

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT TANGA**

APPEAL CASE NO. 62 OF 2010

BETWEEN

M/S UNITED TALENT SERVICESAPPELLANT

**TANZANIA POSTS
CORPORATION INTERESTED PARTY**

AND

**TANGA URBAN WATER SUPPLY
AND SEWERAGE AUTHORITY.....RESPONDENT**

DECISION

CORAM:

- | | |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Hon. V.K. Mwambalasa (MP) | - Member |
| 3. Mr. M. R. Naburi | - Member |
| 4. Ms. B.G. Malambugi | - Secretary |

SECRETARIAT:

Ms. E.V.A. Nyagawa - Legal Expert, PPAA

FOR THE APPELLANT:

Mr. Asanterabi Mfuko – Director General, United Talent Services

FOR THE RESPONDENT

1. Eng. Farles V. Aram – Technical Manager, Tanga UWASA
2. Mr. Jamal Rashid – Head of procurement Management Unit, Tanga UWASA

FOR THE INTERESTED PARTY: (Tanzania Posts Authority)

1. Mr. Geoffrey N. Said – Corporation Secretary, TPC
2. Mrs. Caroline Kanuti – Principal Marketing Officer, TPC
3. Mr. Abdul S. Mwinyimtama – Regional Manager, TPC Tanga

This decision was scheduled for delivery today 11th February, 2010, and we proceed to deliver it.

The Appeal at hand was lodged by **UNITED TALENT SERVICES** (hereinafter to be referred to as "**the Appellant**") against **TANGA URBAN WATER SUPPLY AND SEWERAGE AUTHORITY** (hereinafter to be referred to as "**the Respondent**"). Following notification of the Appeal lodged by the 1st Appellant, the Successful tenderer namely, **TANZANIA POSTS CORPORATION**, commonly known by its acronym TPC opted to join as a party to this Appeal (hereinafter to be referred to as "**the Interested Party**").

The said Appeal is in respect of Tender No.AE/048/2009-10/G/14/LOT 1 for Provision of Bills Dispatch by Hand Services for the Financial Year 2009/2010 (hereinafter to be referred to as "**the Tender**").

According to the documents availed to the Authority and oral submissions made by parties during the hearing, the facts of this Appeal may be summarized as follows:

The Respondent advertised the tender vide The Daily News and Majira newspapers dated 12th August, 2009, as well as The Guardian of 17th August, 2009.

The tender opening took place on 27th August, 2009, whereby four tenderers submitted their tenders as listed herein below:

S/ No	Name of the Tenderer	Tender Price Tshs.	Discount Amount or percentage
1.	M/s H.S. Mtunguja & Co.	6,250,000.00	
2.	M/s United Talent Services	3,512,500.00	2% for the first four months
3.	M/s City Delivery Services	2,478,000.00	
4.	Tanzania Posts Corporation	3,835,000.00	

The said tenders were evaluated and the Evaluation Committee recommended award in favour of Tanzania Posts Corporation for a contract sum of Tshs. 39,000,000.00 per annum.

On 30th September, 2009, the Tender Board approved the award in respect of the said tenderer at a rate of Tshs. 130.00 per bill which was within the budget estimate of Tshs. 150.00 per bill.

On 22nd October, 2009, the Respondent communicated their acceptance to the Successful tenderer vide letter referenced TUW/CF/S.30/VOL.III/270. It should be noted that, the Respondent officially communicated the tender results to the Appellant, vide letter referenced TUW/CF/S 30/VOL.III/346 dated 6th January, 2010, that is, after the Appeal had been lodged.

Having become aware of the tender results through informal means, the Appellant was aggrieved and sought administrative review to the Accounting Officer *vide* unreferenced letter, dated 8th December, 2009.

Upon receipt of a copy of the Appellant's application for administrative review, the Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**") informed the Respondent vide letter referenced

PPRA/AE/048/20 of 10th December, 2009, that they did not have mandate to handle the matter as the procurement contract had already entered into force. Moreover, PPRA advised the Respondent to inform the Appellant that, they should lodge appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**"). The said letter was also copied to the Appellant.

The Respondent heeded PPRA's advice on 21st December, 2009, vide letter referenced T UW/CF/S.30/Vol. III/302 and duly advised the Appellant.

On 4th January, 2010, the Appellant lodged appeal with the Authority vide letter referenced UTS/PPAA OL NO.1/2010.

SUBMISSIONS BY THE APPELLANT:

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

That, during the tender opening it was noted and recorded that, the tender submitted by the Successful tenderer, namely, Tanzania Posts Corporation did not contain a valid courier license from Tanzania Communications Regulatory Authority (hereinafter to be referred to as "**TCRA**").

