

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

APPEAL CASE NO. 75 OF 2010

BETWEEN

WAZAMANI GENERAL SUPPLIES.....APPELLANT

AND

URAMBO DISTRICT COUNCIL RESPONDENT

DECISION

CORAM:

- | | |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mr. M. R. Naburi | - Member |
| 3. Mr. K.M. Msita | - Member |
| 4. Ms. E.J. Manyesha | - Member |
| 5. Ms. B.G. Malambugi | - Secretary |

SECRETARIAT:

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

FOR THE APPELLANT:

1. Mr. Kaunda Silas Kilinda – Managing Director
2. Mr. Stephen Magige – Manager

FOR THE RESPONDENT

1. Mr. Sadoki Magesa – Education Officer/ Member of PMU
2. Mr. Leonard Sunhwa – District Supplies Officer
3. Mr. Steward Eliack – Supplies Officer

INTERESTED PARTY

Mr. James Bigirwa – Director, J.B Electronics and General Traders Co. Ltd. and sole proprietor of James Q. Bigirwa Traders.

This decision was scheduled for delivery today 6th September, 2010, and we proceed to deliver it.

The appeal at hand was lodged by **M/s WAZAMANI GENERAL SUPPLIES** (hereinafter to be referred to as "**the Appellant**") against **URAMBO DISTRICT COUNCIL** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No.UDC/byz/2009/2010/03 for the Supply of Laundry Washing Machines and Radio Calls to the Health Department. However, the matter under Appeal is specifically with respect to the supply of washing machines (hereinafter to be referred to as "**the Tender**").

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

The Respondent invited tenders for supply of Laundry Washing Machines and Radio Calls *vide* Tanzania Daima newspaper of 22nd January, 2010.

The tender opening took place on 03rd March, 2010, and according to the tender opening minutes tenders were submitted as follows;

S. NO	Name of Tenderer	Type of Washing Machine/Radio Call	Unit Price quoted Tshs.
1.	M/s C.G Traders	Washing machine - Machine 32 kg – Girbau - Machine 25 Kg- Girbau	15,450,000/= 13,850,000/=
		Radio calls - Kenwood – Japan - Cadan – Japan - Vartex - Japan	7,950,000/= 7,950,000/= 7,850,000/=
2.	Razaro Bugalu George Traders	Washing Machine - Japan – 32 Kg Girbau - Etika - Japan 23 – Kg Girbau Machine installation	29,000,000/= 26,000,000/= 27,000,000/= 1,699,000/=
		Radio calls -Con C – 78 (HF) -Kenwood TE 90 -Codan NGT – VR -Installation of Radio calls	4,200,000/= 4,200,000/= 10,000,000/= 1,500,000/=
3.	James Q. Bigirwa Traders	Washing Machine -Girbau Spain – 32 Kg -Girbau Spain – 23 Kg -Etika – 23 Kg	27,000,000/= 25,000,000/= 25,000,000/=
		Radio Calls -Kenwood TL 90 – Japan -Icon F78 -Codan NGT – VR-Japan -Installation costs	3,800,000/= 3,800,000/= 9,300,000/= 1,300,000/=
4.	J.B Electronic & General Supplies	Washing Machine -Girbau- 132Kg Spain -Girbau –23 Kg Spain -ETIKA – 23 Kg Malaysia	26,900,000/= 24,500,000/= 25,000,000/=
		Radio Calls -Kenwood TK 90- Japan -Icon C 78 – Japan -Codan NGT–VR – Japan	4,100,000/= 4,000,000/= 9,500,000/=

		Installation of Radio Call	1,400,000/=
5.	DAO Electronic Co. Ltd	Radio Calls -Kenwood -Installation costs	4,000,000/= 2,485,52/=
6.	Wazamani General Supplies	Washing machine -Girbau – 32 Kg -Girbau - 25Kg	30,500,000/= 29,000,000/=
		Radio Calls -Kenwood TK – 80HF 55b -Installation of Radio Call	2,600,000/= 200,000/=
7.	Chiliki Enterprises	Washing Machine -Girbau – 32 Kg -Girbau – 25 Kg	31,000,000/= 29,600,000/=
		-Radio Calls No specification	3,500,000/=
8.	SSI Business To Business	Washing Machine -Girbau – 32 Kg -Girbau – 25 Kg	31,100,000/= 29,200,000/=
		Radio calls -Kenwood TK – 80 HF 55B	2,920,000/=
9.	R.M. Medics	-Washing Machine -Girbau – 30 Kg -Girbau – 25 Kg -Haifeng Machine- 30 Kg -Haifeng Machine – 25Kg	30,000,000/= 24,000,000/= 25,000,000/= 22,000,000/=
		Radio Calls -Codan – Japan -Kenwood - Japan	5,500,000/= 5,500,000/=
10.	Sauti Lab. Medics Supplies	Washing Machine -Electrolux – 25 Kg -Girbau 32 Kg	25,400,000/= 26,550,000/=

