

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

**APPEAL CASE NO. 61 OF 2009**

**BETWEEN**

**NUCTECH COMPANY LIMITED .....1<sup>ST</sup> APPELLANT**

**RAPISCAN SYSTEMS LIMITED.....2<sup>ND</sup> APPELLANT**

**AND**

**TANZANIA REVENUE AUTHORITY .....RESPONDENT**

**DECISION**

**CORAM:**

- |                                |               |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mr. M. R. Naburi            | - Member      |
| 3. Mr. K.M. Msita              | - Member      |
| 4. Mrs. N.S.N. Inyangete       | - Member      |
| 5. Ms B.G. Malambuigi          | - Secretary   |

**SECRETARIAT:**

- |                       |                       |
|-----------------------|-----------------------|
| 1. Ms. E.V.A. Nyagawa | - Legal Expert, PPAA  |
| 2. Ms. F. Mapunda     | - Legal Officer, PPAA |

**FOR THE 1<sup>ST</sup> APPELLANT:**

1. Mr. Deusdedith Mayomba Duncan – Advocate from F.K. Law Chambers
2. Mr. Dismas Mallya – Legal Officer for the 1<sup>st</sup> Appellant

**FOR THE 2<sup>ND</sup> APPELLANT:**

Mr. Herbert Nyange – Advocate from Nyange & Ringia Advocates

**FOR THE RESPONDENT**

1. Mr. Magelan L. Sakinoi – Deputy Director, Administration
2. Mr. Lwakege N. Minga – Manager, Administration
3. Mr. Ndarah H. Kidaya, Principal Legal Counsel
4. Mr. Joseph Charos – Principal Procurement Officer
5. Mr. Paul Jackson – Assistant Manager, Scanner Sites

This decision was scheduled for delivery today 4<sup>th</sup> February, 2010, and we proceed to deliver it.

The Appeal at hand was lodged by **NUCTECH COMPANY LIMITED** (hereinafter to be referred to as "**the Appellant**") against **TANZANIA REVENUE AUTHORITY** commonly known by its acronym **TRA** (hereinafter to be referred to as "**the Respondent**"). Following notification of the Appeal lodged by the 1<sup>st</sup> Appellant, another tenderer namely, **RAPISCAN SYSTEMS LIMITED** opted to join as a party to this Appeal (hereinafter to be referred to as "**the 2<sup>nd</sup> Appellant**").

The said Appeal is in respect of Tender No.AE/23/GS/003/09-56 for Supply, Installation and Commissioning of Heavy Duty Mobile Container Cargo Scanners for Customs Operations at Dar es Salaam and Tanga Ports (hereinafter to be referred to as "**the Tender**").

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

On 6<sup>th</sup> July, 2009, the Respondent invited tenders for Supply, Installation and Commissioning of Heavy Duty Mobile Container Cargo Scanners for Customs Operations at Dar es Salaam and Tanga Ports. The tender advertisements appeared in The Guardian, The Daily News and were also posted in the TRA and PPRA websites. Furthermore, the same advertisement appeared in the Business Times newspaper of 10<sup>th</sup> -16<sup>th</sup> July, 2009.

The deadline for submission of tenders was 27<sup>th</sup> August, 2009, but was later extended to 17<sup>th</sup> September, 2009.

Tender opening took place on 17<sup>th</sup> September, 2009, whereby the tenderers who took part in the tender are as follows:

<b>S/N</b>	<b>Name of a Tenderer</b>	<b>Country</b>	<b>Price Quoted</b>
1.	Rapiscan Systems Ltd	England	US \$ 3,730,000
2.	Smiths Heimann S.A.S	France	Euro 3,180,000
3.	Nuctech Company Ltd	China	US \$ 3,866,709

Having completed evaluation of the Tenders, the Evaluation Committee recommended that award be made to Smiths Heimann S.A.S at a corrected contract price of Euro 3,420,000. However, the Tender Board approved the award in favour of the said tenderer at a contract price of Euro 3,180,000.

On 18<sup>th</sup> November, 2009, the Respondent informed the 1<sup>st</sup> Appellant vide letter referenced TRA/DDA/T.41/1 that their bid was not successful. No reasons were provided for the disqualification of their bid.

On 19<sup>th</sup> November, 2009, the 1<sup>st</sup> Appellant, vide unreferenced letter, requested the Respondent to avail the reasons for their disqualification.

On 30<sup>th</sup> November, 2009, the Respondent vide letter referenced TRA/DDA/T.42/1 communicated to the Appellant seven reasons that led to their disqualification.

On 4<sup>th</sup> December, 2009, the Appellant being dissatisfied with the tender results submitted an application for administrative review to the Public Procurement

Regulatory Authority (hereinafter to be referred to as "**PPRA**").

The PPRA replied to the Appellant's complaint *vide* a letter referenced PPRA/AE/023/38 dated 14<sup>th</sup> December, 2009 in which they indicated that they did not have jurisdiction to entertain the appeal as the Procurement contract was already in force. They were therefore directed to lodge an appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**"). On 24<sup>th</sup> December, 2009, the Appellant lodged an appeal with the Authority.

## **SUBMISSIONS BY THE 1<sup>ST</sup> APPELLANT**

The 1<sup>st</sup> Appellant's documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing were as follows:

That, the Technical Specifications in the Tender Document were flawed as shown under Technical Specification Clause 3.4, 3.5, 3.6, 4.2 and 5.3. The Appellant in support of this point quoted Clause 3.4 of the Technical specification as an example and submitted that the international standards dose for ionizing radiation published by the International Atomic Energy Agency (IAEA) and the American National Standards for determination of Imaging Performance of X-ray and Gamma Ray System for Cargo and Vehicle Security Screening as approved by the World Health Organization is higher than what is required under the Tender Document.

That, the Tender Document contained a number of core technical requirements which are biased towards one manufacturer. In support of this ground the Appellant submitted as follows;

- Clause 1.1 of the Technical Specifications which required the vehicle equipping the scanner to have a diesel engine capacity of 280hp at 230rpm was found to be erroneous. This was later changed to 2300rpm following clarification sought by the 1<sup>st</sup> Appellant. The 1<sup>st</sup> Appellant further noted that the said engine capacity required of **“280hp at 2300rpm”** was the same as the one offered by Smiths Heimann S.A.S in a tender submitted by them in Portugal in 2006. Hence this proves that the tender specifications were biased towards Smith Heimann S.A.S
- Clause 7.10 was found to be biased as each manufacturer has its own style in workstation naming and software function distribution but having similar process and achieving the same functions. For instance, the 1<sup>st</sup> Appellant uses the names “Operation and Inspection Subsystem” to elaborate and name the software and hardware functions. The software and image processing system elaborated in Clause 7.10 is exactly the same as Smith Heimann’s image processing system configuration and the naming of the workstations, terminologies used and the way they have been elaborated in the tender document are exactly Smith Heimann’s style as proved by Smiths Heimann’s offer of mobile scanner in 2006 Portugal tender.

- Clause 8.3 of the Technical Specifications requires the software to have **a deferred analysis function**. The 1<sup>st</sup> Appellant finds this to be just a method to provide Smiths Heimann S.A.S an advantage in the image display method and on the pace control of the image display. This is because both Appellants adopt the image acquisition method to display the scanning image which is especially designed for container inspection process.

That, the Technical Evaluation team failed to understand the technology of Linear Accelerator and material discrimination, both of which are very difficult to be judged and evaluated without professional assistance. Further it was submitted that the 1<sup>st</sup> Appellant's 6/3MeV is the dual-energy mode to realize real material discrimination which single energy cannot do. The image produced by single energy technology is pseudo colour based on the density of the material while the dual energy technology enables the scanner to realize real material discrimination by analyzing the effective atomic numbers.

