

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

APPEAL CASE NO. 113 OF 2011

BETWEEN

**M/S M.A.K ENGINEERING CO.
LTD & M/S SOFTNET LTD JV.....APPELLANT**

AND

**NATIONAL INSTITUTE OF
TRANSPORT.....RESPONDENT**

DECISION

CORAM

- | | |
|---------------------------------|--------------|
| 1. Hon. Augusta Bubeshi, J(rtd) | -Chairperson |
| 2. Mr. Kesogukewele Msita | -Member |
| 3. Mrs. Rosemary Lulabuka | - Member |
| 4. Ms. Esther Manyesha | -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 1ST APPELLANT

1. Mr. Athumani A. Kibodya - Managing Director
2. Mr. Andrew Mwaisemba - Consultant, Association of Tanzania Citizen Contractors

FOR THE RESPONDENT

1. Mr. Joseph E. Matara - Head of the Procurement Management Unit
2. Mr. Moses S. Magere - Procurement officer
3. Mr. Raymond Wawa - Advocate from Update Law Attorneys

This decision was scheduled for delivery today 7th December, 2011, and we proceed to deliver it.

The appeal at hand was lodged by **M/S M.A.K ENGINEERING CO.LTD & M/S SOFTNET LTD JV** (hereinafter to be referred to as "**the Appellant**") against the **NATIONAL INSTITUTE OF TRANSPORT** commonly known by its acronym **NIT** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. PA/028/2010/2011/T3Revised/001/1 for Supply and Installation of Air Condition and Ventilation System for the Proposed Construction of Library Phase III (hereinafter to be referred to as "**the tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**"), as well as oral submissions by parties during the hearing, the facts of the Appeal may be summarized as follows:

This tender was originally floated in April 2011 and awarded to M/s Chigo Air Conditioning Tanzania Ltd (hereinafter to be referred to as "**the previous**

tender”). However, owing to a complaint lodged by one of the tenderers who participated in that tender disputing the award of the tender, this Authority delivered its decision on 18th July, 2011, on Appeal Case No. 107 of 2011, whereby the Respondent was ordered to, inter alia, re-evaluate the tenders. Having re-evaluated the tenders in implementation of the Authority’s decision, the Respondent found all of them to be substantially non responsive, hence re-invited all the tenderers to submit tenders. The appeal at hand therefore, emanates from the re-invited tender.

On 8th September, 2011, the Respondent invited the following five tenderers who had participated in the previous tender, to submit tenders:

- M/s M.A.K Engineering Co. Ltd & M/s Softnet Ltd JV;
- M/s REMCO International Ltd;
- M/s Dar Essential Ltd;
- M/s Mollel Electrical Contractors; and
- M/s Chigo Air Conditioning Tanzania Ltd.

The tender opening took place on 22nd September, 2011, whereby only three out of the five tenderers, submitted tenders as indicated below:

Tenderer's Name	Quoted Price Tshs.
M/s M.A.K Engineering Co.Ltd & M/s Soft Net Ltd JV	1,175,614,294/=
M/s Remco International Ltd	1,338,150,219/80
M/s Chigo Air Conditioning Tanzania Ltd	980,000,000/=

The three tenders were subjected to evaluation whereby one tender submitted by M/s Chigo Air Conditioning Tanzania Ltd was disqualified during preliminary evaluation for failure to fill the Form of Bid. The other two tenderers namely, M/s Remco International Ltd and the Appellant qualified for detailed evaluation despite the fact that the Evaluators had detected some deviations which were treated as minor.

The two tenders were thereafter subjected to price comparison whereby the Appellant's tender was ranked

number one while the tender submitted by M/s Remco International Ltd was ranked number two.

The Appellant's tender having been found to be the lowest evaluated, was subjected to Post-qualification whereby it was disqualified for the following reasons:

- (i) Lack of experience on projects of similar nature and complexity pursuant to Item 13(c) of the Bid Data Sheet.
- (ii) The Site Engineer did not have 5 years experience in projects of similar nature and complexity pursuant to Item 13(e) of the Bid Data Sheet.

