

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

APPEAL CASE NO. 92 OF 2010

BETWEEN

DOUR TANZANIA CO. LTD..... APPELLANT

AND

KONGWA DISTRICT COUNCILRESPONDENT

DECISION

CORAM:

- 1. Hon. A.G. Bubeshi, J. (rtd) – Chairperson**
- 2. Hon. V.K. Mwambalaswa(MP) – Member**
- 3. Mr. K.M. Msita – Member**
- 4. Ms. B.G. Malambuigi – Secretary**

SECRETARIAT:

**Ms. E. V.A. Nyagawa – Principal Legal
Officer**

FOR THE APPELLANT:

Mr. Ally Hamimu – Chief Executive Officer

FOR THE RESPONDENT

1. Ms. Anneth Lyatuu – Procurement Officer
2. Ms. Matinde Nyagonde – Asst. Supplies Officer

FOR THE INTERESTED PARTY – Macrobases (T) Ltd

Mr. Anthony K. Mutafurwa – Director

This Ruling was scheduled for delivery today 17th February, 2011 and we proceed to deliver it.

The appeal at hand was lodged by **DOUR TANZANIA COMPANY LIMITED** (hereinafter to be referred to as "**the Appellant**") against **KONGWA DISTRICT COUNCIL** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. LGA/022/2010/2011/HQ/G/01 PACKAGE NO. 4 for Supply of Hospital and Laboratory Equipment (hereinafter to be referred to as "**the Tender**").

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

On 7th October, 2010, the Respondent invited tenders for the tender under Appeal, *vide* the Daily News.

The tender opening took place on 5th November, 2010, whereby four tenderers submitted tenders as shown below:

- Macro Base (T) Ltd;
- Dour Tanzania Co. Ltd;
- Satima Labmedics Supplies; and
- Bravo Business Agency.

The tenders were evaluated whereby all four tenderers qualified for Detailed Evaluation. However, two tenderers, namely Satima Labmedics Supplies and Bravo Business Agency, were disqualified for failure to fill the Price Schedule in the Bid Document and for not filling some of the items in the Price Schedule respectively. The tenders by the Appellant and Macrobase (T) Ltd were subjected to price comparison whereby some items indicated that the Appellant's prices were higher than those of Macrobase (T) Ltd. The award was recommended in favour of Macrobase (T) Ltd and the Tender Board was requested to review the prices for some items as some of them seemed to be twice as much compared to the prices quoted by the Appellant.

On 15th November, 2010, the Tender Board approved the award in favour of Macrobase (T) Ltd subject to negotiation for reduction on prices for some of the items before signing the contract.

The Respondent communicated the award on 22nd November, 2010, *vide* letter referenced HW/KOG/PMU/F.20/54/160. The said letter invited Macrobase (T) Ltd for negotiations.

On 23rd November, 2010, the Respondent informed the Appellant *vide* letter referenced HW/KOG/PMU/F.20/54/160 that they were not successful.

Upon receipt of the Respondent's notification, the Appellant inquired the reasons for their disqualification, *vide* letter dated 25th November, 2010.

On 30th November, 2010, the Respondent *vide* letter referenced HW/KOG/F.20/18/VOL.III/56 informed the Appellant that they were the second responsive

tenderer and that the tender was awarded to the lowest responsive tenderer.

The contract between Macrobase (T) Ltd and the Respondent was signed on 1st December, 2010.

Being dissatisfied with the reasons for their disqualification, the Appellant appealed to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**").

SUBMISSIONS BY THE APPELLANT

The Appellant's arguments as deduced from documents availed to this Authority, as well as oral submissions and responses to questions raised by the Members of the Authority during the hearing may be summarized as follows:

That, they filled all items in the Price Schedule, save for, Items 214 – 232 which related to pharmaceutical products as the tender was for hospital and laboratory equipment only. They would have

contravened the law had they quoted prices for the business they are not licensed to do as that requires approval by the Tanzania Food and Drugs Authority (TFDA).

That, Item 97 (CAPPILUS HIV) was deleted by the Ministry of Health and Social Welfare since 2007 and in its place a new algorithm was issued. The Appellant feels that, the Tender Board is not aware of the said changes which create doubt on their competence.

That, there were irregularities during the tender opening session which rendered the process invalid.

That, the Appellant was selected as a representative of the tenderers but the Tender Board did not allow them to sign the records as the tenderers' representative which created doubt as to whether or not the process was free and fair.

