

**IN THE**  
**PUBLIC PROCUREMENT APPEALS AUTHORITY**  
**AT DAR ES SALAAM**  
**APPEAL CASE NO. 127 OF 2012**  
**BETWEEN**  
**M/S KACHU UHANDISI**  
**&UJENZI CO.LTD .....APPELLANT**  
**AND**  
**TANZANIA PETROLEUM**  
**DEVELOPMENT**  
**CORPORATION.....1ST RESPONDENT**  
**M/S BEDA TRADING LTD.....INTERESTED PARTY**

**DECISION**

**CORAM:**

- |                                 |             |
|---------------------------------|-------------|
| 1. Hon. A.G. Bubeshi, J. (rtd)- | Chairperson |
| 2. Mr. K.M. Msita-              | Member      |
| 3. Ms. E.J. Manyesha-           | Member      |
| 4. Mrs.N.S.N. Inyangete-        | 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. Ms. V. S. Limilabo | - Legal Officer           |
| 4. Mr. H. O. Tika     | - Legal Officer           |

## **FOR THE APPELLANT.**

Eng. Emmanuel.M.Kachuchuru- Managing Director

## **FOR THE RESPONDENT.**

1. Edwin Riwa- Head PMU
2. Barakaeli Christian-Civil Engineer

## **FOR THE INTERESTED PARTY – M/S BEDA TRADING LTD**

Aristides Justine Bengesi- Managing Director

The decision was scheduled for delivery today 14th September, 2012, and we proceed to deliver it.

The Appeal at hand was lodged by **M/s Kachu Uhandisi & Ujenzi Company Limited** (herein to be referred to as "**the Appellant**") against **Tanzania Petroleum Development Corporation** commonly known by its acronym **TPDC** (hereinafter to be referred to as "**the Respondent**"). Having notified the other tenderers who participated in the tender in dispute of the existence of this Appeal, **M/s Beda Trading Limited**, opted to join as a party to this Appeal (hereinafter to be referred to as "**the Interested Party**").

The said Appeal is in respect Tender No. PA/031/2011-12/Q/W/03 for the Maintenance of TPDC Staff Housing-Mikocheni Estate (hereinafter to be referred to as "**the tender**").

The facts of this Appeal as deduced from the documents submitted to the Authority as well as oral submissions by parties, may be summarized as follows;

The Respondent had invited applications for Pre-qualification of Building Contractors for Minor works *vide* the Guardian newspaper dated 30<sup>th</sup> July,2011.

Five applications for pre-qualification were received from the following Contractors:

- M/s Y.S Hoza & Sons Building Contractor;
- M/s Beda Trading Ltd.;
- M/s PIA Company;
- M/s Mtemi Enterprises Company; and
- M/s Kachu Uhandisi & Ujenzi Co. Ltd.

After evaluating the said applications, three firms, the Appellants inclusive, were pre-qualified as listed herein below :

- M/s Beda Trading Ltd;
- M/s PIA Company; and
- M/s Kachu Uhandisi & Ujenzi Co.Ltd.

On 24<sup>th</sup> May 2012, the three pre-qualified firms were invited to submit their tenders.

The opening of the said tenders took place on 6<sup>th</sup> June, 2012, whereby the prices read out were as follows;

**LOT NO. I**

<b>TENDERER'S NAME</b>	<b>QUOTED PRICE (VAT INCLUSIVE) – TSHS.</b>	<b>COMPLETION PERIOD</b>
<b>M/s Kachu Uhandisi &amp; Ujenzi Co. Ltd.</b>	<b>35,156,920/=</b>	<b>10 WEEKS</b>
<b>M/s Beda Trading Ltd.</b>	<b>71,512,000/=</b>	<b>8 WEEKS</b>
<b>M/s PIA Company</b>	<b>80,287,520/=</b>	<b>9 WEEKS</b>

**LOT NO. II**

<b>TENDERER'S NAME</b>	<b>QUOTED PRICE (VAT INCLUSIVE) – TSHS.</b>	<b>COMPLETION PERIOD</b>
<b>M/s Kachu Uhandisi &amp; Ujenzi Co. Ltd.</b>	<b>37,803,660/=</b>	<b>10 WEEKS</b>
<b>M/s Beda Trading Ltd.</b>	<b>59,880,000/=</b>	<b>7 WEEKS</b>
<b>M/s PIA Company</b>	<b>97,343,400/=</b>	<b>12 WEEKS</b>