Having disqualified the Appellant, the Evaluators Post-qualified the second lowest evaluated tenderer, namely, M/s Remco International Ltd and recommended them for award of the tender at a contract sum of Tshs.1,338,150,219/80.

On 30th September, 2011, the Tender Board approved the award as recommended by the Evaluation Committee.

The Respondent communicated the award of the tender to the Successful Tenderer on 7th October, 2011, vide letter referenced NIT/C/32/VOL.3/14.

On 17th October, 2011, the Respondent vide letter referenced NIT/C/32/VOL.2/20 communicated the tender results to the Appellant.

Having been notified that their tender was not successful, the Appellant felt aggrieved and on 24th October, 2011, vide letter without reference, inquired from the Respondent on the reasons for their failure to win the tender.

Having received no response from the Respondent, on 1st November, 2011, vide an unreferenced letter, the Appellant wrote to this Authority complaining about the Respondent's failure to disclose the reasons for the disqualification of their tender.

On 2nd November, 2011, vide letter referenced PPAA/AG/05/25/2011, the Authority responded to the Appellant's letter, informing them that, the Respondent was obliged to disclose the reasons for their disqualification pursuant to Regulation 97(14)(c) and (d) 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**"). The said letter was also copied to the Respondent.

The Respondent called the Appellant on the same day requesting them to collect the response to their letter of 24th October, 2011.

Upon being dissatisfied with the reasons given by the Respondent, on 8th November, 2011, the Appellant filed an appeal to this Authority.

SUBMISSIONS BY THE APPELLANT

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

That, the reasons for the disqualification of their tender were incorrect as their Project Manager has the required experience of more than five years in the management of Air Conditioning projects.

That, they have technical personnel experienced in the installation of ventilation and air conditioning systems in projects of a similar nature; one of the projects being the Faculty of Education at the University of Dodoma. The Appellant further contended that, their tender was unreasonably disqualified.

That, according to their investigation, the Successful Tenderer has one technical personnel who is also the

director of the company, one engineer and the remaining staff are artisans. The Appellant also found that the said tenderer is currently executing about 13 different projects and was doubtful on their capability to handle such projects with such a limited number of personnel.

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

- (a) Annul the decision of the Respondent to reject the Appellant's Tender;
- (b) Order the Respondent to reach a lawful decision;
- (c) Order the Respondent to pay costs of the Appeal as follows;

Costs for filing the AppealTshs 120,000.00

Costs for hiring a

Procurement Expert.....Tshs 3,000,000.00

Total **3,120,000.00**

- (d) Take any other action as deemed fit.

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 disqualification of the Appellant emanated from non compliance with Items 13(e) and (c) of the Bid Data Sheet which required a Site Manager with five years experience in works of similar nature and volume. They were also required to have experience in at least one project of a similar nature and complexity.

That, the work previously executed by the Appellant at Dodoma University was neither of similar nature nor similar complexity.

That, all tenderers were properly evaluated and fairly treated.

That, the tender process was conducted in accordance with the law and the subsequent award to the successful tenderer was proper.

Accordingly, the Respondent prayed that, the Appeal be dismissed in its totality.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral submissions from parties, the Authority framed the following three issues:

- **Whether the Appellant was unfairly disqualified;**
- **Whether the award of the tender to the Successful Tenderer, namely, M/s Remco International Ltd was proper at law.**
- **To what reliefs, if any, are the parties entitled to.**

Having identified the issues in dispute, the Authority proceeded to resolve them as hereunder;

1. Whether the Appellant was unfairly disqualified

In resolving this issue the Authority reviewed the evaluation process, which led to the disqualification of the Appellant's tender. According to the Evaluation Report, the first stage of the evaluation process involved preliminary evaluation whereby the Evaluators were to be guided by Clause 28.1 of the ITB which states as follows:

"Prior to the detailed evaluation of bids, the Procuring Entity will determine whether each bid

(a) meets the eligibility criteria defined in ITB Clause 3;

(b) has been properly signed;

**(c) is accompanied by the required securities;
and**

(d) is substantially responsive to the requirements of the bidding documents.”