That, the Technical Evaluation team misunderstood the expression of the Appellant's specification. For instance, in compliance with Clause 5.3 of the Technical Specifications, the 1<sup>st</sup> Appellant's expression in their Technical Description was 25 units of 40ft container vehicles per hour. The said "**40ft**" was attributive of the word "**container**" not the word "**vehicle**". The 1<sup>st</sup> Appellant noted that, in Respondent's response to the

request for clarifications, they mistook the “**40ft**” as attributive to “**vehicle**”.

That, based on their own reasons, the Respondent failed to see that the 1<sup>st</sup> Appellant had stated the maximum dimension of the scanned vehicle to be 18m length, 2.6m width and a height of 4.65 in expandable at the customers request. Based on that the 1<sup>st</sup> Appellant suspects that the Respondent did not review latter’s bid carefully and ignored its relevant facts.

That, the penetration test of the scanner offered by the 1<sup>st</sup> Appellant was based on steel according to Clause 3.2 of the Technical specifications. Also the image quality test is not the penetration test as they are two different processes. The tungsten wire have been used in this tender for detection capability as specified in Clause 4.2 of the Technical Specification. The tender documents did not specify that steel should be used in image quality test, hence the 1<sup>st</sup> Appellant is surprised on the reasons why the tungsten wire can not be used.

That, the Evaluation Team failed to take into consideration all the information and commitments provided by the 1<sup>st</sup> Appellant. For instance, they had provided a full report of the system safety with an authorized certificate including radio meter and portable radiation survey meter, but this was totally missed by the Evaluation Team and the Respondent commented that the Appellant’s tender did not specify any radio meter or portable radiation survey meter used for safety illustration while that was not required in the Tender Document.

That, the 1<sup>st</sup> Appellant had provided the three software features in its Technical Description as required by Clause 5.2 of the Technical Specifications

That, Tender Document did not require further illustrations if the tenderer had already complied with technical specifications. The 1<sup>st</sup> Appellant complied with some of the specifications and other specifications were shown by way of illustrations provided for in an additional document which was ignored by the Respondent.

That, Item 2 of the technical requirements did not require tenderers to provide the specifications or model of the electrical generator and electrical stabilizers as claimed . Item 2 requires minimum specification of the facilities for supply of the electrical power and not their model or specifications and this was fully complied with by the 1<sup>st</sup> Appellant

That, it is procedural that if the Respondent found some unclear information in the 1<sup>st</sup> Appellant's tender, they should have sought for clarification thereof, which they did not do.

That, the Respondent had awarded the tender to Smiths Heimann S.A.S whose price was the highest among the three tenderers.

That, the Respondent's Tender Board erred in not observing the underlying Procurement Policy set out under Regulation 4 of the GN No. 97/2005.

That, the 1<sup>st</sup> Appellant had further noted that, the Respondent's recent tender advertisement for Supply, Installation and Commissioning of Airport Baggage Scanners – NCB No. TMP/PG/09/46 had used technical specifications of the same manufacturer thus restricting competition.

That, in preparing the tender documents the Respondent either knowingly or through ignorance prepared them in such a way that they hinder free and fair competition contrary to the law, rules and procedures governing public procurement as stipulated under the Procurement Act, of 2004, Cap 410 (hereinafter to be referred as "**the Act**") read together with the Public Procurement (Goods, Works, Non consultant Services and Disposal of Public Asset by Tender) Regulations 2005 of GN No 97 of 2005 (hereinafter to be referred to as "**GN No 97 of 2005**").

That, the Respondent's actions totally contravened the spirit behind the enactment of the Act, particularly Section 6 which names one of the objectives of the Act and the entire procurement process to be ensuring application of fair, transparent, non discriminatory and value for money procurement standards.

That, the Respondent's action of putting requirements and terminologies which discriminate unfairly against equal participation of all tenderers hindered competition contrary to Section 58 of the Act read together with Sections 62(3) and 63(2) of the Act.

That, the Respondent's Tender Document contained technical requirements which were drawn in such a way as to favour one tenderer thereby contravening the provisions of Section 73(4) of the Act, since they did not grant equal opportunity to all tenderers contrary to provisions of Sections 43 and 60 of the Act, read together with Regulation 79 of GN No. 97/2005.

That, the 1<sup>st</sup> Appellant prays for the following:

- The contract be annulled and the Respondent be ordered to restart the tender process afresh in observance of the law;

OR

- The tender be re-evaluated; and
- The Respondent be ordered to compensate the 1<sup>st</sup> Appellant the sum of US Dollar 50,000.00 as per the following breakdown:

- (i) Legal fees - USD 15,000
- (ii) Appeal fees - USD 90
- (iii) Accommodation and car rental for 2 person USD 11,218
- (iv) Local transportation - USD 420
- (v) International Telephone - USD 2000
- (vi) Printing and photocopy - USD 63
- (vii) Travel allowance - USD 4000
- (viii) Support from technical department USD 1800
- (ix) Support from marketing department USD 6000
- (x) Air Tickets - USD 9,409

**(a) Ma Kaishi**

Beijing – Dubai- Dar es Salaam	]	
Dar es Salaam – Dubai	]	
Dubai – Beijing	]	USD 3641

Ticket cancellation	]	
<b>(b) Yang Lin</b>		
Beijing - Dubai	]	
Dubai – Dar es Salaam-Dubai	]	
Dubai – Paris	]	
London-Amsterdam- Dar es Salaam]	]	USD 5768
Dar es Salaam- Dubai	]	
Dubai - Beijing	]	
<b>Grand Total USD 50,000</b>		

**SUBMISSIONS BY THE 2<sup>ND</sup> APPELLANT**

The 2<sup>nd</sup> Appellant’s documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing were as follows:

That, the 2<sup>nd</sup> Appellant’s tender satisfied all the conditions for award of tender, as it was the most technically responsive and had offered the lowest evaluated bid price of US Dollars 3,730,000.

That, the invitation for tenders was a purported invitation as it was already known in advance who should be awarded the said tender.

That, the Respondent awarded the tender in total disregard of value for money procurement standards and the practice speculated under the Public Procurement Act.

That, the tender was awarded to a non responsive tenderer on the basis of discrimination, in conduct lacking accountability and in total disregard of transparency.

That, the Respondent referred to a distinction between M4500 series and specific Model M4507. The series nomenclature is for mobile and 4500 for energy output. M4507 is the current international version and M4508 is the US customs version. The closest version to the tender specification is the M4507. The 2<sup>nd</sup> Appellant offered M4500 and guaranteed that would be in compliance with Technical Specification.

That, the claim that the 2<sup>nd</sup> Appellant had offered 275mm steel penetration is not correct as serial 3.2 of the technical compliance matrix of the 2<sup>nd</sup> Appellant stated a steel penetration of 300mm.

That, the claim by the Respondent that the 2<sup>nd</sup> Appellant had offered a throughput of 20 vehicles per hour was not correct as in the compliance matrix the latter offered a throughput of 26 vehicles per hour.

That, the 2<sup>nd</sup> Appellant had offered a maximum scan height of 4.65M and not the height of 4.6M as alleged by the Respondent.

That, the 2<sup>nd</sup> Appellant offered an Uninterruptable Power Supply (UPS) which has a dual function namely, to stabilize power and ensure continuity for sometime and protection of sensitive equipment after main power outage.

That, the 2<sup>nd</sup> Appellant has provided a detailed acceptance test as annex to the Technical Description.

That, the 2<sup>nd</sup> Appellant had offered a system that has a mechanism for automatic detection of nuclear devices.

That, the Respondent failed to ask for clarification from the 2<sup>nd</sup> Appellant at any stage of the evaluation process. If there was any discrepancy between the latter's standard documentation and the documentation specifically for the Tanzanian tender a simple correspondence would have cleared this up.

That, the Respondent had chosen the tenderer who will cost the Tanzanian taxpayers 1.25 billion shillings more for a less effective equipment.

