

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

APPEAL CASE NO. 118 OF 2012

BETWEEN

GLOBAL AGENCY L.T.DAPPELLANT

AND

MINISTRY OF HOME AFFAIRS.....RESPONDENT

DECISION

CORAM:

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

SECRETARIAT:

1. Ms. E.V.A Nyagawa – Principal Legal Officer
2. Ms. F.R. Mapunda – Legal Officer
3. Mr. H.O. Tika – Legal Officer

FOR THE APPELLANT:

1. Mr. Jonathan G. Mbuga – Advocate, Legis Attorneys
2. Ms. Esther Njau–Advocate, Legis Attorneys
3. Mr. Abdallah Khalfan- Director
4. Mr. Spidius J. Rubega- Accountant

FOR THE RESPONDENT

1. Mr. Separatus R. Fella – Principal Legal Officer
2. Mr. Manyama Mapesi- Ag. Head of PMU
3. Mr. Mathias Mathias- Procurement Officer
4. Mr. Isack E. Sameji – Engineer
5. Mr. Hyacinth Komba – Principal Printer

This decision was scheduled for delivery today 23rd March, 2012, and we proceed to deliver it.

The appeal at hand was lodged by **GLOBAL AGENCY LTD** (hereinafter to be referred to as "**the Appellant**") against the **MINISTRY OF HOME AFFAIRS** (hereinafter to be referred to as "**The Respondent**").

The said Appeal is in respect of Tender No. **ME/014/2011/2012/G/18** for The Supply Of Printing Machines for Immigration Services Department. The said tender was divided into three Lots, namely;

- **LOT NO: 1. OFFSET TECHNOLOGY**

The machine details were as follows;

- Computer to Plate Machine(CtP)
- One Two Colour Offset Press
- Paper folding Machine
- Stitching Machine.

- **LOT NO: 2. DIGITAL TECHNOLOGY**

The machine details were as follows;

- Pre press
- Colour printer
- Booklet maker
- Digital ups.

- **LOT NO: 3. OFFSET OR DIGITAL TECHNOLOGY.**

The machine details were as follows;

- Paper Cutting Machine (Guillotine Paper Cutter).

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:

The Respondent advertised an invitation to tender for the Supply of Printing Machines for the Immigration Services Department through three newspapers, namely; Mwananchi Newspaper of 26th October, 2011, the Daily News of 27th October, 2011, The East African and the Business Week of 31st October, 2011.

The advertised tender was an International Competitive Tender as specified in the Public Procurement (Goods, Works, Non Consultant Services and Disposal of Public Assets by Tender) Regulations (hereinafter to be referred to as **GN. NO 97 of 2005**).

The Tender opening took place on 14th December, 2011, at 10.00 a.m whereby four tenders were received from the following firms;

	Name of Tenderer	Bid Prices		
		LOT 1	LOT 2	LOT 3
1.	M/s Achelis (Tanganyika) Ltd.	EURO 550,774.15		EURO 99,533.31
2.	M/s MFI Office Solutions Ltd		USD 640,982.14	USD 70,346.88
3.	M/s Quality Traders & Distribution Ltd	TZS 1,233,232,268		TZS 325,091,252.46
4.	M/s Global Agency Ltd	TZS. 1,379,420,000.00 Combining all three lots in one quotation		

The said tenders were evaluated and the award was recommended by the Evaluation Committee to the following tenderers;

- (i) LOT. 1- M/s Achelis (Tanganyika) Ltd for EURO 550,774.15 equivalent to TZS. **1,132,457,745.29.**
- (ii) LOT. 2- M/s MFI Office Solutions for USD 640,982.14 equivalent to TZS. **1,032,340,195.39.**
- (iii) LOT. 3 M/s MFI Office Solutions for USD 70,346.88 equivalent to TZS. **113,297,871.05**

The Tender Board during its meeting held on 19th January, 2012, approved the award of all three Lots as recommended by the Evaluation Committee.

That, on 24th January, 2012, the Respondent communicated award of the Tender for Lots 2 and 3 to MFI Office Solutions Ltd vide letters referenced CAB 48/468/01/28 and CAB 48/468/01/29 respectively, while the award for Lot No. 1 was communicated to M/s Achelis (Tanganyika) Ltd vide a letter referenced CAB 48/01/27.

