

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

APPEAL CASE NO. 70 OF 2010

BETWEEN

**M/S PRINCE GENERAL
INVESTMENT LTD.....APPELLANT**

AND

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

DECISION

CORAM:

- | | |
|---------------------------------------|----------------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Hon. V.K. Mwambalaswa(MP) | - Member |
| 3. Mr. M. R. Naburi | - Member |
| 4. Mr. K. M.Msita | - Member |
| 5. Mrs.N.S.N. Inyangete | - Member |
| 6. Ms B.G. Malambuigi | - Secretary |

SECRETARIAT:

- | | |
|-------------------------------|--------------------------------------|
| 1. Ms. E. V.A. Nyagawa | - Principal Legal
Officer |
| 2. Ms. F. Mapunda | - Legal Officer |

FOR THE APPELLANT:

- 1.Mr. F. Msanjo – Managing Director**
- 2.Mr. C. Mtete – Director of Finance**
- 3.Mr. F. Mbwilo – Quantity Surveyor**
- 4.Mr. C. Meela – Company’s Legal Consultant**

FOR THE RESPONDENT

- 1.Mr. R. Maleta – Legal Secretary**
- 2.Mr. M.L. Hanga – Head of PMU**
- 3.Mr. C.A. Msole – Supplies Officer**
- 4.Mr. M.Shehe – Assistant Supplies Officer**
- 5.Mr. Y. Sood – Assistant Supplies Officer**

This decision was scheduled for delivery today 29th June, 2010 and we proceed to deliver it.

The appeal at hand was lodged by **M/s PRINCE GENERAL INVESTMENT LTD** (hereinafter to be referred to as "**the Appellant**") against **TANZANIA AIRPORTS AUTHORITY** commonly known by its acronym **TAA** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. AE – 027/2009-10/MT/W/22, for Renovation of Terminal Building One (TB 1) at Mtwara Airport Phase - 2 (hereinafter to be referred to as "**the Tender**").

According to the documents submitted to the Authority, the facts of this Appeal may be summarized as follows:

The Respondent invited tenders for Renovation of Terminal Building One (TB 1) at Mtwara Airport Phase – 2 vide The Guardian, The Daily News and Majira newspapers of 16th, 17th and 19th November, 2009 respectively.

The deadline for submission of tenders was originally scheduled for 8th December, 2009, but was later extended to 15th December, 2009 and was further extended to 22nd December, 2009.

Tender opening took place on 22nd December, 2009 whereby 28 tenderers submitted tenders as follows:

S/ No	Name of a Tenderer	Price Quoted TSHS.
1.	M/s N.W Builders .Co. Ltd	362,607,735/- VAT Inclusive
2.	M/s Intercity Builder's Ltd	596,757,634/- VAT Inclusive
3.	M/s Singilimo Enterprises	526,372,485/- VAT Inclusive
4.	M/s AF Mult Con Ltd	430,000,000/- VAT Inclusive
5.	M/s Comfix & Engineering Ltd	370,147,323/-
6.	M/s Prince general Investment ltd	473,391,670.86
7.	M/s Audacity Intercon (T) Ltd	613,883,365.20 VAT Inclusive
8.	M/s R & A Works Co. Ltd	407,620,982/- VAT Inclusive
9.	M/s Basat contractors Ltd	445,960,485/- VAT Inclusive
10.	M/s Décor Tech Tanzania Limited	522,812,503.92 VAT Inclusive
11.	M/s Ntui Commercial Company	448,446,412.50 VAT Inclusive
12.	M/s Mirito Construction	518,370,319.70

		VAT Inclusive
13.	M/s Bogeta Engineering Ltd	444,320,000/- VAT Inclusive
14.	M/s Jeccs Construction and Suppliers Ltd	445,052,528.80 VAT inclusive
15.	M/s Ramne Investment Ltd	359,891,461/- VAT Inclusive
16.	M/s Kaeco (T) Ltd	531,284,742.60 VAT Inclusive
17.	M/s K & G Contractors Ltd	508,337,093.46 VAT Inclusive
18.	M/s Malcom Investment Limited	586,789,780.50 VAT Inclusive
19.	M/s B & S Limited	354,051,704/- VAT Inclusive
20.	M/s Nyakwe Enterprises	462,792,480/- VAT Inclusive
21.	M/s 2003 TSM construction Co. Ltd	706,553,254/- VAT Inclusive
22.	M/s Hima Investments Ltd	401,792,490/- VAT Inclusive
23.	M/s Wajenzi Enterprises	450,443,777.70 VAT Inclusive
24.	M/s Safe Rescue Ltd	420,114,544.50 VAT Inclusive
25.	M/s Ibra Building Contractors and General Supplies Ltd	494,551,806/- VAT Inclusive
26.	M/s V.J. Mistry & Company Ltd	591,628,842/- VAT Inclusive
27.	M/s Daikin Tanzania Ltd	73,950,120/- VAT Inclusive
28.	M/s Maheri's Construction & General Supplies Ltd	196,254,900/- VAT Inclusive

The tenders were evaluated and the Evaluation Committee recommended the award to be made to the Appellant at a contract sum of Tshs. 474,296,311.86 VAT inclusive for duration of 14 weeks.

