

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

APPEAL CASE NO. 82 OF 2010

BETWEEN

WASAFI COMPANY LIMITED APPELLANT

AND

ACCOUNTANT GENERAL'S OFFICE.....RESPONDENT

DECISION

CORAM:

- | | |
|--------------------------------|--------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | -Chairperson |
| 1. Mr. M.R. Naburi | - Member |
| 2. Mrs. R. Mang'anya | - Member |
| 3. Ms. E. Manyesha | - Member |
| 4. 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. Harrison S. Eliakim – Managing Director
2. Mr. Michael Y. Kibindu – Administration Manager

FOR THE RESPONDENT

1. Mr. Rujama Chisomo – Legal Officer
2. Mr. David Kivembele – Principal Supplies Officer
3. Mr. Benas Mayogu – Principal Procurement Officer

This decision was scheduled for delivery today 16th November, 2010, and we proceed to deliver it.

The appeal at hand was lodged by **WASAFI COMPANY LIMITED** (hereinafter to be referred to as “**the Appellant**”) against **ACCOUNTANT GENERAL’S OFFICE** (hereinafter to be referred to as “**the Respondent**”).

The said Appeal is in respect of tender No. IE/031/2009-2010/HQ/S/07 for the year 2009/2010, for Provision of Cleaning Services of Office and Outside Compound of the Accountant General’s Department.

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 advertised the tender for Provision of Cleaning Services of Office and Outside Compound of the Accountant General’s Department *vide* The Guardian, Nipashe and Daily News of 2nd and 3rd March, 2010.

The tender opening took place on 31st March, 2010, whereby six tenderers submitted tenders as follows:

S/ NO	Name of a tenderer	Bid Price
1.	M/s Care and Sanitation Supplies Ltd	Tshs 2,423,012/- Per Month VAT Inclusive
2.	M/s Masu Intertrade Ltd	Tshs 134,233,968/- VAT inclusive for 2 yrs (4,739,900/- pm)
3.	M/s Ram Investment Ltd	Tshs 54,253,298.88 VAT Inclusive for 2 yrs (2,260,554.12pm)
4.	M/s Wasafi Company Ltd	Tshs. 9,760,000/- VAT inclusive for 2 yrs (2,490,000/- pm)
5.	M/s Property Market Consultants Ltd	Tshs.6,866,000/- per month (VAT Inclusive)
6.	M/s Rik's Enterprises Ltd	Tshs. 102,144,000/- VAT inclusive 2yrs (4,256,000/- per month)

The said tenders were evaluated and the award was made in favour of M/s Masu Intertrade Ltd for a two year contract for a total sum of Tshs. 134,233,968/-.

On 03rd July, 2010 the Appellant wrote to the Respondent, a letter referenced TA/WCL/LO/01/JULY/2010 requesting to be informed of the tender results. However on 5th July, 2010, their services were terminated without notice and the Successful Tenderer took over the work. On the same date, the Appellant received a letter from the Respondent referenced ACGEN/DTB/PMU/10/173 dated 1st July, 2010, informing them that their tender was unsuccessful.

On 21st July, 2010, the Appellant wrote another letter to the Respondent referenced TA/WCL/LO/02/JULY/2010 asking to be informed of who had been awarded the tender and at what contract price.

On 27th July, 2010, the Appellant received a letter from the Respondent referenced IE/031/2009-HQ/S/07/02 informing them that the tender had been awarded to M/s Masu Intertrade Ltd for a two year contract at the sum of Tshs. 134,233,968/-.

On 3rd August, 2010, the Appellant wrote a letter to the Respondent referenced TA/WCL/LO/03/2010 inquiring about the reasons for their disqualification.

On 23rd August, 2010, the Respondent replied to the Appellant inquiry *vide* a letter referenced IE/031/2009-10/HQ/S/07/03 informing them that their tender was found to be unsuccessful due to the following reasons;

- The number of staff presented by the Appellant was 11 which is less than the required minimum number of 15.
- The Appellant had no sanitizers and polishing machines, hence having less than the required three (3) pieces of equipment for performing the envisaged assignment.
- The average marks scored by the Appellant was 72% which is less than the pass mark (score) of 80%.

Upon being dissatisfied with the reasons for their disqualification, the Appellant *vide* letter referenced TA/WCL/LO/04/2010 dated 6th September, 2010, filed an

application for administrative review to the Respondent and copied the same letter to the Public Procurement Regulatory Authority (hereinafter to be referred to as **“PPRA”**).

On 13th September, 2010, the Appellant received a letter from PPRA referenced PPRA/IE/031/5 advising them to submit their appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as **“the Authority”**) since the contract had already entered into force.

On 21st September, 2010, the Appellant lodged their Appeal to this Authority.

SUBMISSIONS BY THE APPELLANT

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

That, the Tender Document did not indicate the minimum number of staff required; hence the Appellant set the number according to their expertise and experience.

That, page 76 of the Tender Document (Terms Of Reference) provides a list of equipment with no minimum numbers required for the service, hence the reasons that the Appellant has less than three (3) pieces of equipment for performing the envisaged assignment is not valid and contrary to the requirements of the Tender Document.

