

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 144 OF 2013

BETWEEN

M/S BOBSON GENERAL ENTERPRISES..... APPELLANT

AND

HANANG DISTRICT COUNCIL..... RESPONDENT

ML ENTERPRISES (T) LIMITED..... INTERESTED PARTY

DECISION

CORAM

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|--------------------------------|----------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Mr. H.S. Madoffe | -Member |
| 3. Ms. E.J. Manyesha | -Member |
| 4. Mrs. N.S. Inyangete | -Member |
| 5. Ms. F.R. Mapunda | -Ag. Secretary |

SECRETARIAT:

- | | |
|----------------------|-----------------|
| 1. Mr. Hamisi Tika | - Legal Officer |
| 2. Ms. Violet Simeon | -Legal Officer |

FOR THE APPELLANT:

Mr. Edward I. Kihute - Managing Director

FOR THE RESPONDENT

Mr. Dismas M. Bayi - Procurement Officer

FOR THE INTERESTED PARTY

1. Mr. Deogratias Rugazia - Technical Director
2. Mr. Lukiza Makubo - Commercial Director
3. Mrs. Blandina S. Gogadi - Advocate for the Interested Party

FOR THE OBSEVER

Mr. Mahesh Karji - Marketing Manager

This decision was set for delivery today 23rd May, 2013 and we proceed to deliver it.

The Appeal at hand was lodged by M/s BOBSON GENERAL ENTERPRISES (hereinafter referred to as “the Appellant”) against the HANANG DISTRICT COUNCIL (hereinafter referred to as “the Respondent”). After notification of this Appeal to other bidders who had participated in the disputed tender process M/s ML ENTERPRISES (T) LTD opted to join as an Interested Party.

The said Appeal is in respect of Tender No. LGA/059/HQ/2012/2013/G/04 for Provision of six complete Mobile Science Laboratory Tables with Equipment (hereinafter to be referred to “as the Tender”).

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

On 17th January, 2013, the Respondent issued Quotation Document to four tenderers who were shortlisted by

Government Procurement Services Agency (hereinafter referred to as "GPSA").

The tender opening took place on 25th January, 2013 whereby four tenders were received from the following firms:

S/No	Tenderer's Name	Quoted price
1	M/s ML Enterprises(T) Ltd	35,880,000/=
2	M/s General Booksellers Ltd.	17,415,000/=
3	M/s Bobson General Enterprises	22,920,000/=
4	M/s Worldwide Education Care Co. Ltd	23,913,000/=

The tenders were subjected to Evaluation process which was carried out in three stages, namely, preliminary evaluation, detailed evaluation and Post qualification.

During Preliminary evaluation, the tender submitted by the Appellant was found to be non responsive due to the following reasons;

- i) They submitted TIN certificate which did not belong to their company,
- ii) they did not submit Manufacturer's Authorization letter, and
- iii) they did not submit any document to prove their experience.

Furthermore, it was noted that EMAC certificate was not submitted by three firms except one ML Enterprises (T) Ltd. However, the Evaluation Team decided to treat that omission as a minor deviation since the goods to be procured could be inspected by the Goods Inspection Committee. Further, the firms who participated in the tender process were shortlisted by GPSA for the supply of the same products; hence the EMAC certificate was not regarded to be among key criterion.

After the waiver of the EMAC certificate criterion, the remaining three tenders were found to be substantially

responsive to the Quotation Document and they were subjected to detailed evaluation. During detailed evaluation, all tenders were found to be free from arithmetical errors and were ranked as follows:

S/ No	Tenderer's Name	Quoted price	Ranking
1	M/s ML Enterprises(T) Ltd	35,880,000/=	3
2	M/s General Booksellers Ltd.	17,415,000/=	1
3	M/s Worldwide Education Care Co. Ltd	23,913,000/=	2

The ranking of the quoted price indicated that the quotation submitted by M/s General Bookseller Ltd had the lowest price amongst the three. Having noted that, the Evaluators proceeded to conduct the Post Qualification process to the said tenderer by reviewing the information in their quotation.

After completion of the Post- qualification process the Evaluation Committee recommended the award of tender to M/s General Bookseller Ltd at a contract price of Tshs. 17,415,000/=.

The Tender Board at its Meeting held on 25th March, 2013, approved the recommendations of the Evaluation Committee that the award of tender be made to M/s General Bookseller Ltd at a contract price as stated above.

