

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY
AT SHINYANGA**

APPEAL CASE NO. 69 OF 2010

BETWEEN

**M/s MBASHA'S MEDICS
& GENERAL SUPPLY.....APPELLANT**

AND

**SHINYANGA REGIONAL
SECRETARIAT.....1ST RESPONDENT**

M/S ACACIA PHARMACY LTD 2ND RESPONDENT

DECISION

CORAM:

- 1. Hon. A.G. Bubeshi, J. (rtd) – Chairperson**
- 2. Hon. V.K. Mwambalawa (MP) – Member**
- 3. Mr. K. M. Msita - Member**
- 4. Ms. E. J. Manyesha - Member**
- 5. Ms. E.V.A. Nyagawa - Ag. Secretary**

FOR THE APPELLANT:

1. Mr. Mbasha Matutu – Managing Director
2. Mr. Godfrey P. Nyamsenda – Legal Officer

FOR THE 1st RESPONDENT:

1. Ms. Mwanvua Jilumbi – Regional Administrative Secretary
2. Mr. William N. Nsanzugwanko – Tender Board Chairman
3. Mr. Frank R. Samwel – Legal Officer
4. Eng. Deusdedit Mshuga – PMU Member
5. Mr. Marwa Kisibo – PMU Member
6. Mr. Mihayo Shija – Tender Board Secretary
7. Mr. Barnabas Yindi – PMU Member

FOR THE 2ND RESPONDENT

1. Mr. John L. Masanja – Marketing Manager
2. Mr. Theonest W. Musiba - Storekeeper

This decision was scheduled for delivery today 11th June, 2010, and we proceed to deliver it.

This Appeal was lodged by **M/s Mbasha's Medics & General Supply**, (hereinafter to be referred to as "**the Appellant**") against **Shinyanga Regional Secretariat** (hereinafter to be referred to as "**the 1st Respondent**"). Having notified tenderers who participated in the tender in dispute of the existence of this Appeal, the successful tenderer, namely, M/s Acacia Pharmacy Ltd, opted to join as a party to this Appeal (hereinafter to be referred to as "**the 2nd Respondent**").

The said Appeal is in respect of Tender No. RAS – 018/2009-10/RH/G/01 for Supply of Medical Equipment for Shinyanga Regional Hospital (hereinafter to be referred to as "**the Tender**").

The facts of this Appeal as deduced from the documents submitted to the Authority as well as parties' oral submissions, may be summarized as follows below.

On 15th February, 2010, the Respondent invited tenders for the supply of medical equipment *vide* Majira newspaper. The required equipment were:

- ICU Equipment
- Pediatric Department Equipment
- Laboratory Equipment
- Surgical Equipment
- Ophthalmology Equipment

The tender opening took place on 9th March, 2010, whereby ten tenders were submitted by the following tenderers:

S/ No	TENDERER	TENDER PRICE
1.	M/s MSG General Supplies – Dar es Salaam	Tshs. 552,850,000/=
2.	M/s Anudha Ltd - Dar es Salaam	Tshs. 528,772,000/=
3.	M/s Acacia Pharmacy Ltd - Arusha	Tshs. 609,165,000/=
4.	M/s Lab Equip Ltd – Dar es Salaam	USD 278,886
5.	M/s Laja Enterprises & Co. Ltd – Mwanza	Tshs. 460,005,000/=
6.	M/s Turaco Taxidermy Co. Ltd – Shinyanga	Tshs. 571,689,000/=

7.	M/s Blue Ruby Trading Co. Ltd – Mwanza	Tshs. 91,120,780/=
8.	M/s Mufuruki Traders Co. Ltd - Mwanza	Tshs. 397,236,000/=
9.	M/s Mbasha’s Medics & General Supply - Shinyanga	Tshs. 565,450,000/=
10.	M/s Kayonza Enterprises Ltd - Mwanza	Tshs. 581,295,000/=

The tenders were evaluated whereby eight out of the ten tenders submitted were disqualified during Preliminary Evaluation. Two tenderers, namely, M/s MSG General Supplies and M/s Acacia Pharmacy Ltd, qualified for Detailed Evaluation and later were both post-qualified. The Evaluation Committee recommended award to be made to M/s MSG General Supplies at a contract price of Tshs. 553,200,000/=.

On 29th April, 2010, the Tender Board awarded the tender to M/s Acacia Pharmacy Ltd at a contract price of Tshs. 589,165,000/= after establishing that M/s MSG General Supplies had submitted a forged certificate from

the Private Health Laboratories Board (hereinafter to be referred to as **"PHLB Certificate"**).

On 3rd May, 2010, the Respondent communicated the tender results to the Appellant.

The Appellant was aggrieved by the said tender results, hence lodged an appeal with this Authority on 12th May, 2010.

