

**PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM**

APPEAL CASE NO. 106 OF 2011

BETWEEN

H.S. IMPEX LIMITED APPELLANT

AND

TANZANIA PORTS AUTHORITY RESPONDENT

DECISION

CORAM:

- | | |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mrs. N.S.N. Inyangete | - Member |
| 3. Mr. F.T. Marmo | - Member |
| 4. Mr. H.S. Madoffe | - Member |
| 5. Ms. B.G. Malambugi | - Secretary |

SECRETARIAT:

- | | |
|---------------------|-----------------|
| 1. Ms. F.R. Mapunda | - Legal Officer |
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FOR THE APPELLANT:

1. Mr. Makaki Masatu – Advocate, MM Attorneys
2. Ms. Joyce Lyimo – Legal Trainee, MM Attorneys
3. Mr. Charles Msongole - Accountant

FOR THE RESPONDENT

1. Mr. Peter Kibatala – Advocate, Trustmark Attorneys
2. Mr. David Mmari – Procurement Officer
3. Mr. Sawaya Msemo- Principal Procurement Officer
4. Mr. Michael Simba - Principal Procurement Officer
5. Mr. Theophil Kimaro – Head of Procurement Management of Unit

This decision was scheduled for delivery today 11th August, 2011, and we proceed to deliver it.

The appeal at hand was lodged by **H.S. IMPEX LIMITED** (hereinafter to be referred to as "**the Appellant**") against **TANZANIA PORTS AUTHORITY** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. AE/016/2010-11/CTB/NC/03 for Leasing of warehouses at TPA Supplies Depot along Bandari Road-DSM Port (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 **15th July, 2010**, the Respondent advertised the tender for Leasing of warehouses at TPA Supplies Depot along Bandari Road-DSM Port.

The deadline for submission of bids was set for 21st October, 2010, whereby four tenders were received from the following companies:

S. NO	NAME OF TENDERER	BID PRICES		
		Warehouse A	Warehouse D	Total
1.	M/s Dar-Es-salaam Corridor Group	6,268,200/=	5,438,345/=	11,706,545/=
2.	M/s K& K Cargo Logistics (T) Ltd		6,100,000/=	6,100,000/=
3.	M/s H.S. Impex Ltd	6,379,645/=	5,535,050/=	11,914,000/=
4.	M/s Omega Logistics Ltd	7,006,007.40	6,078,489.90	13,084,497.30

During evaluation process, the Evaluation Committee observed that no tender had been purchased in the name of M/s Omega Logistics Ltd. They were therefore surprised how the said tender had been submitted for Evaluation. They therefore recommended that M/s Omega Logistics who had offered the highest price be disqualified and that the award be made to the Appellant at a total price of Tshs 11,914,695/= VAT Exclusive for a lease period of three years renewable.

The Evaluation Committee sent the Evaluation Report to the Procurement Management Unit (hereinafter to be referred to as "**the PMU**"). The PMU reviewed the Evaluation Report and recommended the award to M/s Omega Logistics Ltd who was disqualified by the Evaluation Committee as they had not purchased the Tender Document. The PMU introduced M/s Omega Logistics Ltd who was allegedly the subsidiary of M/s Synarge Group of Companies who had purchased the Tender Document but opted to allow its subsidiary company to submit it. The PMU recommended the award to M/s Omega Logistics Ltd on the reason that they were the highest tenderer in terms of rent to be paid to the Respondent.

The Tender Board approved the award to M/s Omega Logistics Ltd as it was recommended by the PMU at a monthly rental fee of Tshs. 6,078,489.90 VAT exclusive for a period of three years "**with midterm review after every year**" (sic).

On 8th April, 2011, the Respondent wrote to the Appellant informing them that their tender was unsuccessful and that award had been made to M/s Omega Logistics. This aggrieved the Appellant and caused them to file an application for review to the Respondent on 27th April, 2011 vide a letter referenced MMA/H.S/2011/02.

On 26th May, 2011, the Respondent replied to the Appellant's application for review vide a letter referenced LS/3/1/11, informing them that their complaint could not be entertained since the contract had already entered into force by virtue of Section 55(7) of the Act and the letter of award had already been communicated to the successful tenderer.

Being dissatisfied with the Respondent's refusal to entertain their application for review, the Appellant on 1st June, 2011, filed the same application to the Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**")

On 7th June, 2011, PPRA vide a letter referenced PPRA/AE/016/"A"/76 advised the Appellant to submit their appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**") as the contract had already entered into force.