Finally the 2<sup>nd</sup> Appellant prays for the following reliefs:

- Both the award and the contract be set aside;
- The Successful tenderer be disqualified; or in the alternative
- The tenders be re-evaluated; and
- Costs incurred as per the following breakdown:
  - (i) Legal fees (from 26<sup>th</sup> November, 2009 – 27<sup>th</sup> January, 2010) – **USD 26,804**
  - (ii) Costs arising from Mr. Ian Williams – Tshs. **10,187,220/=** arrived at as hereunder:
    - Return fare London – Dar London (December, 9<sup>th</sup> – 11<sup>th</sup>, 2009) **Tshs. 1,643,772/=;**
    - Accommodation New Africa Hotel - **Tshs. 413,000/=**

- Air tickets – Dubai – Dar (27<sup>th</sup> January, 2010) – **Tshs. 515,944/=**
- Air fare Dar – London (29<sup>th</sup> January, 2010) **Tshs. 1,129,960/=**
- Accommodation (Protea Hotel) **Tshs. 445,544/=;**
- Corporate Counsel – **Tshs. 6,039,000/=** (interco charge)

## **THE RESPONDENT’S REPLIES**

The Respondent’s documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing were as follows:

That, the specifications were prepared to ensure that tenderers respond by providing the best equipment and technology available from them with regard to safety and cost. The 1<sup>st</sup> Appellant was one of the tenderers who complied with technical specifications 3.4, 3.5 and 3.6.

That, the specifications provide a range of qualities under which different tenderers could compete by offering products within that range. Specifications 1.1 and 1.6 were the minimum set requirements and tenderers could offer anything above those limits. The Appellant had complied with these specifications.

That, specification 7.10 is the image processing system without which scanners have no meaning and the tenderers were required to comply with the requirement or provide an improved solution.

That, professionals were involved in the evaluation of the tender and the reasons given were the correct interpretation of the non compliance of the tenderer.

That the Technical Evaluation Team involved an expert from Tanzania Atomic Commission with X-Ray expertise and a well trained and experienced scanner expert with more than five years of daily working with similar scanners.

That, the throughput capacity of the truck was among the important requirements and the specifications clearly require tenderers to provide equipment with throughput capacity of 25 trucks of 18 meters length per hour. The Appellant indicated to have complied on the item by item compliance matrix but the submission specified the technical specifications of the product to be supplied gave a throughput of 25 units of 40 ft container vehicles per hour (40 ft is about 2/3 of 18 meters). Thus the Appellant did not comply with the requirement of 18 meters length.

That, the Evaluation Committee did not miss any information regarding the issue of radiation safety. The main concern was the safety of image operators as clarified in the 4<sup>th</sup> round of questions. A radiometer is necessary in the image operator's cabin and should be integrated to the scanner systems. It informs the system to stop emissions of X-ray and movement of scanner when the dose rate in the operator's cabin exceeds a specified value. It also alerts the operators of the exceeding dose rate with an audible sound. There is no documentation of this in the tender document submitted

by the Appellant instead there is some reporting on Personal Alarm Meters something which was not requested, also the range and model of the survey meter was not specified too.

That, a mere mention of the word comply in the item by item matrix is not enough to evaluate the tenderer for compliance. Clause 9 of the Bid Data Sheet requires tenderers to submit additional relevant documentation including brochures and catalogues to support specifications related to the offered scanners. Also evaluation was based on documents submitted by tenderer's hence there were no need to request for more information from the tenderer's during evaluation process.

That, the contract was awarded to Smiths Heinmann S.A.S who was determined to be the lowest evaluated substantially responsive tenderer among the three. Also having the lowest read out price does not amount to automatic winning of the tender as alleged by the 1<sup>st</sup> Appellant.

That, it is true that the 1<sup>st</sup> Appellant did not comply with 36 items and only seven were narrated in the main body of the Evaluation Report. This was just a format of presentation and the reader of the report was being referred to see the details of the result of the Technical Evaluation in Appendix IV of the Report. Thus it is only the summary of the long list of the non complied items that were presented on the main body of the Evaluation Report and a complete compliance matrix was presented as annexure.

That, the technical specification Clause 3.4 in the Tender Document specified that the dose rate outside the inspection zone was to be  $<0.2\mu\text{Sv}/\text{hour}$ , both tenderers submitted  $\leq 0.5\mu\text{Sv}/\text{hour}$  that was above the range. The 1<sup>st</sup> Appellant in their statement of compliance claimed to comply with  $<0.2\mu\text{Sv}/\text{hour}$  but this could not be verified in the safety report. This was treated as minor deviation for all tenderers on the ground that according to WHO and IAEA safety series No.115 the dose rate outside the inspection zone  $\leq 0.5\mu\text{Sv}/\text{hour}$  is acceptable internationally for pedestrians.

The Respondent therefore prayed for the Appeal to be dismissed with costs.

## **ANALYSIS BY THE AUTHORITY**

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

- **Whether the Tender Document issued by the Respondent complied with the applicable law;**
- **Whether the evaluation was properly done;**
- **Whether the disqualification of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants was justified;**
- **Whether the award in favour of Smiths Heimann S.A.S was proper at law; and**

- **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 Tender Document issued by the Respondent complied with the applicable law**

The Authority examined the Tender Document in order to ascertain if it contained the requisite information necessary to enable tenderers to understand the terms and conditions thereof so as to prepare their tenders.

The Authority revisited Regulation 83 of GN. No. 97 of 2005 which guides as to the content of the solicitation documents. According to the said Regulation, the content thereof should include, among others; eligibility criteria, technical specifications, the manner in which the tender price is to be formulated and criteria to be used in determining the successful tenderer.

The Authority revisited the arguments advanced by parties on this point and deemed it prudent to frame two sub-issues as hereunder:

- **Whether the Technical Specifications in the Tender Document were flawed; and**
- **Whether the Technical Specifications contained in the Tender Document favoured a specific tenderer?**

Having formulated the sub-issues, the Authority went on to tackle them as follows:

### **1.1 Whether the Technical Specifications in the Tender Document were flawed**

In resolving this sub-issue, the Authority revisited the contentions by parties. The 1<sup>st</sup> Appellant alleged that the Technical Specifications in the Tender Document were not only flawed but also faulty. They cited Items 3.4, 3.5, 3.6. 4.2 and 5.3 of the Technical Specifications to substantiate their argument. For purposes of recapitulation, the aforementioned Items relate to:

- dose rate outside the inspection zone;
- dose rate in the operators cabin and drivers cabin;
- average dose rate absorbed by the vehicle during scanning;
- wire detection; and
- throughput.

The 2<sup>nd</sup> Appellant seconded the 1<sup>st</sup> Appellant's contentions stating that there were some ambiguities in the Tender Document. The Respondent, on the other hand, argued that the Technical Specifications were prepared by experts and the contents thereof were clear to any person conversant with the subject matter of the tender.

Having pointed out the contentions by parties, the Authority revisited the applicable law so as to satisfy itself whether the Tender Document met the

requirements of the law. As it has already been shown hereinabove, the contentions by parties on this sub-issue mainly centered on clarity as well as the appropriateness of some of the technical specifications. Before examining whether the Items cited by the 1<sup>st</sup> Appellant were faulty or not, the Authority deemed it prudent to look at the guidance provided under the applicable law on the content of the solicitation documents. Regulation 83 of GN No. 97 of 2005 provides a general description of what should be contained in the solicitation documents whereas Section 63(2) of the Act states as hereunder:

**“The tender documents shall be worded so as to permit and encourage competition and such documents shall set forth clearly and precisely all the information necessary for a prospective tenderer to prepare tender for the goods and works to be provided.”** (Emphasis added)

In light of the above quoted provision together with the documentary and oral submissions made by parties during the hearing, the Authority’s observations on this sub-issue are as listed herein below:

- Item 1.1 of the Technical Specifications which indicated diesel engine capacity to be a minimum 280hp at 230rpm was later changed to 280hp at 2300rpm by the Respondent following inquiry by the 1<sup>st</sup> Appellant on the same. This shows that the original item 1.1 was faulty. However, since the matter was clarified prior to the tender opening, it was neither fatal nor did it prejudice the 1<sup>st</sup> Appellant’s tender.