The Respondent communicated the award of tender to the Successful Tenderer on 2nd April, 2012, vide letter referenced No. HAN/DC/F.1/12/VOL 9/ 14. On the same date the Appellant was informed that their tender was unsuccessful vide letter referenced No. HAN/DC/F.1/12/VOL 9/15.

Being dissatisfied with Respondent's award decision, the Appellant on 15th April, 2013, filed an Appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "the Authority").

SUBMISSIONS BY THE APPELLANT

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

That, during the tender opening, tenderers were represented save for the Interested Party M/s ML Enterprises Ltd.

That, M/s General Bookseller Ltd submitted two envelopes each with quotation document for the same tender.

That, during the tender opening the Appellant noted that the two envelopes submitted by M/s General Bookseller Ltd were not sealed. The Appellant raised their concern on the said anomaly to the Secretary of Tender Board, but they were informed that sealing of Quotation Document was not important.

That, M/s General Bookseller Ltd quoted two different prices in one Quotation as shown herein under:

- a) In the Schedule of Requirement and Prices the quoted price was Tshs. 17,415,000/=
- b) In the Quotation Submission Form the quoted price was Tshs. 29,400,000/=

That, the representative of M/s General Bookseller Ltd was asked by the Chairperson of the Tender Board as to why they had quoted two different prices on the same tender. However the bidder's representative had no answers since the Quotation Document was sent to them from Dar es Salaam, therefore, they had no detailed information on the matter.

That, after receipt of the Respondent's letter of 2nd April, 2013 which notified them of being unsuccessful and that the award was made to M/s General Bookseller Ltd, the Appellant failed to understand as to what price was taken into consideration for the award since there were two prices quoted by the Successful tenderer, that is, Tshs.

17,415,000/= and Tshs. 29,400,000/=. According to the Appellant, the Schedule of Requirement and Quotation Submission Form are supposed to have the same price.

That, the Appellant is dissatisfied with the award of tender since the successful tenderer had quoted two different prices, thus, raising doubt as to the validity of the entire process.

That, during the tender opening the Appellant also queried as to why EMAC Certificate was amongst the evaluation criteria. According to their knowledge all four tenderers had been shortlisted with GPSA for the supply of laboratory materials. Hence EMAC certificate was not important. Furthermore, they did not attach an EMAC Certificate; instead they attached a copy of the Framework Agreement with GPSA.

That, after realizing that the Respondent had delayed to issue the tender results beyond the period stated in their Quotation Document, the Appellant inquired about the status of the tender process vide telephone calls.

However, there was no answer until on 10th April 2013, when they received a letter notifying them that their tender was unsuccessful.

That, finally they prayed for the following orders;

- i. Review of the entire tender process
- ii. Nullification of the award of tender made to M/s General Bookseller Ltd
- iii. Compensation to the tune of Tshs. 305,000/- as per the following breakdown;
 - a) Appeal filing fee Tshs 120,000/=
 - b) Bus Fare Babati - Dar es Salaam Babati Tshs. 60,000/=
 - c) Accommodation costs 25,000 x 2 days = Tshs.50,000/=
 - d) Preparation of the Quotation Document 25,000/=
 - e) Incidental expenses Tshs 50,000/=

TOTAL Tshs. 305,000/=

INTERESTED PARTY'S SUBMISSIONS

The Interested Party's arguments as deduced from their Statement, oral submissions as well as responses from questions raised by Members of the Authority during the hearing were as follows:

That, among the documents to be attached to the tenderers' Quotation included Manufacturer's Authorization Letter, a list of recent performed contracts and an EMAC certificate.

That, all the three tenderers failed to comply with the requirement of submitting the EMAC certificate as it was noted during the tender opening whereby only M/s ML Enterprises (T) LTD had the said certificate.

That, they had obtained the EMAC Certificate from the Ministry of Education and Vocational Training on 20th June 2009.

That, they were issued with EMAC certificate after the Ministry of Education and Vocational Training had approved that their Mobile Science Laboratory Table with

equipment could be used in secondary schools laboratories.

That, for purposes of preventing infringement of their intellectual property rights, they obtained a Utility Certificate from the Registrar of Companies which gave them several exclusive rights under the Patents Act No. 1 of 1987. The said certificate was issued on 6th April 2010.

