

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

APPEAL CASE NO. 98 OF 2011

BETWEEN

M/S TANELEC LIMITED.....APPELLANT

AND

**TANZANIA ELECTRIC
SUPPLY COMPANY LIMITEDRESPONDENT**

DECISION

CORAM:

- | | | |
|----|-----------------------------|---------------|
| 1. | Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. | Mr. F.T. Marmo | - Member |
| 3. | Mr. H.S. Madoffe | - Member |
| 4. | Mr. K.M. Msita | - Member |
| 5. | Mrs. R.A. Lulabuka | - Member |
| 6. | Ms. B.G. Malambugi | - Secretary |

SECRETARIAT:

- | | | |
|----|---------------------|---------------------------|
| 1. | Ms. E. V.A. Nyagawa | - Principal Legal Officer |
| 2. | Mr. R. Chisumo | - Legal Officer |

FOR THE APPELLANT:

1. Mr.Omar Iddi Omar – Advocate from Maro & Co. Advocates
2. Mr Ian W. Robertson – Managing Director

FOR THE RESPONDENT

1. Mr. Steven R. Urassa – Legal Officer
2. Mr. Michael Bangu – Senior Procurement Officer
3. Mr. Roman August Uisso – Procurement Officer

This decision was scheduled for delivery today 20th May, 2011 and we proceed to deliver it.

The appeal at hand was lodged by **M/S TANELEC LIMITED** (hereinafter to be referred to as "**the Appellant**") against **TANZANIA ELECTRIC SUPPLY COMPANY LIMITED** commonly known as TANESCO (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. PA/001/09/HQ/G/132 for Distribution Materials under 100,000 Customers Project which had thirteen Lots. The Appeal at hand is confined to Lot No. 4 for Supply of Three Phase Distribution Transformer 33/0.4/.23 oil Type with various capacities (hereinafter to be referred to as "**the Tender**").

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

The Respondent invited tenders for the Supply of Distribution Materials under 100,000 Customers Project *vide* The Daily News dated 30th December, 2009.

The deadline for submission of tenders was set for 12th February, 2010, which was extended to 19th March, 2010, and later to 16th April, 2010, whereby 32 firms submitted tenders of which 13 tenders were in respect of Lot 4:

S/ No.	NAME OF THE TENDERER	READ OUT PRICE
1.	M/s Transformers & Rectifiers Ltd	USD 7,229,767.00 (CIF – DSM)
2.	M/s Chint Electric Co. Ltd	USD 7,676,635.55 (DDP)
3.	M/s Quality Trade and Distribution Ltd	USD 7,811,344.00 + TSHS. 91,022,002.50 (DDP)
4.	M/s El sewedy Electric	USD 6,635,159.00 (DDP - DSM)
5.	M/s Comfix & Engineering Ltd	USD 8,948,441.15 (VAT Inclusive)
6.	M/s CCC (Beijing) Industrial & Commercial Co. Ltd (CICC) & JV Sanbian SCI-TECH, Ltd.	USD 5,173,100.00 (DDP)
7.	M/s Young Dong Electronic Communication Co. Ltd	USD 4,066,865.00 (DDP)
8.	M/s Beijing Construction Engineering Group Co.	USD 10,275,145.23 (DDP)
9.	M/s Xi'an Tianhong Electric Co. Ltd	USD 8,433,912.72 (DDP)

10.	M/s Incar Tanzania Ltd	USD 5,152,977.87 (DDP)
11.	M/s Vijai Electricals Ltd	USD 5,048,175.70 (DDP)
12.	M/s TANELEC Ltd	TSHS. 5,532,300,700.32 (VAT Inclusive)
13.	M/s Intertrade Commercial Services Ltd	USD 5,701,898.00 + TSHS. 66,441,608.75 (DDP)

Tenders for all the lots were jointly evaluated whereby thirteen tenders were found to be substantially responsive at the preliminary stage while nineteen tenders were disqualified for various reasons. The said thirteen tenders were thereafter subjected to detailed evaluation whereby it was recommended that award for Lot 4 to be made to M/s Intertrade Commercial Services Ltd at a contract sum of USD 5,701,898.00. The said Report was submitted on 28th May, 2010.