That on 2nd February, 2012, the Appellant having learnt of the tender results from undisclosed sources, wrote a letter referenced GAL/GEN012/0520 applying for administrative review to the Respondent disputing the award made on the grounds that:

- (i) The prices they had quoted were lower than all the other tenderers for all the lots.
- (ii) Their prices had been quoted in Tanzanian shillings while the other tenderers had quoted in foreign currency namely Euros and US Dollars an act which contravened Clause 16.1 (a) and (b) of the Instruction

to Bidders (**hereinafter to be referred to as "ITB"**).

On 6th February, 2012, the Appellant received a letter referenced CAB48/468/01/53 from the Respondent which informed them that their tender was unsuccessful. The said letter did not address the Appellant's claim raised in their letter of 2nd February 2012.

Being dissatisfied with the said tender results, the Appellant, on 8th February, 2012, lodged their appeal 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 participated in Tender No. ME/014/2011/2012/G/18 for the Supply of Printing Machines for the Immigration Services Department.

That, their quoted prices were the lowest of all the tenders for all lots but they were not awarded the tender.

That, their quotations were made in Tanzanian shillings as opposed to the other tenders which were quoted in foreign currency, namely, Euros and Dollars, an act which was in contravention of Clause 16.1 (a) and (b) of the ITB.

That, they clearly indicated the price of each product as specified in Clause 12.2 of the ITB and there was no clear format of how the said prices should be. The Appellant wondered where the evaluators obtained such format and thus disqualified them for failure to comply with the same.

That, despite the fact that the Appellant indicated that he was an agent of the manufacturer of the printing machines by submitting a clear and undisputed authorization letter the Respondent still disqualified the Appellant on this ground.

That, their Tender Document indicated that they had sufficient experience to discharge the intended contract, having been doing printing work for the Respondent for more than three years and thus having sufficient experience in Tanzania. Furthermore, they had specified sufficient training experience

with assurance of availability of spare parts. Thus, they had met the said requirement and the Respondent ought not to have disqualified them on those criteria.

That, despite the brochure attached to the Authorization letter showing the required machines and the Four Colour Offset Machine which can discharge more efficiently the printing work than the required Two Colour Machines, the Respondent disqualified the Appellant for non compliance with this condition.

That, the Evaluators concentrated on minor requirements instead of the material ones contrary to Regulation 90(11) (b) of GN No. 97/2005 which requires the procuring entity to disregard minor deviations which can be corrected without affecting the substance of the tender.

That, the Respondent contravened Regulation 90(4) of GN No 97/2005 which requires the evaluation to be conducted in accordance with terms and conditions set forth in the Tender Document.

That, Clause 28(1) of the ITB requires all the tenderers to be treated equally; however, the Appellant had been unfairly

treated as they have been disqualified from the tender process while they met all the criteria.

That, communication of the tender results to the Appellant was not in accordance with Clause 40.3 of the ITB which required the notice of award to disclose the names of the successful tenderer and the awarded contract price.

Therefore, the Appellant requested this Authority to:

- Revise the decision issued against the Appellant
- Re-advertise the said tender
- Grant any other relief this Authority may deem fit

REPLIES FROM 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 Appellant participated in the tender under appeal but was found to be non-responsive due to the following reasons:-

- (i) The Manufacturer's Authorization letter of the Appellant did not comply with the format provided for in the Tender Document and that it was not addressed to the Permanent Secretary of the Ministry of Home Affairs as indicated in

the Tender Document. Moreover, the Appellant's letter did not specify the specific tender number as requested in the format provided.

- (ii) The Manufacturer's Authorization which was submitted to the Respondent by the Appellant named the manufacturer to be Fugu International Industry (HR) from China, while the brochures submitted to the Respondent showed that some machines to be supplied by the Appellant were from Heidelberg Company of Germany without the latter's Authority.
- (iii) The Appellant had no evidence of being experienced in the supply of similar printing machines rather they were experienced in the supply of other types of goods such as laptops, computers, uniforms, telecommunication equipment, padlocks, hand cuffs and Antenna Solar Panels.
- (iv) The experience indicated by the Appellant in their tender was not related to printing machines but rather it related to heavy duty photocopier machines.

That the Printer Master GTO 52 Heidelberg which the Appellant attached to their tender was a Four Colour Offset Press and not a Two Colour Offset Press which was requested in the Tender Document.

