

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM.

APPEAL CASE NO. 36 OF 2014-15

BETWEEN

M/S INTERTEK INTERNATIONAL
LIMITED.....1ST APPELLANT

CHINA CERTIFICATION AND
INSPECTION GROUP CO LTD.....2ND APPELLANT

AND

TANZANIA BUREAU OF
STANDARDS.....RESPONDENT

DECISION

CORAM

1. Hon. Vincent K.D Lyimo, J. (rtd) - Chairman
2. Mrs. Rosemary A. Lulabuka - Member
3. Mr. Louis P. Accaro - Member
4. Eng. Aloys J. Mwamanga - Member
5. Mr. Ole-Mbille Kissioki - Ag. Secretary

SECRETARIAT

1. Mrs. Toni S. Mbillinyi - Principal Legal Officer
2. Ms. Florida R. Mapunda - Legal Officer
3. Ms. Violet S. Limilabo - Legal Officer
4. Mr. Hamisi O. Tika - Legal Officer

FOR THE APPELLANT

1. Mr. Odhiambo Kobas - Advocate, CREST Attorneys
2. Ms. Tausi Shaban - Company Secretary, Intertek
3. Mr. Sallu Johnson - General Manager, Intertek
4. Mr. Percival De Sooja - Program Manager, Intertek

FOR THE 2ND APPELLANT

1. Ms. Neema Kileo - Advocate, ASTUTE Attorneys
2. Ms. Arbogast Warioba - CCIC's representative in TZ

FOR THE RESPONDENT

1. Mr. Baptister Bitaho - Head of Legal Unit
2. Ms. Eunice Lema - Legal Officer
3. Mr. Josha Katabwa - Head of Electrical laboratory
4. Ms. Mary Meela - Head of Imports
5. Mr. Charles Challe - Procurement Unit
6. Ms. Agnes Mneney - Director of Standards Development
7. Mr. Mwesiga Mulinda - Head of Editing and Reprography Section

OBSERVER

1. Mr. Michael Maryogo - VOC Coordinator Bureau Veritas

This decision was scheduled for delivery today 2nd April, 2015 and we proceed to do so.

This is an Appeal which was lodged by M/s INTERTEK INTERNATIONAL LIMITED (hereinafter referred to as "the 1st Appellant") and M/s CHINA CERTIFICATION & INSPECTION (GROUP) CO. LTD (hereinafter referred to as "the 2nd Appellant") against the TANZANIA BUREAU OF STANDARDS (hereinafter referred to as "the Respondent"). The 2nd Appellant filed his Appeal after been notified by the Public Procurement Appeals Authority (hereinafter called "the Appeals Authority"). The notification was done for purposes of informing all tenderers who had participated in the bidding process on the existence of the Appeal inviting them to exercise their rights as provided for under the law.

The said Appeal is in respect of Tender No. PA/O44/2014/2015/NC/02 for the provision of Pre-shipment Verification of Conformity to Standards (PVoC) Services for General Items for Tanzania Bureau of Standards (hereinafter referred to as "the tender").

After going through the record of proceedings submitted to the Appeals Authority, as well as the oral submissions by the parties at the hearing, the facts of the Appeal may be summarized as follows:

The Respondent through the Guardian, the Daily News and East African newspapers of 10th October 2014, invited tenderers to submit tenders, the subject matter of this Appeal.

The deadline for submission of tenders was initially set for 11th November 2014. However, it was later extended to 25th November 2014 through a notice published in the Guardian and the East African newspapers of 5th November, 2014. On the date of opening six tenders were submitted by the following firms: -