- Item 3.1 of the Technical Specifications is ambiguous as it does not specify whether the linear accelerator x-ray source required was **to range between 4 to 6 MeV** or **a tenderer could offer a number between 4 and 6MeV**. The Authority's stand is derived from the differences in understanding depicted by the 1<sup>st</sup> Appellant who indicated "**3 and 6**" whereas the 2<sup>nd</sup> Appellant indicated "**4.5**".
- The 1<sup>st</sup> Appellant had sought clarification from the Respondent on a number of issues contained in the Tender Document prior to the tender submission deadline. The Authority noted that, amongst them, Item 3.4 of the Technical Specifications whereby the 1<sup>st</sup> Appellant questioned the appropriateness of the dose rate outside the inspection zone specified as <0.2µSv/hour against the specification of the International Atomic Energy Agency Standards of <0.5µSv/hour as approved by the World Health Organization.

In responding to the clarification on the item, the Respondent stated that **"Safety against x-ray inside and outside the scanning zone is one of our main concerns. Among other things we will look at the safest machine. Please comply"**.

The Authority is concerned that, the above quoted response by the Respondent seems to suggest that this factor was mandatory, but for unknown reasons, it was treated as a minor deviation during the evaluation

process. The Authority is of the view that Item 3.4 was also flawed.

- During the hearing the Respondent conceded that the specifications pertaining to safety features of the x-ray technology as stipulated under Item 3.8 of the Technical Specifications were faulty.
- Item 4.2 of the Technical Specifications required **“Wire detection 0.5mm diameter”** but during the evaluation the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were found to be non compliant because the 1<sup>st</sup> Appellant indicated test with **“Tungsten Wire”** while the 2<sup>nd</sup> Second Appellant indicated **“Copper Wire”** and the successful bidder indicated **“Steel”**. The Authority observes that the need to have steel for wire detection was not clearly stated in the technical requirements causing each bidder to respond differently. The Authority observes that, the different types of metals indicated by the tenderers who are experienced manufacturers was caused by the lack of specificity.
- The Authority also considered the 1<sup>st</sup> Appellant’s contention that the requirement for the software to have a **deferred analysis function** as specified under **item 8.3** of the Technical Specifications is not only a terminology used by the Successful tenderer but it was the Respondent’s way of giving the said tenderer an advantage in image display method and on the pace control of image display. The Authority noted that, the explanation given by the 1<sup>st</sup> Appellant as to what is meant by **‘deferred analysis’** was

different from what the 2<sup>nd</sup> Appellant understood as well as the Respondent.

The Authority considered the 1<sup>st</sup> Appellant's contention that, the said terminology is used by the Successful tenderer and the Respondent's reply that the term '**deferred analysis**' is known by scanner manufacturers. Having examined the Successful tenderer's tender, the Authority observes that the interpretation provided by the Successful tenderer is that it is **a postponed image analysis feature** which allows several vehicles to be scanned at once but at the same time holding their radioscopic images on the storage unit for future analysis and it is true that the said terminology is found in the said tenderer's tender.

The Authority agrees with the 1<sup>st</sup> Appellant that, the said terminology seemed to be alien to both Appellants and that is conclusive evidence that it did not relay the intended meaning to prospective tenderers. From the above explanation it shows that, the three tenderers did not have the same understanding of the terminology and neither of them complied with the said requirement except the Successful tenderer. It goes without saying therefore that, since the prospective tenderers failed to understand its intended meaning, the said specification was neither clear nor precise contrary to Section 63(2) of the Act.

The Authority is of the firm view that, to a certain extent, the Technical Specifications did not comply with the

provision of Section 63(2) of the Act as they were neither clear nor precise.

In view of the foregoing, the Authority concludes that, some of the Technical Specifications in the Tender Document were flawed.

### **1.2 Whether the Technical Specifications contained in the Tender Document favoured a specific tenderer?**

In order to establish the validity of the claims by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants' on the second sub-issue, the Authority first examined the legal provisions thereof and thereafter checked the technical specifications contained in the Tender Document *vis-a-vis* the Successful tenderer's specifications. Section 43 of the Act sets the standards of equity to be achieved in the following words:

**"In the execution of their duties, tender boards and procuring entities shall strive to achieve the highest standards of equity, taking into account:-**

- (a) Equality of opportunity to all prospective suppliers, contractors or consultants;**
- (b) Fairness of treatment to all parties; and**
- (c) The need to obtain the best value for money in terms of price, quality and delivery having regard to set specifications and criteria."**  
(Emphasis supplied)

The Act further emphasize on the neutrality of the requirements and terminologies under Section 62(3) of the Act which states:

“Tender documents **shall not** include **requirements** and **terminologies** which **discriminate** unfairly against participation by suppliers, contractors or consultants.” (Emphasis added)

Having examined at the legal provisions, the Authority embarked on ascertaining whether the requirements of the Tender Document and terminologies used therein were intended to favour the Successful tenderer, namely, Smiths Heimann S.A.S. In their assertion, the 1<sup>st</sup> Appellant started by citing Item 1.1 of the Technical Specifications which involve description of Diesel Engine Capacity. It was claimed by the 1<sup>st</sup> Appellant that, the specifications indicated in the Respondent’s document of “**Minimum 280hp at 2300rpm**” are similar to those used by the Successful tenderer in a previous tender floated in Portugal. In order to ascertain the validity of the 1<sup>st</sup> Appellant’s claim, the Authority wishes to, first of all, emphasize that, the focus and mandate of this Authority is confined to the tender under Appeal and not the tender floated in Portugal. Secondly, the Authority examined the Successful tenderer’s tender and found that their offer as submitted in the tender in dispute was “**320hp at 1800rpm**”. The Authority is therefore satisfied that, the Successful tenderer did not comply with this specification and therefore finds the 1<sup>st</sup> Appellant’s contention on this point to be unfounded.

The Authority further revisited the Appellant's contention that, the specifications on the Image Processing System provided under Item 7.10 of the Technical Specifications was similar to that provided by the Successful tenderer. During the hearing both Appellants argued that, the Respondent should have specified the functions to be performed rather than the number of workstations as their products were capable of performing all the functions as required by the Respondent. For purposes of clarity, the Authority reproduces the said specification as hereunder:

**"7.10 Image Processing System:** should be computerized with at least 6 workstations; a database workstation, **two** review workstation, a processing and acquisition workstation, a Data handling workstation and control and monitoring workstation. In additional (sic) should have an external Data handling workstation where custom manifests and other custom entries can be scanned and sent to the scanner through a wireless link. However there should be only five display screens; **2 screens for each of the 2 workstations and one screen to display the remaining workstation in turn through a command.**"

Having gone through the submissions made by parties on this point as well as the documents availed, the Authority accepts the Appellant's contentions for the following reasons:

- The number of workstations specified in the Tender Document is the same as that quoted in the Successful tenderer's tender.
- Since the end result of the Appellant's workstations met the Respondent's expectations, and the fact that the Respondent was dealing with manufacturers as opposed to mere suppliers, the Evaluation Committee should have sought for clarification from the tenderers on this specification instead of treating it as an outright deviation.

The Authority further considered 1<sup>st</sup> Appellant's claim that, the term "**deferred analysis**" is used by the Successful tenderer and therefore this particular terminology and specification was copied from them. During the hearing it was evident that, the Respondent is currently using one container scanner which was manufactured by the Successful tenderer, namely, Smiths Heimann S.A.S. The said scanner has been in use for the past six years. The 1<sup>st</sup> Appellant contended that, in view of the fact that the scanner currently being used by the Respondent was manufactured by Smiths Heimann S.A.S, it goes without saying that the staff operating it are more familiar with the Successful tenderer's technology since they were trained by Smiths Heimann S.A.S. at the time when the said scanner were purchased. The 1<sup>st</sup> Appellant further argued that, on that basis, the Respondent's staff, who were part of the team that formulated the specifications and one of them also participated in the evaluation process; could have influenced specifications in favour of Smiths Heimann S.A.S. Furthermore, with that background, such staff

could not therefore understand the other technologies offered by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants.