That, the Tender Document requires a list of equipment which includes, among other things, a polishing machine and scrubbing machine. It is from the experience of the Appellant that, a polishing and scrubbing machine is one and the same thing; it can be used to perform both kinds of works since it requires a change of brush depending on the type of work to be performed at that particular time.

That, the sanitizers were clearly indicated in the Appellant's Priced Activity Schedule together with cleaning services. Also the Appellant had offered to

provide sanitary bins, sanitizers and refills at the same costs.

That, the Tender Document did not indicate how the marks would be allocated in terms of experience, equipment, and technical personnel as required under Section 65(2) of the Public Procurement Act, of 2004 Cap. 410 (hereinafter to be referred to as the "**Act**") and Regulation 9 of the Public Procurement (Goods, Works, Non consultant services and disposal of public assets by tender) Government Notice No. 97 of 2005 (herein after to be referred to as "**GN No. 97/2005**"). However, the same was done during the evaluation process whereby marks were awarded to each of the tenderers. Thus the Appellant suspects that favouritism might have taken place during the evaluation process.

That, if the Tender Document could have indicated specifically how the evaluation would be carried out, the Appellant could have scored above the minimum pass mark required as they had met all the criteria.

That, the Appellant suspects that, the Respondent had set some of the criteria during the evaluation process, instead of including them in the Tender Document so that they would be known to all tenderers for bidding purposes.

That, the Appellant has been providing cleaning services to the Respondent for the past four years without a formal contract. During that period there were no verbal or written complaints that they had performed below standard. Rather the Respondent had been using the Appellant's staff for performing other duties, but the same did not affect the performance of the Appellant in that particular contract.

That, the Appellant had not been informed of the tender results until 5th July, 2010, when they reported to the Respondent's premises for cleaning purposes as they were the former service providers, only to find employees of another company performing the same work.

That, as a result of the Respondent's failure to notify the Appellant about the tender results, the latter had incurred costs for terminating its employees without notice. They had expected that they would have been the service providers for the month of July 2010 as they had been doing so since their contract expired in 2006. Following the expiry of the contract they had continued providing services whereby an invoice was raised at the end of each month and payment effected.

The Appellant therefore, prayed that the award decision be reviewed and re-award be made to them. They also prayed to be compensated a total of Tshs **7, 756, 000/-** as per the following breakdown;

(i) Tshs **1, 276,000/-** being compensation paid to the Appellant's employees by terminating them without due notice as shown hereunder:

- Cleaners 11 x Tshs. 80,000= 880,000/-
- Supervisor 1 x Tshs. 120,000=120,000/-
- Social security contribution 10% = Tshs. 1,000,000/-

- Skills Development Levy 6%of Basic Salary Tshs. 60,000/-
 - Administrative overhead 10% Tshs. 116,000/-
- (ii) Tender preparation fees Tshs. 1,460,000/-
- Tender fees Tshs 100,000/-
 - Consultancy fees Tshs. 1,050,000/-
 - Stationery, typing and binding Tshs. 310,000/-
- (iii) Appeal costs 1,020,000/-
- Appeal fees Tshs. 120,000/-
 - Consultant for preparation of the Appeal Tshs. 700,000/-
 - Stationery, typing and binding Tshs. 200,000/-
- (iv) Compensation for disturbance, humiliation for eviction at the place of work without following procedure Tshs 4,000,000/-
- (v) Any other remedy the Authority deems fit.

SUBMISSIONS BY THE RESPONDENT

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

During the hearing the Respondent raised a Preliminary Objection, to wit, that the Appellant did not observe the dispute settlement procedures provided for under Regulations 109, 110 and 111 of the GN. No. 97/2005.

Arguing on the merits, the Respondent submitted as follows;

That, the Appellant was found to be non responsive and they were duly notified of the tender results *vide* a letter referenced ACGEN/DTB/PMU/10/173 dated 1st July, 2010.

That, the Respondent's Tender Board approved award to M/s Masu Intertrade Ltd at its Extra Ordinary meeting held on 16th June, 2010, after their tender was found to

be responsive to the requirements of the Tender Document.

That, the Evaluation Committee was guided by Invitation for Bids (hereinafter to be referred to as "**IFB**"), Invitation to Bidders (hereinafter to be referred to as "**ITB**") and Terms of Reference (hereinafter to be referred to as "**TOR**") to reach their decision in the disputed tender.

That, the evaluators applied Quality and Cost Based Selection (hereinafter to be referred to as "**QCBS**") method of evaluation as stipulated in Item 1.1 of the Bid Data Sheet.

That, the Evaluation Committee set the minimum criteria for evaluation purposes as the Tender Document was silent on the minimum number of staff required as well as the required number of machines. Further, the Evaluators set the number of staff required to be 15 as there were six work stations, that is, two for each station and three supervisors for all work stations. The machines

were grouped into three whereby two work stations would share one machine.

That, the Respondent conceded that the Tender Document had some deficiencies and the same were noted and modified by the evaluators during the evaluation process.