After evaluation of the tenders the Evaluation Committee recommended the award for the supply of washing machines to Sauti Lab. Medics Supplies. However, the Tender Board at its meeting held on 22nd May, 2010, awarded the tender to J.B

Electronics & General Traders Co. Ltd at a contract sum of Tshs. 83,153,100/=.

On 21st June 2010, the Appellant received a letter from the Respondent referenced UDC/BZH/B.4/Vol/64 dated 1st June, 2010, informing them that their tender had not been selected and that the tender for supply of washing machines was awarded to J.B Electronics & General Traders Co. Ltd and that for supply of Radio Calls had been awarded to James Q. Bigirwa Traders.

The Appellant was dissatisfied with the tender results and on 23rd June, 2010, lodged an appeal with the Public Procurement Appeals Authority (hereinafter to be referred to as “the **Authority**”)

SUBMISSIONS BY THE APPELLANT

The Appellant’s documentary, oral submissions as well as responses from questions raised by the

Members of the Authority during the hearing were as follows:

That, the tender process had been conducted without observing the laid down procedures and the governing rules.

That, they paid to the Respondent Tshs. 50,000/= for the purchase of tender documents but no documents were issued to them. Furthermore, the Appellant has worked with the Respondent before and this is a common practice.

That, the Respondent's failure to prepare the required Tender Document contravened Section 62 (1) of the Public Procurement Act, of 2004, Cap. 410 (hereinafter to be referred to as "**the Act**")

That, the award of tender in favour of J.B. Electronics & General Traders Co. Ltd for supply and installation of three pieces of washing machines with the capacity of 32kg and 23kg is contrary to the

Tender Advertisement which specified capacities of 32kg and 25kg.

Thus, the Appellant prayed for compensation amounting to **Tshs. 17,841,000/=** as per the following breakdown:

- i) Consultation Legal fees charged at 3% of Bid price of Tshs. 90,000,000/= which is equal to Tshs. 2,700,000/=
- ii) General Damages costs at 15% of Bid Price – Tshs. 13,500,000/=
- iii) Tender Purchase fees of Tshs. 50,000/=
- iv) Tender preparation costs – Tshs. 600,000/=
- v) Transportation and accommodation costs Tshs. 871,000/= as per the receipts availed to the Authority.
- vi) PPAA appeal fees – Tshs. 120,000/=.

SUBMISSION BY THE RESPONDENT

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

That, the Appellant had erred in law by filing an appeal directly to the Authority as the same should have been submitted first to the Accounting Officer then to the Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**") and finally to the Authority.

That, the award in favour of J.B Electronics & General Traders Co. Ltd for Supply and Installation of three pieces of Washer Extractor Electric (washing machine) was not contrary to the tender advertisement.

That, the failure to prepare the Tender Document was caused by lack of expertise in the Respondent's

office as most of the officers who dealt with the procurement function were not conversant with the Public Procurement Act and its guidelines.

That, the tender opening took place on the scheduled date and there were no complaints from any of the tenderers or their representatives about the specifications being unclear or ambiguous.

That, the whole tendering process was done fairly and conducted in accordance with the procedures and the governing rules.

That, costs incurred by the Appellant were self inflicted since they did not follow the procedures for filing complaints.

Thus, the Respondent prayed that the Authority should dismiss the Appeal with costs.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral arguments from parties, the Authority is of the view that the Appeal is based on the following issues:

- **Whether the Appeal is properly before the Authority;**
- **Whether the tender process was conducted in accordance with the law;**
- **Whether the award of the tender to J.B. Electronics & General Traders Co. Ltd 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 Appeal is properly before the Authority

In their oral replies during the hearing, the Respondent contended, *inter alia*, that the Appellant erred in submitting their complaint directly to the Authority instead of submitting the matter for review first to the Respondent's Accounting Officer in accordance with Regulation 40(1) of GN. No. 177 of 2007 which states as follows:

“Any application for administrative review shall be submitted in writing to the Accounting Officer of a Council and copies given to the Authority and the Regional Commissioner.” (Emphasis added)

Since this matter hinges on the Authority's jurisdiction to entertain the Appeal, the Authority deems it prudent to resolve it first.