That, as per Section 35(a) of the Patents Act, the owner of a patent right has a right to preclude any person from exploiting the invention by making, importing, selling, offering for sale, selling, using the product and stocking such product for purpose offering for sale, selling or using.

That, the Interested Party has taken these initiative measures to alert the public at large by issuing a caution notice in the Government Gazette dated 27th July, 2012 and in widely circulating newspapers. All bidders and the Respondent are deemed in law to have notice of the registered patent right. Thus, awarding tender to any other bidder apart from themselves would amount to an

infringement of their patent rights as there are no other patented manufacturers of Mobile Science Laboratory Table with equipment in Tanzania.

That, they had never issued a Manufacturer's Authorization to either of the tenderers who participated in the tender under Appeal. Hence, they suspect that the successful tenderer might have infringed their Intellectual Property Right under the utility certificate.

That, there are no other bidders in Tanzania who have been issued with an EMAC Certificate for the supply of Mobile Science Laboratory Tables with equipments.

That, failure by the other bidders to submit all the required document to be attached to the Quotation Document as they had done, proves that they are not authorized suppliers of Mobile Science Laboratory Tables with equipment; rather they are merely suppliers of laboratory equipment which is different from the tender under appeal.

That, they had incurred a loss of Tshs. 200,000/- for preparation of their Quotation and transporting the same to Hanang Manyara.

Therefore, they prayed that the whole tender process be reviewed so as it can be established if the award was properly made.

REPLIES BY THE RESPONDENT

The Respondent's arguments as deduced from the documents submitted to the Authority, oral submissions as well as responses to questions raised by the Members of the Authority during the hearing of the Appeal may be summarized as follows:

That, the Respondent issued Quotation Document to four bidders shortlisted by GPSA.

That, M/s General Bookseller Ltd submitted two envelopes when submitting their quotation, one marked original and the second envelope marked copies.

That, the envelopes of M/s General Bookseller Ltd was not sealed with a wax seal instead they were sealed by ordinary envelope sticker.

That, the Secretary of the Tender Board told the Appellant that failure to seal the Quotation Document with wax could not lead to rejection of the same since both save the same purpose, namely that they cannot be tampered with by unauthorized persons.

That, M/s General Bookseller Ltd submitted a Price Quotation Form of Tshs. 17,415,000 and attached the Schedule of Requirement of the same figure. However, they attached a supporting document showing a previous performed contract that contained Schedule of Requirement for Kinondoni Municipal Council Dar es Salaam worth Tshs 29,400,000. The said document caused confusion to the Appellant.

That, all bidders were required asked to sign the documents attached to the Quotation so that the Appellant might have seen the attachment of the Successful Tenderer for the previous contract of

Kinondoni Municipal council Dar es Salaam and thought they had two quotations with different price.

That, the Chairperson of the Tender Board explained to the Tenderers that the Evaluation Committee will evaluate the tenders as per the requirements of the law and tenderers would be informed about the tender results.

That, the issue of EMAC certificates raised by the Appellant and the Interested Party is relevant in the supply of books and not other goods like mobile Science laboratory tables with equipments.

That, the Evaluation Committee decided to treat the requirement of EMAC Certificate as a minor deviation and that upon the delivery of the goods they would be inspected by the Goods Inspection Committee. Also the user department thought that EMAC certificate was not necessary because it was not possible to stamp the labels on the said mobile laboratory tables.

That, the Respondent was aware of the Interested Party's patent right. The letter of July 2012 from TAMISEMI emphasized on the existence of the said firm in the supply of Mobile Science Laboratory Tables with Equipments. Also, the said letter insisted on the need to abide on the procurement law when the said tables are to be procured. Thus, in their view there has to be competition so they could not go through single source procurement.

That, the Appellant was found to be substantially non responsive for failure to attach Manufactures Authorization, TIN Certificate and lack of experience in supplying goods of a similar nature.

That, the tender was awarded to the M/s General Bookseller Ltd at a contract price of Tshs 17,415,000 and not Tshs 29,400,000 as claimed by the Appellant.

Therefore, the Respondent prayed for the dismissal of the Appeal in its entirety.

ANALYSIS BY THE AUTHORITY

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

- Whether the tender process was conducted in accordance with the law
- Whether the Appellant was unfairly disqualified.
- Whether the award of tender to M/s General Bookseller Ltd was proper in law.
- To what reliefs if any are the parties entitled to.