That, the evaluation process was conducted in accordance with Clauses 27 and 28 of the ITB, and recommendations of the award were based on Clause 33.1 of the ITB.

That, the Appellant's tender did not show that they would supply the sanitizers as required and if the said sanitizers were shown in the Price Activity Schedule the same would amount to a deviation and modification of the Tender Document.

On reliefs, the Respondent submitted that;

- The claim for salary compensation paid to employees who were terminated without notice is not justifiable as the Appellant did not have a valid contract with the Respondent at the time of the said termination.
- The tender purchase fees are not refundable and the same was explicitly provided for in the tender advertisement.

ANALYSIS BY THE AUTHORITY

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

- **Whether the Appeal is properly before the Authority.**
- **Whether the Evaluation Process was conducted in accordance with the law.**

- **Whether the Appellant was unfairly disqualified**
- **Whether the award to the successful tenderer was proper at law**
- **Whether the Respondent's failure to notify the Appellant contravened the law**
- **To what reliefs, if any, is the Appellant entitled to.**

Having identified the issues in dispute, the Authority proceeded to resolve them as follows:

1.0 Whether the Appeal is properly before the Authority

During the hearing the Respondent raised a Preliminary Objection that the Appellant did not observe the dispute settlement procedures provided for under the law. In their submissions the Respondent contended that the Appellant was required to observe the dispute settlement procedures as provided under Regulations 109, 110 and

111 of the GN. No. 97/2005. The Respondent contended further that, the Appellant filed an application for administrative review on 6th September, 2010, while the same was to be done within 28 days after notification of the tender results. Thus the appeal is not properly before the Authority.

The Authority revisited the documents submitted and noted that, the notice of award was communicated to the successful tenderer on 17th June, 2010, was copied to all other unsuccessful tenderers. However, the said letter was not received by the Appellant. The Authority further noted that, the Appellant received tender results notification on 5th July, 2010.

Upon being notified of the tender results, the Appellant wrote a letter to the Respondent on 21st July, 2010, requesting to know the name of the successful tenderer as well as the awarded price. The Respondent replied through their letter of 27th July, 2010, whereby they disclosed the name of the Successful Tenderer to be Masu Intertrade Ltd who was awarded the tender at a

contract price of Tshs. 134, 233,968/-. On 3rd August, 2010, the Appellant wrote again to the Respondent asking for the reasons why their bid was found to be non-responsive. The Respondent replied to the Appellant's letter on 23rd August, 2010, giving reasons on their disqualification. On 6th September, 2010, which was thirteen days after receiving the Respondent's reply, the Appellant filed an application for review to the Respondent and copied the same to PPRA. On 13th September, 2010, PPRA advised the Appellant to file an appeal to this Authority given that the contract had already entered into force thus ousting the powers of the Accounting Officer and PPRA to determine the matter. The Appellant submitted their Appeal to this Authority on 21st September, 2010 which was within seven days of receiving the letter from PPRA.

From this sequence of events, the Authority is satisfied that from the date the Appellant received the notification of award to the date of filling an application for administrative review there was communication between the Respondent and the Appellant. Further the Authority

noted that, the Appellant's intention of filing an application for administrative review came up after they had been notified of the reasons for their disqualification which was received on 23rd August, 2010. The Authority does not agree with the Respondent that, the Appellant ought to have filed an application for administrative review immediately after the tender results notification as the reasons for their disqualification were by then unknown. The Appeal to this Authority was lodged after the Appellant was advised by PPRA to do so.

The Authority wishes to enlighten the Respondent that, Section 80(3) of the Act which is in *pari materia* with Clause 47.3 of the ITB, read together with Section 82(2)(a) of the Act and Clause 51.1 of the ITB, ousts the jurisdiction of the Accounting Officer and PPRA to handle complaints once a procurement contract enters into force. The said Clauses 47.3 and 51.1 as well as Section 82(2) (a) read as hereunder:

“Clause 47.3 The head of a procuring entity shall not entertain a complaint or dispute or

continue to do so after the procurement contract has entered into force". (Emphasis supplied)

"Clause 51.1 The Bidder not satisfied with the decision of the Public Procurement Regulatory Authority or **whose complaint cannot be entertained by the Head of the Procuring Entity or the Public Procurement Regulatory Authority shall appeal to the Public Procurement Appeals Authority (PPAA)**". (Emphasis added)

"S. 82(2) A supplier, contractor or consultant entitled under section 79 to seek review may submit 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** and provided that the complaint or dispute is submitted

within fourteen days from the date when supplier, contractor or consultant submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when supplier, contractor or consultant should have become aware of those circumstances.” (Emphasis added)

The above quoted provisions entail that the Authority has sole original jurisdiction on complaints where a procurement contract has already entered into force. 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 subsection 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)

Therefore, given the facts of this appeal, the Authority is of the settled view that, the Appellant had followed the proper review procedures as required, hence it cannot be said that the Appeal is improperly before the Authority.