On 10th February, 2010, the Tender Board met and rejected the recommendations made by the Evaluation Committee on the ground that there were deficiencies noted in the Evaluation Report and ordered the PMU Secretariat to make the necessary corrections before re-submission.

On 25th February, 2010, the Secretary of the Tender Board re-submitted the Evaluation Report to the Tender Board for approval. The Tender Board reviewed the said Report, did not approve the recommendation and ordered the Secretariat to review the Tender Document then re-issue the revised Tender Document to all firms which had tendered earlier.

In early April 2010, the Respondent re-issued the Tender Documents to all the tenderers who had participated in the previous tender.

Opening of the re-submitted tenders was done on 14th April, 2010, whereby only sixteen tenders, including that of the Appellant were received.

The Appellant later became aware that the re-submitted tender had been awarded to another tenderer who was found to be non-responsive in the first tender. The Appellant was aggrieved and lodged an appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**") on 20th May, 2010.

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 were as follows:

That, the tender process did not observe the procedural requirements of the Public Procurement Act (hereinafter to be referred to as "**the Act**") and the governing rules.

That, the Appellant was not informed about the tender results as required by the law.

That, the Appellant made a follow up on the matter and learnt that they were to be awarded the tender but for unknown reasons the results were withheld and the Tender Documents were re-issued.

That, the Respondent's re-tendering contravened the law as it was not advertised as required instead the tenderers were contacted by telephone and invited to collect the re-issued Tender Document.

That, the Respondent had awarded the tender to the tenderer who was disqualified in preliminary stages of the evaluation of the first tender.

That, at the time of re-issuing the Tender Document the tender validity period had already expired and no extension thereof was made as the tenderers were not notified of the extension.

That, the following questions need to be answered:

- was it appropriate to cancel the earlier tender without issuing a notice vide the media on the said cancellation;
- were the tender securities still valid; and
- whether it was proper not to re-advertise the tender through appropriate procedures as it was the same tender.

The Appellant therefore prayed to the Authority to be granted the following reliefs;

- Order the Respondent to consider the earlier award recommendation which nominated the Appellant to be successful tenderer.

- Compensate the Appellant the sum of Tshs. **87,360,502.36** arising from the following;
 - i) Legal fees charged at 3% of bid price (Tshs 473,391,679.39) **Tshs. 14,201,750.39**
 - ii) General Damage costs at 15% of Bid Price **Tshs. 71, 008,751.97**
 - iii) Tender Purchase fees **Tshs. 50,000.**
 - iv) Tender preparation costs **Tshs. 1,800,000.00**
 - v) Transportation costs **Tshs. 180,000/-**
 - vi) Appeal Fees **Tshs. 120,000/-**

REPLIES BY THE RESPONDENT

The Respondent's replies deduced from the documents submitted to the Authority as well as the oral submissions and responses from questions raised by Members of the Authority may be summarized as hereunder:

That, during evaluation all tenders were found to be substantially non-responsive to the requirements of the Tender Document.

That, based on the importance of the project the Evaluation Committee waived some of the criteria whereby four firms were found to be substantially responsive and among them the Appellant who was recommended for award.

That, having reviewed the Evaluation Report the Procurement Management Unit (hereinafter to be referred to as the "**PMU**") concurred with the recommendations made by the Evaluation Committee.

That, the Respondent's Tender Board rejected the recommendations made by the Evaluation Committee on the grounds that they doubted the rationale of the waiving some criteria and whether it was intended to benefit a particular tenderer.

That, the Tender Board directed the Procurement Management Unit to revisit and review the Tender Document and re-issue the revised tender document to all tenderers who had previously submitted tenders free of charge.

That, after re-issuing the Tender Document, the procurement process was conducted in observance with the law.

That, the re-submitted tenders were evaluated and subsequently the Tender Board approved award to M/s Basat Contractors Ltd.

That, the Tender Board did not award the first tender to any tenderer hence the Respondent wonders how the Appellant managed to obtain inside information that they were recommended for award of the said tender.