S/NO	Tenderers Name	Quoted price in USD			
1.	M/s Bureau Veritas Inspection Valuation Assessment and Control	Route	Fob Value	Min Fee \$	Max Fee \$
		A	0.53 %	250	5000
		B	0.45 %	250	5000
		C	0.25	250	5000
2.	M/s China Certification & Inspection (Group) Co. Ltd	Ro ute	Fob Value	Min Fee \$	Max Fee \$
		A	0.500%	250	5000
		B	0.425 %	250	5000
		C	0.235 %	250	5000
3.	M/s China Inspection Co Ltd	Route	Fob Value	Min Fee \$	Max Fee \$
		A	0.53 %	250	5000
		B	0.45 %	250	5000
		C	0.25	250	5000
4.	M/s Intertek International (T) Government & Trade Services	Route	Fob Value	Min Fee \$	Max Fee \$
		A	0.53 %	250	5000
		B	0.45 %	250	5000
		C	0.25	250	5000
5.	M/s SGS Tanzania Superintendence Co. Ltd	Route	Fob Value	Min Fee \$	Max Fee \$

		A	0.53 %	250	5000																
		B	0.45 %	250	5000																
		C	0.25	250	5000																
6.	M/s TUV Rheinland	<table border="1"> <thead> <tr> <th>Route</th> <th>Fob Value</th> <th>Min Fee \$</th> <th>Max Fee \$</th> </tr> </thead> <tbody> <tr> <td>A</td> <td>0.53%</td> <td>250</td> <td>5000</td> </tr> <tr> <td>B</td> <td>0.45 %</td> <td>250</td> <td>5000</td> </tr> <tr> <td>C</td> <td>0.25</td> <td>250</td> <td>5000</td> </tr> </tbody> </table>				Route	Fob Value	Min Fee \$	Max Fee \$	A	0.53%	250	5000	B	0.45 %	250	5000	C	0.25	250	5000
Route	Fob Value	Min Fee \$	Max Fee \$																		
A	0.53%	250	5000																		
B	0.45 %	250	5000																		
C	0.25	250	5000																		

The tenders were then subjected to evaluation which was conducted in four stages namely; preliminary, technical, detailed and post qualification. During preliminary evaluation, four tenders were found to be non responsive and therefore disqualified from the tender process. The remaining two tenders from M/s Bureau Veritas Inspection Valuation Assessment & Control and M/s SGS Tanzania Superintendence Co Ltd qualified for technical evaluation.

During technical evaluation both tenderers were found to be responsive and had also complied with all the requirements of the Tender Document at the detailed evaluation stages; thus they were recommended for award.

At its meeting held on 23rd December 2014 the Tender Board approved the recommendations of award to M/s Bureau Veritas Inspection Valuation Assessment & Control and M/s SGS Tanzania Superintendence Co Ltd and ordered post-qualification to be conducted.

The post-qualification was conducted and a report was presented to the Tender Board at its meeting held on 14th February 2015. Having deliberated on it, the Tender Board approved the award to M/s Bureau Veritas Inspection Valuation Assessment & Control and M/s SGS Tanzania Superintendence Co Ltd for the period of 36 months.

On 16th February 2015, the Respondent vide his letter Ref. No. PA/044/2014/2015/NC/02/20 notified all tenderers of its intention to award the tender to M/s Bureau Veritas Inspection Valuation Assessment & Control and M/s SGS Tanzania Superintendence Co Ltd.

Being dissatisfied with the Respondent's notice of intention to award the tender, the 1st Appellant by its letter dated 19th February 2015 Ref. No. GTS/02/PVOC/2015, requested for reasons that led to the disqualification of its tender.

In response to the 1st Appellant's request, the Respondent on 23rd February 2015, by its letter PA/044/2014/2015/NC/02-24 informed the 1st Appellant that it had been disqualified because it had made alterations to the Form of Tender contrary to the specific provisions of Clause 13.1 of the Tender Document.

Being dissatisfied with the reasons given for disqualification of its tender, the 1st Appellant on 27th February 2015 filed an application for administrative review vide its letter Ref. No.CA/GE/24/2015. In the said application for administrative review, the 1st Appellant while admitting to have made

alterations to the Form of Tender, contended that the alterations so made were of no effect and were in fact not substantive such as to warrant disqualification. According to the 1st Appellant, those changes were not material. The Appellant further asserted that each of the bidders had in a way altered the Form of Tender and that the Respondent had acted unfairly and showed bias in disqualifying the 1st Appellant's tender.

