

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL NO 141 OF 2013

BETWEEN

M/S JAFFERY IND. SAINI LIMITED.....APPELLANT

AND

TANZANIA INSTITUTE OF
ACCOUNTANCY.....RESPONDENT

DECISION

CORAM:

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

SECRETARIAT:

- | | |
|----------------------|-----------------|
| 1. Ms. F. R. Mapunda | - Legal Officer |
| 2. Ms. V.S. Limilabo | - Legal Officer |

FOR THE APPELLANT:

1. Advocate S.R. Kitare - Kitare and Company Advocates
2. Ms. Ruth N. Sewava - Marketing Manager, Jaffery Ind. Saini Limited

FOR THE RESPONDENT:

1. Mr. Said B.M Mayunga – Legal Officer
2. Mr. Pius Seda – Head of Procurement Management Unit
3. Mr. Gerald Petro – Chairperson of the Tender Board
4. Mr. Bajjet S. Maresho – Member of the Tender Board
5. Mr. Onesphor A. Luhungu – Member of the Tender Board
6. Ms. Anne Assenga – Member of the Tender Board
7. Ms. Salha Tego – Assistant Supplies Officer
8. Ms. Juliana Musomi – Senior Supplies Officer
9. Mr. Joseph K. Mwezinde - Member of the Tender Board
10. Mr. Matei Mapunda - Member of the Tender Board
11. Mr. Adolf Mwakinyuke – Member of the Tender Board
12. Mr. Kennedy E. Ndosi – Assistant Supplies Officer
13. Mr. Dickson I. Biya – Supplies Officer

This Decision was scheduled for delivery today 18th of February, 2013, and we proceed to deliver it.

The Appeal at hand was lodged by M/S JAFFERY IND. SAINI LIMITED (hereinafter referred to as “the Appellant” against TANZANIA INSTITUTE OF ACCOUNTANCY, commonly known by its acronym, TIA (hereinafter referred to as “the Respondent”).

The said Appeal is in respect of Tender No. PA/094/2012/2013/G/01 for the Supply and Installation of various furniture at Dar es salaam, Singida and Mwanza Campuses. The said tender had three Lots and the Appeal at hand is confined to two Lots, namely; Lot 1 which was for Supply of Student Furniture at Dar es Salaam Campus and Lot 3 which was for Supply of Student & office Furniture at Mwanza Campus (hereinafter referred to as “the tender”).

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

The Respondent vide the Mwananchi Newspaper of 03rd July, 2012, invited tenderers to submit tenders in respect of the tender under Appeal.

On 11th July, 2012 the Respondent vide a letter referenced BC/250/260/01/1/31 issued an Addendum which provided for clarification of specifications that were not included earlier in the Tender Document.

The deadline for the submission of the tenders was set for 1st August, 2012, whereby the following seven tenders were submitted;

S / N	NAME	LOT 1	LOT 2	LOT 3	TOTAL PRICE FOR ALL LOTS IN TSHS/USD. (VAT INCLUSIVE)
1.	M/S DARWORTH LTD	110,475,140/=	83,330,000/=	171,546,120/=	Tshs.363,351,260/=
2.	M/S JAFFERY IND.SAINI LTD	83,690,320/=	186,440,000/=	239,416,100/=	Tshs. 509,546,420/=
3.	M/S QUALITY FURNITURE LTD.	71,980,800/=	108,231,872/=	173,536,640/=	Tshs. 353,749,312/=
4.	M/S BETHELS ENTERPRISES	USD. 22,402.03+ TSHS. 1,290,964,641/=	USD 16,741.93 + TSHS. 964,789/34	USD. 33,257.90 + TSHS. 1,916,556.70	USD 72,401.89+ TSHS. 4,172,306.95

5.	M/S PALRAY	77,478,800/=	82,010,000/=	141,983,500/=	Tshs. 301,472,300/=
6.	M/S EURO WOOD CRAFT LTD	98,220,000/=	90,000,000/=	346,000,000/=	Tshs.
7.	M/S THE LIVING ROOM	118,466,250/=	96,250,000/=	191,988,500/=	Tshs. 479,911,605/=

The above tenders were subjected to evaluation which was carried out in three stages, namely, Preliminary Examination, Detailed Examination and Post-qualification.

During Preliminary Evaluation of Lot 1 the tenders submitted by M/S DARWORTH LTD, M/S QUALITY FURNITURE LTD, M/S BETHEL'S ENTERPRISES, M/S EURO WOOD CRAFT LTD and M/s PARLAY LIMITED were disqualified for being substantially non responsive to the tender requirements.

The remaining two tenders submitted by M/s Living Room and that of the Appellant were subjected to Detailed Evaluation. During that process the tender submitted by the Appellant was found to be the Lowest

Evaluated Tender and was recommended for award of Lot 1.