Having gone through the Evaluation Report, the Respondent's Procurement Management Unit (hereinafter to be referred to as "**PMU**"), observed that one of the tenderers, namely, M/s CCC (Beijing) Industrial & Commercial Co. Ltd (CICC) & JV Sanbian SCI-TECH, Ltd.

were erroneously disqualified due to submitting more than one tender. However, it was discovered that the firms had tendered for different lots and further that, each Lot was independent and that the said tenderer quoted for Lots Nos. 1,2,4,10,11, and 16.

On 1st September, 2010, the Tender Board directed the Evaluation Committee to re-evaluate the tenders for Lot No. 4 and consider the observations made by the PMU.

On 1st October, 2010, the Evaluation Committee submitted the Re-evaluation Report recommending award to be made to M/s Intertrade Commercial Services Ltd at a contract sum of USD 5,701,898.00 and Tshs. 66,441,608.75. On 15th October, 2010, the Tender Board approved award of the contract to M/s Intertrade Commercial Services Ltd as recommended.

The acceptance of the tender was communicated to the Successful Tenderer on 28th October, 2010 while the notification of award to the general public was made on 7th February, 2011, vide the Daily News Paper .

On 10th February, 2011, the Appellant lodged their appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**").

SUBMISSIONS BY THE APPELLANT

The Appellants' 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 was advertised in December 2009, but the deadline for submission of tenders was extended due to tenderers' requests for clarification.

That, from April 2010, the Respondent had, on two occasions, requested for extension of the tender validity period, to which the Appellant had agreed. However, the last extension expired on 31st October, 2010, and since then no further extension had been requested. Furthermore, upon expiry of the tender validity period on

31st October, 2010, the Respondent should have requested the tenderers for a further extension or the tender should have been cancelled and re-tendered.

That, the evaluation process and the subsequent award of the tender did not adhere to the Public Procurement Act, Cap. 410 (hereinafter to be referred to as "**the Act**").

That, the contract price awarded to M/s Intertrade Commercial Services Ltd was 54% higher than the price quoted by the Appellant, in that, the Appellant's quoted price was Tshs. 5,532,300,700.32 while that quoted by the Successful Tenderer was USD 5,701,898.00 plus Tshs. 66,441,608.79 which upon conversion to Tanzanian shillings comes to Tshs. 8,533,760,138.75. The difference is exceptionally high and cannot be justified.

That, M/s Intertrade Commercial Services Ltd was the 6th highest tenderer in terms of price.

That, the Appellant's tender was quoted in Tanzanian shillings, which means, by awarding the tender to M/s Intertrade Commercial Services Ltd the Respondent is exposed to currency exchange risks as the main part of the price quoted by the said tenderer is in foreign currency.

That, the Appellant has been supplying distribution transformers to the Respondent for over thirty years. Hence, the issue of non compliance in the products offered cannot arise.

That, the Respondent's Public Notice of the tender award that was made on 7th February, 2011, indicated that the award was made on 10th December, 2010. The Respondent was duty bound to notify the unsuccessful tenderers immediately thereafter so that they could exercise their right to lodge complaints, if any.

That, on 14th December, 2010, that is, four days after the award was made, a meeting was convened between the Appellant's Management and the Respondent's Managing Director with his team. In the course of that meeting the

Appellant inquired on the status of the tender in dispute and they were told that they would be informed once the decision is made.

That, the Appellant's Managing Director pursued the matter further by sending an email to the Respondent on 29th December, 2010, but he did not receive any reply.

That, in view of the above, it was not proper to award the tender to M/s Intertrade Commercial Services Ltd.