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

Having ruled on the Preliminary Objection raised, the Authority proceeded to resolve the issues in dispute as hereunder:

2.0 Whether the Evaluation Process was conducted in accordance with the law

In its endeavor to ascertain whether the evaluation process was conducted in accordance with the law the Authority reviewed the documents submitted and the contesting oral submissions by parties *vis-a-vis* the Tender Document and the applicable law. In so doing, the Authority examined the tender process in order to

establish whether procedural requirements were adhered to in accordance with the law.

To start with, the Authority reviewed the Tender Document in order to ascertain whether it contained the requisite information as required by Regulation 83 of GN No. 97/2005. The said regulation requires the content of the Tender Document to include, among other things, eligibility criteria, technical and quality specifications, the manner in which the tender price is to be formulated and expressed, criteria other than the price to be used in determining the successful tenderer and the relative weight of such criteria.

The Authority noted that, the Tender Document contained generally the required information, save for the following shortfalls:

(i) **Evaluation Method.**

Item 1.1 of the Bid Data Sheet specifically indicated that the evaluation method would be **Quality and Cost**

Based Selection. Under this part the Respondent had indicated specifically that the tenders would be evaluated based on quality and cost of the services to be rendered.

The Authority revisited Regulation 57(1) of Public Procurement (Selection and Employment of Consultants) Regulation of GN No 98 of 2005 (hereinafter to be referred to as GN No.98/2005) which provides as follows;

“The Evaluation of the proposals shall be carried out in the following stages:

(a) The Quality, and

(b) The cost” (Emphasis supplied)

Based on the above quotation the Authority is of the view that, QCBS is an evaluation method for consultancy services and not for evaluation of tenders relating to non consultant services.

The Authority further noted that, the proper method for evaluation of tenders relating to goods, works or non consultant services has been provided for under

Regulations 90, 91, 92, 93 and 94 of GN No. 97/2005. The said regulations provide explicitly on how tenders for non consultant services will be evaluated at each stage of evaluation.

The Authority further reviewed the Tender Document and observes that, Clauses 27 to 34 of the ITB show how the tender in question would be evaluated. That stated, the Authority wonders why the Respondent failed to adhere to what is provided in the ITB and instead they went out of their way to specify in the Bid Data Sheet that the selection method would be QCBS.

During the hearing the Respondent conceded that their Tender Document was faulty.

The Authority therefore finds that, the Respondent had erred in law by specifying a wrong selection method in the evaluation of the tenders.

(ii) Terms of Reference (TOR)

There were three concerns which were raised by the Appellant regarding the TOR as analysed below:

(a) Apportionment of Scores

The Authority revisited the Appellant's argument on this point that, the Tender Document did not indicate how the criteria would be weighted and scores apportioned during the evaluation process as a result they failed to know how their tenders were to be evaluated. That the scores became known to the Appellant after being given the reasons for their disqualification.

In defence the Respondent stated that the evaluation factors used were contained on page 75 of the Tender Document which contained the Terms of Reference. They also added that the QCBS methodology was contained in the Bid Data Sheet.

In order to ascertain the validity of the parties' argument the Authority revisited Section 65(2) of the Act which provides as follows;

"S. 65 (2) The tender documents shall specify any factor in addition to price, which may be taken into account in evaluating a tender and how such factors may be quantified or otherwise evaluated"
(Emphasis added)

Based on the above quoted provision the Authority accepts the Appellant's argument that, the evaluation criteria had to be included in the Tender Document as well as how such factors would be quantified during evaluation process. Hence the Respondent's failure to do so contravened the law.

(b) Number and Type of Equipment required

With regard to this point, the Authority revisited the Appellant's argument that, the Respondent's TOR provide

for a list of equipment with no minimum numbers required for the services, hence the issue of three (3) pieces of polishing machines which was among the reasons for disqualification of the Appellant.

In reply the Respondent conceded that the exact number of equipment was not specified, but the same was set by the Evaluators during the evaluation process. The Evaluators decided that among the six work stations there should be a polishing machine to be shared by two work stations, hence three polishing machines were required.

In order to establish the validity of the Appellant's argument the Authority revisited the TOR and noted that, it had specified among other things, the work stations at which the cleaning services were to be carried out, the equipment and consumables required for performance of the services. However, the TOR did not indicate the number of equipment which was to be provided by service providers.

For purposes of clarity the Authority reproduces Clause 1.6 of the TOR which provide for a list of equipment required as quoted hereunder;

“All equipment and consumables required to undertake the services are to be supplied by the Service Providers. This includes but is not limited to the following items;

- Soft Brooms
- Hard Brooms
- Toilet Brush
- Mob and buckets
- Dusters
- **Scrubbing Machine (?)**
- Polishing Machine
- **Vacuum Cleaners, wet and dry**
- Sanitary disposal bin
- **Sanitizer Machine and refills**
- Toilet Paper
- Paper towels
- Soap” (Emphasis supplied)

The above quoted list covered the items to be supplied by the tenderers. However, the said list did not indicate the quantities of each of the items to be supplied.

The Authority also noted that some of the requirements in the TOR were unclear as they contained question marks (?) like;

- Scrubbing machine (?) etc

The Authority observed that, the TOR did not provide for the required number of equipment or machines, thus the Authority finds the act of evaluators setting the said requirements during evaluation process to be contrary to the law, as tenderers must have all the information regarding the tender before the deadline for submissions of bids.