**LOT NO. III**

<b>TENDERER'S NAME</b>	<b>QUOTED PRICE (VAT INCLUSIVE) - TSHS.</b>	<b>COMPLETION PERIOD</b>
<b>M/s Kachu Uhandisi &amp; Ujenzi Co. Ltd.</b>	<b>40,265,140/=</b>	<b>10 WEEKS</b>
<b>M/s Beda Trading Ltd.</b>	<b>70,323,000/=</b>	<b>8 WEEKS</b>
<b>M/s PIA Company</b>	<b>99,551,910/=</b>	<b>12 WEEKS</b>

The submitted tenders were then subjected to evaluation whereby the Appellant's tender was disqualified at the preliminary stage for failure to submit a Business License as well as TIN and VAT Certificates.

The remaining two tenders were subjected to detailed evaluation whereby the tender submitted by M/s PIA Company was disqualified for indicating a longer completion period of 9, 12 and 12 weeks for Lots I, II and III respectively, which was contrary to the two month period specified under Item 20.0 of the Contract Data. The Evaluation Committee therefore recommended the three Lots to be awarded to M/s Beda Trading Limited.

The Tender Board meeting of 16<sup>th</sup> July, 2012, deliberated on the Evaluation Report and approved the recommendations made by the Evaluation Committee.

On 17<sup>th</sup> July, 2012, the Respondent communicated the award of the tender to the successful tenderer through letter referenced TPDC -S.10/57, which was copied to the other unsuccessful tenderers including the Appellant.

The Appellant being dissatisfied with the tender results wrote to the Respondent *vide* a letter referenced KUUCO/GEN/0323 dated 19<sup>th</sup> July, 2012, requesting to be informed on the grounds for the disqualification of their tender.

The Respondent informed the Appellant *vide* a letter referenced S 10/60 dated 23rd July, 2012, that their tender was not successful for three reasons:

- they had indicated a completion period of 10 weeks contrary to the period of two months specified in the Tender Document;

- failure to attach evidence of their recently performed contracts of similar nature including the names and addresses of employers for verification; and
- failure to attach a valid Business License as well as VAT and TIN Certificates.

The Appellant was dissatisfied with the reasons given by the Respondent and therefore lodged their Appeal before the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**")

### **SUBMISSIONS BY THE APPELLANT**

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



That, the grounds for their disqualification contained in the Respondent's letter dated 23<sup>rd</sup> July, 2012, were not correct since the Appellant's tender contained the eligibility documents mentioned by the Respondent. It is the Appellant's belief that, if at all some of their documents attached to their tender were missing, then, the Respondent might have tampered with them. They also submitted that, during the tender opening the Respondent did not indicate that the said documents were not submitted by the Appellant.

That, even though the said documents were not submitted during the tendering stage, that should not have made their tender to be considered as non-responsive, since they were submitted during the pre-qualification stage.

That, the fact that the Respondent had shortlisted only three tenderers, including themselves, was sufficient proof that they were eligible to tender for the works.

That, the Respondent should have informed the tenderers the reasons for requesting them to submit such documents. The Appellant was of the view that, in requesting the said information at the tendering stage they contravened Regulation 15(24) of the Public Procurement (Goods, Works, Non-Consultant Services and Disposal of Public Assets by Tender) (hereinafter to be referred to as "**GN 97 of 2005**") which requires verification information to be confirmed at the time of award of the contract.

That, information relating to experience in performing contracts of similar nature was submitted at the pre-qualification stage. Hence, their capability to execute similar works was evident but what lacked in their tender was that they did not submit documentary evidence of their recently executed contracts. However, this was not fatal as the Respondent could have used the information provided for during the pre-qualification stage in evaluating their tender, instead of disqualifying them.

That, failure to submit that information should not have made their tender to be non responsive, since such information were to be determined during detailed evaluation as per Clause 10.3(b) of the Instructions To Bidders (hereinafter to be referred to as "**the ITB**") and not during preliminary evaluation. In addition, the phrase "**recent information**" as indicated by the Respondent was vague, in that it was not clear as what was meant by the term '**recent**'. Thus they were in dilemma as to whether they should indicate a week, a month or a year's information. It was not proper therefore, for the Respondent to disqualify them basing on such a vague criterion.

That, as regard their completion period of 10 weeks instead of two months, the Appellant submitted that the 10 weeks indicated included the mobilization period. The said period was indicated after considering the fact that usually there is a lapse of time between the time when a tenderer receives the letter of acceptance and the actual signing of the contract. It was therefore logical for them

to indicate 10 weeks. According to them, this was not a material deviation.