ANALYSIS BY THE AUTHORITY

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

- **Whether the Appellant was unfairly disqualified;**
- **Whether the award to the successful tenderer was justified; and**
- **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 Appellant was unfairly disqualified

In its endeavour to ascertain whether the Appellant's disqualification was justified, the Authority, reviewed the documents submitted and the contesting oral submissions by parties *vis-a-vis* the applicable law. In so doing the Authority examined the tender process in its entirety to establish whether the procedural requirements were adhered to in accordance with the Act and the Tender Document. However, since the Appellant's main argument centres on the evaluation process, the Authority deemed it prudent to focus on the tender evaluation process. Thus in the course of reviewing the tender evaluation process, the Authority will be able to provide answers to some of the key questions which surfaced during the hearing which are;

- **Whether disqualification of the ten tenderers who submitted incomplete Bill of Quantities was justified;**

- **Whether the waiver of some evaluation criteria by the Evaluation Committee was proper; and**
- **Whether the evaluation process which resulted into the Appellant being recommended for award of the tender was conducted in observance with the law.**

For purposes of clarity, the Authority wishes to point out at the outset that, the procurement process pertaining to the tenders which were opened on 22nd December, 2009 will henceforth be referred to as **“the 1st Tender”** while those opened on 14th April, 2010, will be referred to as **“the 2nd Tender”** respectively. The Evaluation process arising from the 1st Tender shall be referred to as **“the 1st Evaluation”** and the second one as **“the 2nd Evaluation”**.

The Authority revisited the 1st Tender Document which sets forth the tender requirements, the evaluation criteria and the modality for evaluating

the said tenders *vis-a-vis* the 1st Evaluation Report for purposes of ascertaining whether the 1st Evaluation was conducted in accordance with the law. In order to do so, the Authority started by examining whether the Tender Document had provided for the requisite evaluation criteria and the methodology to be used in conducting evaluation of the tender under Appeal. Thereafter, it embarked on establishing whether the Evaluators applied the said provisions accordingly.

The Authority observes that, to a large extent, the 1st Tender Document contained the evaluation criteria as well as the methodology of evaluation.

According to Clauses 20, 28,29,32,33 and 34 of the ITB, the evaluation was to be conducted in three stages, namely, Preliminary Evaluation, Detailed Evaluation and Post-qualification. The Authority proceeded to ascertain whether the 1st Evaluation was conducted in accordance with the applicable law and the respective Tender Document.

The 1st Evaluation Report indicates that, during Preliminary Evaluation the 28 tenders were checked for the following:

- **“Eligibility of the bidder: Class VI Building Contractor and above**
- **Completeness of Bid Form**
- **Completeness of Bill of Quantities**
- **Certificate of Incorporation/Registration**
- **Submission of relevant Business License**
- **Submission of VAT / TIN Certificate”**
(Emphasis added)

The Authority noted that, this stage of evaluation, was divided into two parts, namely, Preliminary Assessment and Detailed Assessment. According to the 1st Evaluation Report, sixteen tenderers were found to be substantially non-responsive during Preliminary assessment and therefore disqualified. The Authority noted further that, the reason given for the disqualification of 10 out of the 16 disqualified tenderers was what was termed as **“incomplete Bill of Quantities”**. For avoidance of

doubt, the said 10 tenderers are as listed herein below:

1. M/s N.W. Builder's Co. Ltd
2. M/s Intercity Builder's Ltd
3. M/s Singilimo Enterprises
4. M/s AF Mult Con Ltd
5. M/s Basat Contractors Ltd
6. M/s Mirito Construction & Technical Services Co Ltd.
7. M/s KAECO (T) Ltd
8. M/s K & G Contractors Ltd
9. M/s Malcom Investment Co. Ltd
10. M/s Ibra Building Contractors & General Supplies Ltd.

During the hearing, the Respondent submitted that, the tenderers were required to price all items in the Bill of Quantities and since the said tenderers did not price all the items in the BOQ they were rightly disqualified. The Authority, was not satisfied with the explanation provided by the Respondent as to why the said tenderers were disqualified when the

requisite guidance on what is to be done when a tenderer does not price all the items is provided for under Clause 15.2 of the ITB. The said Clause states as follows:

“The Bidder shall fill in rates and prices for all items of the Works described in the Bill of Quantities. **Items for which no rate or price is entered by the Bidder will not be paid for by the Procuring Entity when executed and shall be deemed covered by the other rates and prices in the Bill of Quantities.”**

(Emphasis supplied)

The Authority is of the considered view that, the Evaluation Committee erred in failing to observe the above quoted Clause and disqualifying the 10 tenderers. Since that was the only reason for their disqualification, the Authority finds that their disqualification was not proper.

The Authority also noted that, the Evaluation Committee detected some deficiencies in the BOQ

prepared by the Respondent but attributed the same to the tenderers as they had an opportunity to seek for clarification. The position of the Evaluation Committee is reflected under Item 2.3(ii) of the Evaluation Report which reads:

“In addition to most bidders (9 bidders) (sic) failing to fill all the items of Bill of Quantities, the Evaluation Committee observed and noted that the Bill of Quantities had some misunderstanding and confusion for items e.g.:

- **Item 1.06**
- **Item 5**
- **Item 10.02 (Manholes)**
- **Item 10.04 (I) had no details (unit and quantity) given**

However, despite the deficiency of the Bill of Quantities it was the responsibility of bidders to ask for clarifications regarding the contents of Tender Document as stipulated in Clause 8 of Instructions to Tenderers.”