In response, on 2nd March 2015, the Respondent vide its letter Ref.No.PA/044/2014/2015/NC/03-26 informed the said Appellant that the Form of Tender is a basic document relied upon by all bidders and procuring entity during tender process. Thus, its alteration or substitution of its format is strictly prohibited in the Tender Document.

Upon being dissatisfied by the Respondent's decision, on 5th March 2015, the 1st Appellant lodged the above appeal to the Appeals Authority. And upon receipt of the said appeal, this Authority notified all tenderers who had participated in the tendering process as required by law. As a result, only the 2nd Appellant filed its appeal containing three grounds of appeal, which have been considered together with those of the 1st Appellant.

SUBMISSIONS BY THE 1st APPELLANT

In this Appeal, the 1st Appellant represented by Mr. Odhiambo Kobas, learned counsel, raised five grounds of Appeal which may be summarized into three main grounds as follows -

- i) The Form of Tender issued by the Respondent did not conform to the PVOC services which are non-consultancy in nature;
- ii) The alterations made in the Form of Tender by the 1st Appellant did not amount to material deviation; and
- iii) The Respondent was biased and showed unfair treatment against the 1st Appellant.

In support of the first ground, the 1st Appellant submitted that, the Form of Tender issued by the Respondent in effect required tenderers to provide the amount of contract price in numbers, in words and name of currency. However, due to the nature of PVoC contracts, tenderers are not required to indicate specific contract price because they are not paid by the procuring entity. Rather, the payments are made by a third party to a successful service provider, who is then required to pay the amount specified in percentage to the procuring entity. Thus, the Form of Tender issued by the Respondent was not clear and precise as it did not contain all information necessary for a prospective tenderer to prepare a competitive tender for PVoC services. In that respect it was argued that the Respondent's

Form of Tender contravened Section 70(2) of the Public Procurement Act, Cap 410 of 2011 (hereinafter referred to as “the Act”).

Furthermore, it was submitted that the Form of Qualification required a clause on declaration of Conflict of Interest to be made part of the Form of Tender. To the contrary, the Form of Tender issued by the Respondent did not contain such a clause. That is to say, the Form of Tender issued by the Respondent contravened even some of the requirements of its own Tender Document.

Addressing the Members of the Authority on ground two of the appeal, the 1st Appellant submitted that the modification of Form of Tender was not substantial or material as it did not go to the root of the subject matter. According to the learned counsel, in order for alterations to be material, the conditions stated in Clause 27.2 of the Instruction To Tenderers (hereinafter referred to as “ITT”) had to be satisfied. He said that the alteration made by the 1st Appellant, could be waived pursuant to Clause 27.4 of the ITT which requires a procuring entity to waive any minor informality or non-conformity. Thus, the Respondent ought to have waived the alterations and not to disqualify the Appellant, since the modifications so made were necessary and because the Form of Tender issued by the Respondent was not suitable for PVoC contracts.

Reverting to the third ground of the appeal, the 1st Appellant asserted that it was discriminated. The said Appellant argued that every tenderer had made alterations to the Form of Tender. Yet, it was only the 1st Appellant who was disqualified. The 1st Appellant insisted that there was no way any of the bidders could have worked on the Form of Tender without making alterations. To that extent, the Appellant submitted that the said Form was not user friendly but highly incomprehensible. Each tenderer tried to modify it to meet the needs of the procuring entity. Thus, it was argued that the Respondent had contravened the requirements of the law, since according to Section 47 (a) and (b) of the Act, procuring entities are required to treat equally and fairly all tenderers in the procurement process without discriminating any of them.

In concluding their submissions, the 1st Appellant asserted that, the disputed tender process was marred by bias and unfair treatment of tenderers due to the fact that some of the bidders had been provided with a separate sheet showing the applicable fee structure while the 1st Appellant was denied the same. The alleged sheet on the fee structure was not part of the Tender Document issued by the Respondent and therefore the 1st Appellant urged this Authority to find that the Respondent exercised double standards against its tender.