That, if the Respondent had considered it as a deviation, the same should have been determined during detailed evaluation as indicated under Clause 10.3(b) of the ITB and not at the preliminary stage. The Appellant wondered if this criterion was checked during detailed evaluation, how was it possible for their tender which was disqualified at the preliminary stage to be subjected to detailed evaluation.

That, the Tender Document was ill prepared and did not therefore fit the description of a tender document. For example, Clause 7 of the ITB provided that tenders should remain valid for a period of not less than 45 days after the deadline for submission of tenders. This entailed that the validity of the tender prices was indefinite, in that, it did not provide any limitation as to the maximum period envisaged. This would have affected the successful tenderer if the tender had not been awarded within 45 days after the submission date.

That, the Tender Document was contradictory in itself as to when the commencement of the completion period should start to run. For instance, the Contract Data indicated that the said period should start one day after the signing of the contract while the Tender Submission Form indicates that time starts to run immediately after acceptance of the tender. It was in cognizance of such ambiguities that the Appellant indicated a completion period of 10 weeks.

That, many items in the Bill of Quantities (hereinafter to be referred to as "**BOQ**") were measured in lump sum including items which could have been accurately measured and quantified with proper specifications. These included, amongst others, the cleaning and repairing of sewerage system, applying slurry seal and eccofelt membrane on top slab and roof tiles and repairing of all inner wardrobes using chip board to mention just a few. The effect of the Respondent's failure to quantify was that the extent of works would

have significantly changed and that disputes were likely to arise during the implementation stage. Furthermore, it was difficult for a person who did not attend the site visit to fill in the Tender Document due to the inclusion of lumpsums instead of unit rates.

That, the Respondent had changed the Tender Document during the site visit and had made the entire filling process of the document to be cumbersome, since the time prescribed in the Tender Document was coming to an end. They doubted as to whether the Tender Document given to the them was the same as that given to the 2nd Respondent.

Finally, the Appellant prayed for the following ;

- revision of the award of the tender to M/s Beda Trading Limited and the Respondent be orderered to re-evaluate the tenders;

- order for any corrective measures to make the tender document valid particularly on the bid validity period;
- give the Respondent clear instructions on how evaluation for tenders involving pre-qualified contractors should be done in future; and
- to take any other action as deemed necessary.

## **SUBMISSIONS BY THE RESPONDENT**

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

That, 17<sup>th</sup> October, 2011, they pre-qualified contractors for the tender under Appeal.

That, on 24<sup>th</sup> May, 2012 they issued a Standard Tender Document issued by the Public Procurement Regulatory

Authority (hereinafter to be referred to as "**PPRA**") to all tenderers who were shortlisted.

That, on 30<sup>th</sup> May, 2012, the Respondent accompanied by the pre-qualified contractors visited the site for inspection of the works to be done.

That, on the same day they issued a new Tender Document to all tenderers and informed them to disregard the former document after they had discovered that the former document issued was for major works while the respective tender was for minor works.

That, all tenderers were evaluated in accordance with the requirements of GN. No. 97 of 2005.

That, in order to ensure that the pre-qualified tenderers met the eligibility criteria set, the tenderers were required to submit valid Business Licenses, VAT and TIN Certificates together with the list of their recently performed contracts of similar nature.



That, the evaluation of the tender was done in two stages namely preliminary and the detailed evaluation.

That, M/s Kachu Uhandisi & Ujenzi Co. Ltd. was disqualified during preliminary evaluation for failure to attach VAT and TIN Certificates, and also failure to provide a list of their recently performed contracts. Furthermore, they had indicated a completion period of 10 weeks instead of the two months period stated in the Tender Document.

That, the tender submitted by M/s PIA Trading Ltd. was disqualified during detailed evaluation for indicating a completion period which was beyond the two months period stipulated in the Contract Data.

That, the only tenderer who was responsive to the requirements of the Tender Document was M/s Beda Trading Limited who was thereafter awarded the three Lots.

That, the Successful Tenderer was requested to furnish a Performance Bond, which they did.

That, the Respondent had used the Standard Tendering Document issued by PPRA. Further that, the Appellant had an opportunity to seek for clarification if they thought that some of the provisions in the Tender Document were vague. Failure to use such an opportunity entails that their complaints are a mere afterthought.

That, they had no reason whatsoever to remove any document from the Appellant's tender as claimed by them and that they never had such experience before from any tenderer.