SUBMISSIONS BY THE APPELLANT

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

That, one of the members of the Procurement Management Unit (PMU), namely, Mr. Marwa Kisibo took part in the evaluation of the tenders; contrary to Section 37 of the Public Procurement Act, Cap. 410 (hereinafter

to be referred to as "**the Act**") as the Evaluation Committee is answerable to the PMU.

That, M/s Acacia Pharmacy Ltd was awarded the tender without meeting the necessary conditions, that is, they lacked financial capability of at least Tshs. 800,000,000/=.

That, M/s Acacia Pharmacy Ltd was awarded the contract while their annual volume of goods supplied in last three years was less than Tshs. 800,000,000/= as required under the Instructions to Bidders (hereinafter to be referred to as "**ITB**").

That, the whole exercise was done through corrupt practices and the Prevention and Combating of Corruption Bureau is investigating two employees of the Respondent's PMU namely, Mr. Marwa Kisibo and Mr. Shija Mihayo over the matter.

That, the tenderers were not required to indicate the tender validity period as Item 16 of the Tender Data Sheet indicated that it was not applicable.

That, the Respondent erred in awarding the tender to M/s Acacia Pharmacy Ltd as the recommendations were made by the PMU instead of the Evaluation Committee.

Finally, the Appellant requested the Authority to:

- (i) Review the Respondent's decision and order them to proceed in a lawful manner.
- (ii) Order the Respondent to compensate the Appellant for the following:

Expenditure	Tshs.
Preparation of the tender document	2,000,000/=
Transport to Dar es salaam to submit documents to PPAA (two trips)	370,000/=
Communication expenses	500,000/=
Meals and accommodation in Dar es salaam for 2 people	1,000,000/=
Loss of profit (for 14 days)	3,000,000/=
Appeal fees	120,000/=
TOTAL	7,090,000/=

REPLIES BY THE 1ST RESPONDENT

Based on the documents submitted, oral submissions as well as replies to questions raised by the Members of the Authority during the hearing, the 1st Respondent's replies may be summarized as follows:

That, the Appellant was eliminated at the preliminary stage for failure to comply with specified bid validity period of 90 days.

That, it is true that Mr. Marwa Kisibo, a member of the PMU participated in the Evaluation of that particular tender. However, this was done in good faith because the other two members of the Evaluation Committee were co-opted from outside the procuring entity. Mr. Marwa was involved in facilitating the exercise by providing documents, venue and typing the report and that the exercise was carried out in a fair manner. Moreover, Mr. Marwa Kisibo neither attended the PMU meeting which discussed the Evaluation Report nor the Tender Board meeting which deliberated the said Report.

That, it is not true that the PMU performed the functions of the Evaluation Committee. The PMU comprises of six members and when one of them takes part in the evaluation of a certain tender it is due to the necessity of that tender; it does not mean that all members of the PMU have taken part in the evaluation. Moreover, when a member of the PMU participates in the evaluation process, he is not allowed to attend meetings of the PMU and the Tender Board which deliberate on that evaluation report.

That, the allegation that M/s Acacia Pharmacy Ltd was awarded the tender without meeting the necessary conditions is not true. The Appellant has no right to seek reference or information from the bankers of M/s Acacia Pharmacy Ltd, and if they did so without prior consent of the account owner, that exercise was illegal.

That, the documents submitted by M/s Acacia Pharmacy Ltd demonstrated that they have the financial capability to supply the hospital equipment.

That, with regard to the Appellant's contention that, M/s Acacia Pharmacy Ltd was not registered by the Regulatory Board for Laboratory Equipment, the Respondent admitted that it was true. However, the Respondent further submitted that the said criterion was waived after the firm that was recommended to be awarded the tender was found to have forged the PHLB Certificate. This decision took into account the period remaining to the end of the financial year.

That, M/s Acacia Pharmacy Ltd submitted documents indicating that they had supplied goods worth Tshs. 815,917,200/= to various institutions during the years 2008 and 2009.

That, the Appellant is not entitled to any compensation.

REPLIES BY THE 2ND RESPONDENT

The 2nd Respondent's documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing were as follows:

That, they submitted their tender accompanied with the required financial statement of cash flow showing more than Tshs. 1.2 billion which was announced during tender opening ceremony.

That, the Appellant's contention that, the 2nd Respondent was awarded the tender without meeting the criterion of the annual volume of goods supplied to be not less than Tshs. 800,000,000/= is not true. The 2nd Respondent submitted documents indicating they had supplied goods worth more than the required sum in the last three years.

That, the Appellant's complaints are affecting service delivery at the Regional Hospital; hence inconveniencing the general public.