Finally, the 1st Appellant prayed for the following remedies -

- i) Declaration that the Respondent failed to follow the procurement principles that govern Tender proceedings.
- ii) Annul the whole decision of the Respondent that disqualified the 1st Appellant's Tender.
- iii) Revise unlawful decision of the Respondent that disqualified the Appellant's Tender or substitute its own decision for the Respondent's unlawful decision.
- iv) Reimbursement of all reasonable expenses incurred by the 1st Appellant in pursuing this matter.
- v) Any other relief that the Appeals Authority may deem fit.

SUBMISSIONS BY THE 2nd APPELLANT

On its part, the 2nd Appellant, being represented by Ms. Neema Kileo learned counsel, filed three grounds of Appeal as follows:

- i. That the respondent had failed to issue/serve notice of intention to award the tender;
- ii. That the Respondent's failure to issue notice of award prejudiced the 2nd Appellant's rights in the tendering process; and
- iii. That the tender process was marred by bias and unfair treatment.

Briefly stated, the 2nd Appellant submitted that it had participated in the bidding process by submitting as per the instructions, its bid to the Respondent. However, they were neither served with the notice of intention to award nor were they informed of the tender results. That the 2nd Appellant became aware of the Appeal at hand after being so informed by the Appeals Authority. In that respect, the 2nd Appellant submitted that the provisions of Section 60(3) of the Act which requires procuring entities to notify all the tenderers of its intention to award had not been complied with. The Respondent had thus failed to comply with the law.

In the course of her submissions, the 2nd Appellant informed the Members of the Authority that on two separate occasions the Appellant had requested to be informed on the tender results. Yet the Respondent dispatched the alleged notice of intention to award through an unknown email address, viz: - cicc@cicc.com. The 2nd Appellant showed that the correct and valid email address provided by the 2nd Appellant was zhouzheng@ccic.com; which was clearly provided by the Appellant during the bidding process. Thus, the Respondent had used a different email address from the one provided in the submitted tender; clearly in contravention of Regulation 231(8) of GN No. 446. The said Regulation requires the dispatched notification to be properly addressed and sent to a tenderer through an acceptable mode of communication.

Addressing the second issue in the grounds of appeal, the 2nd Appellant argued that the Respondent's failure to notify the 2nd Appellant with the notice of intention to award deprived the latter of its right to lodge a complaint, if any. Had the 2nd Appellant being notified of the intention to award, they would have been able to assess the reasons for their disqualification and if necessary, to challenge the tendering process. Thus, the Respondent's failure to do so had denied or prejudiced the 2nd Appellant's right to lodge a complaint.

Further, the 2nd Appellant argued that the Respondent's failure to notify the 2nd Appellant with intention to award clearly shows that, there was non-compliance to the principle of accountability and transparency. This is due to the fact that, tenderers were unequally treated as others managed to get the notice of intention to award quite on time and others did not. In view of that, the 2nd Appellant believes that the whole procurement process was neither fair nor transparent as required by Section 47 of the Act.

Finally, the 2nd Appellant prayed for the following remedies;

- i) Strong orders be issued against the Respondent for failure to comply with Section 60(3) of the Act
- ii) Annulment of the award proceedings.

REPLIES BY THE RESPONDENT

In addressing the specific alterations made by the 1st Appellant to the Form of Tender, the Respondent replied and stated that those alterations were not only substantial and material, but also were done in contravention of Clause 13.1 of the ITT. The Respondent showed that the 1st Appellant had inserted into the Form of Tender, additional information relating to administration fees, accreditation fees, advance payment & eligibility, and a statement regarding to conflict of interest, that were not in the format of the Form of Tender. In effect the Respondent denied that all the tenderers had altered the form of tender in the manner the 1st Appellant did.