(Emphasis added)

The Authority further noted that, among the evaluation criteria listed under Item 12 of the Bid Data Sheet the tenderers were required to submit a **“Certificate of Incorporation/Registration”**. Item 4 of Table 5A indicates that the tenderers were checked to show whether they had submitted the said “Certificate of Incorporation/Registration” which they all complied with. The Authority observes that, the slash between the words Incorporation and Registration entails that a tenderer could submit one of the two documents, that is, either a Certificate of Incorporation or a Certificate of Registration. The Authority is of the firm view that, the two documents are distinct and where a tenderer is not a natural person a Certificate of Registration does not suffice 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).

The Authority further observes that, had the Evaluation Committee checked the Certificates of Incorporation submitted by the tenderers they would have detected the following shortfalls:

- M/s Basat Contractors Ltd had attached a **"Certificate of Change of Name"** from **Bahama Consult Ltd** to **Basat Contractors Ltd**. The Authority observes that, the said tenderer should have submitted the Certificate of Incorporation of M/s Bahama Consult Ltd together with the Certificate of Change of Name as it was done by one of the tenderers who took part in this tender. The same defect was found

in the tender submitted **M/s Hima Investments Ltd** whose name had changed from **M/s Holiday – Makers Car Hire and Tour Operators Ltd.**

- **M/s V.J. Mistry & Co. Ltd** submitted a Certificate of Incorporation, CRB Registration Certificates of **M/s VAJSHI JINA MISTRY & COMPANY LIMITED** but attached a letter from CRB referenced C5/0013/01/1998 dated 19th December, 2006, addressed to **“TO WHOM IT MAY CONCERN”** which indicated the change of name. The Authority is of the considered view that, a valid change of name must be certified by the responsible body vested with statutory powers to effect the said change and not otherwise.
- **M/s Nyakwe Enterprises** and **M/s Ntui Commercial Company** are mere business names registered under the Business Names Registration Act, R.E Cap. 213. The Authority observes that, a Certificate of Registration 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.

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 winning bidder M/s Basat Contractors Ltd being unincorporated did not meet the eligibility criteria.

The Authority insists that, failure to submit a Certificate of Incorporation is fatal as it renders a tender to be substantially non-responsive and hence fit for rejection at the preliminary stage of evaluation.

In addition to the shortfalls pointed out above, the Authority also discovered that, the eligibility of the joint venture between **M/s Comfix & Engineering Limited** and **M/s Serico Company Limited** was evaluated jointly instead of each of them being evaluated separately as they submitted the necessary documentation in accordance with Clause 12.4 of the ITB. Moreover, even the list of tenderers who were evaluated as they appear under Tables 2 and 3 of the 1st Evaluation Report do not indicate that the above-mentioned are joint venture partners.

The Authority therefore finds that, in view of the shortcomings listed above the Preliminary Evaluation was not properly done.

Having analyzed the Preliminary Assessment as done by the Respondent, the Authority proceeded to examine whether the Detailed Assessment was done in accordance with the law. At this stage the Evaluation Committee checked whether the tenderers had submitted information on the following:

- Bid Securing Declaration,
- Power of Attorney
- Anti-Bribery Policy
- Annual volume of work for 2 years of Tshs. 500,000,000/= supported by certified financial statements/Audited accounts
- Experience in at least one project of a similar nature and complexity
- Availability of essential equipment
- Evidence of adequate working capital for the contract
- Information regarding litigation
- Recommendation letters (at least two) from previous employers/client

The Authority also noted that, Item 2 of Table 5B(I) of the 1st Evaluation Report indicated that the Evaluation Committee checked whether the tenderers submitted valid powers of Attorney. The said Table shows that, only one tenderer, namely, M/s Décor Tech (T) Ltd submitted a power of Attorney that was not stamped. Upon review of the

other tender documents the Authority discovered that ten tenderers had submitted defective powers of Attorney while one tenderer did not submit the same as evidenced hereunder:

- The power of Attorney submitted by M/s Basat Contractors Ltd purported to transfer power from the Company to one of the directors namely **Abdulbasat Hatibu Mavura** and was signed by the same **Abdulbasat Hatibu Mavura** which meant he was transferring powers unto himself.
- The powers of Attorney submitted by **M/s Prince General Enterprises, M/s Intercity Builders Ltd** and **M/s AF Mult - Con Ltd** were signed by officers (employees) of the respective companies instead of Company directors (shareholders).
- **M/s 2003 TSM Construction Company Limited** submitted a power of Attorney that purported to transfer powers to one Nicas Ernest

Haule who also signed on behalf of the Company. This means the said Nicas Ernest Haule was transferring powers unto himself. The same anomaly was detected in the powers of Attorney submitted by **M/s Nyakwe Enterprises, M/s Singilimo Enterprises, M/s Ibra Building Contractors & General Supplies Limited** and **M/s Safe Rescue Limited**.