That, according to the Tender Document, the tenders were supposed to be accompanied by a bid securing

declaration which should have been read out during the tender opening and recorded by the Secretary of the Tender Board. This was not done.

That, the prices quoted by the tenderers were not read out during the tender opening, hence it was difficult to identify the final prices because some of the items were included in the tender by mistake as the pharmaceutical tender was already awarded to Blue Pharmacy of Dodoma. Since the tender included pharmaceuticals which were already awarded, the contract with the Successful Tenderer will not be valid in case Blue Pharmacy decides to institute a suit.

That, circumstantial evidence indicates that there was communication between the Secretary of the Tender Board and one of the Directors of the Successful Tenderer before and after the tender opening.

That, at the tender opening they were informed that the evaluation process and award thereof would take 14 days from the date of opening, that is, till 19th

November, 2010. The Appellant inquired on the tender results by telephone on 19th and 20th November, 2010, but the said information was not availed to them instead they were directed to obtain the same by visiting the Respondent's offices.

That, on 25th November, 2010, the Appellant collected the notification letter from the Respondent and upon asking verbally the Secretary of the Tender Board for the reasons of their disqualification the latter told them that they did not fill in all quantities and price of all products in the Tender Document. The Appellant disagreed with the Secretary as they had filled all the items, except for pharmaceutical products.

That, they wrote to the Accounting Officer on 25th November, 2010, requesting for the reasons for not being awarded the tender. The Respondent replied that they were the second responsive tenderer as they had quoted higher prices compared to the Successful Tenderer. The Appellant was surprised as the reason which was previously communicated

verbally to them by the Secretary of the Tender Board was not written in the said letter.

That, the Appellant believed that the criteria for award were created after the tender was awarded and that the Tender Board knew from the beginning who was going to win the tender. Hence, inviting the tenders was a mere formality.

That, malpractices in the procurement process are rampant in the country, and the issue of Kongwa District Council is just a tip of the iceberg. It is important that tenderers should be courageous to point out the said malpractices; considering that tendering is a very costly exercise for small and up-coming companies. He further expressed complete satisfaction for being given an opportunity to be heard regardless of the outcome.

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

- (i) Review the whole process.

(ii) Upon review if it is established that there were irregularities, the following orders be issued:

- Cancel the tender as the opening process contravened the law hence resulting to an award being made to a non responsive tenderer.
- The tender be awarded to the Appellant as they were the second responsive tenderer.
- The Appellant be compensated for the following costs:
 - Appeal filling fees – Tshs. 120,000/=
 - Consultancy fee – Tshs 600,000/=
 - Costs arising from tender preparation, travelling & accommodation – Tshs. 1,500,000/=
 - Tender fee – Tshs. 100,000/=
 - Disturbance – Tshs. 3,000,000/=

REPLIES BY THE RESPONDENT

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

That, the tender process was conducted in accordance with the Public Procurement Act, Cap. 410 (hereinafter to be referred to as "**the Act**").

That, no irregularities were committed by the Respondent in the tender process.

That, during the tender opening, the Appellant's representative was selected to join the Secretary of the Tender Board to oversee the opening process.

That, GN. No. 97/2005 and Clause 8 of the Tender Document guides as to what should be done if a prospective tenderer need clarification.

That, the Appellant's representative has been calling the PMU staff several times before and after the

tender opening which is contrary to the tendering procedures.

That, during the evaluation process Items 116 – 236 were not considered because they were pharmaceutical products.

That, after the evaluation process the lowest responsive tenderer was awarded the tender.

That, the Appellant should substantiate their contention that a senior staff from the Respondent's Tender Board was communicating with one of the tenderers.

That, the Appeal lacks merit and therefore the Appellant should bear their own costs.

ANALYSIS BY THE AUTHORITY

Before analyzing the Appeal, the Authority deems it prudent to put it on record that during the hearing the Respondent was represented by two junior staff from the Procurement Management Unit (PMU) who could

not answer most of the questions raised by the Members of the Authority. The Respondent's failure to send senior officials to respond meaningfully to its queries denied the Authority an opportunity to get more information pertaining to the tender process and this fact depicts lack of seriousness on the part of the Accounting Officer.