- (v) The Appellant had not shown enough training and experience in handling the proposed product as required in the Tender Document.
- (vi) The Appellant had not mentioned any model being in use in Tanzania for not less than three years as requested in the Tender Document.
- (vii) The Appellant had not mentioned the name, model or details of Technical Specification of the machines which were supposed to be provided as requested in the Tender Document.
- (viii) That, the Price Schedule submitted by the Appellant was not in the format required, as it did not include the country of origin and Total CIF/CIP price for each Lot.

That, the claim by the Appellant that their quoted price was the lowest is baseless because this factor is taken into account after consideration of all relevant factors specified in the Tender Document, to which the Appellant did not comply.

That, Clause 16.1 (a) and (b) of the ITB requires goods supplied from abroad and locally to be quoted in Tanzanian Shillings. Also Clause 31.2 of the ITB provides that the currency that shall be used for bid evaluation and comparison purposes to convert all bid prices expressed in various currencies is Tanzania Shillings and the source of exchange rate is the Bank of Tanzania at the date when the tender was opened. Therefore, there was no anomaly exhibited by other tenderers in submitting their quotations in foreign currency.

That, it is not true that the Appellant was not given the reasons as to why their tender was not successful. The Respondent wrote to the Appellant a letter referenced CAB 48/468/01 dated 16th February, 2012, informing them why their tender was not successful.

The Respondent therefore, prayed for dismissal of the Appeal with costs.

ANALYSIS BY THE AUTHORITY

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

- **Whether the Appellant was unfairly disqualified**
- **Whether the quotation of prices in foreign currency by the successful tenderer was proper at law**
- **Whether the communication of the tender results to unsuccessful tenderers was done in accordance with the law**
- **To what reliefs, if any, are the parties 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 resolving this issue the Authority considered the Appellant's main contention that the Evaluation Process was conducted in contravention of the law and that the Authority should review the whole 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 Evaluation Process was conducted in accordance with the law. However, in so doing the Authority confined itself to the four evaluation criteria from which the Appellant's contentions emanated. Consequently, the Authority framed the following sub issues as guidance in resolving the said contentions:

- a) Whether the Appellant complied with the Price Schedule requirement as specified in the Tender Document.**
- b) Whether the Appellant had the required experience as stipulated in the Tender Document.**
- c) Whether the Appellant's tender specified the availability of Spare Parts as per the requirement of the Tender Document.**

d)Whether the Appellant complied with the requirement to submit Manufacturer's Authorization letter as specified in the Tender Document.

Having framed the sub-issues above, the Authority proceeded to resolve them as follows;

a)Whether the Appellant complied with the price schedule requirement as specified in the Tender Document.

In resolving this sub- issue the Authority revisited submissions by the parties on this particular point. To start with the Authority revisited the Appellant's submission that, the Tender Document did not provide the format of how the Price Schedule should be. The Appellant further contended that the wording of the ITB Clause 12.2 which the Respondent relied upon to disqualify the Appellant gave mere explanations and not a format to be complied with. It was further submitted that, the Appellant's Tender clearly indicated the price for each item and the total cost for the three Lots was also shown. Thus, it was unfair for the Appellant to be disqualified on this criterion as the Price Schedule format claimed to be contravened was not included in the Tender Document.

In reply thereof, the Respondent submitted that, the Appellant's Tender did not comply with the Price Schedule format as specified in the Tender Document. The Respondent's Tender Document was in accordance with the format of the Standard Tender Document issued by the PPRA and therefore, it is not true that the Tender Document did not specify the format. The said format was shown under Section VIII (Tender Forms) of the Tender Document. Hence, the Appellant failed to comply at their own peril.

In order to ascertain the validity of the conflicting arguments by parties, the Authority revisited the Respondent's Tender Document in order to substantiate if indeed it had provided the requisite information in relation to the Price Schedule.

To start with the Authority revisited Clause 12.2 of the ITB which was relied upon by the Appellant that it did not provide the format on how the Price Schedules would be. For purposes of clarity, the Authority reproduces the said Clause 12.2 as follows;

"The documentary evidence of the eligibility of the goods and related services shall consist of a statement in the Price Schedule of the country of origin of the goods and related services offered which

shall be confirmed by a Certificate of Origin issued at the time of shipment”.