That, TPC offered the highest price without any discount. The Respondent did not give sound reasons for awarding the tender to the highest tenderer instead of the lowest quoted offer with a sound discount.

That, while conceding that two tenderers, the Appellant inclusive, did not include VAT in their offers, the Appellant claimed that, if price was the basis for the award then TPC did not qualify as M/s City Delivery Services had the lowest price even if VAT would be added thereon.

That, TPC has no experience in respect of the services required to be provided in accordance with the Tender Document.

That, the Appellant therefore prayed for the following:

- (i) The whole proceedings be nullified and the tendering process be started afresh;
- (ii) The award of the tender in favour of Tanzania Posts Corporation be set aside; and
- (iii) The service provider in respect of the same services for the year 2008/2009 be allowed to continue providing the said services pending final determination of this Appeal.

SUBMISSIONS BY THE INTERESTED PARTY:

Submissions by the Interested Party who happens to be the Successful tenderer, as deduced from documentary, oral submissions as well as responses from questions

raised by the Members of the Authority during the hearing were as follows:

That, they dispute the Appellant's claim that TPC did not attach a valid courier licence from TCRA as untrue. TPC had complied with all the tender requirements in that, they attached a valid courier licence as well an extract of the Tanzania Communications Regulatory Authority, Act No. 12 of 2003 (hereinafter to be referred to as "**the TCRA Act**").

That, the Appellant's claim that, TPC was the highest offeror and therefore should not have been awarded the tender, are baseless and highly disputed.

That, TPC is widely experienced in courier business both locally and internationally. They had shown their experience in door to door delivery by attaching documentary evidence that, they have and are still providing similar services to TANESCO District branches all over Tanga region, Tanzania Revenue Authority in

Tanga, Tanzania Ports Authority in Tanga, and Zain in Dar -Es- Salaam.

That, M/s City Delivery Services was not the lowest tenderer as their price per bill was much higher and their price was based on a reduced number of bills compared to the amount specified in the Tender Document.

That, the Appellant is not entitled to any of the reliefs sought or any other as deemed fit by the Authority.

That, the Interested Party requests for the following reliefs:

(i) Dismissal of the Appeal.

(ii) Order confirming that the Interested Party as a lawful winner of the disputed tender.

THE RESPONDENT'S REPLIES:

Based on the documents submitted, oral submissions as well as replies to questions raised by the Members of the Authority during the hearing, the Respondent's replies may be summarized as follows:

That, during the tender opening it was noted that TPC had attached a courier licence issued by Tanzania Communication Commission (TCC) whose validity was 25 years, instead of the one issued by TCRA.

That, the Respondent's decision to allow TPC to continue with the tender process, despite attachment of that license, was based on a clarification made by the Respondent to TCRA way back in 2006/2007 on entities licenced to provide courier services. TCRA availed them a list and advised them to visit their website whenever they needed to know the approved licencees.

That, when the evaluation process was in progress, the Appellant's licence expired and the Respondent having

confirmed from TRCA website that the said tenderer was still listed as a courier service provider they considered the Appellant's licence as valid.

That, according to Section 67(1) of the Act, the lowest submitted price may not necessarily be the basis for selection for award of a contract. The Respondent evaluated all tenders basing on evaluation criteria provided in the Tender Document and was satisfied that the Appellant was not the lowest evaluated tenderer.

That, with regard to the tender submitted by M/s City Delivery Services, they did not offer the lowest price as it was calculated on the basis of a reduced number of bills compared to what was specified by the Respondent.

That, pursuant to Regulation 89(9) of GN No. 97 of 2005, the information that was to be announced during the tender opening includes, the tenderer's name, the tender price, modification and withdrawal, alternative tenders, any discount, tender security and such other detail as a tender board may consider appropriate.

That, the tender opening forms did not indicate that experience was among the information that was announced and recorded at the opening. However, during the evaluation process the Respondent was satisfied with the information given by TPC on their experience in courier services.

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 based on three main issues, namely,

- **Whether the evaluation process was properly done;**
- **Whether the award of the tender to Tanzania Posts Corporation 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 hereunder;

1.0 Whether the evaluation process was properly done

In its endeavor to determine this issue, the Authority deemed it necessary to review the evaluation process in its entirety so as to be able to answer, among others, the following questions:

- **Whether the Successful tenderer did not attach a valid courier service licence; and**
- **Whether the Appellant's disqualification was justified**

In order to establish whether the evaluation was done in accordance with the law, the Authority revisited