That, they had incurred unnecessary costs and expenditure due to unfair handling of this tender. Hence, they prayed for the following reliefs:

- cancellation of the contract and re-tendering;
and
- in the alternative specific and general damages which include:
 - reimbursement of a total of **Tshs. 4,187,296,971/=** being damages for this tender as per the following breakdown:

- i) Loss of Gross Margin for year 1 Tshs.
1,228,198,449/=;
- ii) Estimated Loss of Gross Margin for year 2
(estimated + 10%) Tshs.
1,351,018,294/=;
- iii) Estimated Loss of Gross Margin for year 3
(estimated + 10%) Tshs.
1,486,120,123/=;and
- iv) Legal fees charged at 3% of item (i), (ii)
and (iii) Tsh 121,960,105.

THE RESPONDENT'S SUBMISSIONS

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:

That, the tenders were evaluated by a team of six members who recommended award to be made to M/s Intertrade Commercial Services Ltd whose tender was determined to be the lowest evaluated tender.

That, on 1st September, 2010, the Tender Board deliberated on the Evaluation Report and directed a re-evaluation to be made taking into account the observations made by the PMU.

That, on 15th October, 2010, the Tender Board deliberated on the Re-evaluation Report and approved award of the tender to M/s Intertrade Commercial Services Ltd at a contract price of USD 5,701,898.00 and Tshs. 66,441,608.75.

That, the communication of acceptance to the Successful Tenderer was made on 28th October, 2010, which was within the tender validity period.

Finally, the Respondent submitted that, the required criteria were used in determining the lowest evaluated tenderer. Hence, the issue of the lowest read out price was not the basis for the award of tender.

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 Appellant was unfairly disqualified**
- **Whether the award of the tender was made within the tender validity period**
- **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 Appellant was unfairly disqualified

In order to resolve this issue, the Authority analyzed submissions by parties on this point vis-à-vis the Tender

Document and the applicable law. It is not disputed that, the Respondent’s reason for disqualifying the Appellant was, under-quoting the quantities required (100 units instead of 180 units) relating to supply of Three Phase Distribution Transformers 33/0.4/.23 oil type with the capacity of 50kVA. In order to ascertain whether the said disqualification was justified or otherwise, the Authority started by revisiting submissions by parties on this issue.

In their submissions, the Appellant stated that, the quantities indicated in the Tender Document were varied by the Respondent *vide* an addendum. The Appellant conceded to have wrongly quoted the quantities for two items, namely, 50kVA transformers where they quoted for 100 units instead of 180 units and for the 25kVA transformers they quoted 180 units instead of 100. For purposes of clarity, the Authority reproduces herein below the quantities originally stated in the Tender Document as well as the amended ones and those quoted by the Appellant:

Capacity	Quantity as per the	Amended quantity	Quantity quoted by	Total Price Tshs.
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	Tender Document		the Appellant	
25kVA	114	100	180	759,281,785.20
50kVA	180	180	100	431,772,620.00

Based on the information contained in the Table above, the Appellant argued that the erroneous swapping of quantities for the two items was curable through correction of arithmetic errors as provided under Clause 30 of the ITT read together with Regulation 90(11)(a) of GN. No. 97/2005, as the effect on the price was quite minimal. They submitted further that, the Respondent should have considered, among other things, the Appellant's experience in working with them, domestic preference for local suppliers as well as National interests given the huge price difference between the Appellant's Tender vis-à-vis that quoted by the Successful Tenderer. According to the Appellant, the price difference of Tshs. 3,001,459,438.43 would have enabled the Respondent to purchase an additional 440 new generators.

In their replies the Respondent stated that, the Tender Document indicated that the required quantity for that particular item was 180 while the Appellant had quoted

for only 100, which was a material deviation in terms of Regulation (90)(8) of GN. No. 97/2005. Hence, the Appellant's tender was non-responsive. With regard to the Appellant's contention that, such an anomaly could have been cured through correction of arithmetic errors, the Respondent stated that the deficiency in the Appellant's tender was not an arithmetic error and therefore incurable since Clause 30.1 of the ITT permits correction of values and not quantities.

