

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 137 OF 2012

BETWEEN

M/S KOTES TANZANIA LIMITED..... APPELLANT

AND

MINISTRY OF COMMUNICATION,
SCIENCE AND TECHNOLOGY..... RESPONDENT

DECISION

CORAM:

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

SECRETARIAT:

- | | |
|----------------------|-----------------|
| 1. Ms. F. R. Mapunda | - Legal Officer |
| 2. Ms. V.S. Limilabo | - Legal Officer |
| 3. Mr. H. O. Tika | - Legal Officer |

FOR THE APPELLANT:

1. Advocate S.R.Kitale -Kitale and Company Advocates
2. Mr. M.A. Komba -Managing Director- Kotes (T) Ltd
3. Mr. K.S. Hiza - Technician - Kotes (T) Ltd
4. Mr. Amani Elias - Technician, Kotes (T) Ltd

FOR THE RESPONDENT:

1. Ms. Kijoli N. Saidi - Head of Procurement
Management
2. Ms. Violet Eseko - Head of Legal Unit
3. Mr. Gasper S. Alson - Project Coordinator
4. Mr. Amin A. Twaha - Supplies Officer

OTHER PARTIES (OBSERVERS):

1. Mr. James Dotto - Business Development
Manager, SimbaNet
2. Mr. Julius Mbuna - Account Sales Manager
SimbaNet

This Decision was scheduled for delivery today 21st December, 2012, and we proceed to deliver it.

The appeal at hand was lodged by M/s KOTES TANZANI LIMITED (hereinafter to be referred to as “the Appellant”) against the MINISTRY OF COMMUNICATION, SCIENCE AND TECHNOLOGY (hereinafter to be referred to as “the Respondent”).

The Respondent invited Tenders for the Supply, Installation and Commissioning of Network Equipments and Optic Fibre Cable (OFC) & Related Civil Works for Higher Learning and Research Institutions. The said Tender was subdivided into five lots. However the appeal at hand is related to three lots which the Appellant tendered for, namely, Lot No 3, Lot No 4 and Lot No 5 hereinafter referred to as “the Tender” .

The said lots were for the following Works:

Lot No.	Works Involved
Lot No.3	Outside Plant (Optic Fibre Cables, Accessories and related civil works) for Morogoro and Zanzibar
Lot No.4	Outside Plant (Optic Fibre

	Cables, Accessories and related civil works) for Iringa and Mbeya and
Lot No.5	Outside Plant(Optic Fibre Cables, Accessories and related civil works) for Kilimanjaro

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

The Respondent advertised the tender in three papers namely: The Guardian, Daily News and The East African of 6th and 11th June, 2012. The said tender was also advertised in dg Market.

The deadline for submission of tenders was set for 20th July, 2012, whereby eighteen tenders were submitted as follows:

S.N	Tenderer	Quoted price
1	M/s Telecom Associates Ltd	Tshs Lot 2: 756,106,450 Lot 3: 665,541,650 Lot 4: 309,960,450 Lot 5: 746,378,150
2	M/s Kotes Tanzania Ltd	Tshs Lot, 3: 979,902,621 Lot, 4: 357,614,399 Lot 5: 1,133,313,123
3	M/s Josi General Electronics Co. Ltd	Tshs Lot, 5: 670,304,870
4	M/s Adwest Communications (T) Ltd	USD Lots 2, 3, 4, 5: 1,683,592
5	M/s Raddy Fiber Solution Ltd	Tshs Lot 2: 731,723,994 Lot 3: 670,904,400 Lot 4: 304,253,850 Lot 5: 768,576,550
6	M/s ZTE Corporation	USD 6,269,421
7	M/s BMTL (T) Ltd	USD Lot 1: 2,797,446 Lot 2: 498,436, Lot 3: 445,177 Lot 4: 239,954 Lot 5: 582,300
8	M/ s CITCC	USD Lot 1: 2,446,086 Lot 2: 768,400