On 13th June, 2011, the Appellant lodged their Appeal to this Authority.

SUBMISSIONS BY THE APPELLANT

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

That, the Appellant is a sitting tenant in the Respondent's warehouses for over ten years and operate a business of purchasing, processing and exports of agricultural products.

That, the Appellant was technically forced to participate in the tender process despite the fact their tenancy was

still in force, since the Respondent has been receiving and accepting rent from the Appellant from the year 1999 when the tenancy agreement between the two had expired.

That the invitation to tender and tendering process are invalid for being conducted contrary to the provisions of the Public Procurement Act, No. 21, Cap 410 (hereafter to be referred to as "**the Act**") and the Public Procurement (Goods, Works, Non consultancy Services and Disposal of Public Assets by Tender) Regulations, Government Notice No. 97 of 2005 (hereinafter to be referred to as "**GN No. 97/2005**"), for the following reasons;

- a) Section 61 of the Act and Regulations 80 and 81 of GN. No. 97/2005 requires the Procuring Entity to prepare a clear notice which invites tenderers to participate in the procurement process. However, the notice that was issued did not communicate exactly the type of tender which was being invited by the Respondent.

- b) The notice invited interested tenderers to compete in the tender for provision of non-consultancy services. Hence, that shows that the Respondent was looking for providers of non-consultancy services.
- c) That, the information contained in the invitation to bid was wrong and misleading as per definition of the words "Service" and "Non-Consultancy Services" as provided for under Section 3 of the Act and Regulation 3 of GN. No.97/2005.
- d) The tender under appeal was not for procurement of non-consultancy services as the Respondent was in need of leasing its warehouse or getting a tenant through competitive bidding, hence, the Respondent erred by advertising the tender for provision of non-consultancy services.

That, the Respondent's Tender Document was misleading as it indicated that the Respondent had set aside funds for leasing the two warehouses, while the funds had to be set aside by the would be tenants interested to lease the premises.

That, the Respondent's Tender Document contravened the provisions of Regulation 82(1), 83(1), (c), (e), 83(2), (3), (4), (5) of GN. No. 97/2005.

That, the Respondent's act of inviting persons, companies and firms to submit bids with a view to ultimately lease the premises cannot be taken as a disposal process within the meaning of the Act, because such disposal is applicable to the procuring entity with a view to divest public assets.

That, the Respondent's replies to the Appellant's application for review which was attached with the Evaluation Report and PMU's recommendations, reveals that, the Respondent had awarded the tender to the company which had not purchased the Tender Document.

That, the purported award of tender to a company that did not purchase the Tender Document contravened the provisions of GN. No. 97/2005.

That, the Respondent's Tender Board approved the amended Evaluation Report prepared by the PMU contrary to the requirements of Regulation 90(26) of GN. No. 97/2005 which mandates the Tender Board to receive and approve award recommended by the Evaluation Committee.

That, the Tender Board approved recommendation of the award from an organ not mandated to recommend such awards.

That, the Respondent's PMU interfered with the powers, functions and responsibilities of the Evaluation Committee by changing the Evaluation Committee's recommendations and substituting them with theirs contrary to the provisions of Section 38 of the Act.

That, it was improper for the Respondent to invite a tender in respect of the warehouses occupied by the Appellant instead of rescinding an earlier tender No. AE/016/2008-09/CTB/NC/03 which was advertised before the tender under appeal was issued and no results were given thereof.

Therefore, the Appellant prayed for the following remedies;

- i. Annulment of the purported procurement process and the award thereof

- ii. Compensation to the tune of **Tshs. 6,152,000/=** arising from the following;
 - Legal fees – Tshs. 6,000,000/=
 - Costs of attending hearing of the appeal Tshs. 12,000/=
 - Documentation expenses – Tshs. 20,000/=
 - Appeal filling fees – Tshs 120,000/=

TOTAL Tshs. 6,152,000/=

- iii. Any other relief that may be deemed appropriate to be granted in the circumstances of this matter.

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 may be summarized as follows:

That, the Appellant was a periodic tenant occupying the Respondent's premises for a specified period and they are not expected to occupy the said leased premises indefinitely.

That, the warehouses under the disputed tender process were offered for lease under competitive tendering procedures which are in compliance with the Act and its Regulations.