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 three main issues, namely;

- **Whether the Evaluation was properly done.**
- **Whether the award of the tender to the successful tenderer, namely, M/s Acacia Pharmacy Ltd was proper at law.**
- **To what reliefs, if any, is the Appellant entitled to.**

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

1.0 Whether the evaluation was properly done

In its endeavour to ascertain whether the evaluation of the tender under Appeal was properly done, the Authority reviewed the documents submitted and the contesting oral submissions by parties *vis-a-vis* the applicable law and the Tender Document. In the course of analyzing this

first issue, the Appellant's grounds of Appeal, that is, whether the successful tenderer did meet the necessary requirements and whether it was proper for a member of the PMU to take part in the evaluation process, will be resolved.

The Authority observes that for an evaluation process to be properly done, it has to be conducted in accordance with the applicable law and the tender document. In order to reach such a conclusion, the Authority reviewed the whole evaluation process so as to ascertain whether all procedural requirements were adhered to. The Authority noted that the evaluation was conducted in three stages, namely; Preliminary Evaluation, Detailed Evaluation and Post-qualification.

To start with, the Authority revisited the Tender Document to see how the Preliminary Evaluation should have been carried out. According to Clause 28(1) of the Instructions To Bidders (hereinafter to be referred to as "**ITB**"), the Evaluation Committee was supposed to check whether each bid:

- “(a) meets the eligibility criteria defined in ITB Clause 3 and Clause 4;**
- (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 further ascertained if the Evaluation Committee adhered to the above quoted provision. According to Item 3.2.1 of the Evaluation Report, the Evaluation Committee examined the tenderers eligibility in accordance with Clause 3 of the ITB by verifying whether the tenderers:

- “Have valid Registration certificates of companies, Business Licences, and VAT and TIN certificates
- Operate under Commercial Law
- Do not have a conflict of interest
- Are not under a declaration of ineligibility for corrupt and fraudulent practices.”

The Authority noted that, the Evaluation Committee found that eight out of the ten tenderers, satisfied all the four requirements listed above. Two tenderers did not meet the fourth requirement which reads as follows:

“Are not under a declaration of ineligibility for corrupt and fraudulent practices.”

However, the Evaluation Committee’s comment on the ineligibility of the two tenderers does not clearly show how they came to that conclusion as it reads as follows:

“Supplier (sic) were not found to be under a declaration of ineligibility for corrupt and fraudulent practices except Firm No. 2 and Firm No. 4.” (Emphasis added)

The Authority observes that, such a general statement does not give a clear picture of the actual shortfalls found on the two tenderers.

The Authority further observes that, according to Clause 3.3 of the ITB, the issue of eligibility includes registration with the relevant bodies which was not checked at this stage. For purposes of clarity, the said Clause 3.3. of the ITB is reproduced hereunder:

“National Bidders shall satisfy all relevant licensing and/or registration requirements with the appropriate statutory bodies in Tanzania...”

(Emphasis supplied)

The Authority is of the view that, the requirement that a tenderer should be registered by the Regulatory Board for Laboratory Equipment as per Item 18 of the Tender Data Sheet should have been verified at this stage in accordance with Clause 3.3. of the ITB. The said Item reads as follows:

“Requirements for responsive bidders are:

- **Must be Registered by Regulatory Board for Laboratory Equipment...”** (Emphasis added)

The Authority observes that, the above ITB requirement is a derivative of the law as provided for under Section 46(2) of the Act which is in *pari materia* with Regulation 14(7) of GN. No. 97/2005 which states as follows:

“Local suppliers, contractors or consultants wishing to participate in any procurement proceeding shall satisfy all relevant requirements for registration with appropriate current professional statutory bodies in Tanzania.” (Emphasis supplied)

The Authority is concerned that, this criterion being a statutory requirement was not applied by the Evaluation Committee and the reasons thereof were not stated anywhere in the Evaluation Report. The Evaluation Committee was under obligation to apply all the criteria specified in the ITB. Thus, failure to dis-apply this criterion contravened Regulation 90(4) of GN. No. 97/2005 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 document.” (Emphasis supplied)

The Authority observes that had the said criterion been applied, the Evaluation Committee would have found that the successful tenderer, namely, M/s Acacia Pharmacy Ltd did not attach the said Certificate because they are not registered by the Board as it became evident during the hearing.

The Authority further discovered that, the Evaluation Committee did not check whether the said companies were incorporated under the Companies Act, R.E. Cap. 212, as required under Items 5, 18 and 30 of the Tender Data Sheet. Had they checked, they would have found that the Appellant instead of attaching a Certificate of Incorporation, submitted a Certificate of Registration under the Business Names Registration Act, R.E Cap 213. The Authority observes that, such a Certificate is not

sufficient to meet the eligibility criteria in the absence of a Certificate of Incorporation in accordance with Regulation 14(1)(b) of GN No. 97/2005 which states as follows:

“Reg. 14(1) **To qualify to participate in procurement or disposal proceedings,** suppliers, contractors, service providers or asset buyers **shall meet the following criteria:**

(a) ...