The Respondent submitted further that, the length of time the Appellant had transacted with the Respondent is irrelevant, as the law emphasizes equal opportunity to all tenderers. With regard to the issue of domestic preference, the Respondent argued that, it is done during price comparison stage which the Appellant's tender did not reach.

Having revisited submissions by parties on this issue, the Authority noted that, in resolving the issue in dispute there are three sub-issues which need to be addressed, namely:

- **Whether the Appellant's failure to quote the required quantity was a minor deviation and therefore curable under Clause 30.1 of the ITT**
- **Whether the Respondent erred by not applying the domestic preference in the evaluation of the Appellant's tender**
- **Whether the award of the tender to the tenderer whose quoted price was 54% higher than the Appellant's quoted price was proper at law.**

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

- (i) **Whether the Appellant's failure to quote the required quantity was a minor deviation and therefore curable under Clause 30.1 of the ITT**

The Authority observes that, as it was evident during the hearing that, the Appellant admitted to have mixed up the figures pertaining to the quantities in respect of transformers with capacity of 50kVA and 25kVA. The Authority deems it prudent to ascertain whether the said deficiency was a minor deviation as claimed by the Appellant or a material deviation as argued by the Respondent.

The Authority noted that, the Appellant's confusion was partly attributable to the order of arrangement in the Invitation to Tender as well as the addendum thereof, in that, the capacities in respect of the transformers to be supplied for Lot 4 (as well as Lot 5) were listed starting from the highest to the lowest, except for item (vi) which was supposed to be the last one on the list was placed before Item (v). The same arrangement was repeated in the addendum which is reproduced herein below:

Lot No.	Description of Items	Unit Measure	Previous Quantity	Amended Quantity
4	Three Phase Distribution Transformer 33/0.4/.23 oil type with the			

	following capacity;			
	(i) 500kVA	EA	9	60
	(ii) 315kVA	EA	55	70
	(iii) 200kVA	EA	125	200
	(iv) 100kVA	EA	269	269
	(vi) 25kVA	EA	114	100
	(v) 50kVA	EA	180	180

The Authority observes that, the answer whether the under-quoting of the quantities for the tender under Appeal was a minor or material deviation could be deduced from the Evaluation Report as this is discretionary under Clause 28.4 of the ITT which provides as follows:

“The Procuring Entity may waive any minor informality, non conformity, or irregularity in a Tender which does not constitute a material deviation, provided such waiver does not prejudice or affect the relative ranking of any Tenderer.” (Emphasis added)

According to the Evaluation and Re-evaluation Reports the Appellant’s tender was found to be substantially

responsive as evidenced under Items 2.3.3 of the said Reports which are *in pari materia* read as follows:

“Six (6) bidders M/s TANELEC Ltd, M/s Quality Trade & Distribution Ltd, M/s Comfix & Engineering Ltd, M/s Intertrade Commercial Services Pvt, M/s Chint Electric Co. Ltd and M/s Xian Tianhong Electric Co. Ltd who quoted for the above lot had their bids/offers technically qualified after complying with all technical specifications and as per tender bid (sic) document requirement.”(Emphasis supplied)

The Authority noted that, this position is corroborated by the Summary of the Technical Analysis which shows that the Appellant’s tender was technically qualified. In other words, the Evaluators meant that, the Appellant’s tender had complied with Clauses 28 and 29 of the ITT which provide guidance on **“Preliminary Examination of Tenders”** as well as **“Examination of Terms and Conditions; Technical Evaluation”**. The Authority

revisited Clause 29.2 of the ITT which elaborates Technical Evaluation in the following words:

“The Procuring Entity shall evaluate the technical aspects of the Tender submitted in accordance with ITT Clause 12, to confirm that all requirements specified in Section VI – Schedule of Requirements of the Tendering documents and Section VII – Technical Specifications have been met without material deviation or reservation.” (Emphasis supplied)

The Authority is of the considered view that, the under-quoting of quantities in the Appellant’s tender should have been detected at this stage of evaluation. The Authority also noted that, despite under-quoting for quantities on the 50kVA Transformer, the Appellant also over-quoted the quantities on 25kVA Transformers, that is, instead of 100 units they indicated 180 units, surprisingly, the Evaluators did not say anything about it.