Given the fact that the said terminology was construed differently by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants, coupled with the fact that, the said phrase appears in the Successful tenderer's tender, the Authority is inclined to agree with the 1<sup>st</sup> Appellant's assertions on this point. Moreover, even the wording appearing on page 153 of the Tender Document gives a clue as to the Respondent's satisfaction with the performance of the current container scanner, as it states:

**"The Government has been impressed by the scanning system and the value it provides and it intends to add one more heavy-duty mobile container scanner at Dar es Salaam Port and avail the service to Tanga port. By outright purchase of the two scanners from reputable scanner manufacturers."**

The Authority also discovered that, Item 3.1 of the Technical Specifications which involved specifications for linear accelerator x-ray source as 4 to 6 MeV was exactly the same as that contained in the tender submitted by the Successful tenderer. The Authority is of the considered view that, this particular item was copied from Smiths Heimann S.A.S which was ambiguous to the other two tenderers, that is, the Appellants.

The Authority observes that, although the Respondent may have acted in good faith, their conduct defeated the purpose of competitive tendering as provided under

Sections 58(2), 62(3) and 63(2) of the Act. The Authority is of the view that by using terminologies used by one manufacturer and issuing specifications on Image Processing System and X-ray which favoured a specific tenderer, the other tenderers were denied fair and equal treatment contrary to Section 43 of the Act.

Moreover, the Authority observes that, the Respondent's conduct contravened Regulation 9(b) of GN. No. 97 of 2005 which provides for, among others, equality of participation in the following words:

- “ **To ensure the widest possible participation** by suppliers, contractors, service providers or buyers **on equal terms in invitations to tender for** goods, works, services or disposal of assets, as appropriate, procuring entities and approving authorities **shall take the necessary measures to:**
- (b) **eliminate discriminatory practices or technical specifications which might stand in the way of widespread participation on equal terms;**” (Emphasis added)

The Authority is satisfied that, some of the technical specifications favoured the Successful tenderer and were unfairly discriminative to the other tenderers.

## **2.0 Whether the evaluation was properly done**

The Authority deemed it prudent to examine the evaluation process in its entirety, as both Appellants had

expressed their dissatisfaction with the evaluation process. According to the Tender Document as well as the Evaluation Report, the evaluation was done through four stages, namely, Preliminary Evaluation, Technical Evaluation, Commercial Evaluation and Post-qualification. In order to ascertain whether the evaluation process was properly done and also to resolve the contentions raised by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants, the Authority formulated four sub-issues as hereunder:

- **Whether the evaluation criteria were properly applied;**
- **Whether the basis for determining minor and major deviations was justified;**
- **Whether the Members of the Evaluation Committee were competent to evaluate such a tender; and**
- **Whether the failure to sign personal covenants at the commencement of the evaluation process contravened the law.**

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

## **2.1 Whether the evaluation criteria were properly applied**

In resolving this sub-issue, the Authority examined the evaluation criteria as stipulated under Clauses 29 to 39 of the ITB and as modified in the Bid Data Sheet *vis-a-vis* the Evaluation Report. The Authority embarked on examining each of the evaluation stages separately.

### **2.1.1 Preliminary Evaluation:**

According to Clause 29 of ITB, during Preliminary Evaluation, the Evaluation Committee was supposed to check eligibility, whether the tender was properly signed, whether it was accompanied by the required securities and if it was substantially responsive. Moreover, under Clause 29.3 of the ITB, they were supposed to check if the documents specified under Clauses 12, 13 and 14 of the ITB were provided. The marginal notes to the said Clauses 12, 13 and 14 indicate the documents and information required was that related to the following:

- documents constituting the bid;
- eligibility of information systems and related installations and conformity with the bidding documents; and
- qualifications of the bidder;

The Authority observes that, according to Clause 29.3 of the ITB the Evaluation Committee was supposed to check whether all the information and documents mentioned under Clauses 12, 13 and 14 of the ITB as well as any other document required under the Bid Data Sheet as per Clause 12.1(g) of the ITB were provided.

The Authority proceeded to examine whether the Evaluation Committee adhered to the procedural requirements stated under Clause 29.3 of the ITB. The Authority noted that the Table appearing on page 14 of the Evaluation Report which summarized the items that were checked during Preliminary Evaluation have the following shortfalls:

- It does not show whether Clause 12.1(d) read together with Clause 13.3 of the ITB which required provision of documentary evidence of conformity of the Information Systems and related installations to the bidding documents were checked.
- Clause 14.3(b) required tenderers to show their financial, technical and production capability necessary to perform the contract as specified in the Bid Data Sheet. According to Item 11 of the Bid Data Sheet, Clause 14.3 of the ITB was modified as follows:

“The qualification criteria required from Bidders in ITB Clause 14.3 are as follows:

- (d) Bidders must submit documentary evidence of financial capability to perform this contract and should indicate turnover and experience of having completed at least three contracts of the same value for supply and installation of similar equipment within the last three years
- (e) Bidders must provide audited financial reports of the last three years
- (f) The Bidder shall furnish documentary evidence to demonstrate that it meets the following experience requirement(s):
  - (i) The Bidder must submit documentary evidence of having at least ten (10) years experience in containers scanner manufacturing.

- (ii) Bidders must submit documentary evidence that the model of scanner proposed to be supplied has been in operational in the last five years and provide at least three contact details of the countries where those scanners are operating for the TRA to visit and witness.
- (iii) The Bidder shall provide documentary evidence of having adequate and proven after sale Technical Support facilities that will be able to support the Scanners supplied in Tanzania.”

The Authority noted that, although there were various documents to be checked under Clause 14.3 of the ITB, the said Table shows all of them were lumped under a single Item 1.7 which was referred to as “**Submission of qualification documents**”. The Authority observes that, such handling of documents depicted lack of transparency as the Table does not show how the different documents were checked. Moreover, the ‘**YES**’ and ‘**NO**’ marking given to the tenders do not give a clear picture as to whether the tenders had fully complied with the requirements or otherwise. For instance, the Authority discovered that, among the qualification requirements for establishing responsiveness as provided for under Clause 14.3 (b) of the ITB read together with Item 11 of the Bid data Sheet, tenderers were required to submit documentary evidence that the model of scanner proposed to be supplied **has been in operation in the last five years**. However, the Successful

tenderer's tender indicated the model of the scanner proposed, according to the references submitted the said model has been supplied between 2007 to 2009. This is as found in the reference List on pages 1 to 5 of the Successful tenderer's tender which listed the customers to whom the said model has been sold.

The Authority is of the view that, had the Preliminary Evaluation been properly done, this tender should have been rejected since the product being offered did not meet the eligibility criteria in line with Clause 29.3 of the ITB which states:

**"The PE will confirm that the documents and information specified under ITB Clause 12, 13 and ITB Clause 14 have been provided in the Bid. If any of these documents or information is missing or is not provided in accordance with the ITB, the bid shall be rejected."** (Emphasis added)

The Authority is of the firm view that, failure to check whether the required information and documents were attached contravened Regulation 90(4) of GN. No. 97 of 2005 which states that:

**"The tender evaluation shall be consistent with the terms and conditions set forth in the tender documents and such evaluation shall be carried out using the criteria explicitly stated in the tender documents."** (Emphasis added)

In view of the above the Authority observes that, Preliminary Evaluation was not properly done.