		Lot 3: 664,256 Lot 4: 300,931 Lot 5: 799,978
9	M/s Plessy (PTY) Ltd, Tanzania Branch	USD Lot 2,3,4,&5: 1,764,123
10	M/s Canopies International (T) (JV) H's Ltd	USD Lot 1: 2,340,137 Lot 4: 181,604
11	M/s Global Agency Ltd	Tshs Lot 1: 2,948,376,320 Lot 2: 826,080,948 Lot 3: 818,854,156 Lot 4: 324,986,276 Lot 5: 798,689,254
12	M/s SimbaNet (T) Ltd	Tshs Lot 2: 5,071,649,275 Lot 3: 3,318,910,480
13	M/s Climate Consult (T) Ltd	Tshs Lot 1: 2,860,966,788
14	M/s SCI (Tanzania) Ltd (JV) Mollel Electrical Contractors Ltd	USD Lot 1: 4,404,162 Lot 2: 1,002,141
15	M/s Pritech Office School Solutions Ltd (JV) Syscon Builders Ltd	USD Lot 3: 436,568
16	M/s Sihebs Technologies Co. Ltd	Tshs Lot 4: 544,112,126 Lot 5: 1,347,980,407
17	M/s Kinde Engineering Works	USD 4,275,266

	Ltd (JV) Kenface Econsults (Africa) Ltd	
18	M/s SoftNet Technologies Ltd	USD Lot 1: 2, 235, 138

The tenders were subjected to Preliminary Evaluation whereby only the tender submitted by the Appellant was found to be substantially responsive for Lots 3, 4 and 5 and therefore qualified for detailed evaluation.

During Preliminary Evaluation, it was observed by the Evaluation Committee that, most tenderers did not comply with Clause 21.2 (f) of the Tender Document which required the Bid Security to remain valid for 148 days (that is 28 days beyond the Bid Validity period stipulated in the Bid Data Sheet) (hereinafter referred to as "BDS")

The Evaluation Committee, therefore, proposed to the Tender Board to waive the requirement for Bid Securities to remain valid for 148 days and instead to accept the 120 days indicated by most tenderers since it would increase the number of responsive tenders and widen

competition. That proposal was agreed to by the Tender Board.

Having effected the waiver, the number of tenders qualifying for detailed evaluation increased, whereby for Lot 3 the number of responsive bids increased from 1 to 2, for Lot 4 they increased from 1 to 2 and for Lot 5 increased from 1 to 2.

After the evaluation process was completed the Evaluation Committee recommended the award of tender as follows:

	Tenderer	Price (USD)	Price (TSHS)
Lot 3	M/s Plessey (PTY) Ltd	465,299	737,987, 701/=
Lot 4	M/s Plessey (PTY) Ltd	202,781	321, 620, 963/
Lot 5	M/s Plessey (PTY) Ltd	571,838	906,964,897/=

The Tender Board at its meeting held on 19th September, 2012, approved the award of tender as recommended by the Evaluation Committee.

On the 22nd October, 2012, the Appellant requested to be provided with the tender results from the Respondent through letter referenced KTS/ MW/01/10/2012.

The Respondent replied to the Appellant's letter on 24th October, 2012, indicating that the tender evaluation was still in progress.

On Thursday 2nd November, 2012, the Appellant received a call from the Respondent's office requiring them to collect their Bid Security.

On 7th November, 2012, the Respondent vide a letter referenced No. AB 285/345/01/54 communicated the award of tender to M/s Plessey (PTY) Ltd requiring them to apply for Performance Security and submit within the period stipulated in the Tender Document.

On the 12th November, 2012, the Appellant being dissatisfied with the Respondents failure to provide them with the tender results, wrote to the Public Procurement Regulatory Authority (hereinafter to be referred to as PPRA) seeking for their intervention.

On 26th November, 2012, the Appellant lodged their Appeal to the Public Procurement Appeal 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, the Appellant was among the Tenderers who participated in the tender under appeal whereby they tendered for the three lots at a total price of Tshs 2,470,830,143/= (VAT Inclusive). The prices quoted per lot were:

- Lots 3- Tshs 979,902,621,
- Lot 4 - Tshs 357,614,339, and
- Lot 5 - Tshs 1,133,133,122.

That, they were informed by the Respondent during the tender opening that the tender results would be given within twenty one (21) days of the Tender opening date.

That, on 22nd October, 2012, the Appellant wrote a letter with reference Number KTS/MW/01/08/2012 requesting for the tender results. However, the said letter was not replied to until after 34 days when the Respondent indicated that the process was still in progress.

That, on 22nd November, 2012 the Appellant received a phone call from the Respondent requiring them to collect their Bid Security.

That, the Appellant felt that there was something suspicious going on which led the Respondent not to reveal the tender results to the tenderers and that this

might have been a result of the unfair award of the tender to the successful tenderer.

That, on 5th December, 2012, the Appellant received a letter of notification of award from the Respondent in which they were informed that the Ministry had received 'No Objection' from the World Bank for the award of Lots 3, 4 and 5 and the same had been awarded to M/s Plessey (PTY) Ltd, while the remaining Lots 1 and 2 were to be re-advertised.