Regulation 83 of GN. No. 97 of 2005 which guides as to the contents of the solicitation documents. The said Regulation requires the content thereof to include, among other things, the evaluation criteria and procedures in conformity with Regulations 14 and 90(18) of GN No. 97 of 2005. Moreover, Sub-regulation (2) of Regulation 83 GN. No. 97 of 2005 provides guidance as to the wording of the tender documents 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 information necessary for a prospective tenderer to prepare a tender for** the goods, works or **services to be provided** or executed, or assets to be disposed of.” (Emphasis added)

Having looked at the relevant legal provisions, the Authority proceeded to examine the Respondent’s Tender Document to see if it complied with the requirements of Regulation 83 of GN. No. 97 of 2005 and discovered the following shortfalls:

- The Respondent tailored the Standard Tender Document issued by PPRA to suit their tender, but in so doing they retained some clauses which were contradictory to one another. For instance, Item 8 of the Instructions to Service Providers did not allow for alternative tenders, while Item 9 thereof suggested that they were allowed. The said Items 8 and 9 read as follows:

“8. Alternative quotations are Not Applicable.

9. If alternative quotations are applicable **SP** wishing to offer technical alternatives to the requirements of the quotation documents must also submit a quotation that complies with the requirements of the quotation documents, including the basic technical design as indicated in the specifications. In addition to submitting the basic quotation, the **SP** shall provide all information necessary for a complete evaluation of the alternative by the **PE**, including technical

specifications, breakdown of prices, and other relevant details. Only the technical alternatives, if any, of the lowest evaluated **SP** conforming to the basic technical requirements shall be considered by the **PE.**”

- Another contradiction is found under Items 2.3 and 4.3 of the Instructions To Service Providers on the one hand and the Quotation Submission Form on the other. While Item 2.3 required tenderers to attach either a valid VAT **or** TIN Certificate, the Quotation Submission Form required the prices quoted to include VAT. The Authority observes that, given the estimated tender price of over Tshs. 30 million, the Respondent expected the tenderer’s quoted prices to include VAT as it was a mandatory requirement under Item 4.3 that their prices should include all duties, taxes and other levies payable by the Service Provider under the contract. The Authority therefore observes that, it was wrong for the respondent to

give the tenderers an option in submitting either VAT or TIN Certificates.

- The word “**recent**” used under Item 2.4 of the Instructions To Service Providers is capable of being misconstrued as it is subjective. The said item provides as follows:

“A list of three (3) **recent** performed contracts of similar nature including the names, addresses and telephone number of the Employers for verification;” (Emphasis added)

- There is no provision that required a tenderer to attach a Business Registration Certificate as well as a Certificate of Incorporation which are mandatory to prove eligibility as per Regulation 10(3) and (4) of GN. No. 97 of 2005. The said Sub-regulations state, in part, as follows:

“(3) To be eligible for participation in invitation to tender and award of contracts tenderers shall provide evidence satisfactory to the

procuring entity of their eligibility under this Regulation, **proof of compliance with the necessary legal**, technical and financial requirements and of their capability and adequacy of resources to carry out the contracts effectively.

(4) All tenders submitted shall include the following information:

(a) copies of original documents defining the constitution and/or **legal status ...**"
(Emphasis added)

The Authority observes that, where a tenderer is not a natural person, proof of a Certificate of Incorporation as well as a Certificate of Registration is mandatory. The Respondent's failure to include such requirements in the Tender Document contravened the law.

- According to Item 11 of the Instructions To Service Providers, the evaluation of the quotations was to be done in two stages namely, Preliminary Evaluation

and Correction of arithmetic errors. The said Item, partly states as hereunder:

“11. The PE will evaluate and compare the quotations in the following manner:

11.1 Preliminary Examination: to determine substantially responsive quotations i.e. which are properly signed and conform to the terms and conditions and specifications.

11.2 Quotations determined to be substantially responsive will be checked for any arithmetic errors. In case of any arithmetical discrepancy between the unit rate and amount quoted, then the unit rate shall prevail both for the evaluation of quotation and for subsequent contract agreement.”

According to Item 12 of the Instructions To Service Providers, correction of arithmetic errors was to be

followed by the award of the tender. The said Item 12 states as follows:

“The PE will award the contract to the SP whose quotation has been determined to be substantially responsive and who has quoted the lowest evaluated quotation price.” (Emphasis added)

The Authority is of the view that, the Respondent erred by not providing for detailed evaluation in the Tender Document contrary to Regulation 90(6) of GN. No. 97 of 2005 which requires preliminary evaluation to be followed by detailed evaluation in the following words:

“Prior to the 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 added)

The Authority observes that, detailed evaluation does not involve correction of errors only, but rather it seeks to ascertain the validity of the documents and information submitted as well as whether the said documents and information meet the requirements of the tender document. The Authority wishes to emphasize that, in evaluating tenders detailed evaluation is not optional but mandatory.