The Respondent finally, prayed for dismissal of the Appeal in its entirety, as the Appellant's tender was non responsive to the Tender Document.

## **SUBMISSIONS BY THE INTERESTED PARTY**

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

That, Appellant had given two contradicting statements with regard to the eligibility documents. On the one hand they claimed to have attached the eligibility documents, while on the other they indicated that non submission of the said documents did not amount to non-responsiveness of their tender. It is evident that the Appellant intended to mis-lead the Authority on matters which they conceded that they did not comply with.

That, the Appellant failed to distinguish that pre-qualification and tendering stages are different stages in the procurement process, each stage has its own procedures.

That, the Appellant had indicated a completion period which was beyond the period stated in the Contract Data, the fact which the Appellant themselves conceded in their Statement of Appeal. The completion period indicated by the Appellant shows that they have no capacity to complete the execution of the works within the two months period stated in the Tender Document.

That, the Appellant failed to prove how the missing documents were included in their tender. The Appellant seeks refuge in the Respondent's weakness of not identifying, at the tender opening, which documents were submitted by tenderers.

That, in execution of minor works, tenderers do not always quantify as claimed by the Appellant. However, the Respondent's failure to quantify would have assisted the Appellant to have a wide chance of quoting prices to their benefit.

That, if the Appellant was aggrieved by lump sum quotation, they ought to have objected when they

visited the site for inspection or at the time when tenders were opened.

That the Appellant's interpretation that bid price shall remain valid indefinite was wrong. However, they had failed to indicate how the said provision prevented them from complying with the requirements of the Tender Document.

The Interested Party therefore prayed that the Appeal be dismissed for lack of merits.

### **ANALYSIS BY THE AUTHORITY**

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

- **Whether the Appellant was unfairly disqualified**

- **To what reliefs, if any are 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 Respondent had erred in law for disqualifying their tender based on an ill prepared Tender Document. In analyzing this contentious issue the Authority examined the oral and documentary evidence produced vis-à-vis the applicable law and the Tender Document for purposes of ascertaining whether the disqualification of the Appellant under the disputed tender was justifiable or not. In doing so, the Authority framed the following sub-issues:

- a) Whether the Tender Document issued by the Respondent met the requirements of the law; and**
- b) Whether the Appellant's tender complied with the requirements of the Tender Document.**

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

- a) Whether the Tender Document issued by the Respondent met the requirements of the law**

In resolving this sub issue the Authority revisited the Appellant's argument that the Tender Document was ill prepared making it legally incompetent to be part of the Contract Document due to the following reasons:

- The Respondent issued a new Tender Document on 30<sup>th</sup> May, 2012, during the site visit without extending the submission date which was set on 6<sup>th</sup> June, 2012. Hence, tenderers had only six days to prepare their tenders which period was not sufficient.
- The validity period of not less than 45 days made the tender prices to be valid for an indefinite period. Hence, even if the award could be made after a year the successful tenderer would not be able to change the bid price.
- Many items in the Bill of Quantities (BOQ) were measured as a lump sum, instead of being accurately measured and quantified with proper specifications.



In reply thereof the Respondent submitted that;

- It is true that the new Tender Document was issued during site visit due to the fact that the previously issued document was for larger works. Thus, a new document had to be issued that was suitable for minor works. Also the seven days period given to the tenderers was sufficient for preparation of their tender.
- The Tender Document issued was in accordance with the Standard Invitation for Tender for Procurement of Minor Works issued by PPRA, hence, it was not ill prepared.
- On 30th May, 2012, the tenderers were shown the actual site (houses to be renovated) so they could have the actual measurements and a clear picture of the works to be executed. Thus, it cannot be argued that the measurements in the BOQ were not clear as

the tenderers had an opportunity of seeking clarification on the same.

In order to ascertain the validity of the parties' arguments the Authority examined the Tender Document issued by the Respondent in order to establish whether it complied with the requirements of Section 63 of the Act which requires the procuring entity to use the appropriate standard bidding document in procurement processes. The said Section states as follows;

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

The Authority revisited Regulation 68 of the Public Procurement (Goods, Works, Non consultancy Services and Disposal of Public Assets by Tender) Regulations, Government Notice No. 97 of 2005 (hereinafter to be referred to as "GN No. 97/2005") which guides as to the

issuance of Tender Documents as well as the content thereof. For purposes of clarity the Authority reproduces part of the said regulation which is relevant to the Appeal at hand as follows:

“Reg. 68(7) The letter of invitation for quotations and any attachments shall include at a minimum:

(a) ...