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

- **Whether the tender process was conducted in accordance with the law**
- **Whether the Appellant was unfairly disqualified**
- **Whether the award to the successful tenderer was justified**
- **What remedies, 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 tender process was conducted in accordance with the law

In resolving this issue the Authority considered the Appellant's main contention that the tender process was conducted in contravention of the law and that the Authority should review the whole tender process. In reviewing this process the Authority examined the oral and documentary evidence produced vis-à-vis the applicable law and the Tender Document for purposes of ascertaining whether or not the said process was conducted in accordance with the law. In doing so, the Authority framed the following sub-issues:

- **Whether the Tender Document met the requirements of the law;**
- **Whether the tender opening was conducted in accordance with the law**

- **Whether the evaluation process was conducted in accordance with the law**
- **Whether the participation of a PMU official in both the evaluation and Tender Board was proper**
- **Whether negotiations of prices tendered was proper at law**
- **Whether the notification of award and subsequent contract between the Respondent and Macrobase (T) Ltd was proper at law**

Having framed the sub-issues the Authority proceeded to resolve them as follows:

Sub-issue I: Whether the Tender Document met the requirements of the law;

The Authority examined the Tender Document issued by the Respondent to ascertain whether it met the requirements of Sections 63 of the Act and Regulation 83 of GN. No. 97 of 2005 which guide as to the issuance of tender documents as well as the content thereof. Section 63 of the Act provides as follows:

“S. 63(1) The procuring entity shall use the appropriate standard model tender documents specified in the Regulations for the procurement in question.

(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 for the goods and works to be provided.”

Since the Regulation 83(1) is quite lengthy, the Authority reproduces the actual parts thereof which were breached by the Respondent in the course of customizing the Standard Tender Document to suit the tender under Appeal:

“83(1) The solicitation documents shall include instruction to tenderers with at a minimum, the following information:

- (a) The criteria and procedures, in conformity with the provisions of Regulation 14, relative to the evaluation of the qualifications of contractors, suppliers, service providers or asset buyers and relative to the further demonstration of qualification pursuant to Regulation 90(18);
- (b) the requirements as to documentary evidence or other information that must be submitted by suppliers, contractors, service providers or asset buyers to demonstrate their qualifications;
- (d) the criteria to be used by the procuring entity in determining the successful tender,

including any margin of preference and any criteria other than price to be used pursuant to Regulation 90(15) and the relative weight of such criteria;

- (e) the terms and conditions of the procurement or disposal contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties.
- (k) any requirements of the procuring entity with respect to the issue and the nature, form, amount and other principal terms and conditions of any tender security to be provided by contractors, service providers, suppliers or asset buyers ...;
- (o) the period of time during which tenders shall be in effect, in conformity with Regulation 87;
- (q) the procedures to be followed for opening and examining tenders;
- (v) notice of the right provided under Section 79 of the Act to seek review of an unlawful act or decision of, or procedure followed by,

the procuring entity in relation to the procurement or disposal proceedings; ”

The Authority detected the following deficiencies in the Tender Document issued by the Respondent:

- (a) The Table of Contents and the actual content in the Tender Document are different. For instance the former indicate that Section IV contains the Specific Conditions of Contract while they are missing in the document.
- (b) Clause 14.3 of the Instructions to Tenderers (hereinafter to be referred to as “**ITT**”) make reference to Clause 26.2 of the ITT while the last clause thereof is Clause 24. Similarly, Clauses 17.1, 19.2, 21.3 and 24.1(c) refers to Clauses 36, 41.2, 42 and 45 which are not contained in the ITT.
- (c) The tenderers were not required to submit a power of Attorney and there is no clause that

guides as to the manner in which a tender should be signed.

- (d) Apart from the eligibility and award criteria which were not exhaustive, the Tender Document lacked comprehensive evaluation criteria contrary to Regulation 83 of GN. No. 97/2005.
- (e) Post-qualification criteria were not stated contrary to Regulation 94(2) of GN. No. 97/2005 which require them to be set out in the solicitation documents.
- (f) The tender validity period was not specified contrary to Regulation 83(1)(o) of GN. No. 97/2005.
- (g) Clause 7.2 of the ITT states that **“the number of copies to be completed and returned with the tender is specified in the Tender Data Sheet”** which is conspicuously missing in the Tender Document.

- (h) There are no provisions for preliminary evaluation, detailed evaluation and post-qualification.
- (i) There are no specifications for the items to be supplied, save for a list thereof.
- (j) Most of the clauses in the ITT, like Clauses 1, 2, 3 and 4, just to mention a few; make reference to the Tender Data Sheet which is not contained in the Tender Document.
- (k) Clause 7.1 of the ITT lists documents forming part of the Tendering Documents as including the Tender Data Sheet and Special Conditions of Contract, Schedule of Requirements, Technical Specifications and other forms which are not contained in the Tender Document.
- (l) The review mechanisms are not indicated contrary to Regulation 83(1)(v) of GN. No. 97/2005.