(Emphasis added)

The Authority noted that, preliminary evaluation was divided into two parts, namely, commercial responsiveness whereby the tenders’ completeness and responsiveness to the Tender Document was checked and technical responsiveness whereby compliance with the required specifications and scope were checked. According to the Evaluation Report, in checking commercial responsiveness of the tenders, the Evaluators detected the following shortfalls in each of the three tenders:

Tenderer	Shortfalls detected	Action taken by the Evaluators’
M/s M.A.K. Engineering Co. Ltd and M/s Softnet Ltd JV	One of the JV partner had no relevant business license	These were treated as minor deviations as one of the JV partner M/s M.A.K. Engineering Co. Ltd is registered as a Class 1
	Did not complete the integrity forms	
	One of the JV partner was a registered Specialist Contractor in	

	Class II contrary to Item 6 of the Bid Data Sheet	Specialist Contractor and has a valid business license
	The bid security bears the name of one partner to the JV contrary to Clause 18.10 of the ITB	This was also treated as a minor deviation
M/s Remco International Ltd	Did not submit audited accounts contrary to Item 13 of the Bid Data Sheet	The Evaluators reviewed the tenderer's ongoing projects and treated this omission as a minor deviation
	Did not submit the relevant business license (they instead submitted a business license for maintenance of air conditioning and ventilation)	It was treated as a minor deviation because the tenderer is registered by CRB as Class I Specialist Contractor
	The Form of Bid was altered in contravention of Clause 14.1 of the ITB	The alteration was treated as a minor deviation as it did not affect the works contract
	The format of the bid security submitted was	This was also treated as a

	altered contrary to Clause 18.4 of the ITB	minor deviation though no explanation was given
M/s Chigo Air Conditioning Tanzania Ltd	Did not fill the Form of Bid contrary to Clause 14.1 of the ITB	It was considered to be a material deviation and the said tender was disqualified
	Submitted a license for import and sale of air condition and electronic equipment.	It was treated as a minor deviation because the tenderer is registered by CRB as Class I Specialist Contractor

Having identified the shortfalls in each tender, the Evaluators rightly disqualified M/s Chigo Air Conditioning Tanzania Ltd for failure to fill the Form of Bid. However, the Evaluators treated all the shortfalls pertaining to the tenders submitted by the other two tenderers, namely, M/s Remco International Ltd and the Appellant, as minor deviations. The Evaluation Committee therefore found the tenders submitted by the said two tenderers to be

substantially responsive and qualified for the next stage of evaluation.

The Authority is of the opinion that, the Evaluators' obligation at this stage was to check if the tenders had complied with the mandatory requirements of the Tender Document. In order to ascertain if the waiver of the said requirements by the Evaluation Committee was valid or not, the Authority deemed it imperative to analyse first, what constitutes a minor deviation as opposed to a material deviation.

A material deviation is well defined under Clause 28.2 of the ITB read together with Regulation 90(8) GN. No. 97 of 2005. For purposes of clarity, the said Regulation 90(8) is reproduced hereunder:

"A material deviation or reservation is one which affects the scope, quality or performance of the contract, or which, **in any substantial way, is inconsistent with the tender document** or limits the procuring entity's rights or the tenderer's

obligations under the contract, and affects unfairly the competitive position of tenderers presenting responsive tenders.” (Emphasis added)

The Authority observes that, in determining whether a shortfall amounts to a material or minor deviation, the Evaluators are obliged to consider Clause 28.4 of the ITB which prohibits any attempt to make a non responsive tender to be responsive. The said Clause states as follows:

“If a bid is not substantially responsive, it will be rejected by the Procuring Entity, and may not subsequently be made responsive by correction or withdrawal of the non-conformity deviation or reservation.” (Emphasis supplied)

The Authority also considered the powers to waive, amongst others, minor informalities conferred unto procuring entities by virtue of Clause 28.4 of the ITB which states as follows:

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

However, the Authority cautions that, the right to waive any condition as indicated in the above quoted clause does not extend to mandatory requirements provided for in the applicable law and the Tender Document.