- The Authority also observes that the Tender Document did not provide for Post-qualification or the criteria to be used in Post-qualification contrary to the requirements of Section 48 read together with Sub-regulations (22) and (23) of Regulation 90 of GN. No. 97 of 2005.

- The tender involved dispatch of water bills by hand delivery, meaning physical delivery. Surprisingly, the Tender Document was silent as regards the manner in which a tenderer's capability to perform the contract would be ascertained as there was no requirement for the bidders to provide evidence of neither the tools to be used nor key staff to manage the contract. The Authority observes that, this is contrary to Regulation 10(4) (c) of GN. No. 97 of 2005 which states as follows:

“where applicable, the major items of equipment proposed for use in carrying out the contract; the qualifications and experience of key personnel proposed for administration and execution of the contract ...” (Emphasis supplied)

Having established that the evaluation criteria provided for in the Tender Document were not adequately exhaustive, the Authority proceeded to examine if the

said tenders were properly evaluated. Before embarking on ascertaining whether the criteria set out in the Tender Document were properly applied by the Evaluation Committee, the Authority proceeded to look at the criteria provided under Item 2 of the Instructions To Service Providers as listed herein below:

“2. The Service Provider (SP) shall attach the following documents to its quotation:

2.1 A duly completed and signed priced quotation as per the Statement of Requirements and Schedule of Prices;

2.2 A valid Business License;

2.3 A valid VAT or TIN Certificate;

2.4 A list of three (3) recent performed contracts of similar nature including the names, addresses and telephone number of the Employers for verification;

- 2.5 Properly Filled Quotation submission forms and integrity form – Quotation anti-bribery policy, quotations Submission forms and Bid Securing Declaration;**
- 2.6 A duly completed technical specifications;**
- 2.7 Power of Attorney;**
- 2.8 Bank statements from January 2009 to date, or Latest Audited financial statement for past two years.**
- 2.9 Courier license from the Tanzania Communication Regulatory Authority.” (Emphasis added)**

In its endeavour to ascertain whether the said criteria were properly applied, the Authority reviewed the Evaluation Report, the tenders submitted by the tenderers and the parties oral submissions during the hearing *vis-a-vis* the Tender Document and the

Applicable law. To start with, the Authority examined the Preliminary Evaluation which was supposed to check whether the tenders met the eligibility criteria and whether they were in conformity with the terms and conditions of the Tender Document. Having done so, the Authority discovered the following anomalies:

- The Preliminary Evaluation was done in two stages whereby the first stage was termed as “**Commercial Responsiveness**” as per Table 2A of the Evaluation Report while the second stage was referred to as “**Technical Responsiveness**” as per Table 2B of the same Report. Table 2A, namely, Commercial Responsiveness, contained columns showing that the following items were checked separately at this stage by the Evaluation Committee:

“(i) Price offer, quotation submission forms, **a valid license**, valid business registration certificate, **VAT/TIN Certificates** and a courier license from TCRA;

- (ii) Eligibility: that is, **a valid Business license, a valid VAT/TIN Certificate** and Anti bribery policy;
- (iii) **Tender security;**
- (iv) Completeness of tender: that is, price offer, quotation submission forms, **bid security** and integrity form;
- (v) Substantial Commercial Responsiveness;
and
- (vi) Acceptance for detailed evaluation.”
(Emphasis supplied)

The Authority observes that, there was repetition of some of the items to be checked as seen from Items (i) to (iv) which casts doubts as to whether the Evaluation Committee really understood what they were supposed to do. The Authority further noted that, the fourth bullet to the footnotes under Table

2A states that, **“verification of current authorized courier provider (courier licence) was done through TCRA website (www.tcra.go.tz)”**. The Authority revisited the Respondent’s submissions during the hearing that, during the evaluation process they noted that the Appellant’s courier licence was about to expire and that they checked the above cited website and confirmed that, the said tenderer was still listed as a courier service provider.

The Authority is concerned that, the validity of the Appellant’s one year courier licence issued on 27th August, 2008, had expired on 26th August, 2009, that is, a day before the tender submission deadline which was 27th August, 2009. This means the Respondent’s contention that, it expired during the evaluation process, is not true as it’s validity had ceased prior to the tender opening date. Furthermore, the Authority strongly observe that, the Respondent acted irresponsibly by verifying the validity of the Appellant’s courier licence from the

website instead of the licence that was attached by the Appellant which was conclusive evidence that, the Appellant did not comply with Item 2.9 of the Instructions To Service Providers.