From the above quoted provision the Authority agrees with the Appellant that it does not provide the Price Schedule format. However, the Authority examined further the Tender Document and noted that Section VIII of the same document provides for the different formats of the Price Schedules, namely;

- **Price Schedule for Goods offered from Abroad**
- **Price Schedule for Domestic Goods offered from within the purchaser’s Country** (Emphasis added)

The Authority reviewed the two Price Schedule formats and noted that, the format for the Price Schedule for goods offered from abroad required the tenderer to show, among other things, the unit price of each machine FOB or FCA port or place of loading, the unit price of each machine CIF or CIP point of entry and unit price of inland delivery to the point of final destination as well as duties and taxes to be charged. The Authority also noted that the format for the Price Schedule for domestic goods offered from within the purchasers country had to show, amongst others, the unit price EXW per item, cost of

local labour, raw material and component, unit price of machine to the final destination, duties and taxes to be charged.

Having established that the Tender Document provided for the Price Schedule format, the Authority revisited the Appellant's Tender in order to establish whether the Price Schedule submitted by the Appellant complied with the Price Schedule format specified in the Tender Document. The Authority discovered that the Price Schedule in the Appellant's Tender was not in accordance with the format provided in the Tender Document, for instance; it neither specified if the goods were to be imported nor that they would be supplied from within the country and their related costs.

The Authority revisited Clause 15.5 and 15.6 of the ITB which provides as follows;

15.5 **"The Bidder shall indicate on the appropriate Price Schedule** the unit price (where applicable) and total Bid price of the goods it proposes to supply under the contract.

15.6 Price entered in the **Price Schedule shall be entered separately** in the following manner;

a) for the goods offered from within the United Republic of Tanzania:

i) the price of the goods quoted EXW (ex works, ex factory, ex warehouse, ex showroom, or off the shelf, as applicable), including all customs duties and sales and other taxes already paid or payable.

ii) ...

iii) ...

b) for the goods offered from abroad:

i) **the price of the goods shall be quoted CIF named port of destination or CIP border point, or CIP named place of destination in the purchaser's country as specified in the Bid Data Sheet.** In quoting the price, the Bidder shall be free to use transportation through carriers registered in any eligible countries. Similarly, the Bidder may obtain insurance services from any eligible source country.

ii)

iii)....”

(Emphasis added)

From the above quoted provision the Authority observes that, it was mandatory for the Appellant to prepare their Price Schedule in accordance with the format provided in the Tender Document.

Furthermore, the Authority is of the view that, had the Appellant been careful enough in the preparation of their Tender they would have seen the Price Schedule format which was part of the Tender Document and complied with it.

In view of the above the Authority’s conclusion in this sub issue is that the Appellant did not comply with the format of the Price Schedule as specified in the Tender Document.

b)Whether the Appellant had the required experience as stipulated in the Tender Document.

This sub-issue has two parts. The first part is whether the Appellant had the minimum experience required in the Tender Document. The second one is whether the Appellant had the

minimum training experience as required by the Tender Document. The Authority proceeded to resolve this sub issue as hereunder:

i) **Whether the Appellant had the minimum experience stipulated in the Tender Document**

The Authority revisited the Appellant's argument on this point that, they have been unfairly disqualified from the tender process as the Respondent was aware that they had the required experience since they had been working together for the past three years at the Printing Plant in Kijichi area, Dar es Salaam region. The Appellant contended further that, their printing machines are still in use at Kijichi area todate and they have rescued the Respondent from the shortage of immigration documents. The Appellant stated further that, the Evaluators were aware of the existence of contractual obligation as per Memorandum of Understanding between the Appellant and the Respondent. They also knew that the Appellant has experienced personnel in this industry but they deliberately decided to disqualify them on this ground.

In reply thereof the Respondent submitted that, the Evaluation team conducted their evaluation based on the documents submitted before it and not otherwise. The Respondent contended further that, the Evaluation Process was conducted

in accordance with the criteria provided for in the Tender Document and all the tenderers were treated equally, and that they had no knowledge of the existing Memorandum of Understanding between the parties. The Evaluators discovered that the Appellant did not submit evidence of any experience in relation to the printing works as the experience submitted related to other activities but not printing. Hence, the Appellant was disqualified from the process for non compliance with the requirement of the Tender Document.