Having revisited the relevant provisions in the applicable law as well as the Tender Document, the Authority proceeded to review each of the criteria which were waived by the Evaluators, to ascertain if they were mandatory requirements or otherwise and if so whether the waiver was proper, as indicated hereunder:

(i) Failure to submit relevant business licenses:

As it has been shown in the Table herein above, all three tenderers who participated in the tender did not comply with this requirement. The Authority noted that, Item 1.1 of the Form of Qualification Information required tenderers to attach the current business licenses. Moreover, Clause 3.2 of the ITB contained the same requirement as it provides as follows:

“National Bidders **shall satisfy all relevant licensing** and/or registration with the appropriate statutory bodies in Tanzania.” (Emphasis added)

The Authority observes that, this was a mandatory requirement as it echoes the spirit of Section 46 of the Act read together with Regulation 14(1) which provides for minimum requirements for a prospective tenderer to qualify to participate in any procurement proceedings. It is the view of this Authority that, the Evaluators erred in treating this omission as a minor deviation since it was a mandatory requirement under Clause 3.2 of the ITB.

(ii) Failure to complete integrity forms

The Authority noted that, the Appellant's failure to fill the integrity form was indicated under Table 5A of the Evaluation Report but no other explanation on the same was stated anywhere in the Report including page 9 thereof where the shortfalls on the Appellant's tender were discussed. The Authority observes that, this was a material deviation in terms of the Sixth Schedule to GN. No. 97 of 2005 which require every tenderer to submit an Anti-Bribery Statement which must be signed by its Chief Executive Officer. Failure to conform to the requirements of the Sixth Schedule warrants rejection of a tender pursuant to Paragraph 4 of the said Schedule which provides as follows:

“Bids which do not conform to these requirements shall not be considered.”

(Emphasis supplied)

The Authority is of the firm view that, this was a mandatory requirement and non compliance thereof

should have resulted into rejection of a tender. It goes without saying therefore that, the Evaluators' waiver of this mandatory requirement was improper.

(iii) Alteration of the Form of Bid

This anomaly was detected in the tender submitted by the Successful Tenderer. The Respondent contended that, this was treated as a minor deviation as it did not affect the works contract. The Authority wishes to enlighten the Respondent that, the requirements contained in the Tender Document issued by themselves were purposely made in compliance with the applicable law. The Form of Bid being the offer itself is crucial to the formation of a legally binding contract as stated in the Form of Bid that:

“This bid and your written acceptance of it shall constitute a binding Contract between us.”

The Form of Bid is supposed to be filled in strict compliance with the provisions of the Tender Document

as provided under Clause 14.1 of the ITB which prohibits alteration of the Form of Bid as it stipulates categorically that:

“The Bidder shall fill the Form of Bid furnished in the Bidding Documents. The Form of Bid must be completed **without any alteration to its format** and no substitute shall be accepted.” (Emphasis supplied)

The Authority observes that, alteration of the Form of Bid is strictly prohibited and thus, non compliance thereof is a material deviation.