The Authority is of the view that, the Respondent's conduct of relying on information from the website in evaluating tenders contravened Regulation 90(15) of GN. No. 97 of 2005 which provides as follows:

“The procuring entity's determination of a tender's responsiveness shall be based on the contents of the tender itself without recourse to extrinsic evidence.” (Emphasis added)

The Appellant's tender should have been rejected at this stage for being non responsive in accordance with Regulation 90(16) of GN. No. 97 of 2005 which states as follows:

“If a tender is not responsive to the tender document, it shall be rejected by the procuring entity, and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation.” (Emphasis supplied)

The Authority deems it prudent to resolve, at this point, the Appellant’s prime contention that, the Successful tenderer did not attach a valid courier licence issued by TCRA. According to the documents availed to the Authority as well as oral submissions by parties during the hearing, it is not disputed that, the Successful tenderer had attached a courier licence issued by the defunct Tanzania Communication Commission. Based on the evidence given, the Authority is satisfied that, by virtue of Section 55 of the TCRA Act, No. 12 of 2003, the said tenderer had attached a valid courier license. The said provision recognizes licences issued by its predecessor as valid in the following words:

“55(1) Notwithstanding the enactment and operation of this Act in relation to the relevant sectors, any licences and permits granted prior to the commencement of this Act in relation to the production, distribution or supply of regulated goods or services in the said sectors shall remain in operation until they are revoked, annulled or otherwise replaced.

(2) This Act shall not operate so as to affect in a prejudicial way the rights of any person under a licence or permit granted prior to the commencement of this Act in relation to commencement of this Act.”

The Authority therefore rejects the Appellant’s contention that the Successful tenderer did not submit a valid courier licence.

- According to Table 2A of the Evaluation Report, the Evaluation Committee checked whether a valid Business Registration Certificate was attached. The Authority noted that, this was not among the mandatory requirements listed under Item 2 of the Instructions To Service Provider. Non inclusion of it in the Tender Document was wrong since the need for proof of a tenderer's eligibility and capacity to enter into contracts is expressly stated under Regulation 14(1)(a) and (b) which provide as hereunder:

“14.1 To qualify to participate in procurement or disposal proceedings, suppliers, contractors, service providers or asset buyers **shall meet the following criteria:**

- (a) That they possess the necessary professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial

capability, reliability, experience and reputation, and the personnel to perform the procurement or disposal contract;

(b) That they have legal capacity to enter into the procurement or disposal contract;" (Emphasis added)

The Authority observes that, on the one hand, it was wrong for the Evaluation Committee to use a criterion which was not included in the Tender Document as per Regulation 90(4) of GN. No. 97 of 2005, which reads:

"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.

The Authority wishes to emphasize that, on the other hand, the requirement to check the tenderer's

capacity to contract is not optional and that, the Respondent should have required the tenderers to submit a valid Business Registration Certificate as well as a Certificate of Incorporation as the former cannot operate in the absence of the latter.

The Authority observes that had the Tender Document included the necessary requirements, the Evaluation Committee would have found that the Appellant as well as another tenderer namely, M/s H.S. Mtunguja & Co are mere business names registered under the Business Names (Registration) Act, (R.E. 2002) Cap. 213. Since the said two tenderers are not registered under the Companies Act, (R.E. 2002) Cap. 212, they lack capacity to contract as they are not legal entities. They therefore should have been rejected at the Preliminary Evaluation Stage for being non responsive.

- Item 2.7 read together with Item 10 of the Instructions To Service Providers required the tenderers to submit a power of Attorney. The

requirement to attach a power of Attorney was re-emphasized under the said Items 2.7 and 10 in the following words:

“2. The Service Provider (SP) **shall** attach the following documents to its quotation:

2.7 Power of Attorney;

10. The quotation **shall** be completed and signed by an authorized representative of the SP. For this case a power of Attorney **must** be submitted together with this quotation.” (Emphasis added)

The Authority noted that, despite being a mandatory requirement, the power of Attorney was not checked during Preliminary Evaluation. The Authority went further to review the four tenders in order to satisfy itself whether the tenderers had complied with this requirement and discovered that:

- (i) The Appellant's power of Attorney was defective in that, the Appellant's Director General purported to transfer power unto himself as the same was not signed by another person on behalf of M/s United Talent Service.

- (ii) The Successful tenderer who is also an Interested Party in this Appeal, submitted a power of Attorney which was not attested by the Commissioner of Oaths. The said document was drawn by the said tenderer's Legal Department and signed in the presence of their Corporation Secretary. The Authority observes that, the document submitted by the said tenderer does not fit the description of a power of Attorney. Had the Evaluation Committee checked this document, they would have found it to be defective and would have rejected the tender for non compliance with the requirements of the Tender Document.