That, the Appellant decided to participate in the procurement proceedings out of their own volition and was not forced by the Respondent in any way as alleged.

That, the Respondent had not entertained the Appellant's application for review on the reasons that the award had already been communicated to the successful tenderer namely, M/s Omega Logistics Ltd and in terms of Section 80(3) of the Act, the procuring entity is barred from entertaining such complaints after an award has already been communicated.

That, M/s Omega Logistic Limited, was substantially responsive and therefore eligible for a detailed evaluation after an observation by the PMU that, they held a formal assignment to participate in the procurement proceedings which was issued by their parent company, M/s Synarge Group of Companies who had purchased the tender document.

That, M/s Omega Logistic Limited was competent to tender following the assignment executed between the

parent company, M/s synarge Group of Companies and the former, where by M/s Omega Logistic Limited was authorized to participate in the tendering process.

That, M/s Omega Logistic Limited had offered the highest price for the tender and therefore emerged a successful tenderer thereof.

That, the Respondent's Tender Board has been vested with jurisdiction to act on the recommendations made by the Evaluation Committee as well as the observations by the head of PMU.

That, the Respondent had followed all procurement procedures as per the requirement of the law, and even if there were slight deviation thereof, the same has not occasioned any injustice onto the Appellant's side.

That, under this tender process, the Procuring Entity, the Tender Board, PMU and the Evaluation Committee had acted independently as required by Section 38 of the Act.

Therefore, the Respondent prayed for the following reliefs;

- i) That, the Appellant's prayer for annulment of the contract should not be granted as the contract has already entered into force, hence, the prayer is untenable.
- ii) The Appellant's claim for compensation of Tshs. 6,152,000/= is left within the mandate of the Authority to decide.

ANALYSIS BY THE AUTHORITY

Before embarking on its analysis, the Authority considered the Respondent's request for guidance on a point of law which was raised prior to commencement of the hearing. The Respondent stated that, the Appellant had applied for temporary injunction against the Respondent before the District Land and Housing Tribunal at Temeke, as a result of which a temporary injunction was issued pending the hearing of the matters inter-

parties. The Respondent wanted to know whether this Appeal is properly before the Authority in view of the said injunction.

Having studied the subject matter the Authority was of the view that, the matter which is before this Authority and the one before the Temeke District Land and Housing Tribunal is governed by two distinct laws. Whereas the matter before this Authority is in respect of Tender Award Process which is guided by the Public Procurement Act, the one filed with the Temeke District Land and Housing Tribunal is in respect of Tenancy Agreement which is guided by a different Law.

The Authority was therefore of the view that the matter was properly before it and hence, the hearing should proceed as scheduled.

Having ruled on the Respondent's application for direction the Authority proceeded with its analysis by reviewing the documents submitted and the oral arguments from parties.

Having heard the parties and having reviewed the documents submitted the Authority is of the view that the Appeal is centred 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 the tender to the Successful Tenderer 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 process was conducted in accordance with the law

In resolving this issue the Authority considered the Appellant's main contention that the tender process was conducted in contravention of the law and that the Authority should review the whole tender process. In reviewing this process the Authority examined the oral and documentary evidence submitted vis-à-vis the applicable law and the Tender Document for purposes of ascertaining whether or not the said process was conducted in accordance with the law. In doing so, the Authority framed the following sub-issues:

- a) Whether the Invitation to Tender and the Tender Document met the requirements of the law**

- b) Whether the evaluation process was conducted in accordance with the law**

c) Whether the recommendations of the PMU and the decision of the Tender Board were properly made

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

a) Whether the Invitation to Tender and Tender the Document met the requirements of the law

In analyzing this sub-issue, the Authority revisited the Appellant's contentions that, the Respondent's Invitation to Tender and the Tender Document contained wrong and misleading information contrary to the requirements of Section 61 of the Act read together with Regulations 82(1), 83(1) (c), (e), (2), (3), (4) and (5) of GN. No.97/2005. It was further submitted that, the Tender Document on its second page, contained information which invited interested tenderers to compete in the provision of non-consultancy services while the tender under appeal was not for procurement of non-

consultancy services since the Respondent wished to invites tenants who could lease its warehouses. Hence, the Respondent erred by advertising this tender as a tender for provision of non-consultancy services.

