

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

**APPEAL CASE NO. 87 OF 2010**

**BETWEEN**

**MEDAL INVESTMENTS LTD.....APPELLANT**

**AND**

**MINISTRY OF HEALTH  
AND SOCIAL WELFARE.....RESPONDENT**

**DECISION**

**CORAM:**

- |                                |               |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Hon. V.K. Mwambalalwa(MP)   | - Member      |
| 3. Mrs. N.S.N. Inyangete       | - Member      |
| 4. Ms. B.G. Malambu            | - Secretary   |

**SECRETARIAT:**

1. Ms. E. V.A. Nyagawa – Principal Legal Officer
2. Ms. F. Mapunda – Legal Officer

## **FOR THE APPELLANT:**

1. Christopher Msemo – Managing Director
2. Mr. Alvin Msemo – Manager, Business Development & Research

## **FOR THE RESPONDENT**

1. Mr. Castro E. Simba – Head of PMU
2. Mr. Kessy Mgonera – State Attorney
3. Mr. Lucas O. Suka – Principal Supplies Officer
4. Mr. Daniel G. Makondo – Supplies Officer

## **INTERESTED PARTY (OBSERVER) –**

### **M/s ECOMRESEARCH GROUP**

Mr. Martin Mlele – Research Officer

This decision was scheduled for delivery today 24<sup>th</sup> January, 2011 and we proceed to deliver it.

The appeal at hand was lodged by **MEDAL INVESTMENTS LTD** (hereinafter to be referred to as "**the Appellant**") against the **MINISTRY OF HEALTH AND SOCIAL WELFARE** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. ME/007/2009-10/HQ/C/287 for Provision of Consultancy Services for Monitoring and Evaluation of Subsidized Artemisinin-based Combination Therapy (ACT) for Private Sector (hereinafter to be referred to as "**the Tender**").

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

The Respondent advertised a Request for Expression of Interest (hereinafter to be referred to as "**EOI**") in respect of Provision of Consultancy Services for Monitoring and Evaluation of Subsidized Artemisinin-based Combination Therapy (ACT) for Mainland Tanzania. The said advertisements appeared in the East African and

Daily news of 8<sup>th</sup> March, 2010, as well as in the Guardian dated 10<sup>th</sup> March, 2010.

The deadline for submission of the EOI was set at 8<sup>th</sup> April, 2010, whereby nine firms expressed interest as listed hereinbelow:

<b>S/No.</b>	<b>NAME OF THE FIRM</b>
1	M/s Medal Investments Ltd. in association with Data Vision International (T) Ltd
2	M/s Tanzania Marketing & Communications Company Ltd (T MARC)
3	M/s Data Works Associates Ltd.
4	M/s EcomResearch Group in partnership with Health and Development International Consultants
5	M/s Centre for Enhancement of Effective Malaria Interventions
6	M/s Tanscott Associates (T) Ltd
7	M/s Mzumbe University
8	M/s PAC Plan
9	M/s Gate Way Africa

The EOIs were evaluated in two stages, namely Preliminary Evaluation and Qualification Examination. During Preliminary Evaluation, six out of the nine

applicants were found to be non compliant but the Evaluators waived this part of evaluation so as to ensure wider participation hence considered all firms to be substantially responsive.

All the nine firms were subjected to Qualification Examination so as to determine their technical qualification, experience and knowledge on undertaking this assignment. During this stage of evaluation, the following five out of the nine firms were found to be substantially responsive:

- M/s Medal Investments Ltd. in association with Data Vision International (T) Ltd;
- M/s Data Works Associates Ltd.;
- M/s EcomResearch Group in partnership with Health and Development International Consultants;
- M/s Tanscott Associates (T) Ltd; and
- M/s Centre for Enhancement of Effective Malaria Interventions.

On 5<sup>th</sup> May, 2010, the Tender Board approved the five qualified firms to be issued with Request for Proposals (hereinafter to be referred to as "**RFP**") documents.

The Respondent issued RFPs to the five firms whereby the deadline for submission thereof was set at 5<sup>th</sup> July, 2010.

The opening of the RFP took place on 5<sup>th</sup> July, 2010, as scheduled whereby only four envelopes were opened from the following:

- M/s Tanscott Associates (T) Ltd
- M/s EcomResearch Group;
- M/s Centre for Enhancement of Effective Malaria Interventions; and
- M/s Medal Investment Ltd. in association with Data Vision International (T) Ltd.

However, upon opening of the said proposals it was noted that, M/s Centre for Enhancement of Effective Malaria Interventions did not submit a proposal instead

had submitted a withdrawal letter. Hence, only three of the above listed firms submitted proposals.

Evaluation of Technical Proposals was conducted, including M/s Ceemi who had withdrawn themselves from the tender process. Three Consulting firms qualified for Detailed Evaluation, including the Appellant, whereby the ranking thereof read as follows:

- M/s Tanscott Associates (T) Ltd – 91.4%
- M/s EcomResearch Group – 74.4%
- M/s Medal Investment Ltd. in association with Data Vision International (T) Ltd – 68.4%

The Evaluation Committee recommended the Financial Proposal submitted by M/s Tanscott Associates (T) Ltd to be evaluated as they had scored above the minimum score that was required to pass.