In its endeavour to ascertain whether the Appeal is properly before it, the Authority intends to give a

detailed account on the *modus operandi* pertaining to settlement of disputes arising from the procurement process.

The dispute settlement mechanism under Part VII of the Act provides for **two avenues** which tenderers may follow in submitting procurement complaints or appeals. **Under the first avenue**, complaints arising during the procurement process **before a procurement contract enters into force** must be submitted first, to the Accounting Officer then to PPRA and finally to this Authority as per Regulation 40 of GN. No. 177 of 2007. The said Regulation 40 read together with Sections 79(1), 80(1), 81(1) and 82(1) of the Act stipulate the procedure involved in submitting complaints or appeals in the normal course of business prior to entry into force of a procurement contract.

Under the second avenue, complaints arising **after the procurement contract has entered into force** are submitted directly to this Authority.

In other words, the Authority has sole original jurisdiction over such complaints in accordance with Sections 80(3) and 82(2)(a) of the Act read together with Regulation 40(4) of GN. No.177 of 2007. For purposes of clarity, the Authority reproduces Section 55(7) of the Act which stipulates as to when a procurement contract enters into force. The said sub-section provides as follows:

S. 55(7) "The procurement contract shall enter into force **when a written acceptance of a tender has been communicated to the successful supplier,** contractor or consultant" (Emphasis added)

Linking the second avenue to the Appeal at hand, the Authority finds that, at the time when the Appeal was lodged with the Authority the procurement contract had already entered into force as per Section 55(7) of the Act. Moreover, once a procurement contract enters into force, the accounting officer ceases to have jurisdiction to entertain such a complaint as per Section 80(3) of

the Act which is similar to Regulation 40(4) of GN. No. 177 of 2007 which states as hereunder:

“The Accounting Officer shall not entertain a complaint or dispute or continue to do so after the procurement or disposal contract has entered into force.” (Emphasis added)

The Authority is of the view that, given the facts of this Appeal, the Appellant could neither submit complaints to the Accounting Officer nor to PPRA as the only recourse open for them was to appeal directly to this Authority in accordance with Section 82(2)(a) of the Act which states as follows:

“(2) A supplier, contractor or consultant entitled under section 79 to seek review may submit a complaint or dispute to the Public Procurement Appeals Authority:-

(a) ... if the complaint or dispute cannot be submitted or entertained under section 80 or 81 because of entry into force of the procurement contract ...” (Emphasis added)

In the light of the above findings, the Authority concludes that, this Appeal is properly before it.

2.0 Whether the tender process was conducted in accordance with the law

The Authority observes that, for any procurement process to be properly conducted it has to satisfy all legal requirements provided for under the Act and as specified in the tender document issued by a procuring entity. In order to satisfy itself as to whether the tender process pertaining to the tender under Appeal was properly done, the Authority deemed it prudent to review the whole procurement process so as to ascertain whether all legal requirements were adhered to. In the course of doing so, the Authority will be able to answer the Appellant's main contention that the procurement process did not adhere to the applicable law.

The Authority examined whether the Respondent had complied with the legal requirements relating to tender advertisement and issuance of tender documents. The Authority deems it necessary to reproduce the definition of "solicitation documents" as provided under Section 3 of the Act to mean:

"Tendering documents or **any other documents inviting tenderers** to participate in procuring or disposal by tender proceedings and **includes documents inviting potential tenderers to pre-qualify** and standard tendering documents" (Emphasis added)

The Authority started by examining the invitation to tender issued by the Respondent so as ascertain if it complied with the requirements of the applicable law. Section 61(1) of the Act which is in *pari materia* with Regulation 80(2) of GN. No. 97 of 2005 provides guidance as to what information should be included in the invitation to tender as follows:

“S. 61(1) A procuring entity wishing to commence competitive tendering proceedings shall prepare a tender notice inviting suppliers or contractors to submit priced offers for the supply of the goods or for undertaking the works required and such tender notice shall be submitted within reasonable time before the planned issue of the tender to the Secretary of the tender.” (Emphasis supplied)

The Authority observes that, the Respondent complied with the above quoted provision. The Authority examined whether the said Tender Advertisement adhered to Regulation 81 of GN. No.97 of 2005 which stipulates the minimum information to be contained in the invitation to tender as follows:

“Reg.81. The invitation to tender shall contain at the minimum, the following information:

- (a) the name and address of the procuring entity; the nature and quantity and place of delivery of the goods to be