(c) Number of Staff Required

The Authority revisited the Appellant's argument on this point that, their bid had been unfairly disqualified as the Tender Document was silent on the number of staff

required, hence the specifications quoted by tenderers were based on their experience and expertise on the subject matter. The issue of 15 staff came to the Appellant's knowledge after being informed of the reasons for their disqualification.

In reply the Respondent conceded that, the number of staff required was not specified in the Tender Document. However, the same was set by the Evaluators during the evaluation process for purposes of assisting them to ascertain the number of staff required.

Having considered the arguments by parties with regard to this point, the Authority is of the view that, the TOR were insufficient as they did not contain the required information to enable tenderers to prepare competitive bids.

The Authority having considered the parties arguments on the issue of TOR in general and specifically on matters relating to apportionment of scores, equipment and staff requirements, finds the Respondent's act to have

contravened Section 63(2) of the Act which is in *pari-materia* with Regulation 83(3) of GN No. 97/2005, read together with Regulation 90(4) of GN No. 97/2005 which provide as hereunder;

“S 63(2) The tender document 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 or works to be provided”. (Emphasis supplied)

“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)

Based on the analysis made above, the Authority is of the firm view that, the Appellant was unfairly disqualified, as

the criteria used to disqualify them were not part of the Tender Document.

The Authority therefore, finds that, the Tender Document did not contain all the required information needed by tenderers to enable them to prepare responsive bids and hence contravened the law.

Thereafter, the Authority proceeded to examine the evaluation process in order to ascertain whether it was conducted in accordance with the law.

The Authority started by revisiting Clauses 27, 28, 29, 30, 31, 32, 33 and 34 of the ITB which provide on how the evaluation would be conducted.

The Authority reviewed the Evaluation Report and noted that the evaluation process was done in three main stages, namely, Preliminary Evaluation, Detailed Evaluation and Price Evaluation.

In reviewing the Evaluation Report the Authority noted that, during Preliminary Evaluation all six tenders were checked for Substantial Responsiveness using the following factors; Verification, Eligibility, Bid Security, and Completeness of Bid as required by Clause 27.1 of the ITB which provides as follows;

“Prior to detailed evaluation of tenders, the Procuring Entity will determine whether each bid

- (a) meets the eligibility criteria defined in ITB Clause 3;
- (b) has been properly signed;
- (c) is accompanied by the required securities;
- (d) is substantially responsive to the requirements of the Bidding Documents.

The Procuring Entity’s determination of a tender’s responsiveness will be based on the contents of the tender itself.” (Emphasis added)

During this stage all six tenders were found to be responsive and qualified for detailed evaluation.

However, upon review of the submitted Tenders the Authority noted that, the Power of Attorney of M/s Masu Intertrade Limited (hereinafter to be referred to as "**the successful tenderer**") was defective in that, it was transferring powers from the Company to one Ms Flora Kasambala, a director and bears only one signature that of the recipient. In other words, no representative of the Company signed to indicate the transfer of powers on behalf of the company. Hence it fails to show from whom the powers were being transferred.

The Authority also noted the same type of defect in the Power of Attorney submitted in the bid document of M/s Property Market Consult Limited where the powers were being transferred from the Company to one Ms. Zainab Sinare who is the Managing Director. The Power of Attorney bears one signature of Ms Zainab Sinare and no one else has signed on behalf of the company. That means the said person, Zainab Sinare was transferring powers unto herself.

The Authority revisited Clause 27.3 of the ITB which also provides for the information to be considered during preliminary evaluation of tenders. The said ITB provides as follows;

“The Procuring entity will confirm that the documents and information specified under **ITB Clause 11 and **ITB Clause 12** have been provided in the Bid. **If any of these documents or information is missing or is not provided in accordance with Instructions to Bidders, the Bid shall be rejected**”** (Emphasis added)

The Authority further revisited Clause 11.1 of the ITB which provides as follows:

“The bid prepared by the Bidder shall constitute the following components;

- a) The Form of the Bid (in the format indicated in Section VIII)
- b) Information requested by sub-clauses 12.3; 12.4 and 12.5

- c) Bid security or bid securing declaration in accordance with ITB Clause 17
- d) Priced Activity Schedule
- e) Qualification information Form and Documents
- f) Alternative offers were invited in accordance with ITB Clause 18;
- g) Written power of attorney authorizing the signatory of bid to commit the bidder in accordance with ITB Clause 19**
- h) Any other document required in the Bid Data Sheet.” (Emphasis added)

Based on the above quoted provision the Authority is of the view that, Preliminary Evaluation was to be done in accordance with Clause 27 of the ITB read together with Clauses 3, 11 and 12 of the ITB which provide for what has to be considered during preliminary evaluation. The Evaluation Report shows that verification, eligibility, Bid Security and Completeness of Bid were checked during that process. However, the report does not show in detail

what was checked under verification, eligibility or completeness of the bid.