For Lot 2, the tenders submitted by M/S DARWORTH LTD, M/S QUALITY FURNITURE LTD, M/S BETHEL'S ENTERPRISES and M/S EURO WOOD CRAFT LTD were disqualified for being substantially non responsive to the tender requirements. The remaining three tenders were subjected to Detailed Evaluation whereby the tender submitted by M/s Palray Limited was found to be the Lowest Evaluated Tender and was recommended for award of Lot 2.

With respect to Lot 3, only the Appellant's tender was found to be substantially responsive and was recommended for award while the other six tenders were disqualified for being Substantially Non Responsive.

The Evaluation Committee recommended award of tender for Lots 1 and 3, to M/S JAFFERY IND. SAINI LTD, the Appellant herein, at a contract price of 83,690,320/= for Lot 1 and Tshs. 239,416,100/= for Lot 3 respectively. The award for Lot 2 was recommended to M/S PALRAY LTD at a contract price of

Tshs. 82,010,000/= . The evaluators also recommended for Post qualification to be conducted to the recommended tenderers so that their financial and technical capabilities could be verified as per Clause 35.1 of the Instructions To Bidders (hereinafter referred to as "ITB").

The Tender Board at its meeting held on 6th and 7th September, 2012, reviewed the Evaluation Report and observed that, the tender of M/S PALRAY LTD who had quoted the lowest price for Lot 3 compared to that of the Appellant was disqualified for failure to comply with the specifications set out in the Addendum issued on 11th July, 2012. The Tender Board was not satisfied with the reasons given for the disqualification of the tender of M/s Palray Ltd because there was no proof that all the tenderers were duly served with the said Addendum. The Tender Board, therefore resolved that, Post-qualification be carried out for the two Lowest Evaluated Tenderers; namely, the Appellant for Lots 1 & 3 and M/S PALRAY LTD for Lot 2.

After Post qualification, the Procurement Management Unit (hereinafter referred to as PMU) submitted the Post-qualification Report to the Tender Board for

review. During its meeting held on 28th September, 2012, while reviewing the said Post-qualification Report, the Tender Board observed that, the findings and conclusions made by the evaluators in relation to tenderer's technical capabilities were not proper as they had done comparison of tenders in terms of percentage while that was not provided for in the Tender Document. The Tender Board also noted that, the Addendum issued was not received by some of the tenderers and there was no proper justification as to why the said Addendum was not properly communicated to all tenderers. The Tender Board therefore, ordered for re-evaluation to be done to all tenderers based on specifications provided in the Tender Document and not those contained in the Addendum. Additionally, the Tender Board directed that the re-evaluation to be conducted by a neutral committee which should include one or two members from the previous Evaluation Committee.

Following the Tender Board directions, the tenders were re-evaluated and the 2nd Evaluation Committee recommended award of Lot 1 to M/S QUALITY FURNITURE Ltd at a contract price of Tshs 71,980,800/= and Lot 2 and 3 to M/S PALRAY LTD at a

contract price of Tshs 82,010,000/= and Tshs 141,983,500/= respectively.

The Tender Board at its meeting held on 16th and 18th October, 2012, approved the award of tender as recommended by the 2nd Evaluation Committee subject to Post-qualification to be conducted to M/S QUALITY FURNITURE LTD for Lot 1 and negotiations to be carried out with M/S PALRAY LTD for Lot 3 on quantity reduction for some items including minor changes in specifications.

The Respondent vide a letter referenced BC.97/250/01/31, dated 26th October, 2012, informed all the tenderers that they had extended the Bid Validity Period for one month from 1st November, 2012 so as to finalize the contract award process.

On 29th October, 2012, the Appellant vide a letter referenced JIS/LETTER/TIA/0334/2012 wrote to the Respondent inquiring about award status since 86 days had elapsed from the date the tender was opened and over a month since Post-qualification was conducted to them.

On 31st October, 2012, the Respondent vide a letter referenced BC.97/250/01/33, replied to the Appellant's letter informing them that, Post qualification was conducted for the lowest evaluated tenderers and the report was submitted to the Tender Board which had ordered re-evaluation based on specifications provided in the Original Tender Document with instructions to disregard the Addendum as some of the tenderers had not received it. The Appellant was also informed that, the tender had not been awarded to any tenderer and promised to inform them upon completion of the award process.

On 5th November, 2012, the Appellant vide a letter referenced JISL/LETT/TIA/00345/2012 wrote another letter to the Respondent requesting to be given more clarifications on contentious issues relating to the whole tender process.

The Respondent vide a letter referenced BC.97/250/01/36 dated 9th November, 2012, replied to the Appellant's letter and informed them that, re-evaluation was ordered after it was realised that the 1st Post-qualification failed to abide to the Terms of

Reference and that the Appellant's price for Lot 3 was higher compared to that quoted by M/S PALRAY LTD.