The Authority is concerned that, Item 2.3.3 on page 6 of the Evaluation Report indicates that the Appellant's tender was amongst those which were technically responsive. Item 2.4 on page 10 of the same Report shows that all responsive tenders were subjected to financial evaluation while the Appellant's tender was not. The said Item 2.4 reads:

"All bidders whose bids were both substantially and technically qualified were further evaluated financially as per attached **Appendix C**"

The Authority noted that, the said Appendix C indicates that only four tenders were evaluated under Lot 4. The said tenders were those of;

- **M/s Quality Trade & Distribution Ltd,**
- **M/s Comfix & Engineering Ltd**
- **M/s Intertrade Commercial Services Pvt,**
- **M/s Xian Tianhong Electric Co. Ltd**

The Evaluation Report does not show when, how and for what reasons the Appellant was not subjected to financial evaluation ; having been found to be substantially and technically responsive.

With regard to the Re-evaluation Report, the Authority noted that, Item 2.3.3 on page 6 equally indicated the Appellant's tender was technically responsive. However, Item 2.4 on page 7 of the same Report introduced the disqualification of the Appellant for the first time. The said Item provides as follows:

"2.4 FINANCIAL ANALYSIS

All bidders whose bids were both substantially responsive and technically qualified were further evaluated financially as per attached Appendix C. M/s TANELEC Ltd was disqualified after quoting less quantities in the price schedule/schedule of requirement for item 5 of Lot 4 which is contrary to item 5 of Invitation for Tenders which instructed bidders to quote

for full quantities in each lot, hence dropped for further financial analysis.” (Emphasis added)

The Authority noted further that, Appendix C also indicates that only four tenders, excluding that of the Appellant, were subjected to financial evaluation. The Authority observes that, Appendix C does not show how and at what stage of the financial evaluation the Appellant was disqualified. This means, what was stated under Item 2.4 of the Re-evaluation Report is not supported by Appendix C. The Authority therefore observes that, by the time the financial evaluation was being done, the reasons for disqualification of the Appellant were not apparent.

The Authority further observes that, had the Evaluators been diligent they would have found the Appellant's tender to be substantially non-responsive in accordance with Item 10.3(d) (iv) of the Tender Evaluation Guidelines for Procurement of Works and Goods issued by the Public Procurement Regulatory Authority (PPRA) in February, 2007. According to the said Item, **“failure to**

tender for the required scope of works” makes a tender to be non responsive. In this case the Appellant’s tender failed to comply with the required quantity contrary to paragraph 5 of the Invitation to Tender read together with Item 16 of the Tender Data Sheet which state as follows:

“Para. 5. ... Bidders may bid for a single lot or combination of various lots, but in any case **bidders must quote for full quantities in each lot.** The purchaser shall evaluate the bids for each lot and award the contract on a lot-by-lot basis or a – lot basis or a combination of lots whichever is more economically (sic) to TANESCO. **Bidders not quoting full quantities or partial bids in a lot will be considered as non-responsive...**”

Item 16. Prices quoted for each lot shall correspond to *one hundred* (100) percent of the items specified for each lot.

Prices quoted for each item of a lot shall correspond to *one hundred* (100) percent

of the quantities specified for this item of a lot. (Emphasis added)

Based on the above quoted provisions, the Authority is of the settled view that, failure to quote full quantities had effect on the scope of work; thus, it was a material deviation in terms of Regulation 90(8) of GN. No. 97/2005 and should have been disqualified pursuant to Clause 28.5 of the ITT. The said provisions state as follows:

“Reg. 90(8) A material deviation or reservation is one which affects the scope, quality or performance of the contract, or which in any substantial way, is inconsistent with the tender document or limits the procuring entity’s right or the tenderer’s obligations under the contract, and affects unfairly the competitive position of tenderers presenting responsive tenders.