Accordingly, the Authority is of the considered view that, the Preliminary Evaluation was not conducted in accordance with the requirements of the Tender Document. Had the evaluators been diligent enough they would have shown in detail what was assessed under verification, eligibility and completeness of the bid. Further, they would have noted the anomalies in the Powers of Attorney submitted by the successful tenderer and M/s Property Market Consult Limited. To wit, they were not drawn in accordance with the law.

The fact that the successful tenderer's Powers of Attorney was defective was conceded by the Respondent during the hearing, and that the same ought to have been noted during Preliminary Evaluation and the bid rejected at that stage.

Thus, failure by the evaluators to reject the defective bids at the Preliminary evaluation stage contravened Clause 27.3 of the ITB.

The Authority therefore is of the view that, had the evaluation been properly done the bids of the successful tenderer and that of M/s Property Market Consult Limited would have been found to be substantially non responsive for submitting defective Powers of Attorney and accordingly disqualified at the Preliminary Evaluation Stage and not passed for Detailed Evaluation.

Having reviewed the Preliminary Evaluation and found that it was not properly done, the Authority proceeded to review the Detailed Evaluation. In so doing the Authority observed that, prior to the detailed evaluation process, the evaluators set the criteria to be considered during that process of evaluation. A statement to that effect as contained in the Evaluation report is reproduced hereunder;

“Prior to embarking on the detailed evaluation process, the evaluation team agreed that the pass mark for technical scores would be 80 points. The Evaluation team further agreed that bidders must indicate that they have in their possession at least three machinery (equipment) in order to pass the technical evaluation and qualify for the next stage which is financial evaluation” (Emphasis supplied)

The Authority observes that it is at this stage that the factors to be checked and how they were to be checked were set. The Authority is of the view that, the setting of evaluation criteria by the evaluators at this stage was wrong since the criteria were required to have been specified in the Tender Document so as to be known by the tenderers prior to the bid submission. The Authority observes that the criteria set and used by the Evaluators in the detailed evaluation process were new and not known to tenderers prior to submission of their bids.

The TOR shown above earlier, indicate that tenderers were required to show availability of staff and various equipment including machinery, but it was not stated categorically the number of staff or machines required. Also Item 1.1 of the Bid Data Sheet indicated that selection method will be QCBS but the scores were not indicated hence tenderers did not know how their bid will be evaluated.

The Authority finds the act of the evaluators of setting their own criteria outside of what was contained in the Tender Document to be contrary to Section 65 (1) and (2) of the Act read together with Regulation 90(4) of GN No. 97/2005 as quoted hereunder;

“S.65(1) The basis for tender evaluation and selection of the lowest evaluated tender shall be clearly specified in the instructions to tenderers or in the specification of the required goods or works” (Emphasis supplied)

“S. 65 (2) The tender documents shall specify any factor in addition to price, which may be taken into account in evaluating a tender and how such factors may be quantified or otherwise evaluated”

(Emphasis added)

“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 supplied)

Upon further review, the Authority noted that, during detailed evaluation stage tenders were checked if they had complied with the technical specification criteria and that included the following;

- **Evidence for the firms experience in undertaking cleaning services in Dar es**

Salaam for not less than 3 years (10 marks)

- **Number of the contracts of similar nature and size undertaken by the firm for the past 5 years (5 marks)**
- **Evidence of annual turnover volume for 3 years not less than 2.5 times of the estimated cash flow of the contract (5 marks)**
- **Manager; 3 years contract in managing contracts of equivalent nature and volume. (20 marks)**
- **Number of proposed cleaning staff for the whole assignment (at least 15 staff) (10 marks)**
- **Proposed number of working hours per day (minimum 8 hrs) (10 marks)**
- **Equipments (16 marks)**
- **Consumables (4 marks)**
- **Completeness and compliance to scope of services**

Having reviewed the criteria used under detailed evaluation the Authority noted that, the same were wrongly checked at this stage as they were supposed to be used during Post-qualification as specified under Regulation 94 of GN No. 97/2005 for purposes of ascertaining the winning tenderer's capability to perform the contract.

The Authority is of the considered view that, the Respondent was required to conduct the detailed evaluation in accordance with Regulation 90 of GN No. 97/2005 and not Regulation 94 of GN No. 97/2005.

The Authority also observed that, there was inconsistency in the whole process of determining tenderers compliance with technical specifications. The Authority was unable to ascertain how the said evaluation was carried out as a result each of the Evaluators came up with different scores from the same criteria. For purposes of clarity the inconsistencies are herewith pointed out;

- The Evaluation Report shows that the weight assigned to the criterion of annual turnover volume for the past three years was 10%, however, Evaluators forms show that, the weight assigned was 5% and not 10%.
- The weight assigned for the criterion of number of contracts of similar nature undertaken by the firm for the past five years was indicated in the Evaluation Report to be 5%, however, the evaluation form of one of Evaluators, namely, Mwanaidi Araba shows that the scores which was assigned to this criterion was 10% instead of 5%.
- The evaluation form of another Evaluator, namely, B. Mayogu, indicated that, on the criterion of number of contracts with similar nature undertaken by M/s Care and Sanitation Supplies Ltd for the past five years to be 18 contracts, however, the evaluation form of Mwanaidi Araba on the same criterion and to the

same tenderer indicated that they had shown 48 contracts.