Being dissatisfied with the Respondent's replies, the Appellant on 19th November, 2012, vide a letter referenced JISL/LETT/TIA/0361/2012, wrote to the Public Procurement Regulatory Authority (hereinafter referred to as PPRA) requesting for their intervention on the matter before the award process was finalised. In the said letter, the Appellant presented several grounds which made them to be dissatisfied with the Respondent's tender process.

Having received no response, the Appellant vide a letter referenced JISL/LETT/TIA/0388/2012 dated 21st December, 2012, wrote a reminder letter to PPRA.

On 9th January, 2013, PPRA vide a letter referenced PPRA/ PA/094/"A"/39, required the Respondent to furnish the tenderer with information on the status of the tender under appeal and the same letter was copied to the Appellant.

Having received PPRA's letter and observing that their concerns were not dealt with, on 11th January, 2013,

the Appellant lodged their Appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "the Authority").

SUBMISSIONS BY THE APPELLANT

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

That, the Appellant is a renown local manufacturer of various types of furniture having the market within and outside the country.

That, they had supplied and fixed a number of furniture in various governmental and non governmental institutions including higher learning institutions in Tanzania.

That, they have a big workshop at Keko which, due to its size, staffing and machine lay out, assisted their firm in producing not only quality products but also delivering those goods as per the delivery contracts.

That, they suspect that the tender process might have not been conducted in a fair, competitive and non – discriminatory manner due to the following reasons;

- i) That, the Tender Board had no powers to order re-evaluation of tenders after recommendations of award have already been made by the Evaluation Committee. During the 1st Evaluation process evaluators recommended the award of Lots 1 and 3 in their favour, hence, the Tender Board's act of ordering re-evaluation of tenders had contravened the requirements of the law. Therefore, the Appellant finds the Tender Board's acts in this regard to have disrupted the 1st evaluation done as a result they failed to be awarded the tender while they had already been found to have won the tender for having complied with all specifications provided for in the Tender Document and the Addendum thereof.

- ii) That, the Respondent evaluated tenders which had offered different specifications in Lot 3, as some of them including the Appellant had received the Addendum while others had not. The Appellant's price was based on the Addendum issued and that is why they had higher price compared to that of M/s Palray Ltd on the reason that the specifications in the Addendum were higher compared to those provided in the Tender Document.
- iii) That, the Respondent's decision of disregarding the Addendum during the 2nd evaluation process led the tenders to be evaluated based on different specifications. The Respondent's act contravened Regulation 90(8) of the Public Procurement (Goods, Works, Non Consultant Services and Disposal of Public Assets by Tender) Regulations (hereinafter referred to as "GN. NO 97/2005") read together with Clause 28.2 of the ITB.

- iv) That, the Respondent did not request the tenderers to extend the Bid Validity period as required by Clause 17.2 of the ITB, instead they extended the period on their own and tenderers were just informed about the said extension. Thus, said extension was not done in accordance with the law as the Respondent was required to seek consent of tenderers before extending the said period as required by Regulation 87(4) of GN No. 97/2005.

Finally, the Appellant prayed for the following;

- i) The Respondent be ordered to award Lots 1 and 3 to them.
- ii) Any other relief the Authority deems fit to grant.

REPLIES BY THE RESPONDENT

The Respondent's arguments as deduced from the documents availed to this Authority, as well as oral submissions and responses to questions raised by the Members of the Authority may be summarized as follows:

- i) That, under Section 68 of the Act, the Tender Board has the powers to order re-evaluation of tenders where they are not satisfied with the way the evaluation was carried out. In relation to the tender under Appeal, the Tender Board was not satisfied with the disqualification of M/s Palray Ltd based on the failure to comply with the specifications provided in the addendum, since the said addendum was not duly communicated to them. For that reason, the Tender Board ordered re-evaluation of the tenders. Therefore, it is not true that the Tender Board's act of ordering for re-evaluation had contravened the law.
- ii) That, the re-evaluation process had disregarded the addendum issued for Lot 3 and tenders were assessed on the basis of the criteria specified in the Tender Document which were known to all tenderers.

- iii) That, the Appellant had quoted a higher price in Lot 3 compared to that quoted by M/s Palray Ltd and there was a huge difference of Tshs. 97,432,600/- that is why the Tender Board ordered re-evaluation of tenders so as to achieve value for money.
- iv) That, there was no violation in issuing the letter of extension of Bid validity period, because the same was done in accordance with Clause 17.2 of the ITB and all tenderers were duly informed about the said extension and some of them including the Appellant accepted it.
- v) That, the tender process was postponed following the complaint lodged by the Appellant to PPRA; hence, even the award of Lot 2 that was already communicated to M/s Parlay Limited had to be postponed pending determination of this Appeal.

Finally the Respondent prayed for dismissal of the Appeal in its entirety.