Having identified the issues in dispute the Authority proceeded to resolve them as herein under;

1.0 Whether the tender process was conducted in accordance with the law.

Having considered the parties contentions in this Appeal the Authority finds it prudent, to resolve the pertinent issue of whether the tender process was conducted in accordance with the law as both the Appellant and the Interested Party claim that the whole process was marred by irregularities.

In resolving the above issue the Authority started by observing that, for any procurement process to be properly done it has to satisfy all legal requirements provided for under the Act, Regulations therein and provisions specified in the Quotation Document issued by the procuring entity. In order to satisfy itself on the validity of the whole tender process the Authority deems it prudent to review the Quotation Document so as to ascertain if it complied with the requirements of the applicable law.

In course of doing so, the Authority noted that the Quotation Document issued by the Respondent was similar to the Standard Invitation for Quotations for Procurement of Goods issued by the Public Procurement

Regulatory Authority (hereinafter referred to as PPRA) in July 2007.

The Authority noted further that, the Respondent's use of the Standard Quotation Document was in compliance with Regulation 83(3) of the Public Procurement (goods, works, non consultant Services and disposal of public assets by Tender) Government Notice No. 97/2005 (hereinafter to be referred to "as GN No. 97 of 2005") which guides on how the standard tendering documents issued by PPRA should be used. The said regulation reads as follows:

83(3)"A procuring entity shall use the appropriate standard tender documents issued by the Authority with minimum changes, acceptable to the Authority, as necessary to address the project specific issues".

Having satisfied itself that the Quotations Document issued by the Respondent was in compliance with the law as it contained most of the necessary information

required by tenderers, the Authority went further to resolve other pertinent issues that were raised by the parties in this Appeal. In the course of doing so, the Authority framed the following sub issues:

- i. Whether the tender opening was conducted in accordance with the law
- ii. Whether the evaluation process was properly conducted
- iii. Whether the award of tender was made within the Bid Validity Period

Having framed the above sub issues the Authority proceeded to determine them as follows:

- i) Whether the tender opening was conducted in accordance with the law

In resolving this sub issue the Authority revisited the Appellant's argument that, M/s General Bookseller Ltd submitted two different envelopes during the tender opening while they were required to submit their

quotation in one envelope, one marked original and the other copies, thus, contravening the law. In reply to the Appellant's contentions, the Respondent submitted that M/s General Bookseller Ltd, the Successful Tenderer had submitted two envelopes but was one marked original and the second was marked copies.

In order to ascertain the validity of parties' arguments the Authority revisited the Invitation for Quotations and noted that Clause 3 provided for the modality of how the quotations were to be submitted. The said Clause 3 reads as follows:

"All quotations in one original plus two copies properly filled in and enclosed in plain envelopes marked Procurement of Six Complete Mobile Science Laboratory Tables with Equipment..." (Emphasis added)

From the above provision the Authority is of the view that, although the requirement was to submit quotations in one original plus two copies, there were no clear specifications of how the said documents should be

submitted. That is, whether both the original and the copies were to be kept in one envelope or they were to be kept in separate envelopes. That said, the Authority finds M/s General Bookseller Ltd to have properly submitted their quotation as the requirement contended by the Appellant was not part of the instructions given in the Quotation Document. Further to that, the Appellant had failed to prove how the submission of the two envelopes had prejudiced their right in the disputed tender process.

Furthermore, the Authority considered the Appellant's argument that, the two envelopes submitted by M/s General Bookseller Ltd were not sealed as required by the Quotation Document and they had also raised the same concern on this anomaly during the tender opening.

In reply thereof, the Respondent's submitted that, the Appellant's argument was not that the envelopes of M/s General Bookseller Ltd had not been sealed at all rather they were not sealed with the wax seal instead they were sealed by ordinary envelope sticker. The Respondent

contended further that, sealing by an envelope sticker serve the same purpose as wax seal and the reason for sealing the envelope is to ensure that the document submitted is not tempered with. Furthermore, it was not possible for the Respondent to temper with the documents as they were all submitted by tenderers on the date of opening.

In order to ascertain the parties' arguments the Authority revisited the Quotation Document issued to tenderers and noted that it was silent on how the envelopes were to be sealed.