- supplied or the nature, quantity and location where they are to be provided;
- (b) the description of the asset to be disposed of, the location of the asset and the arrangements for a potential tenderer to inspect the asset, including a statement that the asset is sold on “as is, where is” basis;
 - (c) the desired or required time for the supply of the goods or for the completion of the works or the timetable for the provision of the services;
 - (d) a declaration which shall not later be altered to the effect that contractors, suppliers or service providers, or asset buyers may participate in the procurement or disposal proceedings regardless of nationality or declaration that participation is limited on the basis of nationality;

- (e) the means or conditions of obtaining the solicitation documents and the place from which they may be obtained;
- (f) the price, if any, charged by the procuring entity for the solicitation documents;
- (g) the currency and means of payment for the solicitation documents;
- (h) the language or languages in which the solicitation documents are available;
- (i) the place for the submission of tenders;
- (j) the deadline for the submission of tenders as well as the place, hour and date for the opening of tenders; and
- (k) the source of financing.”

The Authority noted that, only item (b) out of the ten items contained in the above quoted Regulation, was not relevant to the tender under Appeal as it is confined to disposal of assets. However, the Respondent complied fully with three out of the

remaining nine items, namely, items (f), (i) and (k). The Authority's observation pertaining to the remaining five items are as hereunder:

- Sub-regulation (c), (g) and (h) of Regulation 81 of GN. No. 97 of 2005 which requires delivery time, currency and means of payment; as well as the language in which the solicitation documents are available to be stated was not complied with as nothing of the sort was stated in the tender advertisement.

- The following shortfalls were detected in respect of compliance with Sub-regulations (a), (d), (e) and (j) of Regulation 81 of GN. No. 97 of 2005 as hereunder:
 - (i) The tender advertisement indicated that three washing machines were required but did not specify how many were for 32kg and 25kg respectively.

 - (ii) Sub-regulation (d) of Regulation 81 of GN. No. 97 of 2005 required the tender

advertisement to declare whether, among others, the participation thereof was limited on the basis of nationality. Item 2 of the tender advertisement indicated that this was an international tender as it invited tenderers from within and outside the country. The Authority noted that, even the Respondent was surprised when the said item was brought to their attention during the hearing, as the tender was basically a national competitive tender.

(iii) The tender advertisement neither indicated the means nor conditions of obtaining the solicitation documents and the place from which they could be obtained contrary to Regulation 81(e) of GN. No. 97 of 2005.

(iv) According to Regulation 81(j) of GN. No. 97 of 2005, the tender

advertisement was required to indicate the deadline for submission of tenders, place, hour and date for opening of tenders. Item 6 of the Respondent's invitation to tender stated as hereunder:

"6. Mwisho wa kutuma maombi ni **tarehe 12 Februari saa 4.00 asubuhi na Kufunguliwa**, waombaji/wawakilishi mnakaribishwa kushuhudia ufunguzi." (Emphasis added)

Literally translated the quoted item means that, the deadline for submission of tenders is 12th February at 10.00 a.m. and opening (sic), applicants/their representatives are invited to witness the opening.

The Authority noted that, the above quotation does not indicate the respective

year of the submission deadline or the venue for the opening thereof.

The Authority further detected the following anomalies in the tender advertisement:

- Item 1 of the Tender Advertisement indicated that the tender was for supply of washing machines and radio calls. However, it was not stated whether a tenderer could opt to tender for one of the two types of goods as they are distinct in nature. The Authority noted that, the Respondent had intended the said items to be quoted differently as the award thereof was not a single package.
- Item 3(a) required tenderers to submit **“a valid company licence”** which is ambiguous as such a document does not exist under the laws of the Land.

- Item 3(c) should have stated the required specification instead of leaving it to the tenderers.
- There was a contradiction between Items 3(c) and 4 of the Tender Advertisement. Item 3(c) required the tenderers to indicate the model of the washing machines and radio calls to be supplied together with the prices thereof, whereas Item 4 indicated the model and specifications of the said goods which the Respondent had in their possession. The said items state as follows:

“3. Masharti ya Mwombaji;

(c) aonyeshe aina ya mashine za kufulia nguo na Radio Call alizonazo pamoja na bei zake na gharama za ufungaji (Installation).

“4. Mashine za kufulia na Radio Call ambazo specifications zake tunazo ni;

**(a) Mashine za kufulia with
Installation;
Specifications zake;
Washer Extractor Electric
Girbau Model L. S 332
Zenye 32kg na zenye 25kg
Mwombaji aonyeshe bei zake.”**

(Emphasis added)

Literally translated, Item 3(c) required the tenderer to indicate models of the washing machines he had, the prices thereof and installation charges. Item 4 indicated the models and specifications of the washing machines and radio calls which the Respondent they had in their possession and required the tenderers to indicate their prices.