- A joint venture of **M/s Comfix & Engineering Limited** and **M/s Serico Company Limited** delegated powers to Hashim Lema of Comfix & Engineering Limited and Severin K. Mkusa of Serico Company Limited who also signed on behalf of their companies.
- **M/s V. J. Mistry & Company Limited** did not submit a power of Attorney.

According to the 1st Evaluation Report as well as the Respondent's oral submissions at the hearing, during this stage, all the remaining twelve tenderers, the Appellant inclusive, did not meet the requirements of

the Tender Document. In an endeavour to “fast track” the evaluation process, the Evaluation Committee decided to waive four of the evaluation criteria, namely,

- Evidence of working capital
- Litigation information
- Recommendation letters from previous employers.
- Annual Volume of construction work

According to the 1st Evaluation Report, the waiver was due to the fact that the information relating to the waived criteria were to be **“submitted prior to contract award for the winning bidder”**. The Authority’s observations relating to the waiver of the evaluation criteria are as follows:

- The Evaluation Committee acted *ultra vires* as they do not have powers to do so under Section 67(2) of the Act read together with Regulation 90(4) of GN 97/2005. The latter provision states as hereunder;

“Reg.90(4) 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 wishes to emphasize that, the evaluation criteria specified in the tender document cannot be changed after the tenders have been opened.

- It was therefore wrong for the Evaluation Committee to waive statutory requirements which are provided for under Regulations 10(3) and (4) of GN 97 which states:

10(3) “To be eligible for participation in invitation to tender and award of contracts tenderers **shall provide evidence** satisfactory to the procuring entity of their eligibility under this regulation, **proof of compliance with the necessary legal, technical and financial requirements**

and of their capability and adequacy of resources to carry out the contract effectively.

10(4) " All tenders submitted **shall include** the following information:

(a) copies of original documents defining the constitution and/or legal status, and establishing the place of registration and/or statutory seat and, if it is different ..."

(b) Details of experience and past performance of the tenderer or each party to a joint venture on contracts of a similar nature ...

(c) ...

(d) ...

(e) Reports on the accounting and financial standing of the tendere or of each party to a joint venture such as profit and loss statements, Balance Sheet and auditors reports an estimated financial projection for the

next two years, and an authority from the tenderer's or authorised representative of a joint venture to seek references from bankers ; and

(f) Information regarding any current legal or arbitration proceedings or dispute in which a tenderer is involved.

...

- The Evaluation Committee regarded tenderers who had submitted a **turnover lower than the specified Tshs. 500,000,000 required of construction works** as responsive and no reason was given for such a decision. The Authority observes that, this conduct also contravened the law as it purported to amend a criterion that was contained under Item 12 of the Tender Data Sheet which states as hereunder:

"The minimum required annual volume of construction work for the successful Bidder over the last 2 years shall be: Tshs. 500,000,000.00 (To be supported by certified

financial statements/audited accounts)"

(Emphasis added)

- The waiver of the requirement to have adequate working capital, evidence of past performance and experience as well as information in respect of litigation, defeats reason as these form the basis for determining ability to perform the contract.

The Evaluation Committee's reason for the said waivers connotes lack of adequate knowledge of the law in that the waived criteria would have assisted the Respondent in Post qualifying the winning tenderer prior to contract award.

The Authority also noted that, having waived the aforesaid criteria found four tenderers out of the 12 who had qualified in the Preliminary Assessment stage; to be substantially responsive. The Authority finds this to be improper as the tenderers were wrongly qualified and therefore the subsequent outcome was equally in breach of the law.

In an endeavour to ascertain whether Post-qualification was done for the winning tenderer, 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)

Furthermore, Regulation 94(5) of GN. No. 97/2005 read together with Clause 34.2 of the ITB cements the above position as they direct that:

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

34.2 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 12.3.”
(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, Post-qualification was not done. However, the Authority discovered that during the Detailed Evaluation the Evaluation Committee used the criteria set for Post-qualification to evaluate the four tenderers who had qualified following the waiver of some mandatory criteria. The Authority observes that, this was not proper as only the lowest evaluated tenderer was supposed to be post-qualified in accordance with Regulation 94(5) of GN. No. 97/2005. However, this anomaly was attributed to inadequacy of the Tender Document. Furthermore, Item 30 of Bid Data Sheet indicated that Post-qualification

would be carried out. The Authority therefore finds that, failure to conduct Post-qualification contravened the law.

According to documentary as well as oral submissions made, it was apparent that when the 1st Evaluation Report was submitted to the Procurement Management Unit (hereinafter to be referred to as "**PMU**") the latter concurred with the recommendations therein. The Authority is of the view that, it was equally wrong for the PMU to concur with the Evaluation Committee's award recommendations which were based on the improper waiver of some of the pre-disclosed evaluation criteria. The Authority is concerned that, the PMU which is supposed to guide the Tender Board opted to breach the law with impunity.