The Authority also revisited Regulations 86(3)(a) and (b) of GN No. 97 of 2005 and noted that it is not specific on how the envelopes should be sealed. The said sub regulation provides as follows;

86(3) "Tenders shall be delivered by mail or hand to the address within the time limit and in the form and the manner indicated in the invitation to tender and stipulated in the tender documents as follows;

- (a) Subject to sub paragraph (b) of this sub regulation a tender shall be submitted in writing, signed and in a sealed envelope"
- (b) Without prejudice to the right of a supplier, contractor, service provider or an asset buyer to submit a tender in the form referred to in subparagraph (a), a tender may alternatively be submitted in any other form specified in the solicitation documents that provides a record of the content of the tender and at least a similar degree of authenticity, security and confidentiality" (Emphasis supplied).

Based on the above provision the Authority observes that, even the governing law does not specify how the envelopes should be sealed. Indeed, any seal that guarantees authenticity, security and confidentiality of the bid would suffice. Therefore, it is the considered view of the Authority that much as there were no other conditions in the Quotation Document on how the envelopes were to be sealed, the Authority finds the

Appellant's argument in this regard to have no justification, thus it is hereby rejected. Further to that, the Authority agrees with the Respondent that, the way in which the Successful Tenderer sealed their tender did not offend either the governing law or the Quotation Document.

Moreover, the Authority considered the Appellant's contentions that the quotations submitted by M/s General Bookseller Ltd contained two different prices in the Quotation Submission Form and Schedule of Requirement. The Appellant submitted further that, while in the Schedule of Requirement the price quoted was Tshs. 17,415,000/- in the Quotation Submission Form they quoted Tshs 29,400,000/- contrary to the requirement of the law which requires the bid price to be one and the same.

In reply thereof the Respondent stated that the Successful Tenderer submitted a Quotation Form of Tshs.17,415,000/- and attached the Schedule of Requirement with the same price. The Respondent

contended further that, the confusion on prices emanated from the fact that the Successful Tenderer had attached to their quotation a previous contract performed with Kinondoni Municipal Council in Dar es Salaam that contained a Schedule of Requirement that bears Tshs. 29,400,000/=.

In order to ascertain the validity of the contentious arguments by parties the Authority examined the original Quotation submitted by M/s General Bookseller Ltd during the tender opening in order to establish if they quoted two different prices for the same tender. In so doing, the Authority observes that, the Successful Tenderer quoted Tshs. 17,415,000/- in the Quotation Submission Form as well as in the Schedule of Requirement and Prices. Further, it was discovered that, Tshs. 29,400,000 was contained in the Schedule of Requirement that was attached as among the documents by M/s General Bookseller Ltd showing that they had previously executed a similar contract with Kinondoni Municipal Council, Dar es Salaam.

During the hearing the Members of the Authority showed the Appellant the original Quotation of M/s General Bookseller Ltd and he was finally satisfied that the controversial price was contained in the Price Schedule for Kinondoni Municipal Council's contract that was attached as evidence of a previously performed contract.

Based on the information obtained from the documents submitted and the Appellant's self concession during the hearing, the Authority is of the firm view that M/s General Bookseller Ltd did not quote two different prices as contended by the Appellant since they had quoted only one price of Tshs 17, 415,000.

Furthermore, in course of reviewing the tender opening Minutes the Authority noted that, they did not contain the true record of what had transpired during that process. During the hearing the Appellant argued that they had raised their concern as to why M/s General Bookseller Ltd submitted two separate envelopes and two different prices in the same Quotation Document and they were told that the said issues would be considered in the evaluation process. During the hearing the Respondent

admitted that it is true that the issues of two envelopes and two prices were raised during the tender opening and they were inadvertently not recorded in the tender opening minutes. The Authority finds the Respondent's act of not recording all issues that had transpired during the tender opening to be improper. Transparency and accountability detects that minutes of tender organs must record everything that transpired therein properly.