### **2.1.2 TECHNICAL EVALUATION**

The Authority further examined the Evaluation Report to ascertain whether the **Technical Evaluation** was conducted in accordance with the law. As it has already been noted under the first issue that, the Evaluation Committee changed the technical specifications relating to the dose rate during Technical Evaluation for the following reason:

**“This was treated as minor for all bidders on the ground that according to WHO and IAEA safety series No. 115 the dose rate outside the inspection zone of  $\leq 0.5\mu\text{Sv}/\text{hour}$  is acceptable internationally for pedestrians. It was confirmed by an expert of x-rays from Tanzania Atomic Energy Commission (TAEC) who was a member of the evaluation team. If any bidder could have submitted anything beyond  $0.5\mu\text{Sv}/\text{hour}$  that would have been a major deviation.”** (Emphasis added)

The Authority observes that, the Evaluation Committee acted *ultra vires* as they had no mandate to change the technical specifications which were already communicated to the tenderers in the Tender Document prior to bid submission. Furthermore the response to the clarification sought was **“comply”** indicating that it was mandatory. Moreover, the law emphasize that the

tenders be evaluated in accordance with the terms and conditions stipulated in the Tender Document.

The Authority is therefore of the settled view that, the Respondent, erred in changing the specifications at that point in time as the changes should have been made prior to the deadline for submission of tenders and the same should have been communicated to the prospective tenderers in accordance with Sub-regulations (4) and (5) of Regulation 85 of GN. No. 97 of 2005 which state as follows:

- “(4) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier, service provider, contractor or asset buyer, modify the solicitation documents by issuing an addendum.
- (5) The addendum shall be communicated promptly to all suppliers, service providers, contractors or asset buyers to which the procuring entity has provided the solicitation documents ...”

The Authority therefore is of the view that, the clarification sought by the 1<sup>st</sup> Appellant should have been a wake-up call for the Respondent to review their Tender Document and take remedial measures.

The Authority further noted that, the evaluation process lacked transparency as most of the items which were not complied with by the tenderers were neither

documented in the Evaluation Report nor communicated to the 1<sup>st</sup> Appellant.

It was evident during the hearing that, some of the specifications given by the Appellants involved new inventions or technologies which were missed or unknown to the Evaluation Committee. The Authority observes that, clarifications should have been sought so as to evaluate them accordingly instead of treating such items as deviations.

### **2.1.3 Commercial Evaluation**

The Authority noted that, Commercial Evaluation involved comparison of prices and correction of arithmetic errors. Clause 31.1 of the ITB which guides as to the circumstances under which correction of errors may be done states as follows:

“Bids determined to be substantially responsive will be checked for any arithmetic errors. Errors will be corrected by the PE as follows:-

If there is a discrepancy between unit prices and the total price that is obtained by multiplying the unit price and quantity, the unit price shall prevail, and the total price shall be corrected, unless in the opinion of the PE there is an obvious misplacement of the decimal point in the unit price, in which the total price as quoted shall govern and the unit price shall be corrected;

If there is an error in a total corresponding to the addition or subtraction of subtotals, the subtotals shall prevail and the total shall be corrected; and

where there is discrepancy between the amounts in figures and in words, the amount in words will govern.”

Having referred to the relevant clause pertaining to correction of errors, the Authority proceeded to examine whether the Evaluation Committee adhered to that Clause. The Authority revisited Item 4.4 of the Evaluation Report which reads as hereunder:

**“The readout price of the responsive bidder was corrected and compared as shown in Appendix V and summarized on Table 5 below**

**Table 5: Comparison of prices and correction of arithmetic errors**

<b>S/N</b>	<b>Description</b>	<b>Cost</b>
<b>1</b>	<b>Readout price for the two Heavy Duty Mobile Container Cargo Scanners HCV-mobile 6032 T, mandatory Spare parts, software, local transportation, insurance, incidental services and factory acceptance test for five TRA technical experts</b>	<b>€ 3,180,000</b>
<b>2</b>	<b>Two Towing Trucks</b>	<b>€ 240,000</b>
		<b>€ 3,420,000</b>

**In accordance with Clause 35.1 of the ITB, the lowest evaluated bid is from SMITHS HEIMANN S.A.S with the amount of euro 3,420,000, excluding taxes and duties.”**

The Authority noted that, the Evaluation Report neither indicated what triggered them to make the said price addition nor the basis for the sum that was added. The Authority further noted that, Minute 151/252.5 of the Minutes of the Tender Board meeting of 30<sup>th</sup> October, 2009, indicated that the price of the scanners was inclusive of the cost of two trucks worth Euro 24,000 and decided to procure the two mobile scanners without the associated trucks. Moreover, according to Table 7.5 of Appendix V, of the attachments to the Evaluation Report indicate that, **“Price of one Tractor (Towing Truck) was not included in the read out price of the Bidder but was included in the price schedule and the model was provided”**. However, the Authority observes that, the correction of arithmetic error made by the Evaluation Committee contravened Clause 31.1 of the ITB as it does not, in anyway, fit within the circumstances provided therein.

The Authority finds that, what the Evaluation Committee did was not correction of arithmetic errors, but rather they considered an alternative offer made by the Successful tenderer in their tender, which was contrary to Item 17 of the Bid Data Sheet read together with Clause 20.1 of the ITB as alternative tenders were not permitted. The Authority therefore finds that, Commercial Evaluation was wrongly done.

#### **2.1.4 Post Qualification**

With regard to Post-qualification, Item 25 of the Bid Data Sheet stated categorically that, it would be undertaken. The Authority revisited Clause 36 of the ITB which listed

the criteria for Post-Qualification to be those provided for under Clause 14.3 of the ITB already quoted herein above. The Authority reviewed the Evaluation Report in order to establish whether Post-Qualification was done in accordance with the Tender Document and the applicable law. The Authority's observations are as hereunder:

- The Evaluation Report does not show how Post-Qualification was conducted.
- During the hearing, the Respondent submitted that the Successful tenderer's financial capability was verified vide information downloaded from the tenderer's website. The Authority is of the considered view that, this is not an appropriate way of verifying such sensitive information as the website belongs to the tenderer and the downloaded information may not necessarily reflect the true position.
- The experience of the tenderer was not verified as the Evaluation Report does not show whether any effort was made to counter check the authenticity of the information given.

Having gone through the Evaluation Report on this item, the Authority is of the considered view that, Post Qualification was not done properly in contravention of Section 48(1) of the Act read together with Regulation 90(22) of GN. No. 97 of 2005. The said sub-section reiterates the need for post-qualification in the following words:

**“If tenderers have not been pre-qualified, the procuring entity and the tender board shall determine whether the tenderer whose tender or disposal has been determined to offer the lowest evaluated tender, in the case of procurement or the highest evaluated tender in the case of disposal of public assets by tender, has the capability and resources to carry out effectively the contract as offered in the tender.”** (Emphasis added)

The need to verify the lowest evaluated bidder’s qualifications and capabilities even where pre-qualification was carried out is re-emphasized under Regulation 90(22) of GN. No. 97/2005 which reads:

**“Whether or not it has engaged in pre-qualification proceedings, the procuring entity may require the supplier, contractor, service provider or asset buyer submitting the tender that has been found to be the successful to demonstrate again its qualifications.** The criteria and procedures to be used for such post-qualification shall be set forth in the solicitation documents in accordance with Section 48 of the Act.” (Emphasis supplied)

The Authority is satisfied that, post-qualification was not done in compliance with the law and hence the Respondent did not ascertain whether the said tenderer had the requisite capability and resources to carry out

effectively the contract in accordance with Section 48 of the Act.