(b) **that they have legal capacity to enter into the procurement or disposal contract;**” (Emphasis added).

For purposes of clarity, a business name is a mere name that has no legal personality which derives its legal personality through another recognized personality either a natural person or legal person (such as a company registered under Cap. 212). Further that, a business name cannot own property in its own name and has neither the capacity to enter into contract nor sue or be

sued. In this case therefore, the Appellant being unincorporated did not meet the eligibility criteria.

The Authority further noted that, during Preliminary Evaluation, the Evaluation Committee also verified documents comprising the tender by examining, amongst others, the power of Attorney and the tender validity period. The Evaluation Committee found that, out of the 10 tenderers, only one tenderer, namely, M/s Kayonza Enterprises Ltd did not comply with this requirement for submitting undated power of Attorney. Having reviewed the powers of Attorney submitted by the tenderers, the Authority discovered the following shortfalls:

- The successful tenderer, namely, M/s Acacia Pharmacy Ltd submitted a defective power of Attorney as it purported to delegate power from the Company to Mr. Robert Gwanchele and Mrs. Upendo Gwanchele who also signed on behalf of the Company. This meant that they were transferring powers unto themselves. Such a defect renders the tender to be non responsive since a power of

Attorney forms part of the documents constituting the bid as per Clause 11.1(f) of the ITB. A similar defect was found in the power of Attorney submitted by M/s TURACO Taxidermy Co. Ltd where such powers were transferred to Hellen Mong'ateko and Enos Leonard Viji.

- The power of Attorney submitted by the Appellant, was equally defective as it was made to Mbasha Matutu who also signed as one of the authorized officers of the Company who were transferring such powers. The same defect was also detected in the power of Attorney submitted by M/s Laja Enterprises & Co. Ltd which was made to Lubasha John. The latter power of Attorney was also undated and the Evaluation Committee did not see this legal shortfall which was among the reasons for the disqualification of M/s Kayonza Enterprises Ltd.
- The Power of Attorney submitted by M/s Anudha Ltd was not valid as it purported to transfer powers from **Mr. Anurag Hassija** on behalf of the Company to

himself (**Mr. Anurag Hassija**) and it was again signed by the same **Mr. Anurag Hassija**.

- The format of the power of Attorney contained in the Tender Document issued by the Respondent required it to be signed by two authorized officers of the tenderer. M/s MSG General Supplies submitted a power of Attorney in favour of one Mkama Shaaban Mgongo who signed for both two officers of the company in his capacity as the General Manager. This means the delegated power was being given by **Mkama Shaaban Mgongo** on behalf of the company to the same **Mkama Shaaban Mgongo**.
- The power of Attorney submitted by M/s Lab Equip Ltd was signed by **Sultan Ali Panjwani** and **Jill Perigo** but certification thereof contradicts the above as it reads:

“This is to certify that **SAMIR SEMA** and **SULTAN ALI PANJWANI** have this 1st day of March, 2010, in my presence signed this power

of Attorney on behalf of the company above named.” (Emphasis added)

The Authority observes that, the certification thereof should have been made in respect of the persons who actually signed the said document, and not Samir Sema.

- The power of Attorney submitted by M/s Kayonza Enterprises Ltd, apart from being undated, it was neither filled nor signed by the deponents. Yet it was attested to by a State Attorney with the stamp of the “State Attorney, Mwanza”. The Authority is concerned that, the Evaluation Committee only saw that it was not dated, but said nothing about the latter serious anomaly, namely, it was not filled.

In view of the various defects detected in the powers of Attorney above, the Authority observes that they were not valid to suit that description. In other words, the said tenderers, the Appellant and the successful tenderer

inclusive, did not submit valid powers of Attorney contrary to Clause 11.1(f) of the ITB.

With regard to the issue of tender validity period, the Authority deemed it necessary to dwell on it, as it was the reason for the Appellant's disqualification. In order to resolve this contentious point, the Authority revisited the applicable law and the Tender Document before examining whether the Respondent adhered to the same. In so doing, the Authority revisited Section 64 of the Act which provides as follows:

"The procuring entity shall require tenderers to make their tenders and tender securities valid for the 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)

Upon perusal of the Tender Document which was availed to the tenderers, the Authority is satisfied that the said document contains provisions which not only provide for the tender validity period but also state as to when the said period was due for expiry. Clause 17.1 of the ITB read together with Item 16 of the Bid Data Sheet states as follows:

“17.1 Bids shall remain valid for the period stipulated in the **Bid Data Sheet** after the date of bid submission specified in ITB Clause 22...