Be as it may, from the above findings, the Authority concludes on the first sub-issue that, the tender opening process was conducted in accordance with the law.

ii) Whether the evaluation process was properly conducted

In ascertaining whether the evaluation process was conducted in accordance with the law, the Authority revisited the Quotation Document, the Evaluation Report as well as the documents submitted by tenderers vis-à-vis the applicable law. In course of so doing the Authority noted that, the evaluation process was conducted in three stages namely;

- Preliminary examination
- Detailed Quotation Examination and price comparison
- Post-Qualification Evaluation

The Authority further noted that, during Preliminary Evaluation, Quotations were checked for their responsiveness and compliance with the eligibility criteria. During that stage the Evaluation Committee was to be guided by Clause 1 of the ITB which reads as follows:

- “ 1. The Supplier shall attach the following to its quotation;
 - 1.1 a duly completed and signed priced offer as per the schedule of Rates and Prices attached as Appendix A
 - 1.2 A valid Business License
 - 1.3 A valid VAT and TIN certificate
 - 1.4 Manufacturer’s Authorization Letter

- 1.5 A list of recent performed contracts including the names and address of the employers for verification
- 1.6 A sample of the goods to be supplied (where applicable) which will remain with procuring entity for validation against the supplied goods
- 1.7 Certificate of Approval issued by EMAC"

The Authority noted further that during Preliminary evaluation, the quotation submitted by the Appellant was disqualified for failure to submit Manufacturer's Authorization letter, experience required and TIN certificates. During the hearing the Appellant was asked if reasons given for his disqualification were valid and they conceded that they did not submit the Manufacturer's Authorization letter as they intended to supply the goods from Nairobi, Kenya. The Appellant contended further that they did not have an EMAC certificate as required in the Quotation Document but the fact that they had a Framework Agreement with GPSA for the supply of the

Laboratory equipment they considered themselves qualified to participate in the disputed tender.

The Authority reviewed the Appellant's Quotation document submitted and noted that they did not attach the Manufacturer's Authorization as required, also they did not show the experience of a similar nature as they had attached the contract they had entered with GPSA dated 25th June 2012 which was for the supply of Laboratory Equipment. It was noted further that, the TIN attached belonged to Mr. Edward Kihute and not Bobson General Enterprises Ltd that is to say there was no TIN certificate attached for the Appellant's Company.

From the above facts the Authority is of the firm view that, the reasons given by the evaluators for disqualification of the Appellant were proper and fair as they failed to comply with the requirements of the Quotation Document.

The Authority noted further that, it was only the Appellant's quotation that was disqualified at the

Preliminary Stage of Evaluation as the remaining three quotations were found to be substantially responsive.

The Authority considered the argument by the Interested Party that, the Successful Tenderer did not qualify for award of tender since they did not have the EMAC Certificates and Manufacturer's Authorization and find it proper for the sake of fairness to review all the three quotations so as to establish if they complied with criteria that were checked during Preliminary Evaluation.

In so doing, the Authority started by reviewing the quotation document submitted by M/s General Bookseller Ltd and noted that they had complied at the Minimum with some of the criteria for instance; they had the Manufacturer's Authorization from R. Square Industries of Mumbai India. Apart from that, the Authority noted that, M/s General Bookseller Ltd lacked the required experience because neither of the documents attached to prove their experience showed that they had previously executed contracts of similar nature. The documents attached showed that, they had supplied Laboratory Chemicals, Laboratory Equipment and Human Skeleton

Kit. Thus, none of the past performed contracts mentioned were for the supply of Mobile Science Laboratory Tables with Equipment.

Having observed that the Quotation of M/s General Bookseller Ltd lacked the requisite experience, the Authority failed to understand why the Evaluators were unable to discover such a glaring anomaly in the quotation of the Successful Tenderer while they were able to identify the same in the Appellant's quotation. Based on the above facts, the Authority finds the Evaluators in this regard to have erred in law by contravening Regulation 90(18) of GN NO. 97 of 2005 which states as follows;

90(18) (a) " a procuring entity shall evaluate and compare all tenders that have been accepted in order to ascertain the successful tender, in accordance with the procedures and criteria set forth in the tender document."

(Emphasis added)

Based on the above provision the Authority is of the considered views that M/s General Bookseller Ltd ought to have been disqualified at the preliminary stage for being non responsive for failure to show the required experience. Hence, their award is null and void in the eyes of the law.

Furthermore, the Authority considered the argument by the Interested Party that, all the three tenderers including the Successful Tenderer did not have the EMAC Certificate save for them only; thus, they failed to comply with the Quotation Document. The Authority observes that, it is true that none of them had attached the said certificate in their quotation except the Interested Party. The Authority revisited Clause 1.7 of the Quotation Document as quoted earlier and noted that Certificate of Approval by EMAC was among the mandatory documents that had to be submitted by tenderers when submitting their quotation.