During the hearing the Respondent stated that, Item 3(c) gave the tenderers an opportunity to submit models of their own choice while Item 4 was merely intended to cement the above Item

by indicating the machines which were currently used by the Respondent so that prospective tenderers would indicate other models from which the best model would be chosen.

The Authority does not accept the Respondent's defense as both items indicated that the tenderers should show the prices thereof. Which means if Item 4 was merely intended to make the tenderers aware of the models owned by the Respondent, there was no need for the words "**Mwombaji aonyeshe bei zake**" (meaning that the tenderer should indicate their prices) under Item 4 to be re-stated as they already formed part of Item 3(c).

Furthermore, the Authority observes that, by specifying the model the Respondent contravened Section 63(2) of the Act which is similar to Regulation 83(2) of GN. No. 97 of 2005 read together with Regulation 22(1) and

(2) of the same GN. The said Section 63(2) and Regulation 22(1) and (2) read as follows:

“S. 63(2) The tender documents shall be worded so as to permit and encourage competition and such documents shall set forth clearly and precisely all the information necessary for a prospective tenderer to prepare tender for the goods and works to be provided.

Reg. 22(1) Any specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods, or works to be procured, and requirements concerning testing and test methods, packaging, marking or labeling or conformity certification, and symbols and terminology, or description of services that create obstacles to participation, including

obstacles based on nationality, by suppliers, contractors or service providers in the procurement proceedings shall not be included or used in the pre-qualification documents, solicitation of proposals, offers or quotations.

- (2) To the extent possible, any specifications, plans, drawings, designs and requirements or descriptions of goods or construction shall be based on the relevant objective, technical and quality characteristics of the goods or construction to be procured. **There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer** unless there is no other sufficiently precise or intelligible way of describing the

characteristics of the goods, works or service to be procured and provided that words such as “or equivalent” are included.”
(Emphasis added)

The Authority is of the considered view that, by specifying the models of the washing machines the Respondent restricted competition and hence contravened the law. Moreover, the Respondent also contravened Section 62(3) of the Act which prohibits the use of discriminatory terminologies as it states that:

“Tender documents **shall not include** requirements and terminologies **which discriminate unfairly against participation by suppliers, contractors or consultants.**” (Emphasis added)

From the foregoing, it was evident that the tender advertisement was defective in that its

contents did not provide clearly the requisite information in terms of the requirements of Reg. 81 of GN No. 97 of 2005. Furthermore, the Authority wonders whether the said advertisement was approved by the Tender Board as required under Regulation 80(2) and (3) of GN. No. 97 of 2005.

Having reviewed the tender advertisement, the Authority proceeded to examine whether issuance of tender documents in light of Section 62(1) of the Act which is in *pari materia* with Reg. 82(1) of GN. No. 97 of 2005, was complied with by the Respondent. The said Regulation states as hereunder:

“The procuring entity **shall provide solicitation documents immediately after first publication of the tender notice** to all suppliers, contractors, service providers or asset buyers who respond to the tender notice in accordance with the procedures and

requirements specified in the invitation to tender” (Emphasis added).

During the hearing the Appellant contended and the Respondent conceded that, upon payment of the Tsh. 50,000/= fee stipulated in the Tender Advertisement, the Appellant was given a receipt thereof but no tender document was issued to them. The Authority is of the considered view that, this was a contravention of Reg. 82(3) of GN. No. 97 of 2005 which requires the fee to be charged for issuance of tender documents as follows:

“Solicitation documents may be sold in order to recover costs but the price shall be calculated to cover only those costs related to printing, copying and distribution and shall not include any element of profit.” (Emphasis added)

The Authority therefore observes that, since no solicitation documents were issued, the Appellant is entitled to refund of the Tshs. 50,000/=.

With regard to non issuance of tender documents, the Authority emphasizes that the requirement to issue tender documents is not discretionary but mandatory as stipulated under Section 62(1) and Reg. 82(1) of GN. No. 97 of 2005.

Furthermore, the Authority does not accept the Respondent's submission that the non issuance of tender documents was a result of lack of expertise on their part. The said defense is not justified as they were required to use standard tendering documents issued by PPRA as provided under Section 63(1) of the Act which states that:

“The procuring entity shall use the appropriate standard model tender documents specified in the Regulations for

the procurement in question.” (Emphasis added)

The Respondent also conceded that, in the absence of tender document, the tender advertisement was the only document through which prospective tenderers could know the terms and conditions of the tender. The Authority observes that had the solicitation documents been issued they would have contained, *inter alia*, instructions to tenderers in accordance with Reg. 83 of GN 97 of 2005, such as the eligibility criteria, technical specifications, evaluation criteria and methodology as well as the modality of determining the successful tenderer.

