award of the tender was approved by the Tender Board on **27th January, 2011** and communication to the Successful Tenderer was made almost a month after the expiration of the tender validity period, that is, on **14th February, 2011**.

During the hearing the Appellant stated that the tender validity period was not extended while the Respondent said they were not sure and needed to verify the same. However, the Respondent did not avail any documentary proof to the contrary, as the extension is done in writing

prior to the expiration of the original period by requesting the tenderers to extend the validity of their tenders pursuant to Regulation 87(4) of GN. No. 97/2005.

Having established that, both the award and communication thereof to the Successful Tenderer were made after the expiry of the tender validity period, the Authority examined the legal consequences thereof by revisiting Section 64 of the Act which states as follows:

“The procuring entity shall require tenderers to make their tenders and tender security 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)

The Authority observes that, the gist of the above quoted provision is to ensure the tenders submitted are valid up to the time when the procurement contract is awarded. Further that, the award becomes complete when it is communicated to a successful tenderer. In this case, both the award as well as the notification thereof were made after the expiration of the tender validity period.

In view of the above findings, the Authority concludes that the award of the tender to the Successful Tenderer, namely, M/s Joh Achelis & Sohne GmbH was not proper at law.

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

Having resolved the contentious issues and found that both the disqualification of the Appellant as well as the award of the tender to the Successful Tenderer were not proper at law, the Authority considered prayers by parties. The Appellant had requested this Authority to grant one or more of the remedies provided for under

Section 82(4) of the Act, and the Authority, by virtue of Section 82(4)(c) of the Act orders the Respondent to restart the tender process afresh in observance of the law. The Appellant also requested for compensation of **USD 17,462.50** and **Tshs. 250,000.00** as itemized in their submissions. The Authority observes that, they are entitled to some compensation to the tune of **Tshs. 4,370,000.00** only as per the following breakdown:

- Legal Fees – Tshs. 4,000,000.00;
- Appeal Fees – Tshs. 120,000.00; and
- Purchase of tender document – Tshs. 100,000.00.
- Tender preparation – Tshs. 150,000.00

With regard to the Respondent's prayer that the Appeal be dismissed with costs, the Authority rejects that prayer in its entirety as the Appeal has merit.

Other matters which caught the attention of the Authority

In addition to the shortfalls pointed out in this decision, the Authority detected the following anomalies which are pointed out herein below to enable the Respondent to take note of them and ensure that they do not recur in future:

(a) Personal Covenants signed by the Evaluators were signed on 29th November, 2010, but the date was cancelled by hand to read 15th, November, 2010 whereby no initialing was done to authenticate the same. During the hearing the Respondent stated that, the said forms are usually completed by the PMU and the Evaluators just sign them, that is why the handwriting in all forms is similar. The Authority finds the said covenants to be suspicious for being doctored to comply with the law. Moreover, the Authority is not convinced by the Respondent's submission for the following reasons:

- the cancellation of the date of the covenant without initialing the same;

- backdating dates of the covenants to the same date, namely 15th November, 2011; and
- filling the forms by one person instead of the individual Evaluators.

(b) There were a number of versions of the Re-evaluation Report. This was partly attributed to the internal mode of reporting whereby, for instance, instead of the PMU writing a separate report containing their observations and forwarding it with the Re-evaluation Report , they inserted their observations in the said Report. In this case therefore, the authenticity of the Re-evaluation Report was questionable as it had been tampered with. Had the PMU forwarded to the Respondent's Director General the Re-evaluation Report, the Minutes of the CTB which approved the award and an executive summary thereof, they could have avoided the misrepresentation of facts as it has been shown in this decision.

(c) During the hearing, the Head of the PMU seemed to be unaware of what was written in some of the documents availed to this Authority which originated from his Office and how in some areas the Evaluators reached certain decisions. The Authority observes that, had the said Officer acquainted himself with the contents of the documents relating to this Appeal prior to the hearing date, he would have learnt of the said misrepresentations of facts by the time of the hearing.

With regard to the Re-evaluation Report, the Authority observes that, having reviewed the said Report and made their observations thereof, one would have expected them to be more conversant with the said Report as they were in a position to clarify with the Evaluators.

(d) The Authority noted inconsistency in the numbering of pages in the Tender Document as pages 1 to 47 consisted of the ITB, Bid Data Sheet

as well as the Table of Clauses for the General Conditions of Contract. Page 47 was followed by page 6 which contained the General Conditions of Contract and other documents up to page 49.

- (e) The Respondent's letter to the Appellant referenced SU/3/3/01, titled "**PROPOSAL FOR TENDER AWARD – TENDER NO CTB/G/03 OF 2010-2011**" was written on **26th January, 2011**, that is a day before the CTB met to approve the award on **27th January, 2011**. The Authority wonders whether they were sure that the CTB would approve the recommendations of the Evaluation Committee without reservations.
- (f) Given the shortfalls in the Re-evaluation Report, the Authority doubts the competence and diligence of the Evaluation Committee.
- (g) With regard to the contradictions on Regulation 95(1) and (2) of GN. No. 97/2005 as pointed out under the first issue, the Authority urges the

responsible Ministry to take appropriate remedial measures.

Having considered all facts and evidence, the Authority concludes that, the evaluation process was marred by irregularities which resulted into the unfair disqualification of the Appellant as well as the erroneous award of the tender to M/s Joh Achelis & Söhne GmbH.

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

- (a) Restart the tender process afresh in observance of the law.**
- (b) Compensate the Appellant a sum of Tshs. 4,370,000.00 being costs incurred in pursuit of this Appeal.**

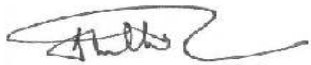
Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

Decision delivered in the presence of the Appellant and the Respondent this 21st June, 2011.




.....
JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MR. K.M. MSITA.....

2. MR. F. T. MARMO.....

3. MR. H. S. MADOFFE.....

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

5. MS. E.J. MANYESHA.....