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 ITB read together with Item 13.3 of the Bid Data Sheet (hereinafter to be referred to as "**BDS**") which provide for the minimum experience required in the tender under Appeal. The said Clauses provide as follows;

ITB 13.3 "The Documentary evidence of the bidders qualification to perform the contract if its bid is accepted shall establish to the Procuring Entity's satisfaction:

a) ...

b) The Bidder has the financial, technical and production capability necessary to perform the contract, meets the qualification criteria specified in the Bid Data Sheet and **has the successful performance history** in accordance with the criteria specified in the **Bid Data Sheet...**" (Emphasis Supplied)

Item 13.3 "The Bidder or its authorized agent shall have **minimum of two(2) years experience in manufacturing/supplying of PRINTING MACHINE**" (Emphasis Supplied)

Having noted that the minimum required experience is two years, the Authority examined the Appellant's Tender in order to establish if they complied with such a requirement. In so doing the Authority noted that, the projects listed in Appellant's tender were not related to supplying or manufacturing of printing machines, instead, the said experience related to the Appellant's supply of, among others;

- Laptops to PCCB
- ICT and Telecommunication equipment to TTCL specifically ICT and wireless phones

- Telecommunication equipments to Tanzania People's Defence Force (TPDF) specifically desk top computers
- Telecommunication equipment to the Law Reform Commission specifically laptop computers
- Uniforms to TPDF specifically combats, shoes, webbing equipment and ranks
- Supply of uniforms to the Ministry of Home Affairs specifically clothing materials for prisoners, suiting materials for staff and shoes for officers.

From the above list, the Authority is of the view that, the experience shown in the Appellant's tender did not relate to printing works. Based on Clause 13.3 of the ITB read together with Item 13.3 of the BDS quoted above, the Authority observes that, for tenderers to qualify for award of the Tender in dispute they were required to prove, amongst others, their experience in supply of printing machines. Thus, the Authority is of the firm view that the Evaluation Committee's observation was proper since the Appellant did not provide evidence to show that they had the required experience.

Therefore, the Authority's conclusion on this part is that the Appellant did not meet the minimum experience as required by the Tender Document.

ii) Whether the Appellant had the minimum training experience as required in the Tender Document.

The Appellant's argument on this point was that, the evaluation criterion for this aspect was unclear and had been unfairly used to eliminate them in this tender process. The Respondent was aware of the training schedule they had prepared which was to be offered to Respondent's employees in South Africa. The only obstacle in implementing it was caused by the Respondent themselves for failure to release their employees to undergo that training. The Appellant contended further that the law as provided for under Regulation 90(18) b (ii) of GN. No. 97 of 2005 requires the evaluation criteria that are used in evaluation to be objective and quantifiable. That being the case, the evaluation team would have looked at the objectives of the project and past relationship the Appellant had with the Respondent and waived other minor issues which do not go to the substance of the tender. Surprisingly, the Respondent used this minor deviation to eliminate them unfairly.

In reply the Respondent submitted that, the Evaluation Committee considered the documents submitted before it. The Appellant's being one of the tenderers did not indicate any information which proved that they had the required training experience in handling the proposed contract. Hence, they were found to have not complied with this requirement too.

In order to ascertain the validity of the parties' arguments, the Authority revisited Item 13.3 (ii) of the BDS which provides that:

"13.3 The Bidder must submit the following;

(ii) the Bidder should have enough training and experience in handling the proposed product". (Emphasis supplied)

The above quoted provision entails that, training experience is among the requirements which was to be complied with by all the tenderers.

The Authority examined the Appellant's tender and noted that, it had not shown any evidence to prove that they had adequate training and experience in handling the proposed products. The Authority finds the Evaluators' observation on this criterion to be valid.

The Authority rejects the Appellant's argument in this regard that, the Evaluators ought to have waived this requirement as it could not affect the substance of the tender on the reason that, the Evaluators are bound to evaluate the tenders strictly in accordance with the criteria stated in the Tender Document pursuant to Regulation 90(4) of GN. No. 97 of 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)

The Authority is of the view that training is crucial for the efficient operation and functioning of the printing machines

Therefore, the the Authority is of the firm view that, the Appellant's tender did not meet the minimum training experience as required in the Tender Document.

In view of the afore going the Authority's conclusion on sub issue two is that, the Appellant did not have the required training experience as stipulated in the Tender Document.

(c) Whether the Appellant's tender specified the availability of Spare Parts as per the requirement of the Tender Document.