**(b) a full description of the goods, works or services to be procured including the technical or quality characteristics, specifications, designs, plans and drawing as appropriate;**

(c) the quantities of any goods to be supplied and the required time and place of delivery, any requirement of such goods;

**(d) in case of works, bills of quantities, the location and the required time for their completion;**

(e) ...” (emphasis supplied)

Upon review of the Tender Document issued by the Respondent the Authority noted that, the same was similar to the Standard Invitation for Tenders for Procurement of Minor works issued by PPRA in July 2007. Having so noted, the Authority considered the Appellant's arguments on the anomalies of the Tender Document and analyze them as follows;

- (a) The Authority considered the Appellant's argument that, they were given shorter period for submission of tenders, in that, the new Tender Document was issued on 30th May, 2012, and the deadline for submission was 6th June, 2012. The Authority noted that, tenderers were given seven days to prepare and submit their tenders. Thus, the Authority is of the firm view that, seven days period given for submission of tenders was adequate since it is in accordance with the Third Schedule to GN No. 97 of 2005.

The Authority also considered the Appellant's claim that, the seven days were not sufficient for seeking

clarification and observes that, that is the period provided by the law.

- (b) The validity period of not less than 45 days could lead the quoted prices to be valid for an indefinite period if the award could not be made within the specified time. Hence, it might lead to failure to execute the works as intended. The Authority observes that, it was the duty of the Respondent to specify the required validity period. The Authority revisited the Tender Document and noted that Clause 7 of the ITB specified the validity period in the following words;

“Quotations shall remain valid for a **period of not less than 45 days** after deadline for submission”. (Emphasis added)

From the above quoted provision the Authority is of the view that, the validity period specified was not fixed as the tenderers had an option of specifying

different validity periods but the same should not be less than 45 days. The Authority observes that Regulation 68(7) of GN. No 97/2005 requires a procuring entity to set the tender validity period as it guides that as far as quotations are concerned, the said period is "generally" forty five days. For purposes of clarity the Authority reproduces the said provision which states as follows;

"Reg. 68(7) The letter of invitation for quotations and any attachments shall include at a minimum:

- (i) **the period, generally forty five days, during which the quotations are to remain valid**". (Emphasis supplied)

Based on the quotation above the Authority is of the view that, the Respondent ought to have specified a fixed validity period so that the tender prices could not remain valid indefinitely.

The Authority noted further that the words “**not less than 45 days**” contained in the Respondent’s Tender Document were the same as in the Standard Invitation for Quotations for Procurement of Minor Works. The Authority observes that, had the Respondent been diligent when preparing their Tender Document they would have realized that according to the requirements of the law the validity period had to be indicated by them.

The Authority accepts the Appellant’s argument on this point that, the validity period provided in the Tender Document did not meet the requirements of the law.

- (c) With regard to the issue that most of the items in the BOQ were measured as a lump sum and not quantified, the Authority observes that, it is true that some of the items in three Lots were not quantified in a way that would allow the tenderers to know exactly the works to be executed. This

would have enabled them to prepare the correct estimate of the costs expected to be incurred.

Upon review of the Tender Document the Authority concurs with the Appellant, in that, the following shortfalls were detected in the BOQ;

- Lot I had seven items and among them only two had unit rates. The Authority is of the view that Items B(i) and (iv) could have been quantified, that is, the actual sizes of gates and fence to determine the quantity of paint required.
  
- Lot 2 Item D (xv) lacks actual measurements and quantities required for the mosquito gauze.

From the above mentioned shortfalls in the BOQ, the Authority is of the view that, the Respondent ought to have specified all the information that would have enabled tenderers to submit competitive tenders.



Thus, the Authority rejects the Respondent's submission on this point that the tenderers could have obtained other relevant requirements that were missing in the BOQ during site visit.

In view of the above pointed shortfalls the Authority observes that, the Appellant had an opportunity to seek for clarification. Hence, the Appellant's failure to do so indicates that they had decided to either ignore or comply with the said requirements as found in the Tender Document.

Notwithstanding the above mentioned shortfalls, the Authority's conclusion on this sub issue is that the Tender Document issued by the Respondent, to a large extent, met the requirements of the law.