(iv) Failure to submit audited accounts

The Authority noted that, the Successful Tenderer did not comply with this particular requirement and the Respondent’s reason for treating this omission as minor deviation was the satisfaction they got after reviewing the tenderer’s on-going projects. The Authority observes that, the qualifications of the tenderers were clearly

stated under Clause 12.3 of the ITB, in the following words:

“If the Procuring Entity has not undertaken pre-qualification of potential Bidders, **to qualify for award of the contract, Bidders shall meet the minimum qualifying criteria specified in the Bid Data Sheet:**” (Emphasis added)

Item 13(a) of the Bid Data Sheet supplemented the above quoted Clause 12.3 in the following words:

“Other information or material required to be completed and submitted by Bidders:

- (a) ... **Audited Reports of the last 3 years** and the list of technical personnel are required.” (Emphasis supplied)

Based on Clause 12.3 of the ITB read together with Item 13(a) as quoted, the Authority observes that, for tenderers to qualify for award of the tender in dispute they were required to submit, amongst others, Audited

Financial Reports. The Successful Tenderer's failure to submit the required information rendered their tender substantially non responsive and should have been rejected at the preliminary stage of evaluation. It was therefore wrong for the Evaluators to treat the said omission as a minor deviation.

(v) Failure to meet the eligibility criteria

The Evaluators noted that, the Appellant's tender was defective, in that, M/s Softnet Ltd, who was a partner to the Joint Venture was not eligible as they were registered Specialist Contractors in Class II while the tender was intended for only Class I Specialist Contractors. The Authority agrees with the Evaluator's observation, in that, Clause 3 .1 of the ITB as amplified by Item 6 of the Bid Data Sheet, required tenderers with the following qualifications:

"Only Bidders registered as Specialist Mechanical Works Contractor (Ventilation and Air Conditioning) in Class 1 with the

Contractors Registration Board are eligible.”

(Emphasis supplied)

The Authority observes that, this was a mandatory requirement which was supposed to be complied with by all tenderers. However, the Authority does not comprehend the Respondent’s **motive** in inviting M/s Softnet Ltd to participate in this tender *vide* letter referenced PA/028/NIT/PMU/VOL.1/19 dated 8th September, 2011, while knowing well that they were registered as Specialist Contractors in Class II and therefore ineligible. That anomaly notwithstanding, the Authority noted that, the Form of Qualification Information gave specific instructions for joint ventures as follows:

“2.1 The information listed in 1.1 – 1.11 above **shall be provided for each partner of the joint venture.**” (Emphasis added)

The said Items 1.1 to 1.11 referred to in the above quotation, required the tenderers to submit information

relating to, amongst others, eligibility, licensing, experience, qualifications and experience of key personnel, financial reports, financial capability and current litigation. The Authority does not understand the rationale behind the Evaluators' waiver of the eligibility criteria as the requirement emanates from Regulation 6(7) of GN. No. 97 of 2005 which guides on the eligibility of partners to a joint venture as it highlights essential requirements to be contained in the solicitation documents at the option of the procuring entity. The said Regulation provides partly as follows:

“Reg. 6(7) **Where a tenderer submits a tender as part of a joint venture**, consortium or association, the solicitation or contract document shall state where appropriate:

(b) that a party to a joint venture, consortium or association shall be eligible to participate in the procurement or disposal by tender and **where one party is deemed to be ineligible, the whole joint venture, consortium or**

association shall be declared ineligible.”

(Emphasis added)

The Authority is of the view that, the said requirement was purposely incorporated in the Tender Document because eligibility of a tenderer is amongst the most important requirements. This fact is underscored in the Tender Evaluation Guidelines Procurement of Works or Goods issued by PPRA in February, 2007, (hereinafter to be referred to as “**PPRA Guidelines**”) where Item 10.3(d)(i) lists failure to satisfy eligibility criteria as amongst the reasons that makes a tender to be non responsive.

The Authority emphasizes that, the underlying intent behind formation of associations and joint venture was well stated under Item 4 of the Bid Data Sheet as follows:

“Bidders are required to bid for the component above as one package. Bidders are free to associate with

others **to enhance their qualifications.**"
(Emphasis supplied)

It is the view of this Authority that, enhancement of the qualifications of a tenderer envisaged in the above quoted provision, was surely not directed towards association with less qualified firms. Relating this finding to the Appeal at hand, the Authority observes that, the Appellant's tender was prejudiced **from the outset** by one of the partners to the joint venture being ineligible **even though** the invitation to tender was extended in the name of that particular partner. Had the Evaluators been diligent they would have found that, the Appellant's tender failed the eligibility test pursuant to Clause 28.1(a) of the ITB.