That, the Appellant had met all the criteria to be awarded the tender and therefore they wondered as to why the tender was not awarded to them.

That, the Appellant had experience of twenty years in works of a similar nature which had been indicated in their Tender. That, they also attached a letter from the Ministry of Home Affairs which showed that they had recently completed a similar project successfully. Thus, the Respondent acted unfairly in disqualifying them on

reason that the project with the Ministry of Home Affairs was yet to be completed.

That, the waiver with respect to the requirement for Bid Security to be valid for 120 days instead of 148 days was done purposely to favour the successful tenderer who had indicated a shorter validity period.

That, M/s Plessey (PTY) Ltd quoted a lumpsum amount for Lots 2, 3, 4, and 5, thus, they wondered as to why the Respondent awarded them only Lots 3, 4 and 5.

That, the Successful tenderer quoted the price in USD instead of local currency contrary to the requirements of the Tender Document in ITB Clause 15.1.

Finally, the Appellant prayed that the Authority order for the following reliefs:

- i. Estoppel of contract signing

- ii. Reasons for the Appellant's disqualification to be disclosed to the Appellant and other appropriate bodies including PPRA, PPAA and NAO.
- iii. Explanation as how the winner was determined
- iv. A re-evaluation of the tender in order to determine the appropriate winner.

REPLIES BY THE RESPONDENT

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

That, eighteen tenderers responded to the invitation to tender.

That, at the preliminary and the detailed evaluation stages, thirteen out of the eighteen tenders were found to be non responsive to the Tender Document for failure to comply with the Bid Security validity period requirements. The Tender Document had indicated the

validity period of bid security to be 120 days plus an additional period of 28 days buffer zone which was intended to protect the Respondent in the event that the contract was to be signed on the last day of the bid validity period.

That, the thirteen tenders were found to have indicated shorter validity periods for their Bid Securities and were therefore found to be non responsive.

That, having disqualified the thirteen tenders, and having followed the World Bank evaluation guidelines, only the tender submitted by the Appellant qualified for detailed evaluation and was later subjected to Post- qualification.

That, it was at the Post-qualification stage that the Appellant's tender was found not to qualify since they did not have experience in implementing projects of a similar nature.

That, the Appellant's tender indicated that they had been recently awarded an Optic Fiber project by the Ministry of Home Affairs but at the time of tendering, the project

was yet to be completed. Thus, it could not be construed that, the Appellant had the requisite experience required in implementing this project.

That, having found that there was no winner for the tender after disqualification of the Appellant, the Evaluation Committee proposed to the Procurement Management Unit (PMU) and the Tender Board to waive the Bid Security validity period of 148 days for all tenders.

That, the Evaluation Committee opined that the issue of Bid Security validity period could be easily negotiated prior to contract signing.

That, as a result of the waiver, the evaluation for the tender was repeated twice; the second evaluation being done after waiving the requirement for Bid Security validity period of 148 days and opt for 120 days.

That, after effecting the waiver that there were two substantially responsive tenderers for Lots 2, 3, 4 and 5, the Appellant's tender being one of them. However,

having been found earlier on to be unqualified due to lack of experience, only one responsive bid submitted by the successful tenderer, namely, M/s Plessey (PTY) Ltd qualified for detailed evaluation.

That, M/s Plessey (PTY) Ltd indicated to have extensive experience in fiber optic installation and implementation in many African Countries (with impressive pictures) which made the Evaluation Committee to recommend that M/s Plessey (PTY) Ltd provide evidence of its experience to the satisfaction of the Ministerial Tender Board and contract Negotiation Team before the Contract is signed.

That, in relation to the Appellant's contention that tenders were to be quoted in local currency, this was not true as this was an International Competitive Tender (ICB) and therefore could not be restricted to using local currency and thus not contrary to the Tender Document.

That, the letter extending the Bid Validity period was only addressed to M/s Plessey (PTY) Ltd and was issued prior to the expiry of the Tender validity period.

That, M/s Plessey (PTY) Ltd is yet to furnish the Performance Security and the negotiations as well as contract signing are yet to be finalized.

Finally, the Respondent prayed to the Authority to dismiss the Appeal in its entirety.