The Tender Board approved the recommendation of the Evaluation Committee for Technical Proposals on 4<sup>th</sup> August, 2010.

On 6<sup>th</sup> August, 2010, the Respondent informed the Appellant vide letter referenced ME/007/2009-10/HQ/C/287, that their Technical Proposal was not approved for failure to meet the minimum qualifying mark of 75%.

On 12<sup>th</sup> August, 2010, the Appellant wrote to the Respondent requesting for the scoring scheme results that translated into their failure to qualify for the minimum mark of 75%. A summary of the Appellant's scores as apportioned by the Evaluators for each criterion was sent to them by the Respondent on 7<sup>th</sup> September, 2010, vide letter referenced ME/007/2009-10/HQ/C/287.

The Tender Board approved the Financial Evaluation Report and its award recommendation in favour of M/s Tanscott Associates (T) Ltd on 3<sup>rd</sup> September, 2011.

Being aggrieved by the decision to disqualify them, the Appellant applied for review to the Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**") on 14<sup>th</sup> September, 2010, vide letter referenced



MIL/MOH/TNB/09/2010. In reply to the said application, PPRA advised the Appellant to submit their complaint to the Accounting Officer as the first review channel in accordance with Section 80(2) of the Public Procurement Act, Cap. 410 (hereinafter to be referred to as "**the Act**"). The said advise was given vide letter referenced PPRA/ME/007/PART"B"/74 dated 16<sup>th</sup> September, 2010.

On the same date the Appellant requested the Permanent Secretary, Ministry of Health and Social Welfare to review the selection process of the tender vide letter referenced MIL/MOH-2/TNB/09/2010.

On 22<sup>nd</sup> September, 2010, the Tender Board approved the award in favour of M/s Tanscott Associates (T) Ltd. However, the contract sum was not disclosed.

On 24<sup>th</sup> September, 2010, the Respondent vide letter referenced CAB 209/549/02E/16 communicated their acceptance to the Successful tenderer, namely, M/s Tanscott Associates (T) Ltd. at a negotiated tender price of Tshs. 1,443,555,000/= . The said consultant confirmed acceptance of the award on 28<sup>th</sup> September, 2010.

The Respondent and the Successful Tenderer signed the contract pertaining to the tender under Appeal on 11<sup>th</sup> October, 2010.

Having received no response from the Respondent on the application for review within the required 30 days, the Appellant, vide letter referenced MIL/MOH-3/TNB/10/2010 dated 21<sup>st</sup> October, 2010, requested PPRA to review the selection process of the tender.

Responding to the Appellant's application for review, PPRA informed them that, by that time the contract had already entered into force by virtue of Section 55(7) of the Act therefore the only avenue open to them was to appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**").

On 4<sup>th</sup> November, 2010, the Appellant lodged their appeal with this Authority.

The Respondent returned the Appellant's Financial Proposals unopened as they did not qualify for further

evaluation vide letter referenced ME/007/2009-10/HQ/C/287 dated 11<sup>th</sup> November, 2010.

## **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 astounded by the conduct of the Respondent to continue entering into a procurement contract while knowing that the tender in question was subjected to review as evidenced in the Appellant's application for review submitted to the Accounting Officer on 16<sup>th</sup> September, 2010. That this attitude shows a total disrespect of the law, the PPRA and the Appellant, for which they seek for redress.

That, during tender opening they noticed that one tenderer did not comply fully with the requirements of Item 4.3 of the Proposal Data Sheet as he submitted

three copies of the bid instead of four. The Appellant's representative who attended the opening ceremony drew the attention of the Tender Board Secretariat present in the said meeting.

That, having studied the Respondent's response to their request for the approach used to apportion scores on various criteria, the Appellant noted that there was gross oversight on the process and are not satisfied with the results thereof.

That, according to the scoring scheme provided, the Appellant noticed that their Consulting Team performed very well in all other evaluated criteria, but they were very lowly rated on the qualification and competence of the Team Leader and other key staff who have extensive experience in many assignments of the Ministry of Health and Social Welfare. The Appellant does not understand the criteria used in assigning such low marks in this category. The Consulting Team proposed in their tender is the same which developed the methodology and good quality Technical Proposal which scored 17.6 out of 20

and whose understanding of the terms of reference and knowledge of the assignment was good as well. The Appellant further finds the Respondent's remarks that they are expected to improve in the future tenders quite contradictory and appear as if the qualifications of the Team Leader and other key staff were targeting a preferred candidature for which they pray for this Authority's review.

That, they were informed that their Financial Proposal would be returned to them unopened after completion of the selection process but the same has not yet been returned to-date.

That, the Appellant's application for review to the Accounting Officer met a deaf ear.

That, the Respondent has maintained a state of lack of transparency in the whole process by denying other parties who took part in the tender, information as to who was awarded the tender and the contract price, hence perpetuating an environment of secrecy and mistrust.

The Appellant therefore prays for compensation to the tune of Tshs. 30,000,000/= for expenses incurred during the whole process to-date, including legal fees and other administrative costs.

## **THE RESPONDENT'S REPLIES**

The Respondent's replies deduced from the documents submitted to the Authority as well as the oral submissions and responses from questions raised by Members of the Authority during the hearing may be summarized as hereunder:

That, Consultants were instructed to submit one original and four copies of the original for both technical and financial proposals as per Item 4.3 of the Bid Data Sheet. However, submission of three copies instead of four is not a material deviation to result into a disqualification of a tenderer. Moreover, it was not among the evaluation criteria for disqualification of proposals.