In the absence of the evaluation criteria the Authority detected a number of shortfalls in the evaluation process as indicated herein below:

- (a) The Evaluation Report does not indicate the stages in which the evaluation was conducted. However, the Table appearing on page 5 of

the said Report indicates that the tenderers were checked for the model of the washing machines, capacity thereof, price and installation charges while attachment 'B' (on page 19 of the Report) shows that the tenderers compliance was checked in respect of the following:

- attachment of a tender fee receipt;
- model of the washing machine;
- Form of Tender;
- a valid company licence, Certificate of Incorporation, VAT registration, TIN;
- capacity of the washing machines; and
- installation charges.

The Authority could not understand whether the content on pages 5 and 19 mentioned above indicates two separate stages as all the items appearing on page five are contained in the Table on page 19 with a few additions. In the absence of evidence to the contrary, the Authority is of the view that the evaluation was

conducted in a single stage contrary to Regulation 90(6), (18) and (22) of GN. No. 97 of 2005. The said provisions state as follows:

“Reg. 90(6) Prior to detailed evaluation of tenders, the tender evaluation committee shall carry out a preliminary examination of the tenders to determine whether or not each tender is substantially responsive to the requirements of the tender documents, whether the required guarantees have been provided, whether the documents have been properly signed and whether the tenders are otherwise generally in order.

(18)(a)A procuring entity shall evaluate and compare all tenders that have been accepted in order to ascertain the successful tender, in accordance with the procedures

and criteria set forth in the solicitation documents.

(b) The successful tender shall be:

(i) the tender with the lowest evaluated tender price in case of goods or works or services, or the highest evaluated tender price in case of disposal of assets, but not necessarily the lowest submitted price, subject to any margin of preference applied; ...” (Emphasis added)

(b) The Evaluation Committee indicated that they checked the tenderers’ compliance and eligibility. The Authority observes that had they done so as the law requires they would have discovered the following shortfalls in the tenders submitted:

(i) Most of the tenderers did not indicate their past experience and financial capability as the same should have

been stipulated in the tender document. The Authority emphasizes that, the prospective tenderers are obliged to know the law and comply with it. Hence, the Respondent failure to provide the minimum requirements should not be an excuse.

- (ii) Two of the tenderers who are incorporated companies were supposed to submit powers of Attorney. One of them, namely, J.B. Electronics & General Traders Co. Ltd submitted a defective power of Attorney as it was issued to James Quitrian **Birigwa** instead of the intended Director, namely, James Quitrian **Bigirwa**. Moreover, the said power of Attorney was not signed by a person authorizing such delegation on behalf of the said Company. The other tenderer, namely,

C.G Traders did not attach a power of Attorney. It should be noted that the other tenderers were not obliged to submit powers of Attorney as they tendered as sole proprietors.

(iii) The Authority noted that, all tenderers who tendered as sole proprietors used their business names to tender instead of tendering as natural persons trading as (T/A) per their respective business names. The Authority emphasize that a business name registered under the Business Names Registration Act, Cap. 213 has no legal capacity to enter into contract.

(c) Item 2.2 of the Evaluation Report indicate that three tenderers failed to comply with one of the specifications by quoting a washing machine with capacity of 23kg instead of the required 25kg. The said tenderers were

Razaro Bugalu George Traders, James Q. Bigirwa Traders, and J.B. Electronics & General Traders Co. Ltd. Surprisingly, the award of the tender was made to J.B. Electronics & General Traders Co. Ltd despite being found to be non responsive for failure to meet the specifications.

- (d) According to the Evaluation Report, two tenderers, namely, Wazamani General Supplies and SSI Business To Business Consultants were disqualified for failure to indicate the model of the washing machines to be supplied. The Authority noted that, the said tenderers had attached the Manufacturers' Authorization in their tenders which were also verified by the Tender Board.
- (e) The Evaluation Committee noted that Sauti Lab. Medics Supplies indicated that they would supply an Electrolux Washer Extractor 25kg which the Evaluators commented that the said

model was not stated in the Tender Advertisement. This shows clearly that even the Evaluators' understanding of the Tender Advertisement was that the Respondent requested for the models indicated therein and not otherwise. However, it is surprising that according to the minutes of the Tender Board dated 22nd May, 2010, the said tenderer did not indicate the model thereof.