16 **The bidder** (sic) **validity period shall be 90 days** after the deadline for the bidder (sic) submission, as specified below in reference to ITB Clause 23. Accordingly, each bid **shall be valid through 7th June 2010.**” (Emphasis added)

Having revisited the applicable law and the ITB on this point, the Authority considered the submissions by parties in this regard.

The Appellant contended that the tender validity period was not applicable to this tender as it was indicated under Item 16 of the Tender Data Sheet. For purposes of clarity, the Authority reproduces the contentious provision as it appears in the Tender Document:

16	ITB 17.1	<p>The bidder (sic) validity period shall be 90 days after the deadline for bidder (sic) submission, as specified below in reference to Clause 23. Accordingly, each bidder (sic) shall be valid through to 7th June, 2010.</p> <p>Bidder (sic) security must be valid thirty (30) days after the end of the bidder (sic) validity period. Accordingly, a bidder with a bidder (sic) security that expires before [insert: the actual date of the expiration of the bidder (sic) security, i.e. thirty (30) days after the end of the bidder (sic) validity period] Shall be rejected as non-responsive. N/A</p> <p>Bidder should fill the Bid securing declaration form as bid security.</p>
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The Appellant further translated the N/A (Not Applicable) appearing in the middle paragraph above, as connoting the content of the whole of Item 16, that is the three paragraphs, as not applicable. Upon being asked by the Members of the Authority, if that was the Appellant's interpretation, why did they indicate that, **"Our Bid validity period will be 45 days from the Bid submission of quotation"**, they replied that, it was attached by mistake.

The 1st Respondent on the other hand, submitted that the Appellant's tender validity period did not comply with Item 16 of the Tender Data Sheet hence their disqualification.

The Authority concurs with the 1st Respondent that, the Tenderers were obliged to indicate the tender validity period of not less than 90 days as per Item 16 of the Tender Data Sheet, which the Appellant did not meet. In so doing, the Appellant contravened the law and their tender was rightly rejected in accordance with Clause 17.1 of the ITB which states that:

“ ...A bid valid for a shorter period shall be rejected by the Procuring Entity as non-responsive.” (Emphasis added)

The Authority is of the view that, had the Evaluation Committee been diligent enough they would have detected these anomalies, at the preliminary stage. Thus they would have found all the ten tenders to be substantially non-responsive; and hence would have rejected them.

Having analyzed how the Preliminary Evaluation was conducted, the Authority proceeded to examine whether Detailed Evaluation was conducted in accordance with the law. It was noted that, the two tenderers, out of the ten, namely, M/s MSG General Supplies and M/s Acacia Pharmacy Ltd qualified for this stage of evaluation. The Authority further noted that, the Evaluation Committee made some arithmetic corrections in respect of the two tenders, whereby the quoted price for the tender by M/s MSG General Supplies was increased by Tshs. 350,000/=

and that of M/s Acacia Pharmacy Ltd was reduced by Tshs. 20,000,000/=. However, no evidence was produced to show that the corrected prices were communicated to the tenderers and whether they accepted the changes as required by Clause 30.2 of the ITB which states as follows:

“The amount stated 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...”. (Emphasis supplied)

Having analyzed the stages for Preliminary Evaluation and Detailed Evaluation, the Authority proceeded to examine the third stage of evaluation, namely, Post-qualification. The Authority revisited Section 48(1) of the Act which reiterates the need for post-qualification as hereunder:

“If tenderers have not been pre-qualified, the procuring entity and the tender board shall

determine whether the **tenderer whose tender or disposal 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 added)

Moreover, Regulation 94(5) of GN. No. 97/2005 read together with Clause 35.2 of the ITB cements the above position as they direct that:

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

35.2 The Procuring Entity will determine to its satisfaction whether the Bidder that is selected as having submitted the lowest evaluated responsive Bid is qualified to perform the contract satisfactorily, in accordance with the criteria listed in sub-Clause 13.3." (Emphasis supplied)

Having revisited the relevant provisions, the Authority examined whether the Post-qualification was conducted in accordance with the law. The Authority noted that, the Evaluation Report indicates that two tenderers, namely, M/s MSG General Supplies and M/s Acacia Pharmacy Ltd were both post-qualified at the same time. However, during the hearing, a member of the PMU who participated in the Evaluation process, submitted that, the former was post-qualified first. After the discovery that they had forged the PHLB Certificate, the Evaluation Committee was directed by the Tender Board to post-qualify the latter whereby a re-evaluation was carried out. Upon being asked by the Members of the Authority, as to why the same was not contained in the Tender Board's minutes, the said Evaluator claimed that, the Tender Board's instructions for re-evaluation were issued but unfortunately were not minuted.

The Appellant, on the other hand, contended that, having established that, M/s MSG General Supplies had forged the PHLB Certificate, the matter was referred to the PMU,

instead of the Evaluation Committee. The PMU came with recommendations that the award be made to M/s Acacia Pharmacy Ltd on which the Tender Board acted upon.