That, tenderers were required to engage a team leader with the following minimum qualifications:

- Must hold a PhD in Health Information System from a reputable University;
- Experience for working in the country/region for not less than 10 years and must have been involved as a team leader in health facilities surveys;
- Must have outstanding experience in managing/executing large survey data collection;
- Must have been a team leader of related assignments in the Health Sector involving designing and implementation of Public Informatics tools;
- Must have been a team leader of related assignments in field work data collection commissioned by reputable local and foreign institutions of not less than five years;
- Understanding the country administrative structure (national, regional and district levels) and must have lived in Tanzania for at least ten years; and
- Must have worked with reputable research or consultancy organizations/firms.

That, team leaders of the firms who submitted Technical Proposals are as follows:

- The Appellant's Team Leader is one Mr. Gasper K. Munishi a PhD holder in Development Management with backgrounds in Educational Degrees. **(Scored 10.4 out of 20)**
- A Team Leader of M/s EcomResearch Group has PhD in Health Economics. **(Scored 16.4 out of 20)**
- A Team Leader for M/s Tanscott Associates (T) Ltd is Mr. B. Mwanyika a PhD holder in Health Informatics. **(Scored 19 out of 20)**

It is obvious that, the qualifications of the Appellant's Team Leader is far from the Ministry's requirements, however, the Evaluators gave 10.4 out of 20 scores

That, with regard to the returning of the Financial Proposal, the same was returned to the Appellant vide letter referenced ME/007/2009-10/287 dated 15<sup>th</sup>



November, 2010, which was received by the Appellant on 15<sup>th</sup> November, 2010.

That, the Respondent concedes that they did not reply to the Appellant's application for review but attributes the same to the fact that, the said application was time barred as it was submitted after the expiry of the 28 days provided for under the Act. Further that, the tender results were communicated to all tenderers on 6<sup>th</sup> August, 2010, but the Appellant's application was submitted on 16<sup>th</sup> September, 2010, which is more than 28 days stipulated under Regulation 105 of GN. No. 97/2005.

That, the tender process was transparent, that is why the Appellant was given a summary of the scores in respect of all criteria as they had requested.

That, the Appellant is not entitled to any compensation as the tender process was conducted in accordance with the law.

Accordingly, the Respondent prayed for dismissal of the Appeal for lack of merit.

### **ANALYSIS BY THE AUTHORITY**

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

- **Whether the Appeal is properly before the Authority.**
- **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.**
- **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 Appeal is properly before the Authority**

In their Written Replies to the Statement of Appeal the Respondent raised a Preliminary Objection, to wit, the Appeal is time barred. In their oral submissions the Respondent contended that the notification of tender results to the consultants, the Appellant inclusive, were communicated on 6<sup>th</sup> August, 2010, while the Appellant's application for administrative review was submitted on 16<sup>th</sup> September, 2010. According to the Respondent, the Appellant's application was submitted beyond the statutory period of 28 days in contravention of Regulation 105 of GN. No. 97/2005.

In reply thereof, the Appellant stated that, having received and being aggrieved by the tender results, they wrote to the Respondent on 12<sup>th</sup> August, 2011, requesting for the scoring scheme results which would

reveal how they failed to meet the minimum score of 75%. The Appellant further contended that, the Respondent availed the Appellant's technical scoring results 25 days later, that is, on 7<sup>th</sup> September, 2010, and the Appellant made a formal application for review to the Accounting Officer on 16<sup>th</sup> September, 2010, having been advised by PPRA on the dispute settlement mechanism. They further argued that, their Appeal was lodged within time as the reasons which caused them to appeal were communicated to them on 7<sup>th</sup> September, 2011. With regard to the provision relied upon by the Respondent on this point, the Appellant argued that, the said Regulation 105 of GN. No. 97/2005 is not relevant as the tender in dispute involves consultancy services which fall under GN. No. 98/2005.

Having summarized arguments by parties on this point, the Authority observes as follows:

- (i) Agrees with the Appellant that Regulation 105 on GN. No. 97/2005 which was relied upon by the Respondent is neither relevant to the point

in dispute as it talks about **“prohibition of running contracts”** nor the proper GN as the tender was for consultancy services which are governed by GN No. 98/2005.

- (ii) Regulation 105 of GN. No. 98/2005 requires an application for administrative review to be made **“within twenty eight days of becoming or should have become aware of the circumstances giving rise to the complaint or dispute”**.

The Authority is of the considered opinion that, it was not possible for the Appellant to seek administrative review without knowing the basis of their disqualification. The Authority’s position is derived from the Respondent’s communication of the tender results which simply stated as follows:

**“...I am obliged to notify you that, the Ministerial Tender Board, at its Meeting Held on August 4<sup>th</sup> 2010, did not approved**

**(sic) your technical proposal for the reason that it did not meet the minimum qualifying mark of 75%...”** (Emphasis supplied)

The Authority noted that, having received the Respondent's letter quoted above, the Appellant requested for the scoring scheme results which enabled them to ascertain how the scores were apportioned. The Authority observes that, it was the information relayed by the Respondent on 7<sup>th</sup> September, 2010, that is, the scoring scheme results, which gave rise to this Appeal. The Authority is of the firm view that, the cause of action arose on 7<sup>th</sup> September, 2010, when the Appellant became aware of the manner in which the scores in respect of their Technical Proposal were apportioned and not on 6<sup>th</sup> August, 2010, when the Respondent informed them that the said proposal did not meet the minimum score of 75%.