In reply the Respondent submitted that, during that procurement process all procedures were adhered to as laid down under the law, and even if there were slight deviation thereof, the same has not occasioned any injustice on the side of the Appellant.

In resolving the contentions of the parties with regard to this point the Authority made its analysis in two stages as hereunder;

i) Invitation to Tender

In order to establish the validity of the Appellant's arguments that, the invitation to tender contained misleading and wrong information, the Authority revisited the Invitation to Tender and noted that, the title appearing at the top indicated that the Respondent

clearly invited tenderers to submit quotations for **“Leasing warehouses at TPA Supplies Depot Along Bandari Road DSM Port”**.

However, Item 1. of the invitation stated that:

“Tanzania Ports Authority has set aside funds for leasing of its two warehouses at Dar-Es-salaam Port during the financial year 1010-2011 and it is intended that fund will be used to cover eligible payment under the contract for which this IFQ is issued”. (Emphasis added)

The above quoted paragraph indicates that, the Respondent had set aside funds to cover eligible payments under the leasing contract for its two warehouses. The Authority finds that information to be wrong and misleading as under the envisaged leasing contract the tenant would be required to pay rent to the owner of the premises, namely, the Respondent. However, the wording of the paragraph implies that the

Respondent would be required to make payment to the successful tenderer as per the terms of the contract.

The Authority revisited Regulation 81 of GN. No. 97/2005 which provides for the contents of invitation to tender which include inter alia:

- The name and address of the Procuring Entity
- The description of the Asset to be disposed of, the location of the asset and the arrangements for a potential tenderer to inspect the asset
- The means and conditions of obtaining the solicitation documents

The Authority noted that, Items 2 to 5 of the invitation provided general guidance to tenderers on the number of copies to be submitted, the place where quotations should be submitted and deadline for submission of quotations. However, the Authority observes that, the Respondent's invitation to tender had the following deficiencies as shown herein below:

- It did not indicate how tenderers would obtain the Tender/ Quotation Documents
- It did not provide how the Tenderers could inspect the warehouses
- It did not specify the desired or required time for the supply of goods or Time table for the provision of the services.

The Authority therefore, accepts the Appellant's contention in this regard, that, the Invitation to Tender was not clear as it contained contradictory information and did not contain some essential information as required by the law.

ii) Tender Document

In order to establish the validity of the Appellant's arguments that the Tender Document was not in compliance with the law, the Authority studied the Tender Document and noted that, on the cover page it contained information which invited tenderers to submit

quotation for leasing of warehouses at the Respondent's premises. Upon further review the Authority noted that the second page of the same Tender Document contained the following words;

“Invitation for quotation for procurement of Non-Consultancy Services” (Emphasis supplied)

Having reviewed the second page of the Tender Document and noted that it had invited quotations for procurement of non-consultancy services, the Authority finds it proper to establish whether leasing falls under the ambit of non consultancy services or not.

In so doing the Authority revisited Regulation 3(1) of GN No. 97/2005 where the term non-consultancy services has been defined in order to substantiate if leasing is among the services under non-consultancy services and justifies the Respondent's action of applying that term in their Tender Document. For purposes of clarity the said definition is reproduced hereunder;

“non-consultancy service’ means a service of a skilled or non skilled nature, which is not a consultancy service and includes, but is not limited to cleaning, security, maintenance and repair services;” (Emphasis added)

The Authority observes that, the above quoted definition indicates that leasing does not fall under the ambit of non consultancy services as it neither requires services of skilled nature nor of non skilled nature.

Having noted that leasing does not fall under non consultancy services, the Authority reviewed various definitions under Section 3(1) of the Act, and noted that the term leasing falls under disposal of public assets. The said definition of the term disposal as per Section 3(1) of the Act provides as follows;

“disposal’ means the divestiture of public assets including intellectual and proprietary rights and goodwill, and any other rights of a

procuring and disposing entity by any means, including sale, hire-purchase, licences, tenancies, rental, **lease**, franchise, auction or any combination however classified other than those regulated by the Public Corporation Act, 1992;" (Emphasis supplied)

From the above cited provision the Authority is satisfied that, the tender under appeal falls within the ambit of disposal of public assets.

Having established that the tender under appeal falls under disposal of public assets, the Authority is of firm view that, the Respondent was required to conduct its procurement process in accordance with the disposal procedures provided for under 2nd Schedule of GN No. 97/2005.