- (iii) Two tenderers, namely, M/s H.S. Mtunguja & Co. and M/s City Delivery Services did not attach a power of Attorney and therefore this should have formed part of the reasons for their disqualification during preliminary stage.

Accordingly, the Authority is of the firm view that, the Evaluation Committee erred in not checking whether the tenders were accompanied by a valid power of Attorney as this was a mandatory requirement as per Items 2.8 and 10 of the Instructions To Service Providers. The Authority further emphasizes that, since Item 10 of Instructions To Service Providers directed the quotations to be signed by authorized representatives as per the individual powers of Attorney, the purported delegation of powers conferred to the persons who signed the four tenders on behalf of the tenderers was legally improper as their powers of Attorney were defective. In other words, the form of tender contained in each of the four tenders was, legally unsigned for lack of proper

authorization. This non compliance by the four tenderers should have resulted in outright rejection of their tenders in accordance with the law.

- Another shortfall discovered by the Authority is that, the prices quoted in the tenders submitted by the Appellant and M/s H.S. Mtunguja & Co. did not include VAT contrary to Item 4.3 of the Instructions To Service Providers which states as follows:

“All duties, taxes and other levies payable by the SP under the contract shall be included in the total price.” (Emphasis added)

During the hearing the Appellant submitted that they did not include VAT in their tender price because they are not VAT Registered on account of their annual volume being lower than the set threshold of Tshs. 20 million. The Authority does not buy this explanation because payment of VAT is a mandatory requirement and the non-registration for VAT does

not preclude one from payment of VAT unless the service is VAT exempt. Furthermore, the Authority observes that, this was a mandatory requirement and therefore non compliance thereof should have resulted in rejection of the tenders.

With regard to "Table 2B" of the Evaluation Report, which recorded the tenderer's Technical Responsiveness, the Authority noted that, the Evaluation Committee checked the following:

- "(i) Specification 1: A list of 3 recent performed contracts including names, Telephone and address;

- (iii) Specification 2: Bank Statement from January 2009 to date or latest Audited financial statements for two years;

- (iii) specification 3: Technical Specification as per Tender document."

The Authority reviewed the Evaluation Report to ascertain if the above quoted three items were actually checked by the Evaluation Committee. The Authority observes that, the said Report does not show how the said items were evaluated as the Tender Document is silent on this part. For instance, the Evaluation Report does not indicate whether the information relayed by the tenderers regarding recent performed contracts was verified and how the markings of 'YES' and 'NO' were arrived at.

With regard to the requirement to attach Bank Statements from January 2009 to date or latest Audited financial statements for two years, the Evaluation Report does not show how it was evaluated as all of the four tenderer were given a 'YES' mark. The Authority further noted that, the Technical Specifications contained in the Tender Document were not exhaustive and also the Evaluation Report does not show how they were evaluated.

According to the Evaluation Report, two tenderers, namely, M/s United Talent Services and Tanzania Posts

Corporation were commercially and technically responsive and hence qualified for Detailed Evaluation. As it has already pointed out, the Authority finds that, had Preliminary Evaluation been properly done, the Evaluation Committee would have discovered the shortfalls pointed above and hence rejected all tenders, including the Successful tenderer's and the Appellant's, at that stage.

With regard to Detailed Evaluation, the Authority noted that, the Table (un-numbered and page numbers were not inserted in the Evaluation Report) titled "**LIST OF BIDDER (sic) WHO ARE SUBSTANTIALLY RESPONSIVE**" does not show how the said two tenderers were subjected to Detailed Evaluation. According to the Evaluation Report, after Preliminary Evaluation, the Evaluation Committee checked for arithmetic errors, unconditional discounts and currency conversion only as per Tables 3 and 4.

As it has already been pointed out, the Tender Document did not give a clear indication on the criteria to be met in

order for the tenderers to be considered as technically responsive. Even though an attempt was made by the Evaluation Committee to evaluate some factors, the Authority observes that, this evaluation was not properly done. For instance, the Tender Document did not mention the minimum working tools or equipment that the tenderers should possess as a way of assessing their capability of executing the contract. The confusion was caused by the inadequacy of the information contained in the Tender Document since the criteria were not clearly set out or known to the tenderers prior to the tender opening. The Authority therefore, strongly observes that, the tenders were not subjected to Detailed Evaluation as required and thus the Respondent contravened the law.

The Authority considered the Appellant's contention that, had price been the basis of determining the lowest evaluated tender, M/s City Delivery Services should have won the tender as their price, even if VAT was added thereon, was far below that of the Successful tenderer's.