In sum, the Respondent argued that the Form of Tender as issued was sufficient to capture the nature of payments as required under Special Conditions of the Contract (hereinafter referred to as "SCC") Clause 20 and General Conditions of the Contract (hereinafter referred to as "GCC") Clause 36.1 without making any alterations. In any event, the Respondent also argued that if the Form of Tender issued by the Respondent did not comprehensively address the peculiarities of PVoC services, the 1st Appellant could have sought for clarification as per Clause 8 of ITT. Thus, the 1st Appellant failed to comply with the requirement of Form of Tender as a result, its tender was disqualified.

Reacting to the allegations of bias and double standards, the Respondent insisted that it conducted the evaluation process in accordance with Regulation 203(1) of GN No. 446 which requires evaluation of tenders to be in consistency with terms and conditions stated in the Tender Document. Further to that, the Respondent considered Regulation 202(5) of GN No. 446 which requires a substantially responsive tender to be that which conforms to conditions given in the Tender Document without material deviations or reservations. Moreover, the Respondent submitted that, the process of determining responsive tenders considered Regulation 206 of GN No. 446 which requires determination of responsive tender to base on contents of the Tender Document itself without recourse to extrinsic evidence. Based on the mentioned provisions, the 1st Appellant's tender was fairly disqualified for failure to comply with the requirements of the Tender Document. The Respondent denied there was bias or unfairness during the tender process, since it had observed all procurement principles in order to ensure that, the award decision reached is fair to all.

Addressing the issues raised by the 2nd Appellant, the Respondent conceded that it had used a wrong email address different from the one provided in the tender submitted by the Appellant. The Respondent reported that the address was obtained from the latter's website. Further, the Respondent denied to have received emails requesting for tender results.

Notwithstanding the above admission, the Respondent was quick to insist that the same was not intended. It was just an oversight on the side of the Respondent and concluded by praying that the Appeal be dismissed in its entirety.

ANALYSIS OF THE AUTHORITY

Having gone through the tender proceedings including the various documents submitted by both parties and the oral submissions during the hearing of the appeal, this Authority is of the view that, there are four main issues calling for determination and these are: -

- 1.0 Whether the Form of Tender issued by the Respondent conforms to PVoC services, and if so, whether alterations made to the Form of Tender by the 1st Appellant amounted to material deviation;
- 2.0 Whether the Respondent failed to issue a notice of intention to award to the 2nd Appellant and if so whether such failure prejudiced the 2nd Appellant's rights;
- 3.0 Whether there was bias or unfair treatment of tenderers in the disputed tender proceedings;

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

Having framed the above issues, the Authority proceeded to resolve them in the following manner;

1.0 Whether the Form of Tender issued by the Respondent conforms to PVoC services, and if so, whether alterations made to the Form of Tender by the 1st Appellant amounted to material deviation.

In resolving this issue, the Appeals Authority considered the 1st Appellant's contentions that, the Form of Tender issued by the Respondent does not conform to PVoC services, was not user friendly and that practice required prospective tenderers to alter it to suit market demands for PVoC contracts.

In order to resolve contentions of the parties on this point, the Appeals Authority deemed it necessary to establish the type of tender under Appeal in order to determine the suitable standard bidding document applicable. Having reviewed the Tender Document the Authority was satisfied that, the tender under Appeal was for provision of non consultancy services. Having so established the Appeals Authority proceeded further to review the Standard Bidding Document for provision of non-consultancy services issued by Public Procurement Regulatory Authority (hereinafter referred to as "PPRA") in order to satisfy

itself if the same document was used by the Respondent in the tender under Appeal. In so doing, the Authority compared the Tender Document issued by the Respondent and the Standard Bidding Documents for non consultancy services issued by PPRA in February 2014 and noted that the two documents were the same. That means, in preparation of the tender under Appeal the Respondent used the said Standard Bidding document. It is quite clear that, procuring entities when using standard bidding documents issued by PPRA are required to modify it so as to fit into the specific requirements of the tender in question. However, the allowed modification should not change completely the nature and the format of the standard bidding document. In the event that major changes are necessary, the PPRA have to be consulted for guidance.