- (m) The Tender Document does not contain the Bid Data Sheet.
- (n) The Tender Document did not require prospective tenderers to submit documents for post-qualification contrary to Regulation 94(2) GN. No. 97/2005.
- (o) The specific documents proving the tenderers eligibility were not stated contrary to Regulation 14(1)(a) of GN. No. 97/2005.
- (p) The relevant licenses to be submitted were not specified.
- (q) The Price Schedule contained some pharmaceutical products while the tender was for hospital and laboratory equipment.
- (r) Page numbers in the Tender Document are not consistent, for instance, page 38 is followed by page 46, 48 and thereafter page 81. During the hearing the Respondent submitted that some pages were missing, but upon being shown that the sequence of pages

was similar to what was reflected in the Table of Contents hence the issue of missing pages was a mere afterthought, they conceded that it was an omission.

- (s) The above changes introduced by the Respondent in the Standard Tender Document were major contrary to Regulation 83(3) and (4) of GN. No. 97 of 2005 which states as follows:

"83(3)A procuring entity **shall use** the appropriate standard tender documents issued by the Authority **with minimum changes**, acceptable to the Authority, as necessary to address project specific issues.

- (4) Any such changes shall be introduced only through tender or contract data sheets, or through special conditions of contract and **not by introducing changes in the standard wording of the Standard Tender Documents.**

Where no relevant standard tender documents have been issued, the procuring entity shall use other internationally recognised standard conditions of contract and contract forms acceptable to the Authority.”
(Emphasis supplied)

It should be noted that, the Authority referred to in Regulation 83(3) and (4) quoted above refers to the Public Procurement Regulatory Authority (PPRA).

In view of the above listed shortfalls, the Authority finds that the Tender Document did not meet the requirements of the law.

Sub-issue II: Whether the tender opening was conducted in accordance with the law

Having examined the Tender Document, the Authority proceeded to review the tender opening process as it formed part of the grounds of this

Appeal. In doing so, the Authority first revisited the Appellant's submissions on this point followed by the Respondent's replies before analyzing the two versions in the light of the Tender Document and the applicable law.

In their submissions the Appellant contended that the tender opening contravened the law as the following irregularities were committed:

- The prices quoted by tenderers were not read out in contravention of Clause 13.3 of the ITT;
- The Bid Securing Declaration was not checked contrary to Clause 13.3 of the ITT; and
- The Appellant's representative who was chosen to represent the tenderers to oversee the tender opening process was not allowed to initial the tenders submitted by tenderers.

The Respondent's replies on this point are as summarized herein below:

- They conceded that the quoted prices were not read out as the list of items was too long.
- They agreed with the tenderers that in areas where the tenderers did not fill in prices in the Price Schedule the same should be signed in order to avoid possibility of tampering with the documents.
- They conceded that the Bid Securing Declaration was not checked during the tender opening.
- With regard to the issue of the role of a representative chosen by the tenderers during the opening ceremony, the Respondent stated that, the said representative was not allowed to sign tenders submitted as that is the sole responsibility of the members of the Tender Board. Asked further, what was the spirit behind selection of the tenderers' representative, they offered no explanation.

In order to ascertain the validity of the conflicting arguments by parties, the Authority deemed it necessary to start by revisiting Clause 13.3 of the ITT which was relied upon by the Appellant. The said clause which is in *pari materia* to Section 66(3) of the Act states that:

“All other envelopes shall be opened one at a time. **The Tenderers’ names, the tender prices, the total amount of each tender** and of any alternative tender (if alternatives have been requested or permitted), any discounts, **the presence or absence of tender security, Tender Securing Declaration** and such other details as the appropriate tender board may consider appropriate, **will be announced by the secretary of the Tender Board or his delegate at the opening.**” (Emphasis added)

The Authority thus concurs with the Appellant that reading out the prices quoted by the tenderers was not optional but mandatory. Moreover, the Respondent’s submissions that failure to observe the

said Clause was done in agreement with the tenderers, is not acceptable as an agreement to breach the law is illegal *ab initio*.

With regard to the Respondent's failure to check the Bid Securing Declaration, the Authority observes that the Respondent contravened the law. The Authority also considered the Appellant's third point that, they were not allowed to initial the tenders submitted, and observes that the practice of choosing a representative of the tenderers who choose to attend the tender opening and the role of the said representative is not provided for in the Act.