In view of the above findings, the Authority is of the firm view that, eligibility criteria was amongst the mandatory criteria and therefore failure to comply with it was a material deviation.

(vi) Failure to submit tender security

According to the Evaluation Report, the Appellant as well as the Successful Tenderer failed to meet this requirement. The Appellant had submitted the said security in the name of one of the Joint Venture partner, namely, M/s Softnet Ltd contrary to Clause 18.4 of the ITB while the Successful Tenderer had altered the form of the said security contrary to Clause 14.1 of the ITB. During the hearing the Appellant, upon being shown the tender security contained in their tender, conceded that it was an oversight on their part. The Respondent, in defense of their action of waiving the said criterion, stated that the shortfalls thereof were minor deviations as there was a possibility of recovering the money, if need arose.

In order to understand the spirit behind Clauses 14.1 and 18.10 of the ITB, the Authority deemed it necessary to reproduce them:

“18.1 Pursuant to ITB Clause 11, unless otherwise specified in the **Bid Data Sheet**, the Bidder shall furnish as part of its bid, a bid Security in the original form and in the amount and currency specified in the **Bid Data Sheet** or Bid Securing Declaration as specified in the **Bid Data Sheet in the format provided in section IV.**

18.10 The Bid Security or Bid Securing Declaration of a joint venture **must be in the name of the joint venture submitting the bid.**” (Emphasis supplied)

The Authority noted that the above quoted Clause 18.1 was modified under Item 19 of the Bid Data Sheet whereby a bid security of 2.5% of the contract value was required. The Authority noted further that, the bolded words in Clause 18.1 as quoted, were purposely emphasized by the Respondent themselves. In order to understand the rationale behind waiver of this particular requirement, the Authority revisited the reasons thereof as they appear on page 10 of the Evaluation Report:

“Both Bidder No. 1 and No. 2 submitted Bid Securities which are not in compliance with the requirements of the bidding document. **In consideration of the status of the project and for the benefit of the Employer, the Evaluation Committee invoking ITB 28.3 and 28.4 agreed to waive the anomalies of the submitted Bid Securities** for both Bidders as they are not affecting relative ranking of any Bidder. Bidder No. 1 and No. 2 are therefore considered for further examination.”
(Emphasis supplied)

In order to ascertain whether the Evaluators’ action of waiving the criteria on tender security was done in accordance with the law, the Authority revisited Clauses 28.3 and 28.4 of the ITB which were the basis of the Evaluators’ action, which provide as follows:

“28.3 The Procuring Entity will confirm that the documents and information specified under ITB Clause 11 and ITB Clause 12 have been

provided in the Bid. If any of these documents or information is missing, or is not provided in accordance with the Instructions to Bidders, the Bid shall be rejected.

28.4 The Procuring Entity may waive any minor informality, nonconformity, or irregularity in a Bid which does not constitute a material deviation, provided such waiver does not prejudice or affect the relating ranking of any Bidder.” (Emphasis supplied)

Based on the above quoted Clauses, the Authority observes that, the said provisions do not supplement each other as they are contradictory and cannot be applied together. The salient differences of the two Clauses lie on the following:

- Clause 28.3 of the ITB requires a tender to be rejected if it does not contain the information requested under Clauses 11 and 12 of the ITB which provides for **“documents constituting the Bid”**

and **“documents establishing eligibility and qualification of the Bidder”**.

- Clause 28.4 of the ITB guides on the manner in which waiver of, amongst others, minor deviations may be exercised.

It is the view of the Authority that, the Evaluators erred in citing Clause 28.3 of the ITB as it was not related to waiver of criteria. With regard to the waiver exercised under Clause 28.4 of the ITB, the Authority is of the settled view that, the submission of a tender security in the name of a joint venture was a mandatory requirement as the word **‘must’** was used and not **‘may’** which is optional. It was therefore wrong for the Evaluators to treat such an anomaly as a minor deviation as the intent of such a security is well articulated under Clause 18.2 of the ITB that it is intended to protect the Respondent against the risk of the tenderer’s conduct which would warrant the security’s forfeiture pursuant to Clause 18.9 of the ITB.