From the sample of inconsistencies pointed out above, the Authority is of the view that, the Evaluators did not discharge their duty diligently as shown by the divergence in the scores awarded and weights assigned to each criterion.

The Authority also is of the view that, such kind of evaluation signifies that tenderers were not equally treated during evaluation process as there was no justification of not using the scores as agreed. The question of differences on why Evaluators' evaluation forms presented different results on compliance of tenderers while they had evaluated the same bid documents was raised during the hearing, but the Respondent could not provide any satisfactory explanation to justify such unequal treatment of tenders.

The Authority further observed that, at the end of the detailed evaluation three tenders were found to be

substantially non responsive to the requirements of the Tender Document. The Authority also noted that, the minimum technical score required was 80%. M/s Ram Investment Ltd scored 82% but was disqualified at this stage for lack of basic equipment. The Authority finds this to be highly questionable and confusing as to how a company missing basic equipment could have scored above the pass mark. This raises doubt as to whether the said equipment was actually missing or it was a way of eliminating that particular tenderer at that stage.

Furthermore, the Authority finds the Respondent's act of imposing new requirements during evaluation and unequal treatment of tenderers to be improper and contrary to Section 46(4) of the Act which provides as follows;

"Any qualification criteria shall be made known to, and shall apply equally to all suppliers, contractors or consultants and a procuring entity shall impose no discriminatory criteria, requirement or

procedure with respect to qualifications of any supplier, contractor or consultant”.

(Emphasis added)

Based on the findings made above the Authority agrees with the Appellant that, some of the criteria were added during evaluation which depicts the element of favouritism.

Having reviewed Detailed Evaluation, the Authority proceeded to examine how Post-qualification was done. The Authority noted that the following criteria were assessed;

- Does the bidder have a duly authorization to supply the service in the United republic of Tanzania?
- Does the bidder have at least three years of adequate and proven after sales technical support facilities in Tanzania?

- Does the bidder have financial, technical and production capability necessary to perform the contract?
- Has the bidder furnished documentary evidence that he is doing business within the United Republic of Tanzania?

The Authority revisited the Tender Document to ascertain if these criteria were specifically provided for, and noted that none of the criteria quoted above was included in the Tender Document. That means they were formulated by the evaluators during post qualification process.

It was also noted that, page 20 of the Evaluation Report indicated that, Post qualification was carried out in accordance with Clause 13.3 of the ITB. Upon review of the Tender Document the Authority noted that, there is only Clause 13.1 which provides for Form of Bid. That means Clause 13.3 referred to by the Respondent as providing criteria for post qualification does not exist in the Tender Document.

The Authority wishes to enlighten the Respondent that, post-qualification has to be carried out in accordance with Regulation 94 of GN No. 97/2005. Furthermore Regulation 94(2) of the same GN provides clearly that the criteria for post-qualification have to be included in the solicitation documents. For purposes of clarity the Authority reproduces Regulation 94(2) of GN No. 97/2005 as hereunder:

“Reg 94(2) The criteria for post qualification shall be set out in the solicitation documents and may include:

- (a) Experience and past performance on similar contracts**
- (b) Knowledge of working local conditions**
- (c) Capabilities with respect to personnel, equipment and construction or manufacturing facilities;**
- (d) Financial capabilities to perform the contract**
- (e) Current commitments**
- (f) Litigation records**

(g) **Any other relevant criteria”** (Emphasis supplied)

From the above provision the Authority observes that, the Respondent had applied all of the criteria listed under Regulation 94(2) of GN No.97/2005 in respect of Post qualification for evaluation of tenders under detailed evaluation. Therefore the Authority is of the view that, the Respondent erred in law by conducting detailed evaluation using the criteria set for post qualification and conducting post qualification using criteria unknown to tenderers.

The Authority also considered the Respondent’s criteria used in post qualifying the Successful Tenderer, and observes that, they were unreasonable and not relevant for such a tender as there was no need for tenderers to provide after sales technical support or to have an authorization of supplying the service in the United Republic of Tanzania.

Having reviewed the Evaluation Report and having established that the evaluation process was not properly conducted, the Authority is of the settled view that, the evaluation process in its entirety was marred by irregularities.

In the light of the above findings, the Authority is of the firm view that, the evaluation process was not conducted in accordance with the law.

3.0 Whether the Appellant was unfairly disqualified

In resolving this issue, the Authority took cognizance of its findings in issue number two above, namely, that the evaluation process was not properly conducted. Accordingly, the Authority finds the Appellant to have been unfairly disqualified.

4.0 Whether the award to the successful tenderer was proper at law

In resolving this issue, the Authority also took cognizance of its findings in issue number two above, that the evaluation process was not conducted in accordance with the law. Had it been properly conducted the successful tenderer would have been disqualified at the Preliminary stage for being substantially non responsive for submitting a defective Power of Attorney. Accordingly the Authority concludes that the award to the successful tenderer was not proper at law.