Accordingly, the Authority's conclusion on the second sub-issues is that, the tender opening process contravened the law.

Sub-issue III: Whether the evaluation process was conducted in accordance with the law

As it has been observed at the beginning of the analysis on the Tender Document, that neither the evaluation criteria nor the procedures to be followed in evaluating the tenders were mentioned therein. In reviewing the Evaluation Report and the submissions by parties the Authority detected the following anomalies in the evaluation process:

- (i) The Evaluators filled the Personal Covenants by listing the number and titles of the packages to be evaluated instead of the names of the tenderers.
- (ii) The Tender Document did not contain exhaustive evaluation criteria. Therefore the said evaluation was conducted using criteria set by the Evaluators which were not known to tenderers contrary to Regulation 90(4) of GN. No. 97/2005 which provides as follows:

“The tender evaluation shall be consistent with the terms and conditions set forth in the tender documents and such evaluation shall be carried out using the criteria explicitly stated in the tender documents.” (Emphasis added)

- (iii) During Preliminary Evaluation the tenders were only checked for business licence, VAT/TIN, receipt of bid document and Certificates of Registration. The Evaluation Report does not show what was actually checked under **“receipt of bid document”**.
- (iv) The Evaluators also checked the **“Certificate of Registration”** which was not specified hence tenderers submitted different documents as shown hereunder:

- Macro Base (T) Ltd – **Certificate of Incorporation**
- Dour Tanzania Co. Ltd - **Certificate of Incorporation;**
- Satima Lab Medics Supplies – **Certificate of Registration of a Business Name;** and
- Bravo Business Agency – **Certificate of Registration of Change.**

The Authority observes that, had the evaluation been properly conducted, two tenderers, namely, Satima Labmedics Supplies and Bravo Business Agency ought to have been disqualified at the preliminary stage as those are mere business names. The Authority wishes to enlighten the Respondent that, a business name registered under the Registration of Business Names Act, Cap. 213, is not a legal personality therefore lacks legal capacity to contract.

- (v) Submission of a Bid Securing Declaration was not checked in contravention of Regulation

90(6) of GN. No. 97/2005 which states as follows:

“Prior to the 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.” (Emphasis added)

- (vi) It has been noted at the beginning of this analysis that, the tenderers were not required to submit Powers of Attorney. The Authority noted that two tenderers, namely, Satima Labmedics Suppliers and the Appellant did not attach the Powers of Attorney. The Authority wonders how, in the absence of such a pertinent requirement, could the Respondent be certain that the

tenders submitted were signed by duly authorized persons pursuant to Regulation 90(6) of GN. No. 97/2005.

Notwithstanding the above observation, the Authority discovered that, the Power of Attorney submitted by Bravo Business Agency was defective, in that, one **HAMISI JUMA BASUKA** transferred the said powers of Attorney unto himself by signing as both the transferor and transferee. Moreover, the Power of Attorney submitted by the Successful Tenderer, namely, Macrobase (T) Ltd lacks the signature of the person to whom the said powers were being transferred to.

- (vii) The Evaluation Report does not indicate how the licenses were checked as the Tender Document itself did not specify the required licenses. As a result of the Respondent's failure to specify the relevant licenses to be submitted, the tenderers submitted

different documents as shown in the Table below:

BIDDER	LICENSES SUBMITTED
Macro Base (T) Ltd	A business license for Import of Hospital equipments issued by the Ministry of Industry, Trade and Marketing
Dour Tanzania Co. Ltd	<ul style="list-style-type: none"> • A license for Hospital and Laboratory services issued by Ilala Municipal Council • A Certificate to Operate as a Dealer for Health Laboratory Products/Supplies issued by the Private Health Laboratories Board.
Satima Labmedics Suppliers	<ul style="list-style-type: none"> • A license for Hospital Equipment issued by Ilala Municipal Council • A Certificate to Operate as a Dealer for Health Laboratory Products/Supplies issued by the Private Health Laboratories Board. The validity of this Certificate expired on 30th June, 2010.
Bravo Business Agency	<ul style="list-style-type: none"> • A license for Laboratory Equipment issued by Ilala Municipal Council issued on 3rd November, 2009 and whose expiry date is shown as "30 June, 20" • A Certificate to Operate as a Dealer for Health Laboratory Products/Supplies issued by the Private Health Laboratories Board.