Clause 28.5 If a Tender is not substantially responsive, it will be rejected by the Procuring Entity and may not subsequently be made responsive by the Tenderer by correction of the nonconformity.” (Emphasis supplied)

The Authority is of the view that, the disqualification of the Appellant’s tender was proper in terms of Item 16 of the Tender Data Sheet read together with Clauses 28.2 and 28.5 of the ITT.

Having resolved one part of the first sub-issue, the Authority proceeded to ascertain whether the under-quoting of quantities was curable under Clause 30.1 of the ITT. To start with, the Authority revisited Clause 30.1 of the ITT and Regulation 90(11)(a) of GN. No. 97/2005 which formed the basis of the Appellant’s arguments on this sub-issue, as they state:

“Clause 30.1 Tenders determined to be substantially responsive will be checked for

any arithmetic errors. Errors will be corrected as follows:

- (a) If there is a discrepancy between unit prices and the total price that is obtained by multiplying the unit price and quantity, the unit price shall prevail, and the total price shall be corrected, unless in the opinion of the Procuring Entity there is an obvious misplacement of the decimal point in the unit price, in which the total price as quoted shall govern and the unit price shall be corrected;**
- (b) If there is an error in a total corresponding to the addition or subtraction of subtotals, the subtotals shall prevail and the total shall be corrected; and**
- (c) Where there is a discrepancy between the amounts in figures and in words, the amount in words will govern."**

“Reg. 90(11)(a) Notwithstanding sub-regulation (6), the procuring entity shall correct purely arithmetical errors that are discovered during the examination of tenders and the procuring entity shall give prompt notice of any such correction to the supplier, contractor, service provider or asset buyer that submitted the tender.”

(Emphasis supplied)

The Authority observes that, Clause 30.1 gives three scenarios through which the said corrections may be made. The Appellant did not say under which of the said scenarios the defect in their tender could be cured. The Authority noted that, the unit price quoted in the Appellant’s tender do correspond to the total price quoted, which means Clause 30.1(a) of the ITT is not applicable. Moreover, Sub-clauses (b) and (c) of Clause 30.1 of the ITT are also not applicable as they only comes into play when there is an error in a total corresponding to the addition or subtraction of subtotal; or in the event there is a discrepancy between the

amounts in figures and in words. Regulation 90(11)(a) of GN. No. 97/2005 cements the above position, as it requires the correction to be purely on arithmetic errors and not otherwise. Moreover, only tenders which are substantially responsive are subjected to correction of arithmetic errors, if any. The Authority therefore agrees with the Respondent that, the under-quoting of quantities does not fall within the ambit of Clause 30.1 of the ITT.

Furthermore, the Authority observes that, under-quoting definitely affected the scope of the work and therefore if subjected to any correction it could have affected the Appellant's quoted price as well as making their non-responsive tender to be responsive, which is prohibited under sub-Regulations (10) and (16) of Regulation 90 of GN. No. 97/2005. The said provisions are reproduced herein below:

“Reg. 90(10) The procuring entity may ask suppliers, contractors, service providers or asset buyers for clarification of their tenders in order to assist in the examination, evaluation

and comparison of tenders but no advantage shall be sought, offered or permitted to change any matter of substance in the tender, including changes in price and change aimed at making an unresponsive tender responsive.

(16) If a tender is not responsive to the tender document, it shall be rejected by the procuring entity, and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation. (Emphasis added)

In view of the above analysis, the Authority's conclusion on the first sub-issue is that, the Appellant's failure to quote the required quantity was a material deviation and therefore incurable.

(ii) **Whether the Respondent erred by not applying the domestic preference in the evaluation of the tenders**

In order to ascertain whether the Appellant was entitled to domestic preference or not the Authority revisited

submissions by parties on this point. During the hearing, the Members of the Authority drew the attention of the Appellant to Item 45 of the Tender Data Sheet which states categorically that **“Domestic preference: Not applicable”**. In reply thereof, the Appellant produced a copy of the Respondent’s replies to the Appellant’s request for clarification which indicated that domestic preference was applicable. The Authority noted that, the said document which was an addendum to the ITT, attached three conditions to the application of the domestic preference provision whereby a tenderer was obliged to submit evidence thereof, to wit, if registered under the scheme, what percent the manufacturer deserves and ownership. The Appellant produced a letter from the PPRA referenced CBC53/213/01/41 dated 8th September, 2009, which accorded them a provisional registration to the National Preference Scheme and hence proof that they were eligible.