Accordingly, the Authority is of the considered opinion that, this was a material deviation warranting rejection of the tenders submitted by the Successful Tenderer and the Appellant.

Had the preliminary evaluation been properly conducted, the Evaluators would have disqualified the tenders submitted by the Appellant and the Successful Tenderer at this stage for being substantially non responsive as they failed to comply with the requirements of the Tender Document. In addition, Clause 28.1 of the ITB required the Evaluators to check if the tenders had, inter alia, met the eligibility criteria and were accompanied by the required securities. For reasons best known to the Evaluators themselves, the waived criteria included those relating to eligibility and tender security. Moreover, the Authority observes that waiver of mandatory requirements by the Evaluators is not acceptable as the Evaluators do not have such powers. The Evaluators are bound to evaluate the tenders strictly in accordance with the criteria stated in the Tender Document pursuant to

Regulation 90(4) of GN. No. 97 of 2005 which provides 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)

It is the settled view of the Authority that, by waiving some of the criteria during the evaluation process, the Evaluators acted *ultra vires*.

Having analysed the waiver of some criteria by the Evaluators, the Authority deemed it necessary to dwell on the Evaluators’ decision to qualify the two tenders for detailed evaluation. In so doing, the Authority revisited Clause 28.3 of the ITB which is in *pari materia* with Regulation 90(7) of GN. No. 97 of 2005 which guides on which tenders should be determined to be substantially responsive. The latter provision states as follows:

“A substantially responsive tender is one which conforms to all the terms, conditions, and specifications of the tender document(s), without material deviation or reservations.”
(Emphasis added)

In addition thereto, the Authority revisited Items 10.3(d) and (e) of PPRA Guidelines which provide as follows:

“(d) Non-responsive tenders

Examples of non-conformance justifying rejection of a tender are as follows: _

- (i) **failure to satisfy eligibility criteria.**
- (ii) failure to satisfy experience criteria.
- (iii) **failure to submit tender security** or tender securing declaration, **where one has been requested.**
- (iv) failure to tender for the required scope of works.
- (v) failure to meet major technical specifications.

- (e) **Tenders which fail to conform to any of the major conditions are normally declared substantially non-responsive. They are rejected and not considered any further in the evaluation.**" (Emphasis added)

The Authority is of the firm view that, waiver of some criteria by the Evaluators **was unlawful** as it contravened Clause 28.5 of the ITB read together with Regulation 90(16) of GN. No. 97 of 2005 which restricts any effort to make a substantially non responsive tender to be responsive. For purposes of clarity, the Authority reproduces the said Regulation 90(16):

"If a tender is not responsive to the tender document, it shall be rejected by the procuring entity, and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation." (Emphasis supplied)

It is evident that the Evaluators' conduct made the non responsive tenders to be responsive. Moreover, the

Evaluators erred in subjecting the two tenders to detailed evaluation as they were both substantially non responsive and should have been rejected at the preliminary stage of evaluation.

The Authority does not deem it necessary to review the Post-qualification process, as the two tenders submitted by the Appellant and M/s Remco International Ltd who reached that stage, were not qualified to be Post-qualified.

The Authority is concerned with the conduct of both the PMU and the Tender Board for failure to detect the serious breaches of the law in the tender under Appeal. The Authority is disappointed with the Respondent's conduct, in that, instead of learning from the earlier decision rendered by this Authority in Appeal Case No. 107 of 2011, they have not been able to learn from their mistakes; instead, more serious breaches have been committed.

In view of the above findings, the Authority is of the settled view that, the Appellant was fairly disqualified.