The Authority revisited the Respondent's submissions and the Evaluation Report which indicate that, M/s City Delivery Services was disqualified for quoting a price that reduced the maximum number of monthly bills to be dispatched from 25,000 to 7,000. The Authority observes that, given the said tenderer's price of Tshs. 300/= per single delivery, it was by any standard the highest price tendered, as evidenced in the Table below:

Tenderer	Price per unit price	Number of Bills to be dispatched monthly	Price per month
M/s H.S. Mtunguja	250.00	25,000	6,250,000.00 (VAT Excl.)
M/s United Talent Services	140.50	25,000	3,512,500.00 (VAT Excl.)
M/s City Delivery Services	300.00	7,000	2,478,000.00 (VAT Incl.)
Tanzania Posts Corporation	130.00	25,000	3,835,000.00 (VAT Incl.)

The Authority therefore agrees with the Interested Party as well as the Respondent that, M/s City Delivery Services did not offer the lowest submitted price. Moreover, had the Successful tenderer been substantially responsive, their tender would have been the lowest

evaluated tender. The Authority also agrees with the Respondent that, the '**lowest evaluated tender**' is not synonymous to the '**lowest submitted tender**' as per Regulation 90(18)(b)(i) of GN. No. 97 of 2005 which states:

"90(18)(b) The successful tender shall be:

(i)the tender with the lowest evaluated tender price in case of goods, works or services, or the highest evaluated tender price in case of disposal of assets, but not necessarily the lowest or highest submitted price, subject to any margin of preference applied;" (Emphasis added)

As regards Post-qualification, the Authority noted that the Evaluation Report does not indicate that it was done contrary to Section 48 of the Act. The Authority revisited the Respondent's oral submission during the hearing that, the Successful tenderer's experience was verified *vide* documents attached to the respective tender and they were satisfied that the said tenderer had sufficient

expertise and experience on provision of the said services. The Authority does not accept the Respondent's contention, as it was neither documented in the Evaluation Report nor was any independent proof thereof availed to the Authority to substantiate the same. In the absence of proof thereof, the Authority is of the firm view that, Post-qualification was not done 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 also considered the Appellant’s contention that, the Successful tenderer did not have the requisite experience in bill dispatch by hand vis-à-vis the

Interested Party's oral submissions and documentary proof of provision of similar services involving door to door delivery to known public and private institutions. It is not disputed that the said tenderer had attached all the necessary documents relating to their past experience but since they were not subjected to post-qualification, the Respondent was not in a position to conclude that they had the required experience. Furthermore the Tender Document did not indicate the experience required to be possessed by the bidders in order to be considered to have the required experience in terms of the number of years.

The Authority is satisfied that, post-qualification was not done 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.

Having reviewed the Evaluation Report, the Authority is of the considered view that, all tenderers who took part in the tender in dispute, the Appellant and Successful

tenderer inclusive, were, for different reasons, substantially non responsive and should have been disqualified at the preliminary stage of evaluation.

In view of the foregoing, the Authority's conclusion in respect of the first issue is that, the evaluation process was not properly done.

2.0 Whether the award of the tender to Tanzania Posts Corporation was proper at law

As it has already been established that, all the tenderers who participated in the tender under Appeal were substantially non responsive, it goes without saying therefore that, the award of the tender in favour of Tanzania Posts Corporation contravened the law and hence a nullity. The Authority concludes that, the award of the tender to Tanzania Posts Corporation was not proper.

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

Having resolved the contentious issues in dispute, the Authority proceeded to analyse the prayers by parties as hereunder:

3.1 The Appellant's Prayers:

3.1.1 The whole proceedings be nullified and the tendering process be started afresh

Based on the findings and conclusions in the first and the second issues, the Authority orders the Respondent to start the tender process afresh in observance with the law.

3.1.2 The award of the tender in favour of Tanzania Posts Corporation be set aside

With regard to this prayer, the Authority finds that, there is nothing to be set aside as there was no award in the eyes of the law.

3.1.3 The service provider in respect of the same service for 2008-2009 be required to proceed providing the said service pending final determination of this Appeal

The Authority is of the considered view that, the mandate of this Authority is solely confined to the Tender under Appeal and not the previous one which has been fully executed. This prayer is therefore rejected for want of jurisdiction.

3.2 The Interested Party's Prayers:

3.2.1 Dismissal of the Appeal

The Authority finds the Appeal to have merit and therefore rejects this prayer.

3.2.2 Order confirming that the Interested Party is a lawful winner of the disputed tender

As it has already been established, the Interested Party is not a lawful winner of the tender under Appeal and this prayer is rejected as well.