The Authority is concerned that, the Evaluators did not detect that the license submitted by Satima Labmedics Suppliers had expired. Moreover, the expiry date

indicated in the license submitted by Bravo Business Agency read **“30 June, 20”** a year which is completely irrelevant.

- (viii) The Tender Document did not provide for Detailed Evaluation, but the Evaluation Report indicates that, this stage involved price comparison of tenders whereby two tenders were disqualified as already stated in the facts of this Appeal, and the Appellant and the Successful Tenderer were subjected to price comparison. While answering questions raised by the Members of the Authority, the Respondent stated that the list of items to be supplied and prices thereof quoted by the said tenderers appearing in the Evaluation Report was a result of sampling made by the Evaluators. However, the Respondent could not explain what triggered the said sampling. The Authority’s observations on the sampling are that:

- Since this stage of evaluation involved price comparison and considering the fact that the prices quoted by the tenderers were in respect of each item on the Price Schedule, it was fair and just to compare prices in respect of each item as the said Schedule was merely a four page document.

- Out of the sampled items, the Evaluators noted only 13 items whose prices quoted by the Successful Tenderer were higher compared to the Appellant's. The Authority further noted that from Items 11 to 52, which were not sampled by the Evaluators, 15 items quoted by the Successful tenderer had higher prices than the Appellant's as shown in the Table appearing herein below:

Item	Price quoted by Macrobase (T) Ltd TSHS)	Price quoted by Dour Tanzania Co. Ltd (TSHS)
15	1,800	800
20	370,000	162,000
21	48,000	8,500
24	700,000	385,900
28	540,000	425,000
41	5,500	2,900
42	60,000	3,400
43	4,500	3,400
44	54,500	45,000
45	100,000	47,600
47	72,000	32,000
48	5,700	3,800
49	44,000	9,010
51	70,000	20,000
52	85,000	70,000

- The Authority also noted that, the Price Schedule in the Successful Tenderer's tender which was typed, some of the prices were inserted by hand which could raise suspicion as to its authenticity.

- (ix) The Authority noted that the award criteria were provided under Clause 15.1 of the ITT in the following words:

“Subject to ITT Clause 35 and 37, the Procuring Entity will award the Contract to the Tenderer whose tender has been determined to be **substantially responsive** to the tendering documents and who has offered the **lowest Evaluated Tender Price**, provided that such Tenderer has been determined to be:

- (a) **Eligible** in accordance with the provisions of ITT Clause 3;
- (b) **is determined to be qualified to perform the Contract satisfactorily;**
...” (Emphasis supplied)

The Authority noted that, both eligibility of the tenderers and substantial responsiveness of tenders were not properly determined. Furthermore, the lowest evaluated tender price and the tenderer’s

capability to perform the contract were not established. This was contrary to Sections 46, 47 and 48 of the Act read together with Regulations 90(6), 90(18) and 94 of GN. No. 97/2005.

- (x) The Evaluators erred in advising the Tender Board to negotiate with the Successful Tenderer on the items in the Price Schedule which were higher compared to the Appellant's as it contravened Clause 16.1 of the ITT. The Evaluators' recommendation reads as follows:

“The evaluation team recommended that Macrobase (T) Ltd, to be awarded with (sic) the tender for supply of Hospital and Laboratory Equipments (sic), but the Tender board should review the price for some items because some of them seem to be twice as much

compared to the price of the other bidder.” (Emphasis added)

The Authority is of the view that, the Tender Board equally erred in accepting this recommendation from the Evaluation Committee.

In view of the above observations, the Authority finds that the evaluation process was not conducted in accordance with the law.

Sub-issue IV: Whether the participation of a PMU official in both the evaluation and Tender Board was proper

The Authority also noted that, a PMU staff took part in the evaluation of the tenders and attended the Tender Board meeting which deliberated on the Evaluation Report and awarded the tender. The Authority observes that, this is a breach of Section 38 of the Act which provides for independence of functions and powers. The said provision states as follows:

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

(Emphasis added)

The Authority’s conclusion in respect of this sub-issue is that, it was not proper for a PMU official to take part in the evaluation of the tenders and thereafter attend the Tender Board meeting which approved the recommendations of the Evaluation Committee.