The Authority further considered the evidence submitted that, the 1st Evaluation Report was subsequently tabled before the Tender Board whereby the recommendations of the Evaluation Committee were rejected on the basis of the improper waiver. The Authority commends the Tender Board for doing so as that was the right decision in accordance with Section 68(b) of the Act which guides as

to what should be done upon receipt of an evaluation report as hereunder:

“The tender board shall review the evaluation and the recommendation made by the procuring entity and may either,

- a) approve the recommendation and, authorize the procuring entity to accept the tender and award a contract in the forms specified in the tender documents; or
- (b) **refuse to authorize acceptance of any of the tenders and refer the evaluation back to the procuring entity with an instruction to re evaluate the tenders or recommendation for re tendering or other action”.** (Emphasis added)

In view of the above analysis, the Authority summarizes some of the key findings in the first issue as follows:

- The disqualification of the 10 tenderers in the Preliminary Assessment was unjustified.
- Having found all the 12 tenders to be substantially non-responsive during Detailed Assessment, the Evaluation Committee should have recommended rejection of all of them.
- Since the waiver of some of the evaluation criteria contravened the law, the Evaluation Committee's recommendation of the successful tenderer was equally against the law.
- The PMU erred in concurring with the recommendations of the Evaluation Committee which were made in breach of the law.
- The Tender Board's decision to reject the recommendations of the Evaluation Committee to award the tender to the Appellant was proper.

In light of the findings in the first issue, the Authority concludes that the Appellant was fairly disqualified.

2.0 Whether the award of the tender to M/s Basat Contractors Ltd was justified.

In resolving this issue, the Authority deemed it necessary to start by revisiting the events that led to the re-issuance of new Tender Documents which was among the grounds of this Appeal and the subsequent 2nd Evaluation which resulted into the award of the tender to the successful tenderer.

According to the Minutes of the Tender Board meeting of 25th February, 2010, which rejected the Evaluation Committee's recommendation to award the tender to the Appellant, the Tender Board directed the PMU to **"review the bidding document, and re-issue the revised bid document to all firms who had submitted the tenders."** As it can be evidenced, the said minutes do not clearly show the nature of the deficiencies detected by the Tender Board or the specific instructions to the PMU. However, a Confidential Memorandum from the Secretary of the Tender

Board to the Director General dated 26th February, 2010 sheds some light on the particular instructions in the following words:

“TTB did not approve it, it directed the secretariat **to review evaluation criteria** in the bidding document so as **to simplify the determination of substantial responsiveness of the bidder** and re-issue the revised bid document to all firms who purchased the document.” (Emphasis added)

During the hearing the Respondent submitted that, in implementation of the Tender Board’s directive, the PMU reviewed the Tender Document and removed some of the evaluation criteria from the Tender Document and modified some other provisions therein. The criteria that appeared in the 1st Tender Document but did not form part of the 2nd Tender Document are as follows:

- **Submission of Bid Securing Declaration Form.**

- **Evidence of adequate working capital for the contract.**
- **Recommendation letters (at least two) from previous Employers/Client.**
- **Change of turnover from Tshs 500,000,000 to Tshs600,000,000**

In its endeavor to ascertain whether non inclusion of the above mentioned criteria in the Tender Document was proper, the Authority started by analyzing the first criterion and thereafter the other two jointly and finally the last one.

During hearing the Respondent submitted that, the tenderers were not required to fill the Tender Securing Declaration as it was amongst the criteria that were not contained in the 2nd Tender Document. Upon review of the said document the Authority found that Item 19 of the Bid Data Sheet removed the said criterion in the following words:

“The amount of Bid Security shall be (...% of the bid amount or TSHs...[Not applicable]

Or

a Bid Securing Declaration. **NA”**

The Authority is of the considered view that, the removal of the requirement to submit a bid securing declaration was wrong given its importance as expounded under Clause 18.2 of the ITB which reads as follows:

“The Bid security or bid securing declaration is required to protect the Procuring Entity against the risk of Bidder’s conduct which would warrant the security’s forfeiture, pursuant to ITB sub-Clause 18.9”. (Emphasis added)

The Authority also noted that this criterion was also not used in the 2nd Evaluation.

With regard to the removal of the criteria to submit evidence of adequate working capital for the contract and recommendation letters from previous employers/client, the Authority observes that this contravened Regulation 10(3) and (4)(b) of GN. No. 97/2005.

With regard to the change of the minimum required turnover from Tshs. 500,000,000/= in the 1st Tender Document to Tshs. 600,000,000/= in the 2nd Tender Document, the Respondent argued that, it was done after realizing that, the latter was proper for tender of such value. The Authority observes that, this was a proper decision.

The Authority emphasizes that, standard bidding documents have been purposely prepared to ensure, amongst others, compliance with law by the users, namely, procuring entities. Further that, the liberty to review them to suit the procuring entity's particular procurement should not be used to omit mandatory statutory requirements as it was done by the Respondent in the 2nd Tender.