The Authority observes that, the Appellant's assertion makes more sense as supported by the following evidentiary proof:

- The Minutes of the Tender Board meeting dated 29th April, 2010, under Agenda IV, indicate that the Tender Board had directed the PMU to conduct an investigation on the matter.
- The 1st Respondent's letter to the Registrar of Private Laboratories Board referenced AE35/314/01C/73 dated 22nd April, 2010, requesting for verification of the legal owner of the original Certificate, was signed by the Secretary of the Tender Board who is the Head of the PMU.
- The 1st Respondent's Accounting Officer conceded during the hearing that, the PMU went through the

Evaluation Report and picked the second lowest tenderer as the work had already been done by the Evaluation Committee.

In view of the above evidence, the Authority is satisfied that, post-qualification was conducted for two tenderers at the same time contrary to Regulation 94(5) of GN. No. 97/2005 and Clause 35.2 of the ITB as referred to earlier on in this decision.

The Authority also noted that, in ascertaining the tenderers capability to perform the contract, the criteria to be employed under Item 37 of the Tender Data Sheet, included, the **“Annual volume of Goods Supplied in last three years should be not less than Tshs. 800,000,000/=”** The Members of the Authority inquired why the said criterion was interpreted by the Evaluators to mean the aggregate volume of goods supplied in three years as opposed to each year. The 1st Respondent replied that, what they meant was an aggregate of three years as interpreted by the Evaluators. The Authority is of the view that, such an

interpretation is not correct due to the use of the term “annual”. Had they wanted a different interpretation thereof they should have expressly stated so.

The Authority also considered the Appellant’s contention that, a member of the PMU participated in the evaluation of the tenders under Appeal contrary to Section 37(1) of the Act. In their replies thereof, the 1st Respondent submitted two contradictory positions. On the one hand, they claimed that a member of the PMU was not an active member of the Evaluation Committee but he only assisted in facilitating the evaluation exercise and the actual work was done by the two co-opted Evaluators. On the other hand, they submitted that, he did take part in the evaluation process as a Secretary to the Committee and he filled the personal covenant.

The Authority agrees with the Appellant’s contention that, it was wrong for a member of the PMU to take part in the evaluation of the tenders, in whatever capacity as the Evaluation Committee is answerable to the PMU as per Section 37(1) of the Act which states that:

“All evaluations shall be conducted by an evaluation committee, which shall report to the Procurement Management Unit.” (Emphasis supplied)

The Authority is further of the considered view that, since it is the PMU which recommends the names of the members of the Evaluation Committee as per Section 37(2) of the Act, it was not right for them to recommend themselves to participate in the evaluation committee and thereafter review the evaluation report before it is submitted to the Tender Board. Such conduct contravened Section 38 of the Act which emphasizes on independence of functions in the following words:

“Subject to the provisions of this Act, the Accounting Officer or Chief Executive, the Tender Board, the Procurement Management Unit, the User Department and the Evaluation Committee shall act independently in relation

to their respective functions and powers.”

(Emphasis added)

Furthermore, the Authority revisited the Respondent’s conflicting replies on this point and observes that, if the Evaluation Committee did comprised of two members, as they want this Authority to believe, then it was not properly constituted as per Regulation 90(1) of GN. No. 97/2005 which provides as follows:

“A procuring entity shall establish a tender evaluation committee comprising **not less than three** and not more than five members.” (Emphasis supplied)

The Authority further considered the composition of the Evaluation Committee to see whether it met the requirements of Section 37(4) of the Act which states as hereunder:

“The members shall be of an appropriate level of seniority and experience, depending on the complexity of the procurement requirement.”

The Authority noted that, the Evaluation Committee constituted of an Environmental Health Officer, a Supplies Officer and a Civil Technician. It is the view of the Authority that, given the value of the tender together with the sensitivity and technicality of the equipment involved, the said officers did not have the appropriate experience to evaluate such a tender. This observation is further confirmed by the anomalies and shortfalls exhibited in the evaluation of the tenders and the fact that their Report was not comprehensive enough to show how a number of decisions were reached at.

The Authority also noted that, the Environmental Health Officer and the Supplies Officer were out-sourced from outside the procuring entity. The Authority is of the view that, the concept of outsourcing was not properly applied as it is intended to bring in relevant technical expertise. In the tender under Appeal, one would have expected the

co-opted members to have adequate expertise on the equipment that was being procured, but that was not the case.

The Authority further noted that, the Evaluation Report availed to it was not signed by the Chairperson and the Secretary and the Respondent could not account for the omission.