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 Authority observes that, the personal covenants signed by the Members of the Evaluation Committee indicated that they evaluated eight different tenders requiring different expertise as listed herein below:

- (i) Provision of Internet Services;
- (ii) Supply of Office Furniture;
- (iii) Servicing and Repair of Fire Extinguishers;
- (iv) Provision of Catering Services;
- (v) Supply of Newspapers, Periodicals and Airtime;
- (vi) Supply of Laboratory Equipments and Reagents;
- (vii) Printing and Supply of Promotional Materials; and
- (viii) Provision of Bills Dispatch and Courier Services.

The Authority noted that, given the designations of the Members of the Evaluation Committee, which comprised of a Water Technician Supervisor, a

Meter Management Supervisor and a Sewerage Network Engineer, it is doubtful that the Evaluation Committee had the competence to evaluate such tenders of different nature and complexity as per Section 37(3) & (4) of the Act.

- (b) The Authority also noted that, personal covenants signed by the Members of the Evaluation Committee are faulty as the content thereof differs with the sample form contained in the Tender Evaluation Guidelines for Procurement of Works or Goods issued by PPRA in February, 2007. The Authority observes that, in the sample covenant Form issued by PPRA, the Members of the Evaluation Committee are required to declare that they do not have any interest whatsoever in the tenderers and a space is reserved for them to fill the names of each of the tenderers. For purposes of clarity the Authority reproduces, in part, the content of the said Form as hereunder:

“1.(a) That, I do not have any interest, pecuniary or otherwise, directly or indirectly in any of the tenderers, associations or joint ventures that have submitted pre-qualification applications/tenders for the above mentioned tender; that is to say:-

- i) M/s**
- ii) M/s**
- iii) Etc.....” (Emphasis added)**

The sample Form requires the names of the tenderers involved in the tender being evaluated to be listed therein. However, in the tender under appeal, Members of the Evaluation Committee listed the eight different tenders they were to evaluate instead of the names of tenderers who were being evaluated. The Authority is of the view that the Personal Covenants signed were not valid and did not fulfil the required purpose as set out in Section 37(6) of the Act.

- (c) The last item on the cover page of the Evaluation Report reads, "**Date of Submission: 27th August, 2009**". This is misleading as it can be construed to mean that the said Report was submitted on that particular date while in actual fact it meant that the said tenders were submitted and opened on that date.
- (d) The Authority observes that, the PMU did not do their job diligently in the following areas:
- (i) They ill advised the Accounting Officer by recommending members of the Evaluation Committee who were not competent to evaluate the tenders and also lacked knowledge of the Public Procurement Act.
 - (ii) They did not advice the Accounting Officer properly on the need to have different

people appointed to evaluate the different tenders depending on their expertise.

(iii) They failed to detect the shortfalls in the Evaluation Report and advise the Tender Board accordingly.

(e) The Tender Board did not perform its duties diligently as evidenced by its failure to detect the following:

(i) The defects and omissions in the Tender Document which was approved by the Tender Board on 8th August, 2009.

(ii) The shortfalls contained in the Evaluation Report.

(f) The Respondent's letter referenced TUW/CF/S.30/2/VOL.III/346 dated 6th January, 2010, which communicated the tender results to the Appellant neither stated who had won the tender nor the contract price as required under

sub-Regulations (11) and (14(a) of Regulation 97 of GN. No. 97/2005. The said Regulation 97(11) reads in part as hereunder:

“Upon entry into force of the procurement contract ... notice of the procurement or disposal contract shall be given to the other supplier, service provider, contractor or asset buyer, specifying the name and address of the ... service provider that has entered into the contract and the contract price.” (Emphasis added)

Furthermore, it took some 75 days for the Respondent to inform the Appellant on the tender results, as the acceptance was communicated to the Successful tenderer on 22nd October, 2009, while the Appellant’s letter was written on 6th January, 2010.

(g) The Authority is appalled that, the purported Successful tenderer being one of the reputable

institutions in the country would submit such a document that does not fit the description of a power of Attorney.

Having considered all facts and evidence, the Authority concludes that, the tender under Appeal was marred by irregularities and hence, the subsequent award of the tender in favour of Tanzania Posts Corporation contravened the law and is therefore a nullity.

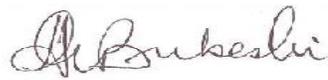
On the basis of the aforesaid findings, the Authority upholds the Appeal and orders the Respondent to:

Re-start the tender process afresh in observance of the law.

It is the ardent hope of this Authority that, this decision will be taken as a lesson to tenderers and procuring entities in their future transactions.

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

Decision delivered in the presence of the Appellant, Interested Party and the Respondent this 11th day of February, 2010.



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

MEMBERS:

1. HON. V.K. MWAMBALASWA



2. MR. M.R. NABURI