Having revisited the major changes in the 2nd Tender Document as presented by the Respondent during the hearing, the Authority discovered additional major changes as observed herein below:

- Item 6 of the Bid Data Sheet which made reference to Clause 3.1 of the ITB, that provides for eligibility of the tenderers states as follows:

“Only Bidders registered as Building Engineering Contractors in **Class VII and above** with the Contractors Registration Board are eligible” (Emphasis supplied)

The Authority noted that, SECTION I of the Tender Document, namely, the tender advertisement invited eligible contractors registered in **Class VI and above**, but the opening paragraph to the Bid Data Sheet states that the modifications made therein should prevail in case of any conflict. The said paragraph reads as follows:

“The following specific data for the works to be procured shall complement, supplement, or amend the provisions in the Instructions to Bidders (ITB). Whenever there is a conflict, the provisions herein shall prevail over those in ITB.” (Emphasis added)

The Authority wonders, since Contractors registered in Class VII were disqualified in the 1st Tender for being ineligible, why were they invited in the 2nd Tender.

- The third bullet under Item 13 of the Bid Data Sheet introduced the following bolded addition to the 1st Tender Document:

“Completeness of Bill of Quantities (Priced Bill of Quantities): The Bidder shall fill in rates and prices for all items of the Works described in the Bill of Quantities and

properly signed as per Clause 15.2 of ITB
**(Firm registered only for TIN shall not
include VAT in the Bid Price)”**

The Authority observes that, given the value of the tender under Appeal, of Tshs. 445,939,022/= the inclusion of the additional information does not make sense as the minimum for VAT Registration is Tshs. 40,000,000/=.

The Authority considered the Appellant’s contention that, it was improper for the Respondent to re-issue the Tender Document as they should have re-advertised the said tender. The Respondent on their part argued that, they did so in line with Section 54(4) of the Act which states as follows:

“Where the rejection of all tenders or proposals is due to lack of competition, wider advertising shall be considered and **where the rejection is due to most of the tenders or proposals being non-responsive, new tenders or new**

proposals being initially pre-qualified firms, or with the prior agreement of the appropriate tender board, from only those who submitted tenders or proposals in the first instance.” (Emphasis supplied)

The Authority concurs with the Respondent that, the above-quoted provision confers powers to limit the invitation to the tenderers who took part in the 1st Tender as there was proof that the approval of the Tender Board was sought. However, it is the view of this Authority that, the Tender Board erred in directing the PMU to re-issue the 2nd Tender Document to all tenderers who took part in the 1st Tender before re-submitting it and obtaining approval by the Tender Board in accordance with Section 30(c) of the Act. The said provision states:

**“30 A Tender Board shall be responsible for:-
(c) Approving tendering and contract documents”**

The PMU was equally at fault for re-issuing a Tender Document which was not re-submitted to the Tender Board for approval and also failure to advise the Tender Board accordingly.

Having examined the shortfalls in the 2nd Tender Document reviewed and re-issued by the PMU, the Authority proceeded to ascertain whether other procedural requirements, including evaluation and award of the said tender adhered to the applicable law.

The Authority noted that during Preliminary Evaluation of the 2nd Tender, ten out of the sixteen tenders were found to be substantially non-responsive for failing to comply with the tender requirements. Seven out of the ten disqualified tenderers were found to have submitted incomplete Bills of Quantities. Since this was the only deficiency detected by the Evaluation Committee on the part of the seven tenderers, the Authority finds their disqualification to be unfair for similar reasons on this point as covered in the first issue.

The Authority noted that, at this stage the Evaluation Committee checked, among other things, if the tenderers had submitted Certificates of Incorporation and valid powers of Attorney. However, the Authority discovered that, the successful tenderer attached the same Certificate of Change of Name and a defective power of Attorney as it was the case in the 1st Tender.

According to the 2nd Evaluation Report six tenders qualified for Detailed Evaluation where the Evaluators checked, amongst others, annual volume of construction works over the last two years of Tshs. 600,000,000/= . The Authority observes that, despite the use of the word "**annual**" in the said criterion the Evaluators applied the same as the aggregate volume of Construction works in two years as opposed to each year. The Authority is of the view that, such an interpretation is not correct due to the use of the term "annual". Had the Respondent wanted a different interpretation thereof they should have expressly stated so. Furthermore, had they

interpreted the said criterion properly they would have found that, five tenderers, the successful tenderer inclusive, out of the six tenderers who qualified for Detailed Evaluation did not meet this requirement.

The Authority further noted that, the criteria intended for Post-qualification were used during Detailed Evaluation. In other words, all six tenderers who had qualified for Detailed Evaluation were post-qualified. However, the said post-qualification was not adequate owing to the non inclusion of some of the statutory criteria which should have been applied at that stage. The Authority's observations on this point are similar to those covered under the first issue.

During the hearing the Respondent conceded 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 members of the evaluation committee are expected to determine whether they have any conflict of interest in the tender **prior to the commencement** of the evaluation process so that they refrain from taking part if circumstances so require. Accordingly, it was not proper for the members of the Evaluation Committee to carry out the evaluation without adhering to this particular statutory requirement.