ANALYSIS BY THE AUTHORITY

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

- whether the Appellant was unfairly disqualified;
- whether the award of tender to M/s Plessey (PTY) Ltd was proper at 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 deems it necessary to revisit the oral and written arguments by parties vis-à-vis the applicable law, the Evaluation Report and the Tender Document so as to ascertain if the disqualification of the Appellant was proper or not. To start with, the Authority revisited the Appellant's main ground of Appeal that, they had been unfairly disqualified from the tender process as their tender had complied with all the criteria stipulated in the Tender Document.

In reply thereof, the Respondent submitted that, the Appellant's tender was fairly disqualified for lack of requisite experience as provided for in the Tender Document.

Having summarized the submissions by parties, the Authority reviewed the evaluation process in order to ascertain if it was conducted in accordance with the law.

In so doing the Authority revisited the Tender Document and noted that, evaluation of tenders was provided for under Clauses 32 to 38 of the Instructions to Bidders (hereinafter referred to as the "ITB"). The said Clauses indicated that the evaluation was to be conducted in three stages, namely; Preliminary Evaluation, Detailed Evaluation and Post-Qualification.

It was further noted that, all the tenders were subjected to preliminary evaluation. After the said preliminary evaluation only the Appellant's tender was found to be substantially responsive. Thus, it was subjected to detailed evaluation. Thereafter, Post qualification of the Appellant was undertaken, whereby, it was realized that, they lacked the requisite experience in works of a similar nature. Hence, they could not be recommended for award of the tender.

Moreover, having reviewed further the Evaluation Report the Authority noted that, though it contained information which indicated that the Appellant's tender was disqualified for lack of experience, the said report did not show how the post qualification assessment was carried out.

In order to ascertain if the Appellant lacked the requisite experience, the Authority deemed it proper to revisit their tender and oral submissions so as to substantiate their argument that they had the required experience. In so doing it was noted that, that Appellant had executed two contracts of a similar nature. The first contract was with the Ministry of Finance which was executed about ten years ago. The second contract was with the Ministry of Home Affairs (Tanzania Police Force) which was completed around May 2012.

In order to ascertain the validity of parties arguments the Authority, revisited the Tender Document and noted that, Item 4(b) of Section III, Evaluation and Qualification

Criteria provides for the required experience in the following words;

“The Bidder shall furnish documentary evidence to demonstrate that it meets the following experience requirements;

- i. supplier has in the past four (4) years performed, supplied or implemented in at least three (3) projects of such nature as specified in the schedule of requirements and associated technical specifications in this bid document”.
(Emphasis added)

From the above quoted provision the Authority observes that, the tenderer's were required to show experience in works of a similar nature performed in the past four years, in at least three projects. Based on the information obtained from the Appellant's tender and their oral submissions during the hearing, the Authority is satisfied that, the Appellant did not have the required

experience, in that, at the time they submitted their tender, they had only executed one project of a similar nature which was executed within the past four years.

From the above findings, the Authority concurs with the Respondent that the Appellant lacked the requisite experience. Thus, their disqualification was proper in the eyes of the law.

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

2.0 Whether the award of tender to M/s Plessey (PTY) Ltd was proper at law

In resolving this issue the Authority revisited the Appellant's argument that, the evaluation process was conducted contrary to the requirements of the law and as a result the award made to the M/s Plessey (PTY) Ltd was based on favoritism.

In reply thereof, the Respondent submitted that, the evaluation process was conducted in accordance with the law. Initially, the tender of M/s Plessey (PTY) Ltd was found to be substantially non responsive as was the case for most of the tenders. Most of the tenders were substantially non responsive because of the failure to comply with the Bid Security validity period requirement. Thus, it was decided to waive that requirement. After the waiver, most of the tenders including that of the Appellant became substantially responsive. After further evaluation the tender of M/s Plessey (PTY) Ltd was found to be the lowest and had the qualification to execute the works. Thus, they were awarded the tender.

In order to ascertain the validity of the parties' arguments the Authority deems it proper to revisit the Evaluation Report so as to establish if the award made to the M/s Plessey (PTY) Ltd was proper or not. In course of so doing the Authority noted that, during preliminary evaluation the tender of the M/s Plessey (PTY) Ltd was found to be substantially non responsive for failure to comply with the Bid Security validity period requirement.