During the hearing, the Members of the Authority asked the Appellant why they did not attach the EMAC certificate and they countered that, to them that was not

important since they have been shortlisted by GPSA to supply Laboratory Equipment, hence, they were qualified even in the absence of an EMAC Certificate. On the same item, the Respondent was asked to justify why they waived the requirement of an EMAC certificate as shown in the Evaluation Report and the Tender Board Minutes dated 25th March, 2013. The Respondent contended that, the User Department was of the view that, the said criterion was not important as it is not possible for the tables to be stamped with an EMAC stamp. They explained further that verification of goods could be done by their Goods Inspection Committee after delivery.

From the above findings, the Authority finds the Respondent's act in this regard to have contravened Regulation 90(4) of GN No. 97/2005 which requires the evaluators to evaluate tenders strictly in accordance with the criteria provided in the Quotation Document. For purposes of clarity the Authority reproduces Regulation 90(4) as hereunder;

“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)

Based on the above provision the Authority is of the view that, had the evaluators conducted their evaluation properly, the quotations of all tenderers except that of the Interested Party had to be disqualified for failure to attach the certificate of Approval by EMAC.

Moreover, the Authority is dismayed by the Respondent’s act of regarding the requirement of EMAC Certificate to be of less importance and treat it as minor deviation for tenderers who failed to comply with it and awarded one of them the tender under Appeal. The Authority finds the Respondent to have erred in law by contravening Regulation 90(7) and (8) which provides as follows;

90(7) “A substantially responsive tender is the one which conforms to all the terms, conditions and specifications of the Tender Document(s) without material deviation or reservation”

90(8) "A material deviation or reservation is one which affects the scope, quality or performance of the contract or which in any substantial way is inconsistent with the Tender Document or limits the procuring entity's rights or the tenderers obligations under the contract, and affects unfairly the competitive position of tenderers presenting responsive tenders". (Emphasis added)

Furthermore, having noted that, only the Interest Party had the certificate of Approval by EMAC, the Authority proceeded to examine further their quotation so as to establish if it complied with all other criteria that were provided in the Quotation Document. In so doing, the Authority noted that the Interested Party had complied with all other requirements that were stipulated in the Quotation Document, for instance; they had performed the contracts of a similar nature in fourteen districts in Tanzania. Further to that, the Authority noted that it is the only firm in Tanzania that has been issued with the certificate of Approval by EMAC. Also they have the Utility

Certificate which gives them exclusive patent rights on the invention of the Mobile Science Laboratory Tables with equipment.

Upon further review of the documents of the Interested Party the Authority noted that, even the Ministry of Education and Vocational Training as well as TAMISEMI recognized the invention and expertise of the Interested Party. Thus, they had been issuing circulars to various districts so that their invention could be recognized when the procurement of Mobile Science Laboratory tables with equipments is to take place. Given the clear guidance from the Ministry of Education and Vocational Training and TAMISEMI on EMAC certificates and the patent rights for the Mobile Science Laboratory Tables with equipment the Authority would have expected the Respondent to give due weight to the patent holders quotation when considering this tender.

Therefore, from the above made analysis the Authority is of the view that, the evaluation process was not properly conducted as result the award was made to a tenderer who did not qualify for the award of the tender.

From the above findings, the Authority's conclusion on the second sub issue is that the evaluation of the tender was not properly conducted.

iii) Whether the award of tender was made within the Bid Validity period.

In resolving this sub issue the Authority revisited the Appellant's argument that the tender results were delayed to be communicated to parties. The Appellant contended further that, despite various efforts made in inquiring the tender results, they managed to receive the same on 10th April, 2013.

In reply to the Appellant's contention, the Respondent submitted that, the tender results were issued on 2nd April 2013, but the Appellant was not able to receive them on the same date as their offices were locked, thus they received them on 10th April, 2013.

In order to ascertain the validity of the arguments by parties the Authority revisited the Quotation Document so as to substantiate if the tender results were issued

beyond the stipulated time. In so doing the Authority noted that, Clause 6 of the Quotation Document specifies the Bid Validity Period in the following words;

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

Having noted that the Bid Validity Period specified was 45 days, the Authority proceeded to examine further document submitted so as to ascertain if the tender results were issued beyond the stipulated period.