In the light of the above findings, the Authority rejects the Preliminary Objection raised and concludes that, the

application for administrative review was made within time and consequently the Appeal is properly before it.

Having ruled on the Preliminary Objection raised, the Authority proceeded to resolve the issues in dispute as hereunder:

## **2.0 Whether the tender process was conducted in accordance with the law.**

In its endeavour to resolve this issue, the Authority deemed it necessary to revisit the whole tender process in order to ascertain whether it adhered to the applicable law as well as the solicitation documents issued by the Respondent. In the course of doing so, the Authority specifically reviewed the following tender stages:

- Invitation for Expression of Interest (EOI);
- Issuance of the Request for Proposals (RFP);  
and
- Evaluation of Technical Proposals

**(i) Invitation for Expression of Interest and the Evaluation thereof**

In analysing whether the invitation for EOI was issued and evaluated in accordance with the law, the Authority revisited the advertisement issued, the Evaluation Report thereof and oral submissions vis-a-vis the applicable law and solicitation documents. To start with, the Authority examined the invitation for EOIs which was advertised in various newspapers to ascertain whether it met the requirements of the law.

During the hearing the Respondent submitted that, the tender under Appeal was an International Competitive Selection. However, upon being asked as to why their invitation for EOI did not state so, they replied that, they advertised through locally and internationally widely read newspapers. The Authority observes that, advertising a tender without specifying whether it is an international one in the East African newspaper does not make it an international competitive selection. No wonder it did not attract any foreign consultants.



The Authority observes that, the advertisement should have stated categorically that it was an international competitive selection in accordance with Regulation 11(1) and (4) which state as follows:

“11(1) **Consultants are permitted to participate in the selection proceedings without regard to nationality, except in cases where the procuring entity decides, on grounds specified in these regulations or according to the provision of any written law, to limit participation in selection proceedings on the basis of nationality.**

(4) The procuring entity, **when first soliciting the participation of consultants in the selection proceedings, shall declare to foreign consultants that they may participate in the selection proceedings regardless of nationality** and such a declaration shall not later be altered but if it

decides to limit participation pursuant to sub-regulation (2) it shall so declare to them.” (Emphasis supplied)

The Authority observes that, in the absence of a declaration that this was an international competitive selection, the advertisement for EOIs restricted competition.

The Authority revisited Regulation 49(4)(a) of GN. No. 98/2005 which guides as to the content of the advertisement for expression of interest in the following words:

**“The advert shall request minimum but adequate information to make a judgment on the firm’s suitability and may not be so complex as to discourage consultants from expressing interest.”** (Emphasis added)

According to the above-quoted Regulation, an invitation for expression of interest is required to request minimum

but adequate information for purposes of identifying qualified firms to be shortlisted. Having reviewed the advertisement issued by the Respondent the Authority noted that, it did not contain adequate information on qualifications of the consultant needed hence creating difficulty during evaluation of the EOIs.

The Authority noted that the deficiency in the advertisement was reflected during the evaluation of the EOIs whereby the following anomalies were detected by the Authority:

- During Preliminary Evaluation of the EOIs, five out of the nine firms which had expressed their interest, including the Successful Consultant, namely, M/s Tanscott Associates (T) Ltd, were found to be non responsive for failure to attach Certificate of Incorporation, trading license, VAT/TIN Certificate and a Certificate of professional affiliations supported by copy of a certificate of registration/testimonials/accreditation. The Authority observes that, in the absence of documented criteria

for short-listing, the Evaluators came with their own criteria which were not known to the prospective consultants as reflected in the number of the firms that did not meet the criteria used.

- Some of the criteria used in the first stage of Preliminary Evaluation of EOIs were not neutral, in that, criterion like submission of a Certificate of Incorporation entails a specific legal entity, a registered company for that matter, were the expected personalities to express their interest. This criterion was not met by four firms, namely, M/s Tanzania Marketing & Communications Company Ltd (T MARC); M/s Tanscott Associates (T) Ltd; Mzumbe University and the Appellant. However, a criterion for submission of a certificate of professional affiliations supported by a copy of registration/testimonials/accreditation was met by eight out of the nine firms. This signifies that procurement of this nature attracted prospective consultants from different legal personalities, other than registered companies as Item 4 of the tender

advertisement invited **“eligible firms/consultants”**.