The Authority revisited Clause 21.2 (f) of the ITB which provided for the Bid Security validity period requirement. The said clause provides as follows;

21.2 “The Bid Security shall be in the amount specified in the BDS and denominated in the currency of the purchaser’s country or a freely convertible currency, and shall:

(f) remain valid for a period of 28 days beyond the validity period of the bids, as extended, if applicable, in accordance with ITB Clause 20.2”
(Emphasis supplied)

The Authority also noted that, the above quoted Clause is similar with Regulation 88(5) of GN No. 97/2005 which reads;

“The tender security shall remain valid for a period of not less than twenty eight days (28) beyond the validity period of the tender, in

order to provide the procuring entity to act if the security is called for" (Emphasis supplied)

From the above cited provisions, the Authority is of the firm view that, the Bid Security validity period was amongst the mandatory requirements to be complied with by the tenderers when submitting their tenders.

It was noted further by the Authority that, the waiver by Respondent made the tender of M/s Plessey (PTY) Ltd to be substantially responsive.

The Authority observes that, the Respondent's act of waiving such a mandatory requirement contravened Sub-Regulations 90(7), (9) and (16) of GN. No. 97/2005 and Clause 30.3 of the ITB. For purposes of clarity the Authority reproduces the said provisions as hereunder;

Reg.90(7)"A substantially responsive tender is the one which conforms to all the terms, conditions and specifications of the Tender Document(s) without

material deviation or reservation”
(Emphasis added)

Reg.90(9) “ Any tender not accompanied by an acceptable tender guarantee where the same has been requested, shall be rejected by procurement management unit and the approving authority” (Emphasis supplied).

Reg.90(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 supplied)

Clause 30.3

“If a bid is not substantially responsive to the Bidding Document it

shall be rejected by a purchaser and may not subsequently be made responsive by the Bidder by correction of material deviation, reservation or omission" (Emphasis added).

The Authority observed further that, Clause 31.1 of the ITB allowed the Respondent to waive only non conformity or omission that did not constitute a material deviation to tenders which are substantially responsive. The said Clause is reproduced as hereunder;

"Provided that a Bid is substantially responsive, the Purchaser may waive any non-conformities or omissions in the Bid that do not constitute a material deviation".(Emphasis supplied)

Accordingly, the waiver made by Respondent was contrary to above provision.

From the above cited provisions, the Authority is of the settled view that, the tender of M/s Plessey (PTY) Ltd ought to have been disqualified at the Preliminary Evaluation stage as it was substantially non responsive for failure to comply with the Bid Security validity period.

The Authority also considered the Appellant's contention that M/s Plessey (PTY) Ltd had quoted their price for all Lots in USD contrary to the requirements of Clause 15.1 of the ITB.

The Authority revisited the Respondent's reply on that contention that, the tender under appeal was an international competitive tender; hence, prices could not be restricted to local currency only.

In resolving the contentious argument by parties on this point, the Authority revisited Clause 15.2 of the ITB and observed that the Tender Document allowed prices to be quoted in the currency of any country. The said provisions states as follows;

“The Bidder may express the bid price in the currency of any country in accordance with Section V, Eligible countries...” (Emphasis added)

From the above quoted provisions, the Authority is of the settled view that, M/s Plessey (PTY) Ltd did not contravene the Tender Document by quoting their prices in foreign currency.

Additionally, upon further review of the tender of M/s Plessey (PTY) Ltd the Authority noted that, it had some shortfalls which were not reported in the tender Evaluation Report. The said shortfalls are as follows;

- Lack of information on tenderer’s qualifications.

The tender document of M/s Plessey (PTY) Ltd given to this Authority by the Respondent had no information as required by Clauses 11.1(g) and 19.1 (c) which states as follows;

11.1 “The Bid shall comprise the following;

(g) documentary evidence in accordance with ITB Clause 19 establishing the Bidder's qualifications to perform the contract if its bid is accepted".

19.1 "The documentary evidence of the Bidder's qualifications to perform the contract if its bid is accepted shall establish to the Purchaser's satisfaction:

(c) that the Bidder meets each of the qualification criteria specified in Section III, Evaluation and Qualification Criteria". (Emphasis added)

It is the considered view of the Authority that, for a tender to be substantially responsive it must comply with amongst others, Clause 11.1(g) read together with Clause 19.1 (c) of the ITB.

- Modification of the Tender Document.