In reviewing the documents submitted the Authority noted that, the tender opening took place on 25th January 2013, that means, the Bid Validity Period of 45 days started to run from that date. Counting from 25th January 2013, the 45 days lapsed on 10th March 2013. Upon further review of the documents submitted the Authority noted that, the award was communicated to the Successful Tenderer on 2nd April 2013 and on the same date letters to unsuccessful tenderers were

communicated. That means, the tender results were issued 22 days after the expiry of the Bid Validity Period.

During the hearing the Respondent conceded to have awarded the tender outside the stipulated Tender Validity Period and that situation was necessitated by the fact that, most of the Tender Board Members were busy with budget sessions so it was not possible to convene the meeting during that period.

From the facts of this Appeal and the Respondent self concession, it is clear that the award of tender was made beyond the stipulated Bid Validity Period. The Authority finds the Respondent's act in this regard to have contravened Regulation 87 (2) of GN. No. 97 of 2005 which states as follows;

87(2) The period fixed by the Procuring entity shall be sufficient to permit evaluation and comparison of tenders, for obtaining all necessary clearances and approvals, and for the notifications of award of contracts and finalise a contract". (Emphasis added)

The above provision entails that the tender process has to be finalized within the Tender Validity Period specified in the Quotation Document. Thus, the Respondent's act of awarding the tender outside the Bid Validity Period specified in the Quotation Document is wrong and the same invalidates the whole tender process and that includes the award itself. The Authority considered the Respondent's argument that the delay was caused by the absence of the Tender Board Members and observes that, if they had justifiable reasons which caused the said delay they ought to have sought for an extension of time as per Regulation 87(4) of GN No. 97/2005 before the expiry the initial period.

The Authority, therefore accepts the Appellant's contention that the tender results were issued beyond the stipulated time.

The Authority's conclusion in relation to sub issue three is that the award was made beyond the Tender Validity Period.

Accordingly, the Authority's conclusion in respect of issue number one is that, the tender process was not conducted in accordance with the law due to anomalies pointed out in sub issue two and three above.

2.0 Whether the Appellant was unfairly disqualified

Having established that the Quotation submitted by the Appellant did not comply with the requirements of the Quotation Documents and therefore it was fairly disqualified at the preliminary stage for non compliance, The Authority concludes that the disqualification was in accordance with the law.

3.0 Whether the award of tender to the Successful Tenderer was proper in law.

In resolving this sub issue the Authority took cognizance of its findings made in sub issue two that the Successful Tenderer ought to have been disqualified for lack of the required experience. The Authority concludes that the purported award of tender to M/s General Booksellers Limited was not proper at law.

4.0 To what reliefs if any are the parties entitled to

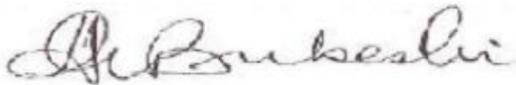
Having resolved the contentious issue in dispute, the Authority revisited the prayers by the Appellant that the tender process be restarted afresh and observes that having established that the tender process was marred by irregularities and that there was no award in the eyes of the law. The Authority orders the Respondent to restart the tender process afresh in observance of the law.

With regard to the Appellant's prayer that they be compensated the sum of Tshs. 305,000/- the Authority is of the view that the said order cannot be issued as the Appellant's quotation was fairly disqualified.

On the basis of the aforesaid findings, the Authority finds that the appeal partly has merits and orders the Respondent to restart the tender process afresh in observance of the law and each party to bear their own cost.

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

Decision is delivered in the absence of the Appellant, as well as the Respondent but in presence of the Interested Party this 23rd May 2013.

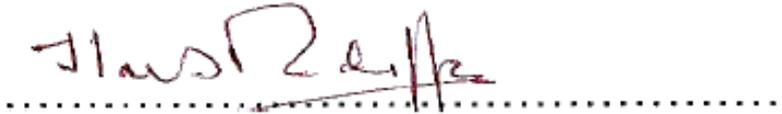


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JUDGE (rtd) A.BUBESHI
CHAIRPERSON

MEMBERS

1. MR.H.S. MADOFFE



2. MS.E.J.MANYESHA



3. MRS.N.S. INYANGETE