In the tender under Appeal, the Respondent used Standard Bidding Document for provision of non-consultancy services. The customization of the standard bidding document was done in various parts including invitation to tender, tender data sheet and special condition of contract. The Appeals Authority observed further that Respondent made no modifications to the Form of Tender before issuing it as such. That is to say, the Form of Tender issued by the Respondent was the same as one contained in the Standard Bidding Document. The presumption being that the Respondent found there were no compelling reasons to alter the same taking into account that it has been floating the same tender for a number of years.

The Authority proceeded further to examine the respective Forms of Tender submitted by all tenderers in order to satisfy itself whether the said Form of Tender was unsuitable for PVoC services. In the course of so doing, the Authority revisited Forms of Tender submitted by all tenderers and very specific the first paragraph which deals with the contract price and observed as follows;

- i) M/s Bureau Veritas Inspection Valuation Assessment and Control - "*see the applicable fee structure*" and attached the table of a fee structure provided under Clause 20 of SCC.
- ii) The 1st Appellant inserted a table showing the applicable fees structure as provided under Clause 20 of SCC. *But inserted additional information relating to administration fees, accreditation fees, advance payment & eligibility, and a statement regarding to conflict of interest.*
- iii) The 2nd Appellant inserted the contract sum of *USD 6,000,000.*
- iv) M/s SGS Tanzania Superintendence Co. Ltd - inserted the words "*Exporter pays as percentage of FOB value*" (as per GCC 36.1 and SCC 20 and 21).
- v) M/s China Inspection Co Ltd - inserted a table showing the applicable fee structure without

omitting the original table provided for in the Form of Tender

- vi) M/s TUV Rheinland – No Form of Tender was submitted.

From above observations, it is quite clear that, among the six tenderers, four had a similar understanding of what was supposed to be the contract price. The four tenderers who had the similar understanding on what has to be the contract price, all made reference to Clause 20 of SCC by either inserting the table which shows fees structure or by attaching it as an annexure.

Upon further review of the Forms of Tender together with the evaluation report submitted, the Appeals Authority observed that tenderers who indicated their contract price by either making reference to Clause 20 of the SCC or by inserting the table in the Form of Tender or by attaching it as an annexure were not disqualified for having altered the Form of Tender. But as already indicated the 1st Appellant was disqualified because, amongst other things he inserted additional information on administration fees, accreditation fees, advance payment & eligibility, and a statement regarding to conflict of interest, changes which substantially modified the Form of Tender.

From the above observations, the Appeals Authority rejects the 1st Appellant's argument that, the Form of Tender was not

suitable for PVoC services. The Authority is of the opinion that from the documents submitted there was nothing which indicated that neither the Form of Tender nor the Tender Document was unsuitable for the Tender under Appeal.

Before closing on the propriety of the Form of Tender, this Authority wishes to comment on one aspect of the form. The said form contains one space wherein the tenderers were required to indicate the contract price and to insert the amount in numbers, amount in words and name of currency taking into account that PVoC contracts do not have fixed contract sum payable. At the hearing of this Appeal the Respondent was asked to clarify on that aspect and replied that, tenderers were required to indicate contract price as provided in the conditions of contract.

Based on the above fact, the Authority is of the view that, pursuant to Regulation 184(2) of GN No. 446, the Form of Tender was supposed to indicate what was required to be shown as a contract price to enable all prospective tenderers to have the same understanding. In the event there was ambiguity, the law as well as the Tender Document allows clarification to be sought from the procuring entity. Shortfalls in the tender documents may not be adequately addressed unless the same are brought to the attention of procuring entities. In the tender under Appeal clarifications were to be sought

pursuant to Clause 8.1 of the ITT read together with Regulation 13(1) of GN No. 446 which provides as follows: -

Clause 8.1 "A prospective tenderer requiring any clarification of the tendering documents may notify the procuring entity in writing or in electronic forms that provide record of the content of communication at the procuring entity's address indicated in the Tender Data Sheet prior to the deadline for submission of tenders".