The Authority also discovered that, the members of the Evaluation Committee signed personal covenants on the date of submission of the Evaluation Report contrary to Section 37(6) of the Act which states:

“All members of the evaluation committee shall sign the Code of Ethics provided under the Regulation made under this Act, **declaring that they do not have a conflict of interest in the procurement requirement.**”

It is the view of the Authority that, signing the said covenants after completion of the evaluation process

defeats the purpose for promulgation of this requirement. This is because an evaluator is expected to determine whether he has any conflict of interest in the tender prior to the commencement of the evaluation so that he could refrain from taking part if circumstances so require. Hence, it was not proper for the members of the Evaluation Committee to carry out the evaluation without adhering to this particular statutory requirement.

The Authority therefore concludes that the Evaluation Committee, in its totality, did not have the requisite competency and was not properly constituted.

In view of the above findings, the Authority's conclusion in respect of the first issue is that, the evaluation was not properly done.

2.0 Whether the award of the tender to the successful tenderer, namely, M/s Acacia Pharmacy Ltd was proper at law.

In its endeavour to resolve this issue, the Authority revisited the parties submissions on this point. The Appellant's contention that M/s Acacia Pharmacy Ltd was not qualified to win this tender is based on the following three points:

- Their annual volume of goods supplied was below the required Tshs. 800,000,000/=;
- Their financial capability was less than Tshs. 800,000,000/=; and
- They were not registered by the Regulatory Board for Laboratory Equipment.

In view of the findings of this Authority in the first issue, the first two points above have been analyzed and found that had the said the criteria been properly applied the Evaluation Committee would have found that, the successful tenderer did not meet them. Since the first

two points have already been dealt with, the Authority reviewed the 1st Respondent's replies in respect of the PHLB Certification.

The Respondent conceded that M/s Acacia Pharmacy did not submit the PHLB Certificate. They further stated that, upon confirmation that the recommended successful tender M/s MSG General Supplies had submitted a forged PHLB Certificate, the Tender Board awarded the tender to the second lowest evaluated tenderer, namely, M/s Acacia Pharmacy Ltd. The Tender Board's decision was said to have been triggered by two reasons, namely, the requirement of having a PHLB Certificate was waived after it was confirmed that M/s MSG General Supplies has submitted a forged Certificate and that the financial year was coming to an end. Asked if the Tender Board has the mandate to waive a statutory requirement, the Respondent relied on Section 32(1)(d) of the Act which is reproduced hereunder:

"In exercise of their powers under this Act, tender boards may:-

(d) do all such acts and things as they may consider incidental or conducive to the attainment of their objects.” (Emphasis added)

Much as the Authority agrees that the afore-quoted provision confers blanket powers to tender boards, such powers cannot be exercised in breach of the law. The said conduct contravened Section 30(f) of the Act which requires tender boards to ensure compliance with the law.

Having reviewed the submissions by parties on this point, the Authority's observations are as follows:

- The 1st Respondent's replies are not corroborated as the minutes of the Tender Board do not give any reasons for their decision to award the tender to M/s Acacia Pharmacy Ltd. The Respondent's replies emerged for the first time in their Written Replies submitted to this Authority.

- The 1st Respondent's assertion that the said requirement was waived by the Tender Board, is not correct as it was also dis-applied by the Evaluation Committee.
- By awarding the tender to a tenderer who did not have a PHLB Certificate, the Tender Board contravened the law.

The Authority therefore observes that, the Tender Board's conduct in awarding the tender to unqualified tenderer and failure to detect the anomalies in the Evaluation Report and take relevant remedial measures connotes lack of adequate knowledge on the applicable law.

Accordingly, the Authority's conclusion in respect of this issue is that the award of the tender to the successful tenderer, namely, M/s Acacia Pharmacy Ltd was not proper at law.

3.0 What reliefs, if any, is the Appellant entitled to

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

(a) The Authority was requested to revise the Respondent's unlawful decision and order them to proceed in a lawful manner in accordance with Section 82(4)(e) of the Act

In resolving this issue, the Authority took cognizance of its findings and conclusions in the first and second issues that, all tenderers who participated in this particular tender were substantially non-responsive as they did not meet the requirements as specified in the Tender Document. It goes without saying therefore that, the Authority cannot order the Respondent to proceed with the tender process which contravened the law. However, considering the irregularities and other flaws committed, the Authority orders the Respondent to start the tender process afresh in observance of the law.

(b) Order the 1st Respondent to compensate the Appellant a sum of Tshs. 7,090,000/= for costs incurred and loss of profit

With regard to this claim the Authority is of the view that, since it has already established that, the Appellant's tender was substantially non-responsive, they are therefore entitled to some compensation for costs incurred in pursuit of this Appeal. The costs pertaining to preparation of the tender document cannot be granted because assuming the evaluation was done properly they would have not won the tender as they were substantially non responsive.