ANALYSIS BY THE AUTHORITY

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

- Whether the evaluation process was conducted in accordance with the law.
- Whether the extension of the Bid Validity Period by the Respondent prejudiced the Appellant's rights.
- To what relief, 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 evaluation process was conducted in accordance with the law.

In resolving this issue, the Authority reviewed the Evaluation Report vis-a-vis the applicable law and the Tender Document in order to ascertain if the evaluation

process was properly conducted as most of the Appellant's grounds of Appeal revolve around this point. In the course of doing so, the Authority deemed it necessary to frame the following sub issues to assist it in resolving contentious arguments by parties;

- Whether the Respondent's act of re-evaluating tenders was proper at law
- Whether the Respondent's act of disregarding the Addendum to the Tender Document during the re-evaluation process was proper at law

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

- a) Whether the Respondent's act of re-evaluating tenders was proper at law

In resolving this sub-issue, the Authority considered the Appellant's main argument that the Respondent's Tender Board had erred in law for ordering a re-evaluation of tenders after award recommendations had already been made, thus, causing them not to be awarded the tender while they had already been

recommended for award of Lots 1 and 3. The Appellant contended further that, the re-evaluation process had prejudiced their rights in the disputed tender process.

In reply thereof, the Respondent submitted that, re-evaluation was ordered after it was realized that the 1st evaluation process was not conducted in accordance with the law. Further, the Respondent contended that, the Tender Board has powers under the applicable law to order for re-evaluation of tenders. Hence, it was done in accordance with the law.

In order to ascertain the validity of the parties' arguments the Authority reviewed the documents submitted and noted that, the evaluation of the tender under Appeal was carried out twice. The 1st evaluation was conducted immediately after the opening of the tenders, whereby the evaluators recommended award of Lots 1 & 3 to the Appellant and Lot 2 to M/s Palray Ltd.

The 2nd evaluation was carried out following the Tender Board's dissatisfaction with the 1st Evaluation Report for reasons to be analysed in the course of this decision.

Having observed that, the Respondent had conducted two evaluations on the same tender, the Authority considered the Appellant's argument that the former had contravened the law for carrying out two evaluations and observes that, Section 68 of the Public Procurement Act of 2004, Cap 410 (hereinafter referred to as "the Act") allows the Tender Board to refuse to approve an award recommendation made by the Evaluation Committee and may amongst others refer it back to the Evaluation Committee for re-evaluation. For purposes of clarity the Authority reproduces the said Section 68 as hereunder;

"The tender board shall review the evaluation and recommendation made by the procuring entity and may either: -

- a) Approve the recommendations and, authorize the procuring entity accept the tender and award a contract in the form specified in the tender documents; or
- b) Refuse to authorize acceptance of any of the tenders and refer the evaluation back

to the procuring entity with an instruction to re-evaluate the tenders or a recommendation for re-tendering or other action". (Emphasis supplied)

The above quoted provision entails that, the Tender Board has powers to direct an Evaluation Committee to re-evaluate tenders if it is not satisfied with the evaluation done. It is abundantly clear from the above provision that, the Evaluation Committee merely makes recommendations to the Tender Board. The mandate to award tenders is squarely vested onto the Tender Board, pursuant to the provisions of Section 31 of the Act.

That said, the Authority rejects the Appellant's argument that the Respondent's Tender Board had erred in law for ordering re-evaluation of tenders after an award recommendation had already been made as it has such powers to do so.

Having established that the law allows the Tender Board to order for re-evaluation of tenders, the Authority proceeded to examine whether the reasons

given by the Respondent that had necessitated the said re-evaluation were acceptable in the eyes of the law. In the course of doing so, the Authority reviewed the Tender Board minutes of 28th September, 2012 which contained three major reasons that led the Respondent to order for re-evaluation of tenders. The said reasons were as follows:

- i) Comparison of tenders using percentages during Post-qualification was not proper as comparison percentage wise was not in the Terms of Reference.
- ii) Disqualification of M/s Palray Ltd, the tenderer with the lowest price for failure to comply with the specifications provided in the Addendum was not proper as the said Addendum was not communicated to them.
- iii) Want of Neutrality on the part of the evaluators.

In order to satisfy itself if the reasons given were justified the Authority deems it necessary to analyse each of the reasons given as follows;

a) Comparison of tenders using percentages during Post-qualification

In substantiating the validity of this point the Authority reviewed the 1st Post-qualification Report and noted that, it was conducted through physical visitation to two tenderers namely: the Appellant and M/s Palray Ltd. The Appellant was Post-qualified for Lots 1 and 3 while M/s Palray Ltd was Post-qualified for Lot 2 and they were assessed in terms of technical and financial capabilities. The Post-qualification Report also shows that, after tenderers assessment on Technical and Financial capabilities, they were compared on percentages in terms of compliance to the Terms of Reference and to Technical Specifications whereby the Appellant was seen to have complied to the Terms of reference by 85% while M/s Palray Ltd was seen to comply by 59%. Also the said report indicates that the Appellant had complied with technical specifications by 95% while M/s Palray Ltd had complied by 40%.