2. Whether the award of the tender to the Successful Tenderer, namely, M/s Remco International Ltd was proper at law

In resolving this issue the Authority considered its findings in the first issue that, the tenders submitted by both the Appellant and the Successful Tenderer should have been disqualified at the preliminary stage of evaluation for being substantially non responsive. It goes without saying therefore that, the award of the tender to M/s Remco International Ltd was not proper at law.

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

Having resolved the issues in dispute the Authority considered the prayers by parties.

(a) Prayers by the Appellant:

The Authority revisited the Appellants prayers, and observes as follows:

- (i) The Authority does not accept the Appellant's prayer for nullification of the Respondent's decision to reject the Appellant's tender as the said tender was substantially non-responsive and therefore rightly rejected.
- (ii) As for the prayer to order the Respondent to reach a lawful decision, the Authority observes that, having found the tender process to be marred by irregularities the Respondent is ordered to start the tender process afresh in observance of the law.
- (iii) With respect to the prayer for compensation of Tshs. 3,120,000/= for costs arising from this Appeal, the Authority orders the Respondent to compensate the Appellant a sum of **Tshs.**

120,000/= only being appeal filing fees as the appeal has some merit.

(b) Prayers by the Respondent:

The Authority also considered the Respondent prayer for dismissal of the Appeal and rejects it as the Appeal has some merit.

OTHER MATTERS THAT CAUGHT THE ATTENTION OF THE AUTHORITY

The Authority noted that, the Respondent co-opted a Legal Counsel from a private law firm to be the Chairman of the Evaluation Committee. However, it was evident during the hearing that, the said Chairman who also attended the hearing as the Respondent's Advocate, could not explain the rationale behind some of the decisions which were made by the Evaluation Committee nor the legal justification thereof. The Authority wishes to enlighten the Respondent that, co-opting is allowed for specific purposes as reiterated under Section 37(5) of the Act which states as follows:

“Members of the evaluation committee may be external to the procuring entity, **where the required skills or experience are not available within the procuring entity or where members are indisposed or have a conflict of interest.**”
(Emphasis supplied)

It was evident during the hearing that, the co-opted Chairman of the Evaluation Committee was not conversant with the subject matter of the procurement. The Authority wonders what was the motive of appointing such a person to chair such a committee **knowing well that it required specialized knowledge in mechanical engineering.** The Authority reminds the Respondent that, appointment of members of the evaluation committee is guided by Section 37(4) of the Act read together with Item 2.1 of PPRA Guidelines which are reproduced herein below:

“S.37(4) The members shall be of an appropriate level of seniority and

experience, depending on the value and complexity of the procurement requirement.”

Item 2.1 ... Each committee shall comprise of not less than **two government officials with the necessary qualifications and experience, one official from other public authorities who is a specialist or qualified person in the field of particular procurement** to be called for and **one procurement specialist** who shall not be involved in the approval process. **Subject to the prior written approval by the PPRA, non-public officers may be appointed as committee members.**(Emphasis added)

Based on the above provisions, it is evident that the appointment of the co-opted Chairman did not observe the requirements of the law as it requires PPRA’s approval before co-opting a non public official.

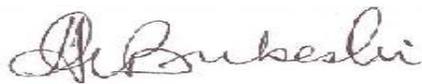
4.

Having considered all facts and evidence, the Authority partly upholds the Appeal and orders the Respondent to do the following:

- **start the tender process afresh in observance of the law;** and
- **pay the Appellant a sum of Tshs. 120,000/= being appeal filing fees.**

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

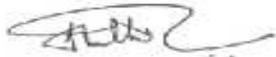
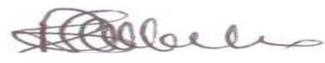
Decision delivered in the presence of the Appellant and the Respondent this 7th day of December, 2011.



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JUDGE (rtd) A. G. BUBESHI

CHAIRPERSON

MEMBERS:

1. MR. K.M. MSITA.....
2. MRS. R.A. LULABUKA.....
3. MS. E. J. MANYESHA