The Authority revisited the Respondent's Tender Document and noted that, it had invited quotations for procurement of non consultancy services from eligible tenderers. Also it was further noted that, the said Tender

Document is almost *parimateria* with the Standard Invitation for Quotation for Procurement of Non-Consultancy Services issued by PPRA in June, 2007. This indicates that the Respondent had treated the Tender under appeal as if it were for procurement of non-consultancy services while it was for procurement of tenants for leasing the warehouses.

The Authority is of the further view that, the Respondent should have used the Standard Bidding Document for Disposal of Public Assets issued by PPRA in July, 2007, as required by Section 63(1) and Regulation 83(3) of GN. No.97/2005 which provides as follows;

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

Reg.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 projects specific issues.” (Emphasis added)

Having revisited Regulation 83 of GN. No. 97/2005, Standard Tender Document for disposal of public assets and Bid Evaluation Guidelines for disposal of public assets vis-à-vis the Respondent’s Tender Document, the Authority noted amongst other things, the following deficiencies;

i) Option to view Asset

The Tender Document did not provide for the option to tenderers to view the premises offered for Lease as required by Regulation 83(1)(c) which could have helped them to know the condition of the leased premises before submitting tenders.

ii) Tender Validity Period

The tender validity period was not specified contrary to Regulation 87 of GN. No. 97/2005.

iii) Bid Deposit.

The Tender Document did not specify the requirement for a bid deposit as required by Clause 17 of the Standard Bidding Document for Disposal of Public Assets. The said Bid Deposit is mandatory as it protects the procuring entity against the risk of tenderers conducts.

iv) Evaluation and award criteria.

Apart from the eligibility criteria which were not exhaustive, the Tender Document did not contain evaluation and clear award criteria contrary to Regulation 83 of GN. No. 97/2005. For instance, Item 7 of the Tender Document issued by the Respondent stated that;

“The TPA will award the contract to a SP whose quotation has been determined to be substantially responsive and who has

quoted the lowest evaluated quotation price” (Emphasis added)

Based on the above mentioned deficiencies the Authority is of the view that, the Respondent’s Tender Document did not comply with the requirements of the law.

Having reviewed the Tender Document and being satisfied that the same had substantial deficiencies and that it was not suitable for the tender under appeal, the Authority is of the firm view that, the Respondent contravened the law.

The Authority therefore concludes that, the Respondent’s Invitation to Tender and Tender Document did not meet the requirements of the law.

b) Whether the evaluation process was conducted in accordance with the law

Having established that the Tender Document had many glaring deficiencies, the Authority went on to review the

Evaluation Report so as to establish if the evaluation process was conducted in accordance with the law.

The Authority hastens to quote the requirements of the law in so far as evaluation of tenders is concerned. Regulation 90(4) of GN. No. 97/2005 stipulates as follows;

“The tender evaluation shall be consistent with the terms and conditions set forth in the tender document and such evaluation shall be carried out using the criteria explicitly stated in the tender documents”

(Emphasis supplied)

The Authority further reiterates requirements of the Standard Bidding Documents and Bid Evaluation Guidelines for Disposal of Public Assets issued by PPRA in May 2007, which among other things provide guidance on how to ascertain the highest evaluated tender. These guidelines oblige the procuring entity to determine the reserve price below which they cannot go. Clause 32 of

the Standard Bidding Document for Disposal of Public Assets direct on how to establish the best value in a disposal exercise.

In the light of the legal requirements stated above, the Authority revisited the Evaluation Report and noted that, the evaluation was conducted in two stages, namely, Preliminary Evaluation and Detailed Evaluation.

Under Preliminary Evaluation tenderers were checked if they had complied with the following;

- Signed price quotation
- Valid business license
- Valid VAT & TIN certificates
- Power of Attorney
- Company Profile

The Authority noted further that, under that stage of evaluation the tender submitted by M/s K&K Cargo Logistic was found to be non responsive for not attaching

a Power of Attorney and therefore disqualified at that stage.

The remaining three tenders were subjected to detailed evaluation where they were checked for arithmetic errors. Under that stage of evaluation, the Evaluation Committee noted that M/s Omega Logistics Limited (hereinafter to be referred to as “the successful tenderer”) had not purchased the Tender Document; hence, their offer was not to be subjected to further evaluation.