In resolving this sub issue the Authority revisited the Appellant's submission that, the Evaluators erred in law by evaluating this criterion at the Technical Evaluation stage instead of at the Post-qualification stage whereby they could have verified the availability of spare parts by physically visiting their premises. The Appellant submitted further that, the Respondent is aware that the Appellant is capable of supplying spare parts at any time as it was done in the previous contract where spare parts were supplied as soon as they were required. Hence, the evaluation on the basis of this criterion was not properly conducted.

The Respondent in reply submitted that, the Appellant's tender was silent on the issue of availability of spare parts and maintenance. The Evaluators therefore, found the Appellant's tender to be non responsive on this criterion as well.

In order to satisfy itself as to the validity of the arguments submitted by both parties, the Authority revisited Clause 13.3(ii) of the ITB which provides that:

“Bidder should have technical support capabilities after sales these includes services, maintenance and spare parts supply” (Emphasis added)

The above quoted provision stipulates clearly that the tenderers were required to demonstrate their technical support capabilities, maintenance, services and availability of spare parts.

The Authority revisited the Appellant’s tender and noted that the same did not comply with this criterion. During the hearing the Authority learnt that the Appellant did not comply with some of the requirements as they thought that the Respondent would waive them due to the existence of the contractual obligation under the Memorandum of Understanding.

The Authority hastens to enlighten the Appellant, that each tender has its own peculiar requirements separate and distinct from other tenders or previous contracts. Thus, the Appellant was required to comply fully with the requirements of the

relevant Tender Document regardless of the contractual obligations in existence.

Furthermore, the Authority wishes to enlighten the Appellant that, Post qualification is undertaken to the lowest evaluated tenderer only as per Regulation 94(5) of GN No. 97/2005.

Accordingly, the Authority's conclusion on this sub issue is that the Appellant's Tender did not specify the availability of Spare Parts as per the requirements of the Tender Document.

(d) Whether the Appellant complied with the requirement to submit Manufacturer's Authorization letter as specified in the Tender Document.

In resolving this sub-issue the Authority revisited submissions by parties on this particular point vis-à-vis the Tender Document and the applicable law. In their submission the Appellant admitted that they had submitted the Manufacturer's Authorization letter from Fugu International Industry. The Appellant contended further that, although the said letter did not comply with the requirement of the Tender Document, its contents clearly show that the Appellant has been appointed as

the agent of the said Company in Tanzania in relation to Printing Machines. The Appellant's honest belief was that, if the Evaluators had taken into account the contents of that letter, they would not be disqualified for non compliance.

In reply thereof the Respondent submitted that, they found the Appellant's Tender to have contradictory information as they submitted the Manufacturer's Authorization letter from Fugu International Industry from China while the brochures attached showed that the printing machines were to be supplied from Heidelberg Company of Germany. The said printing machines shown in the brochure of Heidelberg were for Four Colour Offset Press and not for Two Colour Offset Press which was requested in the Tender Document. The Respondent contended further that the Heidelberg Company was not related to Fugu International. Also Heidelberg has several agents in Tanzania but the Appellant is not amongst them.

Having considered the contentious arguments of parties, the Authority revisited Item 13.3(d) of the BDS which provides guidance on how a Manufacturer's Authorization letter should be. The said Item 13.3(d) provides as follows;

“The Manufacturer’s Authorization form for all products shall be submitted (duly signed) together with the tender in the format as shown in Section VIII (Form No. 7 of the Bid Document)” (Emphasis supplied)

Furthermore, the Authority revisited Section VIII, Form No 7 of the Tender Document and noted that, it provided the Format of how the Manufacturer’s Authorization letter should be. The Authority compared Form No. 7 to the Appellant’s Manufacturer’s Authorization letter and noted that, the latter was not addressed to the Respondent as required; instead, it bore a title “TO WHOM IT MAY CONCERN”. Also the same Manufacturer’s Authorization letter did not specify the specific Tender number as required in Form No 7. That means, it was not in the Format specified in the Tender Document.

Moreover, the Authority examined the Appellant’s Tender and observed that the same had a Manufacturer’s Authorization letter from Fugu International dated 6th December, 2011, but the Brochures attached bore the Logo of Heidelberg. The Authority failed to understand why the Appellant submitted the Manufacturer’s Authorization letter and Brochures from two different companies which are unrelated.

Based on the requirements of Item 13.3(d) (ii) of the BDS and Form 7 under Section VIII of the Tender Document, the Authority is of the firm view that, the Manufacturer's Authorization letter submitted by the Appellant did not meet the requirements of the Tender Document.