- (f) Despite the Evaluation Committee's comments in respect of Sauti Lab. Medics Supplies indicated above, the said Committee went ahead and ranked the said tenderer as the first amongst those who had tendered for supply of washing machines of 32kg. However, having indicated in their minutes that Sauti Lab. Medics Supplies did not indicate the model of the washing machines, the Tender Board awarded the tender to the second ranked tenderer, namely, J.B. Electronics & General Traders Co. Ltd who

ranked second in the Evaluation Report. During the hearing the Respondent stated that, the first ranked tenderer was not considered for award because the model they indicated was different from that specified in the Tender Advertisement. The Authority observes that, the Respondent's reason contradicts their previous submission on the interpretation of the Tender Advertisement, that is, the tenderers were required to indicate the different models they had.

- (g) Under Item 3.2 of the Evaluation Report, it is indicated that none of the tenderers had complied with the requirement to supply the specified model with the capacity of 25kg. The minutes of the Tender Board do not show the reasons that led to the award of a 23kg washing machine to be made to J.B. Electronics & General Traders Co. Ltd whom the Evaluation Committee had indicated that did not meet the specification. Moreover, the

Respondent failed to show the rationale behind the Tender Board's decision to award a tenderer to supply a 23kg washing machine instead of the 25kg which was communicated to the tenderers *vide* the Tender Advertisement.

The Authority noted that, the tender submitted by J.B. Electronics & General Traders Co. Ltd did not indicate that they would supply a Girbau washing machine with the capacity of 23kg. Thus, the Authority is dismayed that the LPO issued to the said tenderer by the Respondent required them to supply a Girbau 23kg washing machine which they did not tender.

- (h) The Evaluation Report does not show as to how J.B. Electronics & General Traders Co. Ltd was found to be the lowest evaluated tenderer as the criteria for finding the winner was not stated anywhere. The Authority is of the firm view that, had the Respondent determined the

lowest evaluated tender they would have found that Sauti Lab. Medics Supplies had the lowest price of them all. Moreover, had the Respondent wanted to be supplied with 3 washing machines of 32kg the said tenderer had offered to sell them for **Tshs. 79,650,000/=** and 3 washing machines of 25kg with capacity up to 28kg for **Tshs. 76,200,000/=** which would have been a saving compared to the **Tshs. 83,153,100/=** that was awarded to J.B. Electronics & General Traders Co. Ltd.

- (i) Post-qualification was not done in contravention of Section 48(1) of the Act read together with Regulation 90(22) of GN. No. 97 of 2005 The said sub-section 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)

The Authority is satisfied that, by not subjecting the Successful tenderer to post-qualification, the Respondent did not ascertain whether the said tenderer had the requisite capability and resources to carry out effectively the contract in accordance with Section 48 of the Act.

In view of the above findings, the Authority concurs with the Appellant that the tender process did not adhere to the applicable law as provided for under Section 58(1) and (2) that:

“58(1) All public procurement and disposal by tender shall be conducted in accordance with the basic principles set out in this Act.

(2) Subject to this Act all procurement and disposal shall be conducted in a manner to maximize competition and achieve economy, efficiency, transparency and value for money.”

(Emphasis added)

Accordingly, the Authority’s conclusion in respect of the second issue is that, the tender process was not conducted in accordance with the law.

3.0 Whether the award of the tender to J.B Electronics & General Traders Co. Ltd. was justified

In resolving this issue the Authority revisited the Appellant’s contention that the award of the tender

for supply of three washing machines in favour of J.B Electronics & General Traders Co. Ltd. with the capacity of 32kg and 23kg was contrary to the Tender Advertisement. The Respondent on their part conceded that the specification was for 25kg but they had to award for 23kg because none of the tenderers met that requirement. The documentary evidence availed to the Authority, does not support such an argument since four tenderers had indicated that they would supply washing machines with the capacity of 25kg as follows:

- Wazamani General Supplies - **25kg Electrolux**
- Sauti Lab. Medics Supplies - **25kg Electrolux**
- SSI Business To Business Consultants - **25kg Girbau**, and
- R.M. Medics - **25kg Girbau.**

At this juncture the Authority is concerned with the inconsistencies between the findings of the Evaluation Committee *vis-a-vis* the Tender Board. For instance, in their oral submissions the

Respondent stated that the first ranked tenderer, namely, Sauti Lab. Medics Supplies was not awarded the tender because the user Department preferred washing machines from Spain. However, the Authority noted that the said tenderer had indicated that they would supply washing machines from Spain while the Tender Board indicated that they did not show the model thereof. Moreover, the change of specifications from 25kg to 23kg effected by the Tender Board in contravention of the law leaves a lot to be desired. The above analysis shows clearly that the Tender Board's decisions were intended to favour J.B. Electronics & General Traders Co. Ltd. and James Q. Bigirwa Traders.