## **2.2 Whether the basis for determining minor and major deviations was justified**

In resolving this sub-issue, the Authority revisited the Evaluation Report, submissions by the Respondent *vis a vis* the Tender Document and the applicable law. The Authority started by examining the legal provisions relating to substantial responsiveness of tenders. Regulation 90(7) of GN. No. 97 of 2005 states as follows:

**“A substantially responsive tender is one which conforms to all the terms, conditions and specifications of the tender document(s) without material deviation or reservations.”**  
(Emphasis added)

The law further guides as to what amounts to a material deviation under Regulation 90(7) of GN. No. 97 of 2005 which is in *pari materia* with Clause 29.2 of the ITB. The said Regulation 90(7) states that:

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

According to Clause 29.1(d) of the ITB, the Respondent's determination of a tender's responsiveness was to be based on its compliance with the requirements of the Tender Document. The Authority observes that, as it was evident during the hearing, the Respondent could not provide authentic explanation as to what was their basis of determining a certain deviation as minor or major. Having gone through the Evaluation Report and other pieces of documentary evidence availed, the Authority is of the firm view that, the Respondent's treatment of minor and major deviations lacked consistency. A good illustration of this point could be deduced from the Respondent's replies to the 1<sup>st</sup> Appellant's request for clarification sought prior to the submission deadline. For purposes of clarity, the Authority reproduces both the Appellant's question and the Respondent's reply as follows:

**“Question 9:** Furthermore, the requirements in the above Clause 3.4, 3.5 and 3.6 are not in comply (sic) with the international standards and no customers have ever required so demanding dose/dose rate. Taking clause 3.6 as an example, according to international regulation standards made by the International Atomic Energy Agency (IAEA), the International Commission on Radiological Protection (ICRP) and the World Health Organization (WHO), the upper limitation of absorbed dose per scan is 100 $\mu$ Sv for film exposure safety, and 200 $\mu$ Sv for normal medical chest X-ray examination. 2 $\mu$ Sv required in clause 3.6 is not practical according

to the standards. So are the clause 3.4 and 3.5. Please clarify.

**Answer:** Safety against x-ray inside and outside the scanning zone **is one of our main concern**. Among other things we will look at the safety machine. Please comply.” (Emphasis added)

In view of the above quoted communication between the 1<sup>st</sup> Appellant and the Respondent, the Authority observes that, despite stating categorically in the above correspondence that safety against x-rays was amongst the Respondent’s main concerns, the same was treated as a minor deviation during the evaluation process. The Authority is of the considered view that, the Respondent’s reply connotes the safety issue being a mandatory requirement that is why the 1<sup>st</sup> Appellant as well as the other tenderers were advised to comply.

The Authority does not comprehend the rationale behind the Respondent’s change of attitude by treating mandatory requirements as minor deviations. The Authority’s position is further cemented by the fact that, at page 154 of the Tender Document where the technical specifications were listed it is titled “MINIMUM TECHNICAL SPECIFICATIONS FOR THE TWO SCANNERS” meaning that prospective tenderers were not at liberty to provide specifications which were detrimental to the purpose of the Respondent.

The Authority further considered the Respondent’s submission that none of the three tenderers complied

with the said requirement and since it was treated as a minor deviation no tender was prejudiced. The Authority wishes to remind the Respondent that, the law requires the evaluation process to be conducted in accordance with the terms and conditions set forth in the solicitation documents and therefore the Respondent had erred in changing the specifications during the evaluation process. Moreover, the Authority considers the Respondent's submission that, the technical specifications were prepared by a team of experts from various bodies to be doubtful as some of them have been found to be faulty.

The Authority is concerned with the Respondent's failure to account for the reasons that triggered the incorporation of only seven out of thirty six instances of non compliance in respect of the 1<sup>st</sup> Appellant. The Authority does not buy the Respondent's reply that,

**"It is true that Nuctech did not comply with 36 items as indicated in appendix IV page 15 of the evaluation report but only seven were narrated on the main body of the evaluation report. This is a format of presentation. You noted that the reader of the evaluation in Appendix IV of the report. It is only a summary of the long list of the non-compliance items presented on the main body of the evaluation report and a complete compliance matrix is presented as an Annex."** (Emphasis added)

The Authority wishes to enlighten the Respondent that, the evaluation report is essentially a confidential document which cannot be availed to a tenderer as per

Regulation 99(1) of GN. No. 97 of 2005. That is why when the 1<sup>st</sup> Appellant inquired about the reasons for their disqualification, the Respondent did not give them a copy of the Evaluation Report but deduced the seven points raised in the main Report and duly informed the said tenderer. However, the Authority is concerned that, the said Respondent was duty bound to inform the said tenderer on all the shortfalls found in their tender so that they could understand and either accept them or take further steps. Moreover, by learning their shortfalls the tenderer would be in a position to rectify them in their future endeavours. In this case therefore, the 1<sup>st</sup> Appellant was denied their right to know their other shortfalls as articulated in the attachments to the Evaluation Report contrary to Regulation 97(14)(e) of GN. No. 97 of 2005.

The Authority further observes that, the Evaluation Report indicated only one deviation in respect of the Successful tenderer while the other three appeared in the attachments to the said Report. The Authority does not accept the Respondent's reasons that they were minor and the reader of the said Report could easily access them. As it has been stated above, the Authority is of the opinion that, the Evaluation Report should have been exhaustive in that, the deviations irrespective of whether they are minor or major should have been clearly shown in the main Report. The same observation applies to the shortfalls detected in the 2<sup>nd</sup> Appellant's tender.

The Authority also considered the effect of the Respondent's conduct in providing ambiguous specifications and change of specifications during the

evaluation process and finds that, it narrowed competition as prospective tenderers may have declined to participate in the tender having seen the specifications which were not in conformity with the recognized international standards. This was a contravention of Section 58(2) read together with Regulation 9(b) of GN. No. 97 of 2005 which state as follows:

“58(2) Subject to this Act all procurement and disposal shall be conducted in a manner **to maximize competition** and achieve economy, efficiency transparency and value for money.”

9. To ensure the widest possible participation by suppliers, contractors, service providers or buyers on equal terms in invitation to tender for goods, works, services or disposal of assets, as appropriate, procuring entities and approving authorities shall take the necessary measures to:

(b) **eliminate discriminatory practices or technical specifications which might stand in the way of widespread participation on equal terms;**” (Emphasis added)

The Authority concludes that, the basis for determining minor and major deviations was not justified.

## **2.3 Whether the Members of the Evaluation Committee were competent to evaluate such a tender**

The Authority examined the legality of the Evaluation Committee and found that, the composition of the said Committee contravened the law as it consisted of seven members instead of the maximum of five as per Section 37(3) read together with Regulation 90(1) of GN. No. 97 of 2005. The said Regulation provides as follows:

**“A procuring entity shall establish a tender evaluation committee comprising **not less than three** and **not more than five members.**”**  
(Emphasis added)

Having observed that the composition of the Evaluation Committee was contrary to the applicable law, the Authority revisited the arguments by parties on this sub-issue. The Appellants contended that, the evaluation process was not properly conducted as the Evaluation Committee lacked the requisite competency to grasp some new technological developments in scanner manufacturing. The Respondent, on the other hand, counter argued that, the Evaluation Committee was clearly competent as it included experts as hereunder:

- Mr. Wilbroad Mompome – Principal Radiation Safety Inspector – (Tanzania Atomic Energy Commission);
- Mr. Julius Magile – Systems Development Manager, TRA;
- Mr. Josephat Paul – Computer Engineer, President’s Office;

- Mr. Paul Jackson – Scanner Maintenance Officer, TRA;
- Eng. Swai Jackson – Infrastructure Manager – Tanzania Ports Authority;
- Mr. Oscar B. Hossea – Head PMU, PCCB; and
- Mr. Joseph Charles – Principal Procurement Officer, TRA

Having analysed the two sub-issues to the second issue, and established that, the evaluation process was not properly done, the Authority is of the considered view that, the evaluation was not done competently notwithstanding the designations of the Members of the Evaluation of Committee.

In view of the foregoing, the Authority's conclusion in respect of the third sub-issue is that, the Members of the Evaluation Committee, irrespective of their qualifications and competency, did not evaluate the tenders competently.