- The second stage of evaluation of EOIs, the firms were checked if they met the following criteria as reproduced in the Table below:

S/ No.	Name of the Firm	EVALUATION CRITERIA			
		Experience of the firm in similar assignments	Are the CV's for proposed staff submitted and signed by the owner?	If the lead consultant has minimum qualification of Masters' in Medical field or science with experience of not less than 10 years in similar field	If other key staff posses Masters' Degree in Medical field or Science with experience of not less than 5 years
1	M/s Medal Investments Ltd. in association with Data Vision International (T) Ltd	YES	YES	YES	YES
2	M/s Tanzania Marketing & Communications Company Ltd (T MARC)	YES	YES	NO	NO
3	M/s Data Works Associates Ltd.	YES	YES	NO	YES
4	M/s EcomResearch Group in partnership with Health and Development International Consultants	YES	YES	YES	YES
5	M/s Centre for Enhancement of Effective Malaria Interventions	NO	NO	YES	YES
6	M/s Tanscott Associates (T) Ltd	YES	YES	YES	YES

7	M/s Mzumbe University	YES	YES	YES	NO
8	M/s PAC Plan	NO	NO	NO	YES
9	M/s Gate Way Africa	YES	NO	NO	NO

The results thereof indicated that five out of the nine firms did not meet all the above listed criteria. Surprisingly though some of those who did not qualify in the first stage of Preliminary Evaluation met the criteria in the second stage whilst some who passed the first stage failed the next stage. This is a clear indication that had the said consultants been aware of the minimum information that was supposed to be availed they could have met the requirements.

- The outcome of the evaluation of the EOIs, that is, the two stages, revealed that all firms did not meet the criteria, save for M/s EcomResearch Group in Partnership with Health and Development International Consultants. This is a clear indication that, there was something wrong with the invitation for EOIs.

- Having noted the poor performance of the firms, the Evaluators waived the evaluation for EOIs and considered all firms qualified for the next stage of evaluation. This is evidenced in the Evaluators' own words appearing on page 5 of the Evaluation of Expression of Interest which read as follows:

**“After long discussion on the outcome of the preliminary evaluation, it was revealed that it may result into elimination of potential firms for that criteria that have no impact to consultant or Ministry on execution of this assignment. This was done deliberately in order to ensure broad numbers of firms are retained. For that reasons, Evaluation team agreed to waive this part of evaluation. Thus, all firms were considered to be substantial responsive and considered for further evaluation processes.”** (Emphasis supplied)

The Authority observes that, the Evaluation Committee did not have the mandate to waive the evaluation made.

- The Evaluation Report for EOIs, does not show the criteria which were used in the next stage of evaluation. However, judging by the comments of the Evaluators on the performance of individual firms, it seems the criteria reproduced in the Table above, were used. Moreover, the Evaluators just harmonized their individual assessments of the said firms and came up with a common stand as evidenced on page 6 of the Evaluation Report for EOIs as follows:

“In order to have a (sic) consistency, evaluators met to share what each evaluator had observed during the evaluation and rectify any inconsistency among them as indicated in table 2...”



- The reasons given by the Evaluators for not short-listing four firms were mainly, for lack of the Team Leader's experience on monitoring and evaluation of medical related activities and supporting staff having different professions which are not related to monitoring and evaluation of medicines. The Authority noted that the invitation for EOIs did not contain explicit evaluation criteria. The Authority is of the view that, had the minimum and adequate information been requested as required under Regulation 49(4)(a) of GN. No. 98/2005, the EOIs could have been more responsive.

In view of the above findings, the Authority is of the view that, the evaluation of the EOIs was not properly done as the criteria set were too general that the Evaluators modified them. The modified criteria were unknown to the bidders. Regulation 50(1) of GN. No. 98/2005 requires that the short list prepared should be of consultants who possess the required capabilities and experience.

Having reviewed the invitation for EOIs and the subsequent evaluation thereof, the Authority finds that, the said process was not properly done and it leaves a lot to be desired.

## **(ii) Issuance of the Request for Proposal**

In analyzing this point, the Authority started by examining whether the issuance of the RFP document was in accordance with the law. To start with, the Authority revisited Regulation 54 of GN. No. 98/2005 which guides as to the information to be relayed to prospective consultants and is satisfied that, to a large extent it meets the requirements of the said Regulation, save for some shortfalls detected therein. Having reviewed the RFP Document issued by the Respondent, the Authority noticed that, there are two grey areas as discussed herein below.

During the hearing it was evident that, the RFP document contained some inconsistencies within the Proposal Data

Sheet itself as well as between the Terms of Reference and the Proposal Data Sheet as shown herein below:

- **Inconsistencies within the Proposal Data Sheet:**

Item 3.3(iv) of the Proposal Data Sheet required the minimum experience of proposed professional staff to be 10 years for Team Leader and 8 years for other key staff, whereas the qualifications of the Team Leader provided for under the second bullet to Item 5.3(iii) of the same Data Sheet required not less than five years. For purposes of clarity the Authority reproduces the said provisions:

“3.3(iv) The minimum required experience of proposed professional staff **is ten (10) years for Team Leader and 8 for other key staff.**”

“5.3(iii) Working experience in the country and region for **not less than 5 years** in a senior position within the health sector” (Emphasis added)

The experience of the other key staff provided for under Item 5.3(iii) of the Proposal Data Sheet ranged between 3 – 5 years as opposed to the 8 years stated under Item 3.3 of the same Data Sheet.

- **Inconsistencies between the Terms of Reference and the Proposal Data Sheet:**

Item 5 of the Terms of Reference appearing on page 33 and 34 of the RFP document, the professional requirements of the Team Leader were, amongst others, experience of **“not less than ten years”** compared to the 5 years required under Item 5.3(iii) of the Proposal Data Sheet.