Sub-issue V: Whether negotiations of prices tendered was proper at law

The Tender Board approved the award in favour of Macrobases (T) Ltd without mentioning the tender price. Furthermore, they adopted the Evaluation

Committee's recommendation that negotiations be made with the Successful Tenderer on the items whose prices were higher than the Appellant's. The Authority observes that, the law does not allow negotiation on prices because as per Regulation 89(18) of GN. No. 97/2005 once the tenders are opened, no changes can be made on the price quoted. Furthermore, Regulation 95(2)(c) of GN. No. 97/2005 prohibits negotiations primarily for purposes of reducing prices in case of procurement of goods, works or services. The Authority further observes that, the negotiations directed by the Tender Board equally contravened Clause 19.1 of the ITT which guides as to the basis of negotiations as follows:

“Negotiations may be undertaken with the lowest evaluated tender relating to the following areas:

- (a) a minor alteration to the technical details of the statement of requirements;
- (b) reduction of quantities for budgetary reasons, where the reduction is in excess of any provided for in the solicitation documents;

- (c) a minor amendment to the special conditions of Contract;
- (d) finalizing payment arrangements;
- (e) delivery arrangements;
- (f) the methodology; or
- (g) clarifying details that were not apparent or could not be finalized at the time of bidding.”

Moreover, during the hearing the Respondent promised to submit proof relating to the appointment of the members of the Negotiation Team as well as the minutes of the Negotiations. However, the next day they informed the Authority that such documents were non-existent.

The Authority is appalled by such malpractice as the Respondent conceded during the hearing that the price changes were made and that the minutes thereof formed part of the Contract.

In view of the above, the Authority concludes that the negotiations on prices were not proper at law.

Sub-issue VI: Whether the notification of award and subsequent Contract between the Respondent and Macrobase (T) Ltd was proper at law

The Authority also examined the letter of acceptance to the Successful Tenderer and noted that it neither disclosed the awarded contract price pursuant to Clause 19.1 of the ITT nor used the format of the standard letter of acceptance contained in the Tender Document. For purposes of clarity, the Authority reproduces the said clause herein below:

“The Tenderer whose tender has been accepted will be notified of the award by the Procuring Entity prior to expiration of the tender validity period by cable, telex, or facsimile confirmed by registered letter. This letter (hereinafter and in the Conditions of Contract called “Letter of Acceptance”) **will state the sum that the Procuring Entity will pay the Service provider** in consideration of the provision and

maintenance of the Service(s) as prescribed by the Contract (hereinafter and in the Contract called the "**Contract Price**")."

The Authority is of the considered view that, failure to mention the contract price is fatal as the same is also referred to under Clause 22 which relates to advance payment.

The Authority also reviewed the Contract signed by the Respondent and the Successful Tenderer, namely, Macrobase (T) Ltd on 1st December, 2010, and discovered the following anomalies and/or contradictions:

- The title refers to the subject matter of the contract as "**Supply of Hospital and Laboratory Equipments**" while the second paragraph on page 1 of the contract indicates the tender is for "**Security guard (sic) services**".

- Page 2 of the Contract mention documents deemed to form part of the agreement to be the following:
 - (i) The Form of Bid and the Price Schedule submitted by the Bidder;
 - (ii) The Technical Specifications;
 - (iii) The General Conditions of Contract;
 - (iv) The Special Conditions of Contract;
 - (v) The Procuring entity Notification of award; and
 - (vi) The Suppliers acceptance of the award.

The Authority observes that, both Technical Specifications and Special Conditions of Contract which are deemed to be part of the contract are not contained in the Tender Document.

Moreover, the Price Schedule submitted by Macrobase (T) Ltd cannot be part of the Contract because the negotiations done are said by the Respondent to have reduced some of the prices. It goes without saying therefore that, the contract does not recognize the price changes made during negotiations.

- Neither the contract nor the documents deemed to form part of it, disclose the contract price.
- The contract period is not explicitly stated in the Contract, except for the following two contradictory provisions:
 - **“The Supplier shall provide 100% hospital and laboratory equipments within one week after the contract signing.”**
 - **“Call-off orders may be issued at any time during a period of one year from the date of the contract**

indicated above ...” (Emphasis added)

Furthermore, during the hearing the Respondent stated that the contract is for a period from 1st December, 2010, to 30th June, 2011.

The Authority’s analysis on the three versions of the duration of the Contract is that, the first one suggests the contract by now has been fully executed as all the items should have been delivered within one week after the signing of the Contract which took place on 1st December, 2010.

The second version connotes that this is a framework agreement for a duration of one year. The oral submission mean, the duration of the Contract has been reduced to seven months as a result of unforeseen delay in the tendering process, which was re-advertised after failing to attract any

tenderer. The Authority emphasizes that, the duration of the Contract being amongst the key elements in any agreement, should have been explicitly stated.