The Authority noted further that, though the two tenderers were Post-qualified for different Lots, the Post-qualification Report seems to indicate that both

tenderers were evaluated for the same Lot. The Post-qualification Report does not show how the assessment of each tenderer for each Lot was carried out as it was done in the Preliminary and Detailed Evaluation stages.

The Authority reviewed the Tender Document and noted that, Post-qualification was provided for under Clause 35 of the ITB read together with Item 45 of the Bid Data Sheet. Clause 35.2 of the ITB states clearly that Post-qualification was to be carried out based on the criteria provided for under Clause 13.3 of the ITB. In addition, Clause 35.3 of the ITB requires the Post-qualification to be based on the examination of the documentary evidence of the bidder's qualifications submitted in their tender.

Having reviewed Clause 35 of the ITB, the Authority compared it with the 1st Post-qualification Report and observes that, the Evaluator's act of comparing tenders based percentages and criteria which were not provided for, was not proper as the Tender Document did not provide for percentage comparison. Further that, Post qualification was to be done based on the documents submitted, so the physical Post- qualification conducted was contrary to the Tender Document. Also, the

Authority is of the firm view that the Evaluator's act of post-qualifying and comparing tenderers for all Lots as if they were being assessed for the same Lot contravened the requirements of the Tender Document which requires evaluation to be conducted independently for each Lot so as to check a tenderer's capability to execute the work tendered for.

From the findings above, the Authority concurs with the Respondent's Tender Board that comparison of tenders based on percentages was not proper and that the evaluators had erred in law for failure to conduct Post-qualification in accordance with the procedures set out in the Tender Document.

b) Disqualification of M/s Palray Ltd

In relation to this point, the Authority revisited the Tender Board's Minutes of 28th September, 2012 and noted that, the Tender Board was dissatisfied with the disqualification of M/s Palray Ltd, the tenderer with the lowest price in Lot 3 on the reason that, their failure to comply with the specifications provided in the Addendum to the Tender Document was caused by the PMU's failure to communicate the said Addendum to

them. Hence, that omission led the Tender Board to order for re-evaluation.

In order to ascertain if the disqualification of M/s Palray Ltd was due to non compliance with specifications provided in the Addendum, the Authority revisited the 1st Evaluation Report and observed that, it is true that M/s Palray Ltd was disqualified for failure to comply with the specifications provided for in the Addendum. Further to that, the Authority reviewed the tender submitted by M/s Palray Ltd and noted that they had failed to comply with the said Addendum as they offered different specifications from what was required in the said Addendum.

From the above fact and the Respondent's self admission that they did not communicate the Addendum to M/s Palray Ltd, the Authority observes that, the issue of non compliance with the Addendum due to failure to receive communication ought to have been discovered during the 1st Evaluation as the Addendum to the Tender Document was supposed to form part of the Bidding Documents. Information contained in the tender submitted by M/s Palray Ltd indicates clearly that they had not received the

Addendum. Thus, the Authority is of the view that, had the Evaluators been diligent they would have noted the inconsistencies in the information provided by the tenderers and that it originated from two different sets of information, that is, the Tender Document and the Addendum. The Evaluators' failure to detect such inconsistencies until it was discovered by the Tender Board during the review of the Post qualification Report raises doubt as to their competence and credibility.

Furthermore, the Authority is of the view that, after the Respondent had satisfied themselves that the Addendum was not communicated to M/s Palray Ltd, they ought to have re-advertised the tender instead of ordering for a re-evaluation. It is the firm view of the Authority that, re-evaluation would not result in a fair assessment, since tenders were prepared on different information; some based on the additional information contained in the addendum while others based on information without the Addendum. Therefore, re-tendering would have enabled the Respondent to include all the required amendments to the Tender Document which would have allowed tenderers to be

able to prepare their tenders based on the same information.

Accordingly, the Authority is of the settled view that though the Respondent's failure to communicate the Addendum to M/s Palray Ltd was improper in the eyes of the law, the solution to that omission was not to re-evaluate the tenders but to order for re-advertisement.

c) Want of Neutrality on the part of evaluators

Reading between the lines of the Tender Board Minutes of 28th September, 2012, it is clear that, the Tender Board was not satisfied with neutrality of the 1st Evaluation Committee (see Item 3.0 at page 2 of the said Minutes).

The Authority hastens to agree with Tender Board that, want of neutrality of any Evaluation Committee is a sound ground for disregarding its recommendations and ordering re-evaluation by neutral committee. The Authority, however, doubts the neutrality of the Evaluation Committee in the 2nd Evaluation, in as much as one or two members of the disgraced committee

were appointed to sit in the purportedly neutral committee. This is a classical case of putting new wine in old bottles.