The Authority revisited the Appellant’s contention in this regard that, the Respondent had erred in law for awarding the tender to a company which had not purchased the Tender Document and that their offer was not to be considered.

The Respondent in reply submitted that, the successful tenderer had purchased the Tender Document through their parent company, namely, M/s Synarge Group of Companies who had authorized the successful tenderer to

submit a tender instead of themselves. Furthermore, they contended that it was their common practice to accept any one who has submitted a tender even if the said party is not the one who bought the Tender Document as long as their tender was accompanied by the Tender Document purchase receipt. In their contention this was sound practice since it encouraged competition and wide participation.

In order to substantiate the arguments by parties' the Authority revisited the documents submitted and noted that there was a letter from M/s Synarge Group of Companies addressed to the Respondent dated 4th October, 2010, informing the latter that they would not be able to participate in the tender process instead the quotations would be submitted by M/s Omega Logistics Limited. For purposes of Clarity the Authority reproduced part of the said letter as follows;

“Synarge Group of Companies collected quotation document for the said quotation but we will not be able to submit the quotation

instead the quotation will be submitted by our subsidiary company M/s Omega Logistics Limited”

On reviewing further the documents the Authority noted that, the above cited letter is the only document which authorized the successful tenderer to participate in the tender process. The letter from the so called parent company coupled with Respondent’s oral elaboration during the hearing leaves many questions unanswered, such questions includes;

- If the letter from M/s Synarge Group of Companies which was written on 4th October, 2010 and received by the Respondent on 5th October, 2010, that is three weeks before the deadline for submission of quotations, why was that information not availed to the Evaluation Committee so that the status of the successful tenderer in the tender process could be verified during evaluation.

- Why did the PMU not return the Evaluation Report to the Evaluation Committee after noting that the recommendations of award had been wrongly made in omitting M/s Omega Logistics Ltd whose status was known to the PMU's office.
- The PMU having received a letter from M/s Synarge Group of Companies authorizing the successful tenderer to submit a tender instead of them, why didn't they seek evidence to verify that the two Companies are legally related.
- Since the two companies are different legal entities and their liabilities under the law are separate and distinct from each other, why did the Respondent treat them as one and the same company while knowing the legal implications thereof.
- Why was it that the Evaluation Committee came up with different observations from that of the PMU while both are within the same entity?

- Why did the Tender Board approve the award while the Evaluation Report and Recommendations of the PMU contained different observations as to who should be awarded the tender. The Authority noted this with concern as no proof has been submitted to the Authority showing that Tender Board noted this anomaly and deliberated upon it before approving the award.
- If it is the Respondent's practice to verify the purchasers of the Tender Document by just looking at the attached receipt without checking that the name in the receipt is the same as in the Tender Document, then why did they labour to argue that the letter from M/s Synarge Group of Companies was adequate evidence to prove that the successful tenderer had purchased the Tender Document, as they could have accepted the Tender Document of the successful tenderer without any doubt as it had the receipt of M/s Synarge Group of Companies.

- Why did the successful tenderer fail to purchase the Tender Document while the company is located in Dar es Salaam if they really had an intention of participating in the Tender process and why did Synarge Group of Companies purchase a Tender Document and choose not to return it or take part in the Tender.
- The Respondent was required to submit the minutes of tender opening and those of various Tender Board meetings a day after hearing so as the Authority could clarify some of the doubts. However, the said minutes were not submitted to the Authority as requested. This casts doubts on the authenticity of the whole procurement process and subsequent award thereof.

On the basis of the above cited questions and in the absence of other proof to the contrary, the Authority is of firm view that, there was no sufficient evidence adduced to prove that, the participation of the successful tenderer in the tender process was valid in the eyes of the law.

The Authority accepts the Appellant's argument that, the award has been made to a tenderer who had not purchased the Tender Document, as their participation in tender process raises a lot of doubt.

Furthermore, circumstantial evidence clearly suggests that the successful tenderer did not bid for this tender and was simply catapulted into the tender process in suspicious circumstances and awarded the tender.

Upon further review of the Evaluation Report, the Authority noted that, after the detailed evaluation analysis was completed the Evaluators recommended the award to the Appellant who had quoted the second highest price after the successful tenderer who had the highest price but found to be non responsive for failure to purchase the Tender Document.