It is also worth mentioning that, during the hearing it was evident that, Mr. James Quitrian Bigirwa who attended the hearing as an Interested Party was the Managing Director of the successful tenderer for washing machines, namely, J.B Electronics & General Traders Co. Ltd. Mr James Quitrian Bigirwa is also

the sole proprietor of James Q. Bigirwa Traders who won the tender for supply of radio calls.

The Authority concludes therefore that, the award of the tender to J.B Electronics & General Traders Co. Ltd was not justified.

4.0 To what reliefs, if any, are the Appellant's entitled to

Having resolved the contentious issues in dispute, the Authority revisited the prayers by the Appellant who had requested this Authority to do justice and further order the Respondent to compensate the Appellant a total of Tshs. 17,841,000/= . As it has been established in the second and third issues that, the tender process in its totality was marred by irregularities and that there was no award in the eyes of the law, the Authority orders the Respondent to restart the tender process in observance of the law. The Authority further observes that the Appeal has merit and the Appellant is therefore entitled to

compensation for costs arising out of this Appeal as follows:

- i) Consultation Legal fees **Tshs. 1,350,000/=**
- ii) Tender purchase fee – **Tshs. 50,000/=**
- iii) Transportation and accommodation costs **Tshs. 871,000/=** as per receipts availed to the Authority.
- iv) PPAA appeal fees – **Tshs. 120,000/=**
Total Tshs. 2,391,000/=.

With regard to the request for compensation for general damages of Tshs. 13,500,000/= (at 15% of Bid Price of Tshs. 90,000,000/=) and tender preparation costs of Tshs. 600,000/=, the Authority cannot grant them as they are too remote.

Other matters that caught the attention of the Authority:

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

- (a) The tender was advertised only once contrary Regulation 80(5) of GN No.97 of 2005 which requires it to be advertised at least twice.
- (b) In view of the weaknesses identified in the evaluation as analyzed under the second issue, the Authority doubts the competence of the Members of the Evaluation Committee.
- (c) The Authority also noted that the evaluation was carried out from 22nd April, 2010, up to 24th April, 2010, while the personal covenants were signed on 24th April, 2010 i.e. at the end of the Evaluation process instead of before starting the Evaluation process. The Authority further observes that the requirement to sign Personal Covenants before beginning the evaluation process is not

optional as it is intended to allow the members to confirm that they do not have any conflict of interest and also to allow them not to take part in the evaluation process where they find that they have a conflict of interest. The Authority observes that this act breached the requirements of Section 37(6) of the Act.

- (d) The Authority is also concerned with the conduct and competence of the PMU for failure to:
- prepare a tender advertisement that complies with the requirements of the applicable law;
 - prepare tender documents,
 - detect the anomalies and shortfalls contained in the Evaluation Report;
 - advise the Tender Board accordingly.
- (e) In view of the anomalies pointed out in this decision, the Authority is concerned with the

integrity and competence of the Tender Board. The Authority's stand is derived from, amongst others, the following shortfalls:

- Changing the recommendations of the Evaluation Committee.
- Changing the specifications which were already known by the tenderers.
- Giving untrue statements that some tenderers did not indicate the models while they did and the Evaluation Report so indicated.

Having considered all the facts and evidence, the Authority concludes that, the tender process was marred by irregularities and the award made in favour of J.B. Electronics & General Traders Co. Ltd is a nullity at law.

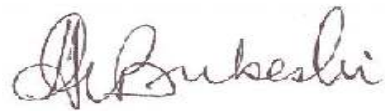
On the basis of the aforesaid findings, the Authority upholds the Appeal and orders the Respondent to:

- **re-start the tender process afresh in observance of the law;** and
- **compensate the Appellant a sum of Tshs. 2,391,000/= for the following costs:**
 - (i) Consultation Legal fees **Tshs. 1,350,000/=;**
 - (ii) Tender document purchase fee – **Tshs. 50,000/=;**
 - (iii) Transportation and accommodation costs **Tshs. 871,000/=;** and
 - (iv) PPAA appeal fees – **Tshs. 120,000/=.**

That said, it is the sincere hope of this Authority that, the Respondent in particular and other procuring entities in general, will take a lesson from this decision in abiding with the law.

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 6th September, 2010.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MR. M.R. NABURI.....


2. MR. K.M. MSITA


3. MS. E. J. MANYESHA.....