Therefore, despite the Tender Board's intention to install a neutral Evaluation Committee, this objective was not achieved.

Having considered the three points that led the Respondent to order for re-evaluation of the tenders, the Authority concludes that, the fact that the Addendum was not issued to all tenderers in itself was a sufficient ground to re-advertise the tender because re-evaluation could not cure this anomaly.

Therefore, the Authority's conclusion on sub issue one is that, the Respondent's act of re-evaluating the tenders was not proper in the eyes of the law.

b) Whether the Respondent's act of disregarding the Addendum to the Tender Document during the re-evaluation process was proper at law

In resolving this sub issue the Authority revisited the Appellant's argument that, the Respondent's act of disregarding the Addendum during the 2nd evaluation process had prejudiced them as their tender was prepared based on the information provided for in the Addendum. Thus, disregarding it had made their tender price to be higher than that of M/s Palray Ltd as the specifications in the Addendum were of high standards compared to those in the Tender Document.

In reply thereof, the Respondent submitted that, the act of disregarding the Addendum was necessitated by the fact that, some of the tenderers did not receive it, and therefore it was proper to disregard it, so as to evaluate all tenders on a common basis.

In order to ascertain the validity of the arguments by parties the Authority deems it proper to reproduce part of the Technical Specifications for Lot 3 which were

based on the Tender Document and those based on the Addendum.

TECHNICAL SPECIFICATIONS (TENDER DOCUMENT AND ADDENDUM)

S/N	ITEM DESCRIPTION (TENDER DOCUMENT)	ITEM DESCRIPTION (ADDENDUM)
7.	BED '6x6 WITH THREE PILLOW (made of mninga or Mkongo)	BED '6x6 WITH THREE PILLOW (made of mninga or Mkongo)
8.	MATRESS- sample available	MATRESS- with thick sponge of high quality
9.	CUPBOARDS – sample available	CUPBOARDS – for keeping clothes made of MDF material
10.	DRESSING TABLES – sample available	DRESSING TABLES – made of MDF material
12.	COFFEE TABLE – sample available	COFFEE TABLE – made of MDF material
13.	SOFA SET – of leather type	SOFA SET – made of leather with high quality

From the above table the Authority observes that, the technical specifications in the Tender Document indicated that the samples would be made available

while the Addendum issued indicated what was required in terms of mattresses, cupboards, dressing tables, coffee tables and sofa sets. During the hearing members of the Authority asked the Respondent if the samples indicated in the Technical Specifications were made available to the tenderers before opening of tenders. In reply thereof, the Respondent admitted not to have issued any samples as stated in the Tender Document.

Based on that fact, the Authority is of the view that the Respondent's act of simultaneously disregarding the Addendum in the 2nd evaluation and not availing samples as per the Tender Document indicates that, there were no evaluation criteria which could be used to assess tenderers' compliance to the specifications of mattresses, cupboards, dressing tables, coffee tables and sofa sets. Indeed, the Authority wonders how the Respondent was able to check tenderers' compliance with requirements of the Tender Document in the absence of the samples mentioned therein.

The Authority also observed that, much as the Addendum provided some details on the required

specifications, actual sizes required for the items to be supplied were not provided. For instance, actual thickness and quality of the mattress was not stated, as the words "thick sponge of high quality" does not state the thickness of the mattress required (Whether 6", 8" or other). Also the type and size of the Cupboards needed were not clearly provided as the words "for keeping clothes made of MDF material" do not portray the type and size of Cupboards required, (for example whether it was a single door or double door cupboards).

Furthermore, the Authority reviewed the tenders submitted and observed that, some of the tenderers who received the Addendum prepared their tenders based on the information contained therein while others based their tenders on the Tender Document. Hence, the Authority failed to comprehend how the Respondent managed to evaluate tenders that were prepared based on different specifications, as the material and sizes used for preparation of tenders were not the same.

In view of the above findings, the Authority finds the Respondent's act to have contravened Regulation 90(4)

of GN No. 97/2005 which requires evaluation to be consistent with terms and conditions issued to tenderers. The said provision states as follows;

“The tender evaluation shall be consistent with the terms and conditions set forth in the tender documents and such evaluations shall be carried out using criteria explicitly stated in the Tender Document” (Emphasis supplied)

From the above provision the Authority is of the settled view that, the Respondent’s act of disregarding the addendum had made non responsive tenders to be responsive contrary to Regulation 90 (16) of GN No. 97/2005 which states as follows;

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

According to Clause 28.2 of the ITB a substantially responsive tender is the one that conforms to all terms,

conditions and specifications of the Tender Document without material deviation or reservation. Thus, the Respondent's act of disregarding the Addendum indicates that they had intended to award the tender to a particular tenderer.