#### **2.4 Whether the failure to sign personal covenants at the commencement of the evaluation process contravened the law**

During the hearing, it was evident that, the Respondent conceded that the Evaluation Committee members had signed the personal covenants after completion of the evaluation process, that is, when they were submitting the Evaluation Report. The 2<sup>nd</sup> Appellant contended that, it was unprocedural and therefore renders the whole evaluation process a nullity. The Authority observes that, the members of the Committee were obliged to sign a

personal covenant prior to the commencement of the evaluation process in line with Section 37(6) of the Act which provides as follows:

**“All members of the evaluation committee shall sign the Code of Ethics provided under the Regulations made under the Act, declaring that they do not have a conflict of interest in the procurement requirement.”** (Emphasis supplied)

It is not disputed that, the joint covenant was signed by the Members of the Evaluation Committee on 4<sup>th</sup> October, 2009, when the Evaluation Report was being submitted. As it was conceded by the Respondent during the hearing that, one of the Members of the Evaluation Committee, namely, Eng. Swai Jackson took part in the evaluation process to the end, but when the Report was being compiled he could neither sign the same nor the personal covenant, because he was out of the country. This proves that, the joint covenant was signed after the actual evaluation of tenders was complete instead of signing before the commencement of the evaluation process.

The Authority is of the view that, the intent of subjecting the Members of the Evaluation Committee to sign personal covenants was to ensure that those who have interest do not take part in the evaluation thereof. In this case therefore, signing personal covenants after completion of the evaluation, as it was done by the Respondent, constitutes a serious procedural error on their part. The Authority agrees with the 2<sup>nd</sup> Appellant that it renders the evaluation process a nullity in the eyes of the law.

The Authority further observes that, PPRA Tender Evaluation Guidelines for Procurement of Works or Goods dated February, 2007, contain a sample covenant Form which need to be signed by individual members of the evaluation committee. According to the content of the said Form, each of the members had to sign a separate form and not a joint one as it was done in the tender under Appeal.

The Authority's conclusion in respect of the fourth sub-issue is that, failure to sign personal covenants at the commencement of the evaluation process contravened the law.

With regard to the second issue, namely, whether the evaluation process was properly done, the Authority having taken cognizance of the findings in the four sub-issues, concludes that, the evaluation process contravened the law hence a nullity.

### **3.0 Whether the disqualification of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants was justified**

Having analysed the first and second issues and found that the Tender Document was faulty, some of the specifications were not neutral and that the evaluation process did not comply with the law, accordingly, the Authority concludes that, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants disqualification was not justified.

#### **4.0 Whether the award in favour of Smiths Heimann S.A.S was proper at law**

In the light of the conclusion in the first, second and third issues, the Authority's conclusion in respect of the fourth issue in that, there was no award in the eyes of the law.

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

Having analysed the contentious issues in dispute, the Authority considered the prayers by parties. However, since the prayers by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants are to a great extent similar, save for request for compensation, the Authority addresses them jointly.

The Authority considered the Appellants request that the tender be revoked and be re-advertised. With regard to this prayer, the Authority finds that, there is nothing to be revoked as the evaluation and the subsequent award was a nullity. The Authority therefore orders the Respondent to re-start the tender process afresh in observance with the law.

As regards the Appellants' request, in the alternative, that the tenders be re-evaluated, the Authority cannot grant it for lack of jurisdiction.

The Authority further considered the Appellants' request for payment of compensation arising from pursuing this Appeal. The Authority is satisfied that, had it not been for the Respondent's conduct the Appellants would not have incurred expenses to pursue this Appeal therefore they

are entitled to some compensation arising from this Appeal.

The Authority orders the Respondent to compensate the 1<sup>st</sup> Appellant the sum of **USD 26,735** for the following expenses:

- (i) Legal fees - **USD 10,000**
- (ii) Appeal fees - **USD 90**
- (iii)** Accommodation, meals for 21 days & car rental **USD 9,000**
- (iv) International Telephone - **USD 300**
- (v) Printing and photocopy - **USD 63**
- (vi) Return Air tickets - **USD 7,282**

The Authority rejects the 1<sup>st</sup> Appellant's prayer for compensation on local transportation as they have been covered under '**accommodation and car rental**'. Moreover, claims for travel allowance and support from technical and marketing departments are equally rejected for being too remote.

The Authority orders the Respondent to compensate the 2<sup>nd</sup> Appellant **USD 10,000** and **Tshs. 4,148,220/=** for the following:

- (i) Legal fees - **USD 10,000**
- (ii) Costs arising from Mr. Ian Williams - Tshs. **4,148,220/=** arrived at as hereunder:
  - Return fare London - Dar London (December, 9<sup>th</sup> - 11<sup>th</sup>, 2009) **Tshs. 1,643,772/=;**

- Accommodation New Africa Hotel - **Tshs. 413,000/=**
- Air tickets – Dubai – Dar (27<sup>th</sup> January, 2010) – **Tshs. 515,944/=**
- Air fare Dar – London (29<sup>th</sup> January, 2010) **Tshs. 1,129,960/=**; and
- Accommodation (Protea Hotel) **Tshs. 445,544/=**;

The Authority rejects the 2<sup>nd</sup> Appellant's claim for 6,039,000/= being interco charge for being too remote.

The Authority also considered the prayers by the Respondent that the Appeal be dismissed with costs for lack of merit, and observes that, the Appeal has merit and since the Respondent should not be allowed to benefit from their own wrong doing, their prayers are rejected in their entirety.

### **Other matters that caught the attention of the Authority**

In course of handling this Appeal the Authority came across other pertinent matters which are worth mentioning as hereunder:

- (a) The minutes of the Tender Opening dated 17<sup>th</sup> September, 2009, do not indicate the names of the bidders or their representatives who attended the said meeting.
- (b) The Authority observes that, the laws of the Land have established various bodies vested with

distinct functions and powers, amongst them being the Prevention and Combating of Corruption Bureau (PCCB). The Authority is of the considered opinion that, it was not proper to co-opt a Member of the Evaluation Committee from PCCB as the said body may be involved in prosecuting or investigating the tender at a later stage in case an allegation of corruption arises as per Section 76 of the Act which states:

**“The measures provided by this Act shall not preclude the institution of criminal proceedings pursuant to the Penal Code, the Prevention of Corruption Act, 1971 or any other written Law against any person discharging functions or exercising powers under this Act or regulations made under this Act.”** (Emphasis added)

- (c) Minutes of the Tender Board meeting of 30<sup>th</sup> October, 2009, indicate that the Evaluation Committee had recommended award in favour of Smiths Heimann S.A.S for a corrected contract price of Euro 3,420,000. The Tender Board decided to procure the two mobile scanners without the associated trucks for Euro 3,180,000 (the original price quoted by the said tenderer). The Authority noted that, the reasons for such a decision or why they differed with the recommendation of the Evaluation Committee were not documented in the said Minutes.

- (d) The Authority observes that, the PMU did not do their job diligently in advising the Tender Board especially with regard to the shortfalls in the Evaluation Report.
- (e) The Tender Board did not perform their duties diligently as evidenced by its failure to detect various anomalies contained in the Evaluation Report.
- (f) The Respondent's letter referenced TRA/DDA/T.41/1 which informed the 1<sup>st</sup> Appellant that their tender was not successful, neither stated the name of the tenderer who was awarded the tender nor the contract price contrary to Regulation 97(14) of GN. No. 97 of 2005.

Having considered all facts and evidence, the Authority concludes that, the tender was marred by irregularities and the subsequent award of the tender in favour of Smiths Heimann S.A.S contravened the law and therefore a nullity.

On the basis of the aforesaid findings, the Authority upholds the Appeal and orders the Respondent to do the following:

- **Re-start the tender process afresh in observance of the law.**
- **Compensate the 1<sup>st</sup> Appellant a sum of USD 26,735 being Appeal costs.**
- **Compensate the 2<sup>nd</sup> Appellant a sum of USD 10,000 and Tshs. 4,148,220/= being Appeal costs.**

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

Decision delivered in the presence of the 1<sup>st</sup> Appellant, 2<sup>nd</sup> Appellant and the Respondent this 04<sup>th</sup> day of February, 2010.



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

**MEMBERS:**

1. MR. M.R. NABURI .....  

2. MRS. N. INYANGETE .....  

3. MR. K. M. MSITA .....  