The Authority also noted that, the experience required for the Monitoring and Evaluation Manager as per Item 5 of the Terms of Reference was 8 years in monitoring and evaluation and 5 years in management of health researches while the requirement under Item 5.3(iii) of the Proposal Data

Sheet was 5 years in monitoring and evaluation as well as 3 years in management and evaluation. Similar inconsistencies were detected on the experience required for the other key staff as well.

The Authority further examined the requirement that, **“the Team Leader must hold a PhD. in Health Information System from a reputable university”** which the Appellant contended as unnecessary and was intended to favour a certain consultant. The Appellant argued further that, any medically oriented professional could oversee the implementation of such a project without necessarily being a PhD holder in Health Informatics as it involves monitoring and evaluation of the distribution of anti-malaria drug (Artemisinin) to 21 regions through private sector. Upon being asked to explain the rationale behind the said requirements, specifically that the said doctorate should be in **‘Health Information System’**, the Respondent stated that, given the value and complexity of the consultancy they needed the best expert they could get on that particular discipline. Furthermore, much as they conceded that, the

required expertise to execute such a project included statistics and IT knowledge, they could not provide a satisfactory rationale for restricting competition by requiring the Team Leader to be a PhD holder in Health Informatics.

Having analysed the evidence adduced on this point, the Authority concurs with the Appellant that, that requirement was discriminatory contrary to Regulation 7(b) of GN. No. 98/2005 which provides as follows:

- "7. To ensure the widest possible participation by consultants on equal terms in invitations to provide to provide consultancy services, as appropriate, procuring entities and approving authorities shall take the necessary measures to:
- (b) eliminate discriminatory practices or description of services which might stand in the way of widespread participation on equal terms."

### **(iii) Evaluation of Technical Proposals**

Having reviewed the RFP document and highlighted the shortfalls therein, the Authority proceeded to examine whether the evaluation of the Technical Proposals was conducted in accordance with the law. Prior to analyzing the evaluation of the technical proposals, the Authority deemed it necessary to address one of the Appellant's concerns regarding the opening of the Technical Proposals.

In their submissions, the Appellant contended that, during the tender opening it was evident that, one of the firms had submitted one original and two copies instead of one original and three copies. The Appellant further argued that, submission of an original and three copies was a mandatory requirement which was supposed to be complied by all consultants as per Item 4.3 of the Proposal Data Sheet. In reply thereof, the Respondent conceded the same but added that, it was a minor deviation as it did not form part of the evaluation criteria, that is why the said consultant was not penalized.

In order to ascertain the validity of arguments by parties on this particular point, the Authority revisited Item 4.3 of the Proposal Data Sheet which was relied upon by the Appellant. The said provision states as follows:

**“Consultants must submit an original and **Four additional copies of each proposal i.e Technical and Financial proposal.** All envelopes should be submitted in one sealed envelope and marked **Tender No. ME-007/2009-2010/HQ/C/287 for the Provision of consultancy Services for Monitoring and Evaluation of Distribution of Artemisinin – Based Combination Therapy (ACT)**”**

The Authority agrees with the Appellant that, this was a mandatory requirement which was supposed to be adhered to by all consultants. Moreover, the Authority noted that, according to the Record of Technical Proposal Opening Form 9C, two consultants submitted 3 copies instead of the required four.



With regard to the evaluation of the Technical Proposals, the Authority started by revisiting the RFP document in order to ascertain whether the evaluation of the said proposals was done in accordance with the applicable law and the RFP. Item 5.3 of the Information to Consultants (hereinafter to be referred to as "ITC") guides as to the manner in which the said proposals would be evaluated in the following words:

“ The evaluation committee, appointed by the Client as a whole, and each of its members individually, evaluates the proposals on the basis of their responsiveness to the Terms of Reference, applying the evaluation criteria, sub-criteria (typically not more than three per criteria), and point system specified in the **Data Sheet...**”

According to the Report on the Evaluation Technical Proposals, the evaluation was carried out in two stages, namely, Preliminary Examination and Detailed Evaluation. During Preliminary Evaluation, the proposals

were checked if they had complied with the terms of reference and instructions laid down in the RFP. The Authority noted that, four consultants were evaluated, including M/s Centre for Enhancement of Effective Malaria Interventions who had submitted a letter of withdrawal and thus did not submit a Technical Proposal. The Authority wonders as to what did the Evaluators evaluate in the absence of a Technical Proposal. The other three consultants, namely, M/s Tanscott Associates (T) Ltd; M/s EcomResearch Group and M/s Medal Investment Ltd. in association with Data Vision International (T) Ltd qualified for Detailed Evaluation as they had submitted the required information in accordance with the RFP.

During the hearing it was evident that, the main contentious ground of this Appeal was how the scores in respect of the set criteria were apportioned in the second stage of evaluation, namely Detailed Evaluation. According to the Proposal Data Sheet, the criteria to be used and the scores to be apportioned were indicated therein. However, the Authority noted that the criterion on **“specific experience of the firm related to the**

**assignment”** and **“adequacy of the proposed work plan and methodology in responding to terms of reference”** were divided into two sub-criteria each and the scores for each sub-criterion were indicated. The criterion on **“qualification and competence of key staffs proposed for the assignment”** was further subdivided into two, namely, **“Project Team Leader”** and **“Other key staffs”** whose scores were indicated. The said sub-criterion were further divided depending on the nature of the position, for instance, there were six items which the Team Leader was required to satisfy while the qualifications of the Monitoring and Evaluation Manager had seven items.