Furthermore, the Authority considered the Respondent's argument for disregarding the Addendum and observes that, it was their duty to ensure that all the tenderers were duly served with it, as it contained necessary information for preparation of their tenders. Thus, if some of the tenderers were not served, then no tenderer should have been punished for Respondent's failure to discharge its duty. The Respondent's failure to communicate the Addendum to all tenderers had contravened Clause 9.2 of the ITB which states as follows;

"Any addendum issued shall be part of the Bid documents pursuant to sub-Clause 7.1 and shall be communicated in writing or cable to all who have obtained Bidding documents directly from the Procuring Entity. Prospective bidders shall acknowledge receipt of each addendum by writing electronic mail, telex or

facsimile to the procuring entity” (Emphasis supplied)

The Authority also considered the Appellant’s argument that, their tender was found to have quoted the highest price because they had complied with high specifications provided in the Addendum. The Authority rejects that argument on the reason that, the specifications in the Tender Document could only be discerned from the samples which in this case were not provided.

Accordingly, it is the view of the Authority that, the Respondent’s act of disregarding the Addendum during the 2nd evaluation was not proper in the eyes of the law.

Having considered the Appellant’s grounds of Appeal in relation to the evaluation process, the Authority reviewed further the Evaluation Reports and noted, amongst others, the following anomalies;

- i) The Evaluators who conducted the 1st evaluation were not competent to do such an

evaluation as the team had five members and amongst them there was a Plumber, a Trainee and an Assistant Supplies Officer. Equally, there was no evidence attached to prove that the members of the 2nd Evaluation Committee were competent to carry out the said evaluation though the team consisted of a Quantity Surveyor, an Accountant, an Assistant Admissions Officer, an Assistant Lecturer and a Librarian.

In that regard, the Authority finds the Respondent to have contravened Section 37(4) of the Act which requires the members of the Evaluation Committee to be of an appropriate level of seniority and experience. The said Section 37(4) states 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)

ii) The Curriculum Vitae of the Members of the Evaluation committee were not attached to prove that they have the sufficient relevant experience which enabled them to evaluate the tender under Appeal. The Authority finds the Respondent to have contravened Clause 1.4 of the Evaluation Guidelines for Procurement of Works and Goods issued by PPRA in February 2007. The said Clause states as follows;

“A summary of qualifications and abridged curriculum vitae of each of the evaluation committee members should be made part of the evaluation report and where appropriate the records of the procurement process”. (Emphasis supplied)

iii) The Post qualification process was not conducted in accordance with Regulation 94 of GN. No. 97/2005. The said provision requires Post-qualification to be conducted for the Lowest Evaluated Tenderer only for purposes of ascertaining their capability to execute the

work. According to both Evaluation Reports, after completion of Detailed Evaluation, the reports were sent to the Tender Board with recommendations that Post-qualification be carried out to the recommended tenderers. That means, tenderers were recommended for award before capability to execute the intended work was ascertained.

The Authority finds the Respondent to have erred in law as after comparison of tenders Post-qualification was to be carried out to the Lowest Evaluated Tenderer before recommendations of award were made.

Furthermore, Clause 35.3 of the ITB states clearly that Post-qualification would be based on the documentary evidence submitted. The said Clause 35.3 states so in the following words;

“The determination will take into account the Bidder’s financial, technical and production capabilities. It will be based

upon an examination of the documentary evidence of the bidders qualifications submitted by the Bidder pursuant to sub-Clause 13.3,..." (Emphasis added)

The Authority reviewed the Bid Data Sheet and noted that the above quoted Clause 35.3 was not modified in the Bid Data Sheet that means Post-qualification was to be done based on the documentary evidence submitted. The Respondent's act of conducting Post-qualification through physical visitation had contravened their own Tender Document. Furthermore, had there been a need for additional verification of a tenderer's capabilities, the same ought to have been done after having evaluated the bidder's qualifications through the documents submitted with the tender which in this case was not done.

Moreover, the Authority reviewed the Post-qualification Report and noted that, in

assessing tenderers financial capability, the evaluators examined Bank Statement only. The Authority finds this to be improper as it is not possible to verify ones financial status through a Bank Statement. According to Regulation 10(4) (e) of GN No. 97/2005 a tenderer's financial status could prove through financial reports, audited accounts, profit and loss statement, balance sheet and financial projection for the next two years.

From the above made findings the Authority is of the settled view that, both evaluation processes were not properly done as they were marred by a myriad of irregularities.

Having noted that both evaluation processes were not conducted in accordance with the law, the Authority was unable to substantiate whether the re-evaluation process for Lot 1 had prejudiced the Appellant's rights.

Accordingly, the Authority's conclusion on the first issue is that, the evaluation process as a whole was not conducted in accordance with the law.