In view of the above, the Authority's conclusion on this sub issue is that, the Appellant did not comply with the requirement to submit a Manufacturer's Authorization letter as specified in the Tender Document.

Accordingly, the Authority's conclusion on issue number one is that, the Appellant was fairly disqualified.

2.0 Whether the quotation of prices in foreign currency by the successful tenderers was proper at law

In resolving this issue the Authority considered the Appellant's submission on this point which was based on the following grounds:

- The Tender has been awarded to tenderers who quoted their prices in foreign currency while that was

in contravention of Clause 16.1(a) of the ITB which specifically states that the tenderers were required to quote their prices in Tanzanian shillings. It was submitted further that, Clause 16.1(a) of the ITB imposed an important criterion; instead, the Respondent ignored it and imposed a new criterion on how foreign currencies would be converted and applied the same during the evaluation process.

- The Respondent contravened Regulation 90(4) of GN. No. 97/2005 which requires the evaluation to be consistent with the terms and conditions set forth in the Tender Document.
- The Respondent contravened Clause 28(1) of the ITB which requires equal treatment of tenderers during evaluation, as the tenderers were not equally treated.

In reply thereof the Respondent submitted that, Clause 16.1 (a) of the ITB requires goods supplied from **within the country** to be quoted in **Tanzanian Shillings** while Clause 16.1(b) requires goods to be supplied **from abroad** to be quoted in **any freely convertible currency** . Also Clause 31.2 of the ITB provides that the currency that shall be used for tender evaluation and comparison purposes to convert all bid prices

expressed in various currencies is Tanzania Shillings and the source of exchange rate is the Bank of Tanzania at the date when the tender was opened. Therefore, there was no error committed by other tenderers in submitting their quotations in foreign currency. Given that this was an International Competitive Tender, tenders in convertible currencies were inevitably expected.

Having summarized the submissions by parties on this sub-issue, the Authority deemed it necessary to analyze the validity of the said submissions in light of the Tender Document and the applicable law. To start with the Authority revisited Clause 16. 1(a) of the ITB which was relied upon by the Appellant that, it strictly requires the currencies in the disputed tender process to be quoted in Tanzania shillings. For purposes of clarity the Authority reproduces the said Clause 16(1) (a) as hereunder;

“Prices shall be quoted in the following currencies:

- a) For goods and service that the Bidder will supply from within the United Republic of Tanzania, **the price shall be quoted in Tanzania shillings** unless otherwise specified in the **Bid Data Sheet.**”

The Authority revisited further Regulation 16.1(b) of the ITB which provides as follows;

b) "For goods and related services that the bid will supply from outside the United Republic of Tanzania, or for imported parts or components of goods and related services originating outside the United Republic of Tanzania, **the Bid Prices shall be quoted in any freely convertible currency of another country...**" (Emphasis supplied)

Furthermore, the Authority observed that Clause 16.1(b) of the ITB has to be read together with Clauses 31.1 and 31.2 of the ITB and Item 31.2 of the BDS which provides as follows:

Clause 31.1 "To facilitate evaluation and comparison, the procuring entity will convert all bid prices expressed in the amounts in various currencies in which the Bid prices are payable to either;

a) **In Tanzania Shillings at the selling exchange rate established for similar transactions by the Bank of Tanzania**
or...

b) a **currency widely used in international trade, such as U.S Dollars** at the selling rate of the exchange published in the international press for the amount payable in foreign currency; **and at the selling exchange rate established for a similar transactions by the Bank of Tanzania....**" (Emphasis added)

Clause 31.2 "The currency selected for converting Bid Prices to a common base for purposes of evaluation, along with the source and date of exchange rate, specified in the **Bid Data Sheet**" (Emphasis supplied)

Item 31.2 BDS "**The currency that shall be used for Bid evaluation and comparison purposes to convert all bid prices expressed in various currencies is:- Tanzania shillings, source of the Exchange rate:- Bank of Tanzania (BoT) Date of Exchange rate:- Date of Bid Opening**" (Emphasis supplied)

Based on the above quoted provisions, the Authority is of the view that, although Item 16.1(a) of the ITB was very specific that the tender price has to be in Tanzanian shillings for the goods to be supplied from within Tanzania, Clauses 16.1(b), 31.1 and 31.2 of the ITB allow the tender prices to be quoted in foreign currency (Euro or USD) if the goods were to be supplied from outside Tanzania. The Authority further noted that, Item 31.2 of the BDS provided how the said foreign currencies would be converted. Thus, the Authority is of the firm view that, the Tender Document allowed the use of other foreign currencies.