Reg. 13(1)(a) "A tenderer may request a clarification of the solicitation documents from a procuring entity, provided that such request is submitted to the procuring entity at least;

(a) In case of competitive tendering methods, fourteen days prior to the deadline for the submission of the tenders" (Emphasis supplied)

The 1st Appellant conceded not to have sought for clarification from the Respondent. Further the 1st Appellant failed to establish how the said form of tender was not suitable for PVoC services. The Appeals Authority is of the settled view that, the Appellants have not been able to establish that the Form of Tender was not suitable for PVoC services. The 1st Appellant had opportunity to seek for clarification and raise the said issue of incompatibility of Form of Tender to PVoC services but he

failed to do so. The 2nd Appellant did not even attempt to talk on incompatibility. Therefore, the Appeals Authority finds that, the Form of Tender was suitable for the Tender under Appeal.

Having established that the Form of Tender was suitable for the tender under Appeal, the Authority proceeded to determine the second part of the framed issue; namely, whether the alteration made to the Form of Tender by the 1st Appellant amount to material deviation.

During the hearing, the 1st Appellant conceded to have altered the Form of Tender alleging it was not suitable for PVoC services. The 1st Appellant contended that, the said alterations were not material as they had not gone to the root of the subject matter.

In order to substantiate the validity of the arguments by the 1st Appellant, the Appeals Authority deemed it prudent to revisit the Tender Document and observed that Clause 13.1 of the ITT guides on the requirement of Form of Tender and it requires tenderers to comply with it as issued. The said Clause 13.1 provides as follows;

"The tenderer shall fill the Form of Tender furnished in the Tendering documents. The Form of Tender must be completed without any alterations to its

Format and no substitute shall be accepted".
(Emphasis added)

Furthermore, Clause 27.2 of the ITT provides for various circumstances on material deviation or reservation. For purposes of clarity the Appeals Authority reproduces the relevant parts as hereunder;

27.2 "A substantially responsive tender is one which conforms to all terms, conditions and specifications of the tendering documents, without material deviation or reservation. A Material deviation or reservation is one that;

a) N/A

b) Limits in any substantial way, inconsistent with the tendering documents, the procuring entity's rights or the tenderer's obligations under the contract

c) N/A (Emphasis added)

From the provisions quoted above, the Authority is of the view that, tenderers were required to comply with the requirements of Form of Tender as issued in the Tender Document in compliance with Clauses 13.1 and Clause 27.2 quoted above. The 1st Appellant's Form of Tender contravened the above quoted ITT. The added information inserted by the 1st Appellant in the Form of Tender relating to administration fees,

accreditation fees, advance payment & eligibility, could be found under Clause 4.1 and 4.2 of the Statement of Requirement (Section VI of the Tender Document). Similarly the clause on declaration of conflict of interest was covered under Form of Qualification and a specific form which was to be filled by tenderers was provided for under page 104 of the Tender Document.

The Appeals Authority is therefore of the firm view that, the 1st Appellant had made material deviation to the Form of Tender and the disqualification thereof was proper in law.

2.0 Whether the Respondent failed to issue a notice of intention to award to the 2nd Appellant and if so whether such failure prejudiced the 2nd Appellant's rights

In resolving this issue, the Appeals Authority considered the Respondent's admission that they did not send a notice of intention to award through the specific email address provided in the tender submitted by the 2nd Appellant. However, the Respondent denied to have acted with bias or double standard as he insisted that they had used email address obtained from the 2nd Appellant's website. It is to be noted that the 2nd Appellant did not disown the said website.

In resolving the issue, the Authority considered the provision of Section 60 (3) of the Act which provides as follows;

"Upon receipt of notification, the Accounting officer shall, immediately thereafter issue a notice of intention to award the contract to all tenderers who participated in the tender in question giving them fourteen days within which to lodge complaints thereof, if any. (Emphasis added)

Technically, in as much as the Respondent conceded to have used a wrong email address, it had failed to serve a notice of intention to award on the 2nd Appellant.