From the analysis made on the Evaluation Report, the Authority noted that, the whole evaluation process was conducted in a way that would not help a procuring entity to obtain a prospective tenant with required capacities to

be given a leasing contract. The weaknesses in the Evaluation Report have been caused by using a wrong Tender Document which was not in accordance with Standard Document for Disposal of Public Assets as well as non adherence to the Evaluation Guidelines for Disposal of Public Assets issued by PPRA in May, 2007.

The Authority also finds the evaluation process to have been conducted not in accordance with provisions of Regulation 90 of GN No. 97/2005.

Therefore, the Authority's conclusion with regard to the second sub-issue is that, the Evaluation process was not conducted in accordance with the law.

c) Whether the recommendations of the PMU and the decision of the Tender Board were properly made.

In resolving this issue the Authority revisited the submissions by the Appellant that, the PMU had

interfered with the powers, functions and responsibilities of the Evaluation Committee by changing the recommendation of the Evaluation Committee and substitute it with theirs and thus violated the provisions of Section 38 of the Act. It was further submitted that the PMU had contravened Regulation 90(26) of GN. No.97/2005 which requires the Evaluation Committee to submit the Evaluation Report to the Tender Board for approval, hence, PMU was not required to re-evaluate or recommend otherwise.

In reply the Respondent submitted that, the PMU had not interfered with the powers and functions of the Evaluation Committee, instead after receipt of the Evaluation Report, the PMU made its recommendation and attached it to the Evaluation Report and forwarded it to the Tender Board for determination and further action.

Having considered the contentions of the parties the Authority finds it prudent to revisit Section 38 of the Act which had been relied upon by the Appellant in support of his argument. The said Section 38 provides as follows;

“Subject to the provisions of this Act, the Accounting Officer or Chief Executive, the Tender Board, the Procurement Management Unit, the User Department and the Evaluation Committee shall act independently in relation to their respective function and powers” (Emphasis added)

The above provision indicates that the Accounting Officer, Tender Board, PMU, user Department and the Evaluation Committee are required to work independently without interference.

In relation to the Appeal at hand, the Authority reviewed the documents and noted that, after evaluation was completed the Evaluation Committee submitted the Evaluation Report to the PMU which reviewed it and recommended that, the award in respect of the tender under appeal be made to the successful tenderer who offered to pay the highest rent. The recommendation of

the PMU differed from that of the Evaluators who recommended award to the Appellant and disqualified the successful tenderer as he did not purchase the Tender Document.

The Authority finds the PMU's act of reviewing the Evaluation Report and making necessary recommendations thereafter to be proper as it is the only organ in the procuring entity which provides advice in relation to procurement procedures. The PMU's act is supported by Section 35(a) and 37(1) of the Act which provides as follows;

37(1) "All Evaluations shall be conducted by an evaluation committee which shall report to the Procurement Management Unit" (Emphasis added)

The Authority further, wishes to enlighten the Appellant that, the PMU normally consists of experts in procurement matters, their role includes that of advising the Tender Boards, User Departments and Accounting

officer in various procurement matters. Thus, the PMU's act of reviewing the Evaluation Report and making recommendation thereafter was proper. However, the PMU having noted that the recommendations of the Evaluation Committee had been erroneously arrived at because they had missed some of the information which was available internally in their office, they were required to resubmit the Evaluation Report back to the Evaluation Committee for re-evaluation together with the information which was previously missing to the Evaluators. Thus, the Authority finds the PMU's act of reviewing the Evaluation Report and making different recommendations from that of the evaluators basing on information which was not availed to the Evaluators at the time of doing the Evaluation to be improper since it contravened Section 37(1) of the Act.

The Authority also finds the approval of award to the successful tenderer by the Respondent's Tender Board on the basis of the advice given by the PMU was equally not proper as the Tender Board ought to have noted the conflicting positions by the PMU and Evaluation

Committee on the award recommendations and resolving the same before awarding the tender to the successful tenderer.

During the hearing the Respondent was required to submit the minutes of various Tender Board meeting so as to verify if deliberations were done on the distinct ideas of the PMU and Evaluators. However, the said minutes were not submitted to the Authority; hence, this implies that there were no deliberations made before approval of award and that could be due to the reason that, the Tender Board had not noted the conflicting recommendations of the PMU and Evaluation Committee or if they had noted had found it to be insignificant and decided to proceed with award of the contract.