During the hearing, the Respondent was asked and confirmed that each of the qualification items listed in the Data Sheet were evaluated and promised to submit the Evaluators’ working sheets containing individual assessments. However, upon submission of the said documents, the Authority noted that the information relayed was similar to that contained in the Evaluation Report which indicated scores apportioned to **“other key**

**staff”** were generalized as opposed to apportionment to individual staff. In the absence of any guidance in respect of the apportionment of scores to other key staff, the difference in individual scores given to the same consultant was apparent. For instance, the highest score given to M/s Tanscott Associates (T) Ltd in respect of other key staff was 30/30 while the lowest was 25/30; while for M/s EcomResearch Group was 28/30 against 20/30; and for the Appellant the highest score was 24/30 against 14/30. Equally, the difference in the total individual assessment given by the five Evaluators for the three consultants were as follows:

<b>Name of the Firm</b>	<b>Highest score</b>	<b>Lowest score</b>
M/s Tanscott Associates (T) Ltd	<b>100</b>	<b>80</b>
M/s EcomResearch Group	<b>84</b>	<b>70</b>
M/s Medal Investments Ltd. in association with Data Vision International (T) Ltd	<b>75</b>	<b>57</b>

Judging from the individual scores apportioned by the Evaluators, the Authority opines that, the Evaluators did not have the same understanding of the marking scheme

contrary to Guideline 10.2 and 10.3 of the PPRA Guidelines on the Evaluation of Technical and Financial Proposals and Preparation of Evaluation Report – Selection and Employment of Consultant, of February, 2007. The said guidelines provide as follows:

“10.2 All technical proposals are marked on a merit point system or scores system specified in the request for proposals. **To avoid misunderstanding, the chairperson should ensure the evaluation committee members understand and agree on the marking system before detailed proposal evaluation begins.**

10.3 **The chairperson should encourage consistency in applying the marking system.** This is particularly important where price will be a selection factor and where absolute marks, not ranking, are thus taken in consideration in the evaluation’s second stage.”  
(Emphasis supplied)

The Authority further revisited the comments made by the Evaluators on each key staff and noted that they were not consistent, in that, while the Team Leader’s qualifications for M/s EcomResearch (T) Ltd and the Appellant were indicated as **“moderate compliance”** but the final comment in respect of the former was **“Non responsive”** whereas the latter was termed as **“responsive”**. The said comments which are reproduced in the Table herein below speak for themselves:

<b>Firm</b>	<b>Position</b>	<b>Qualification of the Proposed Staff</b>	<b>Responsiveness</b>
M/s Tanscott Associates (T) Ltd	Team Leader	High Compliance	Responsive
M/s EcomResearch Group	Team Leader	<b>Moderate compliance</b>	<b>Non responsive</b>
M/s Medal Investments Ltd. in association with Data Vision International (T) Ltd	Team Leader	<b>Moderate compliance</b>	<b>Responsive</b>

The Authority's observations on the comments of the Evaluators appearing in the Table above are as hereunder:

- The categorization thereof raises questions, as it is not stated anywhere in the Evaluation Report the basis for "**moderate compliance**". This is because the qualifications of the Team Leaders for both M/s EcomResearch (T) Ltd and the Appellant were termed as "**moderate compliance**" but the Evaluators' final analysis was that one of them was responsive while the other was not.
- In their Written Replies, the Respondent submitted that, the Appellant's Team Leader scored 10.4 out of 20 while the Team Leader for M/s EcomResearch (T) Ltd scored 16.4. The Authority wonders as to how would the scores of M/s EcomResearch (T) Ltd who was termed as "**non responsive**" be higher than the Appellant's who was said to be "**responsive**". Moreover, during the hearing the Respondent submitted that, out of the six requirements the Team

Leader was supposed to meet, the Team Leader proposed by the Appellant met only two of them. The Authority could not apprehend the rationale behind giving the Appellant's Team Leader 10.4/20 marks for scoring only two out of the six requirements. This shows that, there was a formula invented by individual Evaluators which enabled them to apportion the scores in a situation where the person being evaluated did not have all the qualifications required.

- Moreover, Item 7.0 of the Evaluation Report for Technical Proposals pointed out the strengths and weaknesses of the proposals, whereby the '**weakness**' of the Team Leader proposed by M/s EcomResearch (T) Ltd was stated as follows:

**"A proposed Team Leader does have qualification for the assignment"** (Emphasis added)

The Authority observes that, the above quoted comment contradicts the Evaluators' earlier



comment that, the qualifications of the Team Leader was said to be not responsive. Furthermore, such a comment cannot be a weakness.

The Authority also noted that, the Evaluators' comment on the qualifications of the Team Leader for the Appellant was that, "**Team leader does not have qualification for this assignment**". This contradicts their previous comment of '**moderate compliance**' hence responsive.

With regard to the Evaluators' final comments on the other key staff, the Authority discovered the following anomalies:

- The Table on page 10 of the Evaluation Report for Technical Proposals indicate that the Evaluators' comments in respect of the Regional Managers and Field workers, namely, supervisors, data collector, ICT Data entry and processing and support staff in the proposal submitted by M/s Tanscott Associates (T) Ltd were rated as "**responsive**" while under the

qualification column it was indicated that they were **“to be recruited”**. The Authority wonders as to how the Evaluators could evaluate this item in the absence of CVs as the said personnel are yet to be recruited.