With regard to compensation for loss of profit, the Authority cannot grant it for want of jurisdiction. The Authority also considered the Appellant's claim for transport and upkeep in Dar es Salaam for two trips and observes that, they are entitled to only one trip as the second trip was caused by an omission on their part as conceded in their submissions. The claim for meals and

accommodation was also considered and the Authority is of the view that, there was no justification for the Appellant to spend seven days in Dar es salaam, therefore two days are considered to be adequate. With regard to the claim for car hire for seven days, the Authority allows the Appellant three days only. The Authority therefore orders the Respondent to compensate the Appellant a total of **Tshs. 936,857/=** only for the costs incurred as hereunder:

- (i) **Air transport – Tshs. 398,000/=**
- (ii) **Meals and accommodation – Tshs. 238,857/=**
- (iii) **Car hire in Dar es salaam – Tshs. 180,000/=**
- (iv) **Appeal fees – Tshs. 120,000/=**

OTHER MATTERS THAT CAUGHT THE ATTENTION OF THE AUTHORITY

In the course of handling this Appeal, the Authority came across some pertinent issues which are worth mentioning as hereunder:

- (a) The quality of the Tender Document issued by the Respondent is not satisfactory as it contains multiple errors, some of which could be misleading. The Authority noted, amongst others, the following mistakes:
- Items 5 and 18 of the Tender Data Sheet require tenderers to submit a **“Certificate of Incooperation”** instead of a **“Certificate of Incorporation”**.
 - Under Items 16 to 19 of the Tender Data Sheet, the word **“bidder”** appeared instead of **“bid”**; just to mention but a few.

- Item 37 of the Tender Data Sheet which required tenderers to show the annual volume of goods supplied was ambiguous as it reads as follows:

“Annual volume of Goods Supplied in last three years should be not less than Tshs. 800,000,000/=” (Emphasis added)

- (b) The Authority is concerned that, having confirmed that M/s MSG General Supplies had forged the PHLB Certificate which is a criminal offence the 1st Respondent being a public body, has not reported the matter to the Police.
- (c) The 1st Respondent does not have a properly constituted Procurement Management Unit (PMU) in that according to their oral submissions the PMU is formed by members drawn from other departments contrary to Section 34 of the Act which states as follows;

“34(1) In every procuring entity there shall be established Procurement Management Unit staffed to an appropriate level.

(2) The Procurement Management Unit shall consist of procurement and other technical specialists together with the necessary supporting and administrative staff.”

(d) The Authority is also concerned with the conduct and competence of the PMU as they did not detect the anomalies and shortfalls contained in the Evaluation Report.

(e) During the hearing the 1st Respondent’s Accounting Officer conceded that the Appellant and another tenderer had complained to her about corrupt practices of some of her officers. In her attempt to establish the truth, the employee to whom the said tenderers had alleged that the

envelopes containing bribe passed through, admitted having been given by a tenderer, an envelop containing Tshs. 100,000/= with instructions that she should give it to the Respondent's Supplies Officer for "communication".

The Authority observes that, such a confession should be taken as a signal of the existence of corrupt practices within the procuring entity and that appropriate measures should be taken.

- (f) The Authority is appalled by the lack of confidentiality in the 1st Respondent's office. During the hearing it was apparent that the Appellant had inside information on the tender process, including the recommendations of the Evaluation Committee, what had transpired in the Tender Board meetings, and the operations of the PMU. The Authority observes that, the leakage of confidential information to tenderers contravenes Regulations 4(1)(d) and 8(2) of GN. No 97/2005

which provides for the code of ethics for public officers who are undertaking procurement.

- (g) The Authority is further concerned with the Appellant's acquisition of confidential information pertaining to the tender in dispute. The Authority does not accept the Appellant's defence that, for them to prepare their case they had to look for information through various means. This depicts lack of civility and an intentional breach of existing laws.
- (h) The Authority appreciated, at the hearing, the physical presence of the Regional Administrative Secretary as well as the Chairman of the Tender Board, and the former's general concern on the lack of adequate knowledge of the applicable law on the part of public officers. The Authority expects that such concern should lead to appropriate remedial action to be taken.


Having established that, the evaluation was not properly done and the award was not proper at law, the Authority orders the Respondent to restart the tender process in observance of the law.

On the basis of the aforesaid findings, the Authority upholds the Appeal as having merits and therefore orders the Respondent to do the following:

- **Re-start the tender process afresh in observance of the law.**
- **Compensate the Appellant a sum of Tshs. 936,857/= being Appeal costs.**

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's this 11th day of June, 2010.



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JUDGE (rtd) A. G. BUBESHI

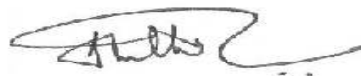
CHAIRPERSON

MEMBERS:

1. HON. V.K. MWAMBALASWA (MP)



2. MR. K. M. MSITA



3. MS. E. J. MANYESHA