2.0 Whether the extension of the Bid Validity period by the Respondent prejudiced the Appellant's rights

In ascertaining the arguments by parties on this point the Authority deems it prudent to revisit Clause 17.2 which was the basis of the Appellant argument. The said Clause states as follows;

“In exceptional circumstances, prior to expiration of the Bid Validity period, the Procuring Entity may request that the Bidders consent to an extension of the period of validity of their Bids. The Request and Bidders responses shall be made in writing electronic, mail, telex and facsimile...”

The above provision entails that the procuring entities are required to seek consent of tenderers when they need to extend the Bid Validity Period.

The Authority also noted that, Clause 17(2) of the ITB is similar to Regulation 87(4) of GN No. 97/2005 which provides as follows;

“In exceptional circumstances, prior to the expiry of the original period of effectiveness

of tenders, the procuring entity may request suppliers contractors, service providers or assets buyers to extend the period for an additional specified period of time". (Emphasis added)

In order to substantiate whether the Respondent's extension of the Bid Validity period was in accordance with the law as claimed by themselves, the Authority reviewed the documents submitted and noted that the Respondent informed the tenderers vide a letter dated 26th October, 2012, on the extension of the Bid Validity period in the following words;

"...In this regard the validity period has been extended for further period of one month with effect from 1st November, 2012 to allow smooth contract award process..." (Emphasis supplied)

From the above letter it is crystal clear that, the tenderers were merely informed of the extension of the Bid Validity period for one month. However, having reviewed further the documents submitted, the

Authority noted that, tenderers including the Appellant responded to the notification and accepted the said extension. Based on that fact the Authority is of the view that, much as the Respondent's letter to the tenderers was not seeking their consent to extend the Bid Validity period, the tenderer's replies thereof indicated that they had consented to the extension as stated by the Respondent.

Based on the above findings the Authority is of the settled view that, even though the request for extension of time was not done in the form of a request as the law requires, the tenderer's acceptance indicated that they were in agreement. Also, from the documents submitted, the Authority was unable to establish how the extension of the Bid Validity period had prejudiced the Appellant's rights in the disputed tender process as claimed.

Furthermore, the Authority observed that, the extended Bid Validity Period had expired on 1st December, 2012 and up to this time the award is yet to be granted. That means, even if this Authority were to order the tender process to proceed, the finalization of the tender award process would be done outside the Bid Validity period

which would be contrary to Regulation 87(2) of GN. No.97/2005. The said regulation requires award of tender to be finalised within the Bid Validity Period.

The Authority also wishes to remind the Respondent that, the law allows for extension of the Bid Validity period up to a maximum of 120 days. The facts of this Appeal indicate that the 120 days had already lapsed as of 1st of December, 2012, as the Bid Validity period provided in the Tender Document was 90 days plus the 30 days that were extended. Hence, the Respondent cannot seek any further extension as that will be contrary to Regulation 87(3) of GN. No. 97/2005 which provides as follows;

“The validity period shall not exceed one hundred and twenty days from the date fixed for submission of tenders but it may vary depending on the nature and complexity of the contract”. (Emphasis added)

Accordingly, the Authority’s conclusion on issue number two is that, the Respondent’s extension of the Bid

Validity period had not prejudiced the Appellant's rights in the disputed tender process.

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

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

The Authority revisited the Appellant's prayer that the Respondent be ordered to award them Lots 1 & 3 and observes that, the said order cannot be issued as it has already been established that the whole evaluation process was marred by irregularities and the Bid Validity period has lapsed.

With regard to Respondent's prayer that, they should be allowed to proceed with the award process, the Authority rejects it as it has already been established under the first issue that the evaluation was marred by irregularities and the Bid Validity period has long expired.

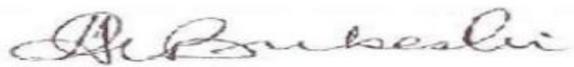
The Authority also considered the Respondent's prayer that the Appeal be dismissed and rejects it as the appeal has some merit. That said, the Authority orders the Respondent to re-start the tender process afresh in observance of the law in respect of Lots 1 and 3.

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

- re-start the tender process afresh in observance of the law in respect of Lots 1 and 3; and
- each party to bear their own costs

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

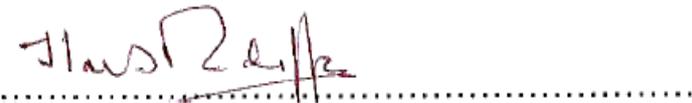
This decision is delivered in the presence of the Appellant and the Respondent this 18th day of February, 2013.



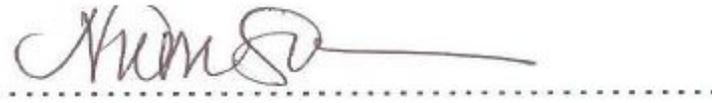
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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MR. H.S. MADOFFE



2. MRS. N.S. INYANGETE



3. MS. E.J. MANYESHA