Having established that the Respondent had failed to issue a notice of intention to award, the Authority proceeded to examine if such failure had prejudiced the 2nd Appellant's rights. In so doing, the Appeals Authority reviewed the documents submitted and the applicable law and observed that, the right of the 2nd Appellant which might have been affected is the right to lodge complaint to challenge the intended award or unfair disqualification of their tender. The Authority went further to review the evaluation report in order to establish if the 2nd Appellant's tender was fairly disqualified and whether the recommendations of award to successful tenderers was proper in law.

In the course of reviewing the evaluation report the Appeals Authority observed that, the evaluation of the tenders was conducted in four stages namely; preliminary, technical,

detailed and post qualification which was carried out pursuant to Clauses 28, 29, 30, 31 and 34 of the ITT. The Authority observed further that, the 2nd Appellant was disqualified at the preliminary stage of evaluation for submitting a Power of Attorney which was not signed contrary to Clause 22(v) of the Tender Data Sheet. Furthermore, the 2nd Appellant was disqualified for indicating in the Form of Tender the contract sum of USD 6,000,000 contrary to Clause 20 of SCC. Therefore, the Authority finds that the 2nd Appellant was fairly disqualified on the basis of the anomalies noted by the evaluators during the evaluation process.

In reviewing further the evaluation report, it was observed that the award was recommended to M/s Bureau Veritas Inspection Valuation Assessment & Control and M/s SGS Tanzania Superintendence Co Ltd after they had complied with all the requirements provided in the Tender Document. Furthermore, the Authority observed that, the evaluation was conducted based on the criteria specified in the Tender Document and each stage was conducted as per Clauses 28, 29, 30, 31 and 34 of the ITT. Thus, the Authority is satisfied that, the evaluation process was conducted in accordance with the law and the subsequent award thereto was fair.

In view of the foregoing analysis, the Appeals Authority is satisfied that, much as the 2nd Appellant was not given the

notice of intention to award, such failure did not affect or prejudice 2nd Appellant's rights under the tender process.

3.0 Whether there was bias or unfair treatment of tenderers in the disputed tender proceedings

In resolving this issue, the Authority considered the two Appellants contentions that there was bias and unfair treatment of tenderers in the disputed tender process and decided to resolve contentions of each Appellant separately.

To begin with the Appeals Authority considered the 1st Appellant's contention that their disqualification was based on unfair treatment on the fact that, all tenderers had made alteration in the Form of Tender. That, they were singled out for the said disqualification. In the course of dealing with this Appeal, we have shown how each tenderer had reacted to the Form of Tender. Specifically we have shown that none of the tenderers sought for clarification on the alleged incompatibility of the Form of Tender with PVoC Services. In addition neither the 1st Appellant nor 2nd Appellant has shown whether there was bias or unequal treatment of the tenderers by the Respondent. And as indicated above both Appellants were fairly disqualified for various reasons.

Therefore, the Authority's conclusion with regard to the 3rd issue is that, there was neither bias nor unfair treatment of the tenderers in the disputed tender process.

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

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

To start with the 1st, 2nd and 3rd prayers by the 1st Appellant cannot be upheld in view of the findings by this Appeals Authority. Furthermore, with regard to the prayer of reasonable compensation, the Authority finds it to have no legs to stand on as the 1st Appellant was fairly disqualified.

With regard to the 2nd Appellant's prayers, the same cannot be upheld as they were also fairly disqualified.

On the basis of the aforesaid conclusions, the Appeals Authority hereby dismisses the Appeals for lack of merits. Each party to bear its own costs.

This decision is binding upon the parties and may be enforced in any court of competent jurisdiction in terms of Section 97 (8) of the Act.

Right of Judicial Review as per Section 101 of the PPA/2011 explained to parties.

This Decision is delivered in the presence of the Appellants and their respective counsel's and the Respondent this 2nd April, 2015.



VINCENT K. D. LYIMO (J. rtd)

CHAIRMAN

MEMBERS:

1. MRS. R. A. LULABUKA



2. ENG. A. J. MWAMANGA



3. MR. L. P. ACCARO