The Authority is of a considered view that, though the PMU has the duty of reviewing the Evaluation Report and making the necessary recommendations for purposes of advising the Procuring Entity, in the appeal at hand the said recommendation was based on doubtful and insufficient information, thus, their recommendation of

award thereto was not proper and the approval of award by the Tender Board was also improper.

Therefore, the Authority's conclusion with regard to the third sub issue is that the recommendations of the PMU and subsequent award decision by the Tender Board were not properly made.

Accordingly, the Authority's conclusion with regard to the first issue is that the tender process was not conducted in accordance with the law.

2.0 Whether the Appellant was unfairly disqualified;

In resolving this issue the Authority took cognizance of its findings and conclusion on the first issue that the tender process was not conducted in accordance with law and therefore finds that, the Appellant was unfairly disqualified.

3.0 Whether the award of the tender to the Successful Tenderer was proper at law;

As it has already been established under the first issue that, the tender process in its entirety contravened the law, it goes without saying therefore that, the purported award of the tender to M/s Omega Logistics Ltd equally contravened the law. That said, the Authority's conclusion on the third issue is that, the award of the tender to the Successful Tenderer was not proper at law.

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

Having resolved the contentious issues, the Authority revisited the Appellant's prayers. With regard to the prayer for cancellation of the procurement process and its subsequent award, the Authority observes that, there is nothing before this Authority to be cancelled as entire procurement process is a nullity in the eyes of the law. Moreover, the Authority accepts the Appellant's prayer that the tender be re-tendered and orders the

Respondent to restart the tender process in observance of the law.

The Authority is of the firm view that, the Appellant is entitled to compensation for some of the expenses incurred. The Authority therefore orders the Respondent to compensate the Appellant a sum of **Tshs. 3,152,000/=** only as per the following breakdown:

- Legal consultation fees – Tshs. 3,000,000/=
- Appeal filing fees – Tshs 120,000/=
- Costs of attending hearing of the appeal
Tshs. 12,000/=
- Documentation expenses – Tshs. 20,000/=

TOTAL Tshs. 3,152,000/=

The Authority also considered the Respondent's prayer that, the Appellant's prayer for annulment of the contract should not be granted as the contract has already entered into force, hence, the prayer is untenable. The Authority does not agree with the Respondent as the

submissions made by the Appellant have merit. Therefore this prayer is accordingly rejected.

The Authority also considered the Respondent's second prayer that, the compensation claimed by the Appellant be left at the discretion of this Authority. It is observed that, the prayer has already been granted in favour of the Appellant.

Other matters that caught the attention of the Authority:

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

- a) The Authority also revisited the Appellant's contention that, they were technically forced to participate in the tender under appeal and noted that, there was no evidence which proves that they were forced to participate in the tender process.

Also during the hearing the Appellant failed to prove before this Authority as to how they were forced to participate in the tender process. Thus the Authority finds the claim to be unjustifiable.

- b) The Authority is dismayed by the Respondent's failure to submit Minutes of Tender Board meetings, Minutes of Tender opening, Personal covenants, Minutes of other Tender board meetings which deliberated on the Tender under Appeal and evidence of having sought extension of bid validity period contrary to their promise during the hearing.
- c) The Authority noted that, the award of tender has been made outside of the Bid Validity period as the tenders were opened on 21st October, 2010 and award was communicated to the successful tenderer on 1st April, 2011, that is five months after the

date of opening. The Authority finds the Respondent's act to have contravened Section 64 and Regulation 84(3) of GN 97.

- d) The Respondent's act of issuing the Evaluation Report to the Appellant including deliberations which transpired during the evaluation process contravened Section 42(2) of the Act and Regulation 99(1) of GN No. 97/2005 which emphasizes on the need for Confidentiality of the Procurement Process.

Having considered all facts and evidence, the Authority concludes that, the tender process was marred by irregularities as it was not conducted in accordance with the law. Hence, the disqualification of the Appellant and the award of the tender to M/s Omega Logistics Ltd M/s was therefore a nullity at law.

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

(a) Restart the tender process in observance of the law; and

(b) Compensate the Appellant a sum of Tshs. 3,152,000/=/- for some of the costs incurred.

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

Decision delivered in the presence of the Appellant and the Respondent this 11th August, 2011.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MRS. N.S.N. INYANGETE.....


2. MR. F. T. MARMO.....


3. MR. H. S. MADOFFE.....