- **“Moderate compliance”** with respect to other key staff was rated as responsive as opposed to the same comment for the Team Leaders which was not consistent. The Evaluation Report does not provide any answers for the double standards detected.

Moreover, the Authority also considered the effect of the inconsistencies found within the Proposal Data Sheet and between the Terms of Reference vis a vis the Data Sheet in the evaluation of the Technical Proposals. As it has already been analyzed that, the experience required for the Team Leader and other key staff differed. Since the Respondent failed to substantiate that the Evaluators had given scores to each sub-criterion, the Authority could not satisfy itself whether the said inconsistencies did not affect the scores. This is due to the fact that, while the

Respondent maintained that the experience required for the Team Leader was 10 years and 8 years for the other key staff, the Appellant argued that, it was 5 years as per the Proposal Data Sheet. The Authority concurs with the Appellant on this particular point because the Item 5.3 of the Proposal Data Sheet which stipulated the criteria for evaluation, provided for 5 years for the Team Leader and 3 years for other key staff.

The Authority also considered the Respondent's submission that, they project required the expertise of a PhD holder in Health Informatics due to the complexity of it. However, the Authority is concerned that, the seriousness shown in drafting the qualifications of the Team Leader did not match with the qualifications of the Members of the Evaluation Committee. The Authority expected that, given the complexity of the tender and the Respondent's desire to get the best consultant for the project should have been complemented by appointing a competent and experienced Evaluation Committee in accordance with Section 37(4) of the Act which provides as follows:

**“The members shall be of an appropriate level of seniority and experience, depending on the value and complexity of the procurement requirement.”** (Emphasis added)

In view of the shortfalls pointed out above, the Authority is of the firm view that, the Members of the Evaluation Committee lacked the requisite expertise and experience to conduct such a complex evaluation and they were not diligent.

Having reviewed the tender process from the invitation of EOIs to the issuance of RFP and the subsequent evaluation thereof, and having been satisfied that, the whole process was marred by irregularities, the Authority concludes that, the tender process was not conducted in accordance with the law.

### **3.0 Whether the Appellant was unfairly disqualified.**

As it has been established in the second issue that, the tender process was not conducted in accordance with the law, it goes without saying that, the whole process was a nullity in the eyes of the law. That said, the Appellant was unfairly disqualified.

### **4.0 Whether the award of the tender to the Successful Tenderer was proper at law**

In resolving this issue, the Authority considered its findings and conclusion in the second issue that, the tender process was not conducted in accordance with the law. The Authority therefore is of the settled view that, the award of the tender to the Successful tenderer, namely, M/s Tanscott Associates (T) Ltd was not proper at law.

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

Having resolved the main issues in dispute, the Authority considered prayers by parties. The Appellant prayed for compensation of Tshs. 30,000,000/= being administrative costs incurred in the preparation of the tender as well as legal fees. Since it has been established that, the tender process was not conducted in accordance with the law, that is, the Respondent contravened the law, the Authority finds that the Appellant is entitled for compensation for some costs incurred. That said, the Authority orders the Respondent to pay the Appellant a sum of **Tshs. 3,620,000/=** being costs for the following:

- **Appeal fees – Tshs. 120,000/=**
- **Legal fees – Tshs. 3,500,000/=**

With regard to the Appellant's prayer for compensation for administrative costs incurred in preparing the tender,

the Authority cannot grant them as the Appellant neither specified nor quantified them.

The Authority also considered the Respondent's prayer that, the Appeal be dismissed as the tender was conducted in accordance with the law. The Authority rejects the Respondent's prayer as the Appeal has merit.

### **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:

- (a) During the hearing the Appellant contended, the the Respondent conceded that, while the Respondent's Written Replies to the Statement of Appeal itemized seven requirements under the qualifications of the Team Leader, the RFP contained only six items. The disputed item reads as follows:

**“Must have been a team leader of related assignments in field work data collection commissioned by reputable local and foreign institutions of not less than five years.”** (Emphasis added)

The Authority is concerned that, such errors are likely to create suspicion, especially on the part of the tenderers who do not have access to the evaluation report, that new evaluation criteria were used.

- (b) The Respondent did not reply to the Appellant’s application for administrative review on the ground that, the application was time-barred. The Authority does not condone such conduct as it defeats the principles of Good Governance, in that, public bodies are obliged to respond to letters from clients.

Having considered all facts and evidence, the Authority concludes that, the tender process was marred by



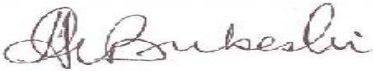
irregularities hence the award of the tender to M/s Tanscott Associates (T) Ltd was therefore a nullity.

On the basis of the aforesaid findings, the Authority upholds the Appeal and orders;

- The Respondent to restart the tender process afresh in observance of the law.
- The Respondent to compensate the Appellant a sum of **Tshs. 3,620,000/=** being appeal fees and legal fees.

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

Decision delivered in the presence of the Appellant, Respondent and the Interested Party this 24<sup>th</sup> January, 2011.



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



1. HON. V.K. MWAMBALASWA(MP) .....



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