**(b) Whether the Appellant's tender complied with the requirements of the Tender Document**

In resolving this sub-issue the Authority revisited the grounds for the disqualification of the Appellant's tender as deduced from the Respondent's letter to the Appellant dated 23<sup>rd</sup> July, 2012, which were stated as follows;

- **failure to attach a valid Business Licence as well as VAT and TIN Certificates;**
- **specifying a completion period of 10 weeks instead of two months stipulated in the Tender Document; and**
- **failure to attach evidence of recently performed contracts of similar nature.**

In order to ascertain whether the Appellant's tender had complied with the requirements of the Tender Document, the Authority deems it prudent to address each of the above as follows;

**i) Failure to attach a valid Business Licence as well as VAT and TIN Certificates**

In analyzing this ground, the Authority revisited the Appellant's main arguments on this point which are as summarized herein below;

- (i) A Business License as well as VAT and TIN Certificates were duly attached to their tender.
  
- (ii) Even if the said documents were missing in the Appellant's tender, such an omission could not make the Appellant's tender to be non responsive as the same documents were submitted to the Respondent at the pre-qualification stage. Thus, they could have been used for verification purposes pursuant to Regulation 15(24) of GN. No. 97 of 2005.

- (iii) Had the submission of the said documents been important, the Respondent should have informed the tenderers the reasons for requesting them.
  
- (iv) For a firm to be eligible for registration by CRB it must have a Business license as well as TIN and VAT Certificates. Therefore there was no need for the Respondent to request for such documents from the contractors as they had already met the said requirements at the time of applying for registration with CRB. This means, the most important document to be requested should have been the CRB Certificate.

In reply thereof the Respondent maintained that, a valid Business License as well as VAT and TIN Certificates were among the documents required for eligibility purposes.

Hence, non compliance thereof rendered the Appellant's tender to be non responsive.

Having summarized submissions by parties on this particular point, the Authority proceeded to address each of the arguments relied upon by parties in light of the Tender Document and the applicable law. To start with the Authority reviewed the Tender Document in order to satisfy itself whether the Respondent's contention that submission of a Business License as well as TIN and VAT Certificates as proof of the tenderers' eligibility is valid. In so doing the Authority noted that, Clauses 2.2 and 2.3 of the ITB provide as follows:

"Clause 2. The bidder **shall attach** the following documents to its quotation;

**2.2 A valid Business License.**

**2.3 A valid VAT and TIN certificate (sic)."**

(Emphasis added)

Based on the above quoted provision, it is obvious that submission of a Business License as well as VAT and TIN Certificates was not optional but mandatory. Having so established the Authority proceeded to address the three arguments raised by the Appellant. The Appellant had contended that when they submitted their tender they had attached the Business License together with VAT and TIN Certificates. In order to verify the Appellant's contention, the Authority examined the Appellant's application for pre-qualification as well as their tender availed to this Authority by the Respondent and noted that the said documents were indeed attached in their pre-qualification application while their tender did not contain those documents. Upon being asked by the Members of the Authority why the said documents were not attached to their tender, the Appellant replied that, at the time of submission of tenders the said documents were appended, hence, they suspected that, the Respondent might have tampered with them.

Furthermore, during the hearing the Appellant was requested by the Members of the Authority to produce their copy of the said tender for purposes of verifying if the said documents were so attached. However, the Appellant failed to do so. In the absence of any other evidence to the contrary, the Authority is inclined to agree with the Respondent that the Appellant did not attach the said documents to their tender.

The Authority noted further that, despite the Appellant's failure to prove that the said documents were attached to their tender, they insisted that non submission of the said documents could not render their tender non responsive as the same documents were submitted during the pre-qualification stage. The Authority does not agree with the Appellant and wishes to enlighten them that, pre-qualification process is different from the main tender process and each of the two processes are conducted independent of each other. Section 3 of the Act defines **"pre-qualification"** to mean:

**“a formal procedure whereby suppliers, contractors or consultants are invited to submit details of their resources, and capabilities which are screened prior to invitation to tender on the basis of meeting the minimum criteria on experience, resources, capacity and financial standing;”**  
(Emphasis added)

Based on the above definition, it is obvious that the purpose of conducting a pre-qualification is merely to **‘screen’** the applicants in order to shortlist those who have the minimum qualifications required for execution of the intended contract. In order to ascertain if the Appellant’s contention is backed by the law, the Authority revisited sub-regulations (4) and (6) of Regulation 90 of GN. No. 97 of 2005 which provide for the manner in which tenders should be evaluated. The said provisions state as follows:

**Reg. 90(4) “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.”**

**Reg. 90(6) “Prior to detailed evaluation of tenders, the tender evaluation committee shall carry out a preliminary examination of the tenders to determine whether or not each tender is substantially responsive to the requirements of the tender documents, whether the required guarantees have been provided, whether the documents have been properly signed and whether the tenders are otherwise generally in order.”** (Emphasis supplied)

The Authority is of the view that, the above quoted provisions require the tenders to be examined if they, *inter alia*, comply with the requirements of the tender document. The Authority observes that, Clause 10.1 of the ITB echoes the spirit of the above quoted Regulation as it states as follows:

**“10.The Procuring Entity will evaluate and compare the quotations in the following manner:**

**10.1 Preliminary Examination; to determine substantially responsive quotations i.e. which; are properly signed and conform to the terms and conditions and specifications.”**

(Emphasis supplied)

It is the view of the Authority that, if the Appellant’s assertion is correct, why then should the Tender Document together with the applicable law require preliminary as well as detailed evaluation of tenders to be conducted irrespective of whether pre-qualification was carried out.

With regard to the Appellant’s contention that, the Respondent ought to have informed the tenderers the reason for requesting such document, the Authority observes that the applicable law does not provide for such a requirement. As a general rule, tenderers are

required to adhere strictly to the requirements of the solicitation documents.

The Authority also considered the Appellant's contention that the only important document to be requested by the Respondent should have been the CRB Certificate. The Authority is of the firm view that the Appellant's contention is a misconception, in that, submission of documents proving a tenderer's eligibility is a statutory requirement under Section 46(1) and (2) of the Act read together with Regulations 14(1) and 83(1)(b) of GN. No. 97 of 2005.

Having dismissed the Appellant's contentions on this point, the Authority is satisfied that the Appellant neither submitted a valid Business License nor VAT and TIN Certificates. Therefore, the Authority is of the settled view that, the Respondent's first ground for disqualifying the Appellant's tender, namely, failure to attach a Business License and VAT & TIN Certificates, was proper in the eyes of the law.

## **(ii) Specifying a completion period of 10 weeks instead of the two months stipulated in the Tender Document**

In ascertaining whether this particular ground was proper, the Authority reviewed submissions by the Appellant on this point which are twofold.

- Firstly, the Appellant argued that the two months completion period provided for in the Tender Document did not include the mobilization process.
- Secondly, they contended that there is an ambiguity as to the commencement of the completion period, in that, while Item 1 of the ITB states that time will start to run after acceptance of the tender, Item 20.0 of the Contract Data provides that the time will start to run one day after contract signing.

In reply to the Appellant's contentions the Respondent disputed the contention that the completion period excludes the mobilization process as the said period was explicitly stated in the Tender Document to be two months for each Lot. They further argued that, the Appellant's tender was disqualified for non compliance with this requirement, in that, they indicated a completion period of 10 weeks. With regard to the ambiguities relating to the commencement of the completion period, the Respondent conceded that the provisions cited by the Appellant are contradictory. In addition they submitted that, the said provisions were not invented by them as they are contained in the Standard Invitation for Quotations for Procurement of Minor Works issued by PPRA in July 2007.

In analyzing the validity of submissions by parties the Authority started with the contention that completion period does not include mobilization. The Authority rejects this contention and concurs with the Respondent that, completion period includes mobilization as provided

in the Tender Submission Form which was filled by the tenderers which states in part that;

“We also offer to complete the said works within a period of ..... days/weeks/month (delete as necessary) **that includes mobilization period.** (Emphasis supplied)

The Authority further observes that, it was risky for the Respondent to allow the tenderers to indicate a completion period based on weeks while the period stipulated by the Respondent was pegged on months. This is because the number of weeks in a month is not uniform and therefore is likely to complicate evaluation of such a criterion.

As regards the Appellant’s contention that there is an ambiguity in relation to the time when the completion period should start to run, the Authority agrees with the Appellant that the said ambiguity is apparent on the face of record. For purposes of clarity the Authority

reproduces the said contradictory provisions herein below:

ITB Clause 1.

**“The site will be indicated on each lot and works should be completed two months after acceptance of Quotation.”**

Item 20.0 of the Contract Data

**“Contract start date: 1day after date of signing the contract”** (Emphasis added)

The Authority observes that the ambiguity is caused by the fact that **“acceptance of quotation or tender”** and **“signing of the contract”** are not one and the same. Acceptance of a tender occurs when a written communication of award of tender to the successful tenderer has been made by virtue of Section 55(7) of the Act while signing of a contract takes place at a later stage, that is, after completing the other procedural requirements like the furnishing of Performance Security,

where applicable. Assuming the completion period in the tender under Appeal started to run after acceptance of the tender, it means the two months period started to run from 17<sup>th</sup> July, 2012, when the award was communicated to the successful tenderer and the said works should be completed by 16<sup>th</sup> of September, 2012.