The Authority wishes to enlighten the Appellant that, clauses in a Tender Document have to be read together and not in isolation of the other provisions therein. For instance, the Appellant cited Clause 16.1(a) of the ITB in isolation of other relevant provisions which if read together would have given the holistic meaning of the Tender Document.

Accordingly, the Authority's conclusion in respect of the second issue is that, the quotation of prices in foreign currency by the successful tenderers was proper at law.

3.0 Whether the communication of the tender results to unsuccessful tenderers was done in accordance with the law

In resolving this issue the Authority revisited the Appellant's contention that, the tender results were not properly communicated to the Appellant as the same did not disclose the names of the Successful Tenderers and their awarded contract prices as required by Clause 40.3 of the ITB. The Appellant submitted further that, the Respondent's failure to comply with Clause 40.3 defeats the principle of procurement which requires tender results to be communicated in a transparent manner.

In reply thereof the Respondent submitted that, the tender results were communicated to the Appellant immediately after the successful tenderer had furnished the performance security.

The Respondent also conceded that their letter which informed the Appellant of the tender results did not disclose the names of the successful tenderers and contract price at which the tender was awarded.

In order to ascertain the validity of the Appellant's argument the Authority revisited Clause 40.3 of the ITB which was relied upon by the Appellant in support of their argument. The said clause provides as hereunder;

“Upon the successful Bidder’s furnishing of the performance security pursuant to ITB Clause 42, the Procuring Entity will **promptly notify each unsuccessful Bidder, the name of the successful Bidder and the contract amount** and will discharge the bid security or bid securing declaration of the Bidders pursuant to sub Clause 18.7” (Emphasis added)

Furthermore, the Authority revisited Regulation 97(11) of GN. No 97/2005 which provides as follows;

“Upon entry into force of the procurement or disposal contract, and if required, the provision by the supplier, service provider, contractor or asset buyer of the security for the performance of the contract, **notice of the procurement of disposal contract has to 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 contract and the contract price.**” (Emphasis supplied)

Based on the above quoted provisions the Authority accepts the Appellant's argument that the Respondent ought to have informed them of their unsuccessfulness as well as the name of the successful tenderer and the contract price. The Respondent is reminded to comply with Regulation 97(11) of GN No. 97/2005 in their future tenders.

The Authority therefore, concludes that, the communication of the tender results to unsuccessful tenderers was not done in accordance with the law.

4.0 To what reliefs, if any, are the parties entitled to.

Having resolved the issues in dispute the Authority considered the prayers by parties.

(a) Prayers by the Appellant:

Before considering the Appellant's prayers the Authority hereby informs the Appellant that, even though the Respondent failed to comply with Regulation 97(11) of GN No. 97/2005 and Clause 40.3 of the ITB the same did not prejudice the Appellant's rights in this procurement process. Having pointed out so the Authority revisited the Appellant's prayers, and observes as follows:

- (i) The Authority does not accept the Appellant's prayer that the Respondent be ordered to revise the decision made

against the them, as it has already been established under issue number one that the Appellant was fairly disqualified, thus, the Respondent's decision was proper.

(ii) With regard to the Appellant's prayer for cancellation and re-advertisement of the said tender, the Authority rejects that prayer on the reason that, the Appellant's tender was substantially non-responsive and therefore rightly rejected.

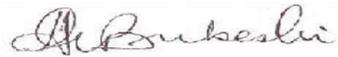
(b) Prayers by the Respondent:

The Authority also considered the Respondent's prayer for dismissal of the Appeal and accepts it as the Appeal lacks merit.

Having considered all facts and evidence, the Authority dismisses the Appeal and each party is ordered to bear its own cost.

Right of Judicial Review as per Section 85 of the Act explained to parties.

Decision delivered in the presence of the Appellant and the Respondent this 23rd day of March, 2012.

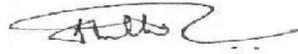


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JUDGE (rtd) A. G. BUBESHI

CHAIRPERSON

MEMBERS:

1. MR. K.M. MSITA



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2. MR. H.S MADOFFE



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3. MS. E. J. MANYESHA



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