The Authority further noted that, the notification of tender results to the Appellant, as unsuccessful tenderer, contravened Clause 19.3 of the ITT as neither the name of the Successful Tenderer nor the contract price were disclosed. The said clause provides as follows:

“Upon the successful Tenderer’s furnishing of the performance security pursuant to ITT Clause 42, **the Procuring Entity will promptly notify each unsuccessful Tenderer, the name of the successful Tenderer and the Contract amount** and will discharge the tender security or tender securing declaration of the Tenderers pursuant to sub-Clause 18.7.” (Emphasis added)

The Authority concludes that award notification and the subsequent contract between the Respondent and the Macrobase (T) Ltd is *void ab initio*.

In view of the observations and findings made in the six sub-issues above, the Authority's conclusion on the first issue is that, the tender process was not conducted in accordance with the law, as the entire process was marred by irregularities.

2.0 Whether the Appellant was unfairly disqualified

In resolving this issue the Authority took cognizance of its conclusion in the first issue, that is, the tender process was marred by irregularities and observes that the whole process is a nullity in the eyes of the law. Accordingly, the Authority's conclusion on this issue is that, the Appellant was unfairly disqualified.

3.0 Whether the award to the Successful Tenderer was justified

The Authority's conclusion in the first issue equally applies to the award made to the Successful Tenderer, as it was made in contravention with the law. It goes without saying therefore that, the said award is a nullity in the eyes of the law.

4.0 What remedies, if any, is the Appellant entitled to

Having resolved the issues in dispute, the Authority considered the prayers by the Appellant. By reviewing the tender under Appeal, the Authority has granted the Appellant's first prayer. The Authority is satisfied that the whole process from the preparation and issuance of the Tender Document, tender opening and evaluation process were highly irregular that the award arising from such a process is not valid. Since the whole process was a nullity, there is nothing to be annulled.

With regard to the Appellant's second prayer, the Authority cannot order the award to be made to the Appellant as the second responsive tenderer because he acquired such a status from a process which contravened the law and such powers are conferred unto tender boards. Therefore, the Authority orders the Respondent to start the tender process afresh in observance of the law.

With regard to the Appellant's request for compensation to the tune of **Tshs. 5,320,000/=**, the Authority is of the settled view that, the Appellant is entitled to some compensation for costs incurred amounting to **Tshs. 1,320,000/=** only as per the following breakdown:

- (i) Appeal filling fees – Tshs. 120,000/=;
- (i) Legal consultation fee – Tshs 600,000/=;
- (ii) Tender fee – Tshs. 100,000/=; and
- (iii) Travelling and accommodation in pursuit of this Appeal – Tshs. 500,000/=.

With regard to compensation for disturbance of Tshs. 3,000,000/=, the Authority rejects it as it does not fall within the ambit of Section 82(4)(f) of the Act which allows compensation for only **“reasonable costs incurred”**.

Other matters that caught the attention of the Authority

In the course of handling this Appeal the Authority came across some pertinent matters that are worth mentioning as indicated herein below:

- (i) Tender fee of Tshs. 100,000/= charged by the Respondent was on the high side as it contravenes Regulation 82(3) of GN. No. 97/2005 which directs 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)

- (ii) Some of the documents submitted by the tenderers as proof of their eligibility to take part in the tender were too faint to be readable.

The Authority commends the Managing Director of the Appellant for being bold and courageous for filing the Appeal and pointing out malpractices that are considered to be rampant in public procurement process throughout the country.

Last but not least, the Authority directs this decision to be taken as a lesson to the Respondent, in particular, and other procuring entities in general, so as to ensure compliance with the law at all times. Furthermore, in case of difficulties in the course of the procurement process procuring entities should consult the Public Procurement Regulatory Authority (PPRA).

Having considered all facts and evidence, the Authority concludes that, the tender process was marred by irregularities and was not conducted in accordance with the law. Hence the award of the tender to M/s Macrobase (T) Ltd was therefore a nullity.

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

- Restart the tender process afresh in observance of the law.
- Compensate the Appellant a sum of **Tshs. 1,320,000/=** being appeal fees, legal consultation fees, tender fees as well as transport and accommodation.

Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

Decision delivered in the presence of the Appellant, Respondent and the Interested Party this 17th February, 2011.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

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



2. MR. K.M. MSITA.....