The Respondent’s reply was that, domestic preference is considered when comparing prices; a stage which the

Appellant's tender did not reach. The Authority agrees with the Respondent in that regard.

The Authority's conclusion on this sub-issue is that, the Respondent did not err as the Appellant's tender did not reach the stage where domestic preference could have been considered.

(iii) Whether the award of the tender to the tenderer whose quoted price was 54% higher than the Appellant's quoted price was proper at law.

In resolving this sub-issue, the Authority considered the Appellant's contention that, it was not proper to award the tender to M/s Intertrade Commercial Services Ltd whose quoted price exceeded the Appellant's price by Tshs. 3,001,459,438.43. The Respondent's reply thereof was that, price was the last factor to be considered.

Having revisited the submissions by parties on this sub-issue, the Authority concurs with the Respondent that,

only those tenders which are substantially responsive are subjected to price comparison. Since the Appellant's tender was non-responsive their quoted price was not considered. Moreover, according to the Evaluation Reports, during price comparison the price quoted by the Successful Tenderer was found to be the lowest evaluated in terms of Clause 34 of the ITT which is reproduced hereunder:

“The tender with the lowest evaluated price, from among those which are eligible, compliant and substantially responsive shall be the lowest evaluated tender.” (Emphasis supplied)

In view of the above, the Authority's conclusion in respect of the third sub-issue is that, the award of the tender to the tenderer whose price was 54% higher than the Appellant's quoted price was proper at law.

In view of the findings and conclusions made on the three sub-issues, the Authority's conclusion in respect of

the first issue is that, the Appellant was fairly disqualified.

2.0 Whether the award of the tender was made within the tender validity period

It is not disputed that, the tender validity period, having been extended twice, expired on 31st October, 2010, and it was not extended any further. The Appellant contended that the tender process continued after the expiry of the said period as evidenced in the Respondent's Notice which appeared in the Daily News of 7th February, 2011, that the award of the contract in respect of the disputed tender was made on 10th December, 2010. The Appellant contended further that, after the expiry of extended period, the Respondent should have either requested for another extension or re-tendered. The Respondent submitted that, the Tender Board approved the award on 15th October, 2010, which was communicated to the Successful Tenderer on 28th October, 2010, that is, before the expiry of the tender validity period.

In analyzing the validity of the submissions by parties, the Authority revisited Section 64 of the Act which states as follows:

“The procuring entity shall require tenderers to make their tenders and tender security valid for periods specified in the tendering documents, and such periods shall be sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders and for the appropriate tender board to review the recommendations and give its approval for the contract or contracts to be awarded whilst the tenders are still valid.” (Emphasis added)

The Authority observes that, the gist of the above quoted provision is to ensure the tenders submitted are valid up to the time when the award is made. According to the documents availed to this Authority, the award was approved by the Tender Board on 15th October, 2010, while the notification of the award of the tender to the Successful Tenderer was made on 28th October, 2010.

This means, the contract between the Respondent and the Successful Tenderer became binding on 28th October, 2010, by virtue of Section 55(7) of the Act which states as follows:

“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 supplied)

This is also in line with the Form of Tender appearing on page 79 of the Tender Document which contains the following paragraph:

“Until a formal Contract is prepared and executed, this Tender, together with your written acceptance thereof and your notification of award, shall constitute a binding Contract between us.” (Emphasis added)

It is in recognition of the above quoted paragraph that the Respondent’s letter of acceptance to the Successful

Tenderer dated 28th October, 2010, reads in part as follows:

“Attached herewith please find the Form of Contract incorporating the General and Special Conditions of Contract for your signing and initialing. Kindly note that this notification of award constitutes the formation of the Contract, subject to furnishing the Performance Security in the form of Bank Guarantee in accordance with ITT Clause 42.1 and signing of the contract within thirty (30) days of receipt of the contract form, and return it to the procuring entity as in accordance with ITT Clause 41.2. (Emphasis added)

With regard to the Appellant’s contention that, the tender process continued after the expiry of the tender validity period, the Authority revisited Regulation 97(11) of GN. No. 97/2005 which reads:

“Upon entry into force of the procurement or disposal contract and, if required, the provision

by supplier, service provider, contractor or asset buyer **of a security for the performance of the contract**, notice of the procurement or disposal contract shall be given to other supplier, service provider, contractor or asset buyer, specifying the name and address of the supplier, service provider, contractor or asset buyer that has entered into the contract and the contract price.” (Emphasis added)

The Authority observes that, the above quoted provision recognizes the presence of other processes, after the coming into force of a procurement contract, for instance, where a successful tenderer is required to furnish a performance security.

The Authority is also aware of the existence of Regulation 87(2) of GN. No. 97/2005 which requires all the processes including finalization of the contract to be made within the tender validity period. The said provisions states as follows:

“The period fixed by the procuring entity shall be sufficient to permit evaluation and comparison of tenders, for obtaining all necessary clearances and approvals, and for the notification of the award of contracts and finalise a contract.” (Emphasis added)

The Authority opines that, the above quoted Regulation is contradictory to Section 64 of the Act, and as a general rule, the latter prevails as the former is expected to amplify the latter and not otherwise.

In view of the above analysis, the Authority is satisfied that, the award was made within the tender validity period. Accordingly, the Authority concludes that, the award of the tender was made within the tender validity period.

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

Having dealt with the contentious issues, the Authority considered the Appellant's prayers and rejected them in their entirety as the Appeal has no merit.

Other matters that caught the Authority's attention

In the course of handling this Appeal the Authority discovered the following matters which are worth mentioning:

- a) The Evaluation Committee comprised of six members contrary to Regulation 90(1) of GN No. 97/2005 which provides as follows:

"A procuring entity shall establish a tender evaluation committee comprising of not less than three and **not more than five members.**"

During the hearing, the Respondent submitted that, given the number of the Lots to be evaluated, the Evaluators were divided into two groups. However, both the Evaluation Reports as

well as the Personal Covenants signed by the Evaluators indicate they evaluated all the Lots.

- (b) Given the shortfalls in the Evaluation and Re-evaluation Report, that the Evaluators should have disqualified the Appellant during Technical Evaluation, the Authority doubts the competence and diligence of the Evaluation Committee.
- (c) The Authority agrees with the Appellant that, there was no justification whatsoever for the Respondent's failure to inform unsuccessful tenderers after the Successful Tenderer had furnished the Performance Security pursuant to Clause 40.3 of the ITT which 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)

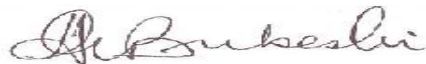
- (d) The Authority was disappointed by the Respondent’s failure to assign senior officials to appear before the Authority during the hearing, as those who attended could not respond adequately to some of the pertinent questions. Moreover, the Written Replies submitted by the Respondent did not address adequately, the issues raised in the Appellant’s Statement of Appeal.

Having considered all facts and evidence, the Authority concludes that, the Appellant was fairly disqualified and the award of the tender to M/s Intertrade Commercial Services Ltd was proper at law.

On the basis of the aforesaid findings, the Authority dismisses the Appeal for lack of merit.


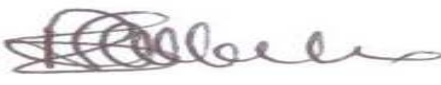

Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

Decision delivered in the presence of the Appellant and the Respondent this 20th May, 2011.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. ENG. K.M. MSITA.....
2. MRS. R.A. LULABUKA.....
3. ENG. F. T. MARMO.....
4. MR. H. S. MADOFFE.....