5.0 Whether the Respondent's failure to notify Appellant contravened the law

In resolving this issue, the Authority revisited the Appellant's submission that, failure by the Respondent to notify them that their bid was not successful and that the tender had been awarded to M/s Masu Intertrade Ltd has caused them financial loss since they were required to

vacate Respondent's premises without notice them being the former service providers.

The Appellant submitted during the hearing that they were not aware of the award letter dated 17th June, 2010. In that, when the Appellant reported to work stations on 5th July, 2010 they found another company executing the same job. They were then required to vacate the premises, an act which embarrassed them and caused them to incur unnecessary expenses in terms of salaries in lieu of notice.

The Authority revisited the documents submitted and noted that, the notification of award to the successful tenderer was made on 17th June, 2010, vide letter referenced IE/031/2009-10/HQ/S/07/01. The successful tenderer accepted the offer on 21st June, 2010, vide a letter referenced MIL/MFEF-AG/2010-11/06.

Having noted that the notification of award and acceptance were done before July, 2010, and the commencement of the contract was 1st July, 2010, as per

Bid Data Sheet, the Authority is of the view that, the Respondent ought to have notified the Appellant about the tender results as required by Clause 39.3 of the ITB. The said Clause 39.1 of the ITB requires notification to unsuccessful tenderers to be done immediately after the furnishing of the performance security. The successful tenderer started execution on 5th July, 2010, that signifies that the successful tenderer had already furnished the performance security. Hence, it is the view of the Authority notification ought to have been given immediately after the performance security was furnished and before the commencement of the contract.

Accordingly, the Authority concludes that, failure of the Respondent to notify the Appellant contravened the law.

6.0 To what reliefs, if any, is the Appellant entitled to.

Having analyzed the contentious issues in dispute, the Authority finds it prudent to consider prayers by the Appellant.

The Authority revisited the Appellant's prayer that the Respondent be ordered to compensate the Appellant the sum of Tshs. 1,276,000/- being compensation paid to cleaners for termination without notice. With regard to this prayer the Authority observe that, the act of the Appellant vacating the Respondent's premises do relate to the execution of the former contract, hence the Authority does not have powers of granting the said prayer as it is arising out of contract execution, hence it is outside the Jurisdiction of the Authority. Therefore the prayer is rejected.

The Authority also considered the prayer that, the Appellant be compensated Tshs. 1,460,000/- being tender preparation fees and Tshs. 1,020,000/- as appeal costs. The Authority is of the view that, the Appellant is entitled to be compensated tender preparation fees as well as the appeal costs as they have resulted by the Respondent's non adherence to the law. Accordingly, the Authority orders the Respondent to compensate the Appellant **Tshs. 1,755,000/-** as shown hereunder;

- Tender fees Tshs 100,000/-
- Consultancy fees for tender preparation Tshs. 525,000/- being 50% of the total amount claimed.
- Stationery, Typing and Binding Tshs. 310,000/-
- Appeal filing fees Tshs. 120,000/-
- Legal fees Tshs 700,000/-

TOTAL Tshs. 1,755,000/-

The Authority considered the Appellant's prayer that, the Respondent be ordered to compensate them the sum of Tshs. 4,000,000/- being cost for disturbance and humiliation for eviction at work place without a notice, and finds the prayer to be too remote and not related directly to the tender in dispute, hence the prayer is rejected.

With regard to the Appellant's prayer that the Authority review the award decision and re-award the same to the Appellant, the Authority has reviewed the award decision

but is unable to grant the prayer to re-award the tender to them for lack of jurisdiction.

Therefore the Authority concludes that the Appeal has merit and orders the Respondent to:

- Restart the tender process afresh in observance of the law, and
- Compensate the Appellant the sum of **Tshs. 1,755,000/-** as per the down shown above

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 advertisement made reference to the General Procurement Notice of **29th September, 2010**, while the advertisement for this tender was made on **2nd March, 2010**. The Authority noted this typographical error ought to have been noted by the members of the Procurement Management

- Unit (PMU) if they could have been discharging their duties diligently.
- b) The Respondent's Procurement Management Unit (PMU) had exhibited high level of incompetence for preparing a defective Tender Document as its weakness had been pointed above on the analysis by the Authority. Also the PMU failed to advise the Tender Board on weaknesses noted on the Evaluation Report.
 - c) The Tender Board also did not act diligently as they would have noted the anomalies in the Evaluation Report before approving the award to the successful tenderer.
 - d) The Authority doubts the competence of the members of the Evaluation Committee due to high level of shortfalls noted in the Evaluation Report.
 - e) The Authority noted that the Tender Board Minutes of 16th June, 2010, have not been signed to date by the chairperson.

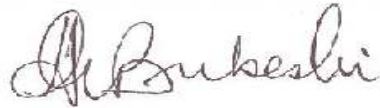
Having considered all facts and evidence, the Authority concludes that, the evaluation process was not conducted in accordance with the law leading to award being made in favour of the successful tenderer being improper and in contravention of the law.

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.**
- **Compensate the Appellant a total of Tshs. 1,755,000/-.**



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 16th November, 2010.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MR. M. R. NABURI

2. MRS. R. MANG'ENYA

3. MS. E. MANYESHA