In reviewing the tender of M/s Plessey (PTY) Ltd the Authority observed that, their tender had modified parts of the Tender Document instead of complying with the requirements provided therein. The Authority finds it prudent to reproduce some of the modified clauses as shown in table hereunder;

GCC/SCC	Original Provision contained in the Bid Document (Special Conditions of Contract)	modified provision by the M/s Plessey (PTY) Ltd
Liquidated Damages Clause 27.1	The liquidated damages shall be 2% per week... The maximum amount of liquidated damages shall be 50% of the contract price ...	The liquidated damages shall be 1% per week... The maximum amount of liquidated damages shall be 10% of the contract price...
Warranty Clause 28.3	The period of the validity of the warranty shall be 36 months.	Services and material warranty is 12 months from PAC potr being out into services whichever comes first or 18 months from shipping whichever comes first

Settlement of Dispute		
Clause 10.1	The Purchaser and the Supplier shall make every effort to resolve amicably by direct informal negotiation any disagreement or dispute arising between them under or in connection with the Contract.	In the event of any dispute or disagreement arising between the CONTRACTOR and the CUSTOMER in connection with the CONTRACT or the carrying out of the terms thereof or any other matter arising there from such dispute shall,
Clause 10.2	If, after twenty eight (28) days, the parties have failed to resolve their dispute or difference by such mutual consultation, then either the Purchaser or the Supplier may give notice to the other party of its intention to commence arbitration... Arbitration proceedings shall be conducted in accordance with the UNCITRAL arbitration rules	if it cannot be settled by mutual agreement, be submitted to and decided by arbitration. Arbitration proceedings shall be held in a country mutually accepted and agreed to by both parties. Failing which the arbitration shall be held in England (London) in accordance with the laws of England...

From the above few examples, the Authority observes that, the act of M/s Plessey (PTY) Ltd of modifying the Tender Document had contravened Regulation 90(8) of GN No.97/2005 which is similar with Clause 30.2 (b) of the ITB. For purposes of clarity the Authority reproduces Regulation 90(8) as hereunder;

“A material deviation or reservation is the 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 rights or the tenderer’s obligation under the contract, and affects unfairly the competitive position of tenderers presenting responsive tender” (Emphasis supplied)

The above provision entails that a responsive tender had to comply with all the requirements of the Tender Document. Furthermore, the changes offered are substantially inconsistent with the Tender Document and limits the procuring entity’s rights and the tenderer’s obligations under the contract. Hence, the act of M/s Plessey (PTY) Ltd of modifying the Tender Document constituted a material deviation/reservation.

The Authority wonders as to why the Respondent's fail to detect the obvious anomalies and instead proceeded to award the tender to M/s Plessey (PTY) Ltd while their tender had deviated from the requirements of the Tender Document.

In view of the above pointed shortfalls, the Authority is of the settled view that, the Respondent's conduct in this tender process depicted lack of competence specifically on the part of Evaluators, the Procurement Management Unit and the Ministerial Tender Board generally. Had they acted diligently they would have disqualified the tender of M/s Plessey (PTY) Ltd for being substantially non responsive.

Accordingly, the Authority concludes that, the award of tender to M/s Plessey (PTY) Ltd was not proper at law.

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

Having resolved the issues in dispute and having satisfied itself that, the tender of M/s Plessey (PTY) Ltd was substantially non responsive and that the Appellant lacked the necessary qualifications for the works, the Authority revisited the prayers by parties.

To start with the Authority revisited prayer by the Appellant, that the contract signing process be estopped, and observes that, the said prayer cannot not be granted as the purported award was nullity in the eyes of the law. Thus, there is no contract to be estopped.

With regard to the prayer that the Respondent be ordered to explain how the Successful Tenderer was obtained, the Authority observes that, the said prayer had been overtaken by events since analysis by the Authority on the second issue has clearly demonstrated that, the tender of M/s Plessey (PTY) Ltd ought to have been disqualified. Like wise re-evaluation cannot be

ordered in view of the Authority's findings in the first and second issue.

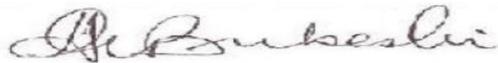
As regards to the Respondent's prayer that the Appeal be dismissed, the Authority rejects that prayer and partly upholds the Appeal as demonstrated in the second issue. That said, the Authority orders the Respondent to re-start the tender process afresh in observance of the law.

On the basis of the aforesaid conclusions, the Authority partly upholds the Appeal and orders the Respondent to:

- re-start the tender process afresh in observance of the law; and
- each party to bear its own costs

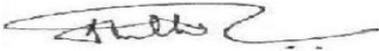
Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

This decision is delivered in the presence of the Appellant and the Respondent this 21st day of December, 2012.



.....
JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MR. K.M MSITA 

2. MRS. N.S.N. INYANGETE 

3. MS. E. J. MANYESHA 