In view of the above analysis, some of the Authority’s key findings in the second issue are as follows:

- Non inclusion of some of the statutory criteria in the 2nd Tender Document contravened the law.
- Since the said criteria were not used in the 2nd Evaluation, the said evaluation was not proper.
- The signing of Personal Covenants by the Members of the evaluation team after conclusion of the evaluation process was improper.
- The failure to post-qualify the lowest evaluated tenderer was contrary to Section 48 of the Act.
- The award of tender to M/s Basat Contractors Ltd. who was substantially non-responsive was contrary to the applicable law.
- The disqualification of 10 tenderers due to the purported incomplete bills of quantities was improper.

In the light of the above findings, the Authority's conclusion in respect of the second issue is that, the

award of the tender to M/s Basat Construction Ltd was not justified.

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

Having reviewed the procurement process and having established that the Appellant's disqualification was proper in the eyes of the law and that the award of the tender to M/s Basat Contractors Ltd was not proper at law, the Authority proceeded to review the Appellant's prayers as follows;

(a) The Authority should order the Respondent to consider the earlier recommendations to award the tender to the Appellant.

Having satisfied itself that, all tenders in the 1st tender were substantially non-responsive and therefore the Appellant's disqualification in the 1st tender was justified, the Authority rejects this prayer.

(b) Compensate the Appellant the sum of Tshs. 87,360,502.36 as itemized under the Appellant's submissions in this decision

Considering the conclusions of this Authority in the first and second issues, the Authority observes that the Appeal has some merit as it has brought into light breach of the applicable law committed by the Respondent. The Authority rejects the Appellant's prayer for compensation of costs relating to the tender process as they would not have won the tender even if the Respondent had observed the law to the letter. However, the Authority grants the Appellant's prayer for compensation of costs arising from this Appeal to the tune of **Tshs. 3,120,000/=** only arrived at as follows:

- (i) Legal fees – Tshs. 3,000,000/=
- (ii) 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 matters that need to be highlighted:

- a) As it was conceded by the Respondent during their hearing, the Tender Board minutes were not detailed enough to enable a reader to understand what actually transpired in the said meetings and how the decisions were reached.

- b) The Authority is concerned with the competence of the Head of PMU, as it was evident during the hearing that, he concurred with the changes made to the Evaluation criteria by the Evaluation Committee during the evaluation of the first tender by forwarding the Evaluation Team's recommendations whilst knowing that it was wrong to change the Evaluation criteria after the tender opening.

- c) The Authority doubts the competence of the Evaluation Team since they failed to comply with the evaluation criteria set in the Tender Document.
- d) The Authority opines that, given the nature of their business and projects involved, the Respondent needs the services of Quantity Surveyors. Had they engaged such experts they would have prepared a better BOQ as well as using such expertise in the evaluation thereof.
- e) The Authority is shocked and appalled by the Appellant's admission that they perused the Evaluation Report in the Respondent's offices and learnt that they were recommended for award of the first Tender. The Authority observes that an evaluation report is a confidential document as per Regulation 99(1) of GN. No. 97/2005 which states as hereunder:

"Information relating to the examination, clarification, evaluation and comparison of tenders and recommendations for the award

of a contract **shall not be disclosed to suppliers, service providers, contractors, asset buyers or to any other person not involved officially in the examination, evaluation or comparison of tenders or in the decision on which tender should be accepted."**

The Authority further observes that, equally the disclosure of confidential information to the Appellant by the Respondent's officials contravened Regulations 4(2) (d) and 8(2), of GN. No 97/2005 which provide for the conduct of public officers when carrying out duties in Public Procurement.

- f) While perusing the Personal Covenants signed by members of the Evaluation Team, it was discovered that one of the members was a Personal Secretary. During the hearing, it was submitted that the said Secretary had upgraded and studied accounting and was therefore

qualified to do evaluation of this tender. The Authority is of the view that this depicts lack of seriousness on the part of the PMU. Furthermore this was in contravention of Section 37(4) of the Act which requires that members of the Evaluation Team be of an appropriate level of seniority and experience.

It is the view of the Authority that considering the Technical nature of the Tender a Personal Secretary could not be qualified to take part in the Evaluation process.

- g) The Authority also observes that both the Tender Board and the PMU depicted lack of professionalism since they were prepared to compromise quality by waiving a number of mandatory criteria in order to accommodate a larger number of tenderers who had been found to be substantially non-responsive in the first tender.

Having considered all facts and evidence, the Authority concludes that, the Appeal has some merit as the evaluation of the two tenders breached the law and that the subsequent award to M/s Basat Contractors Ltd was a nullity in the eyes of the law.

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

- Restart the tender process afresh in observance of the law.
- Compensate the Appellant a sum of **Tshs. 3,120,000/=** as appeal costs incurred by the Appellant.

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 29th June, 2010.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. HON. V.K. MWAMBALASWA


2. MR. M. R. NABURI


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


4. MR. K. M. MSITA