The Authority further considered the Respondent's submission that the said contradictions originate from the Standard Invitation for Quotations for Procurement of Minor Works issued by PPRA. Having reviewed the said document the Authority concurs with the Respondent as procuring entities are obliged to use Standard Tendering Documents issues by PPRA as per Section 63(1) of the Act. Additionally, the procuring entities' mandate to customize the said documents is curtailed under Regulation 83(4) of GN. No. 97 of 2005, which allows them to do so only *vide* the contract data sheet or general conditions of contract. The Authority therefore urges the said Regulatory body to take the necessary remedial measures to address this problem.



Having resolved the issue pertaining to the ambiguities in the commencement of the completion period, the Authority considered the Appellant's contention that, it was wrong to evaluate their tender on the basis of completion period at the preliminary stage while for the other two tenders, the same criterion was evaluated during detailed evaluation. The Authority observes that according to the Evaluation Report, completion period was neither evaluated at the preliminary stage nor formed part of the reasons for the disqualification of the Appellant. The Authority is surprised that the Minutes of the Tender Board meeting of 16<sup>th</sup> July, 2012, contained two additional grounds for the disqualification of the Appellant which were neither evaluated at the preliminary stage nor stated in the Evaluation Report. The said reasons were that, the Appellant specified a completion period of 10 weeks instead of two months stated in the Tender Document and that they did not attach evidence of their recently performed contracts.

The Authority further noted that the aforementioned two additional reasons were brought up for the first time by

the Procurement Management Unit (PMU) during the Tender Board meeting of 16<sup>th</sup> July, 2012. Thus, it was the PMU which misdirected the Tender Board and as a result the said erroneous reasons were included in the Respondent's letter to the Appellant dated 23<sup>rd</sup> July, 2012, which disclosed the reasons for the disqualification of their tender.

The Authority observes that it was wrong for the Respondent to include reasons for disqualification of the Appellant's tender on criteria which were not evaluated at the preliminary stage of evaluation.

In view of the foregoing, the Authority is satisfied that specifying a completion period of 10 weeks instead of two months stipulated in the Tender Document should not have been amongst the reasons that led to the disqualification of the Appellant's tender, since the Appellant was not subjected to detailed evaluation.

### **(iii) Failure to attach evidence of recently performed contracts of similar nature**

As it has already been established under the second ground above, the Appellant's failure to submit documents indicating their recently executed contracts was neither evaluated at the preliminary stage nor mentioned anywhere in the Evaluation Report. Notwithstanding the fact that the Appellant conceded during the hearing that they did not attach the said documents, the Authority is of the view that it was wrong for the Respondent not to check this requirement during the Preliminary Evaluation stage when verification is done to ensure that all the eligibility documents requested have been submitted. That said, the Authority concludes that, this item should have been checked during preliminary evaluation and included among the reasons for disqualification of the Appellant's tender.

Based on the above findings the Authority's conclusion on the second sub-issue is that, the Appellant's Tender did

not comply with the requirements of the Tender Document.

Accordingly, the Authority is satisfied that, the Appellant's tender was fairly disqualified.

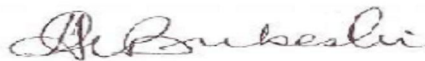
## **2.0 To what reliefs, if any, are the parties entitled to?**

Having resolved the contentious issue and having satisfied itself that the disqualification of the Appellant's tender was proper, the Authority is of the settled view that the Appellant is not entitled to any relief. That said, the Appellant's prayers are rejected in their entirety and each party is ordered to bear their own costs.

On the basis of the aforesaid findings and conclusions, the Authority dismisses the Appeal for lack of merit and orders each party to bear their own costs.

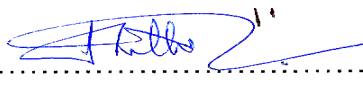
Right of Judicial Review as per Section 85 of the Act explained to parties.

Decision delivered in the presence of the Appellant and the Interested Party, and in the absence of the Respondent this 14<sup>th</sup> day of September, 2012.



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

**MEMBERS:**

1. MR. K.M. MSITA  .....

2. MRS. NURU INYANGETE  .....

3. MS. E. J. MANYESHA  .....