

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY**

APPEAL CASE NO. 77 OF 2010

BETWEEN

M/S MESACOM (UK) LTD..... APPELLANT

AND

**GOVERNMENT CHEMIST
LABORATORY AGENCYRESPONDENT**

CORAM:

- | | |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mr. M. R. Naburi | - Member |
| 3. Mr. K.M. Msita | - Member |
| 4. Mrs. N.S.N. Inyangete | - Member |
| 5. Ms. B.G. Malambuigi | - Secretary |

SECRETARIAT:

- | | |
|-----------------------|---------------------------------|
| 1. Ms. E.V.A. Nyagawa | - Principal Legal Officer, PPAA |
| 2. Ms. F. R. Mapunda | - Legal Officer, PPAA |

FOR THE APPELLANT:

1. Mr. Bethuel E. Mwanyika – Agent of Mesacom (UK) Ltd
2. Mr. David Mwanyika – Representative of Mesacom (UK) Ltd

FOR THE RESPONDENT

1. Mr. Athman S. Senzota – Manager, Business Support
2. Mr. Donald M. Aponde – Supplies Officer

This decision was scheduled for delivery today 8th October, 2010, and we proceed to deliver it.

The appeal at hand was lodged by **M/s MESACOM (UK) LTD** (hereinafter to be referred to as "**the Appellant**") against **GOVERNMENT CHEMIST LABORATORY AGENCY** commonly known by its acronym **GCLA** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. AE/007/2009-10/HQ/G/171 for Supply of DNA Reagents, Instruments, Supplies, Service/Repair and Spare Parts (hereinafter to be referred to as '**the Tender**')

According to the documents submitted to the Authority, the facts of the Appeal may be summarized as follows:

The Respondent advertised the tender for Supply of DNA Reagents, Instruments, Supplies, Service/Repair and Spare Parts *vide* The Guardian and Daily News of 13th October, 2009.

The tender opening took place on 4th March, 2010, whereby five tenderers submitted their tenders as listed herein below:

LOT NO.	NAME OF THE TENDERER				
	M/s Mesacom (UK) Limited	M/s Egerton Mercantile	M/s Bethelis Enterprises (T) LTD	M/s High Tech Systems (T) Ltd	M/s Immunolabs Medicals Supplies Limited
Lot 1	21,693.47 (USD)	18,477.00	USD 24,442.00 + Tshs. 1,424,156.25	22,604.40 (USD)	22,249.68 (USD)
Lot 2	78,605.05 (Sterling pounds)		-	133,181.72 (USD)	217,968.84 (USD)
Lot 3	20,894.66 (Sterling pounds)	28,388.20	-	39,379.95 (USD)	28,357.00 (USD)
Lot 4	26,137.79 (USD)	23,950.00	USD 36,739.00 + Tshs. 1,712,425.00	21,864.00 (USD)	23,144.52 (USD)
Lot 5	88,779.56 (USD)	86,364.00	USD 108,500.00 + Tshs. 500,000.00	23,623.67 (USD)	83,665.82 (USD)
VAT	Exclusive	Exclusive	Inclusive	Exclusive	Inclusive

The tenders were evaluated and the award was made to two tenderers as follows:

TENDERER	LOT NO.	TENDER PRICE	AWARDED PRICE
M/s Immunolabs Medicals Supplies Limited	Lot 1 –	USD 22,249.68	USD 22,249.68
	Lot 3 –	USD 28,357.00	USD 33,461.26
	Lot 4	USD 23,144.52	USD 23,144.52
	Lot 5	USD 83,665.82	USD 83,665.82
M/s Hightech Systems (T) Ltd	Lot 2	USD 133,181.72	USD 157,154.43.

On 1st July, 2010, the Appellant received a letter from the Respondent referenced MK/B.40/1D/8 dated 31st May, 2010, informing them that their tender was not successful.

The Appellant being dissatisfied with the tender results, on 15th July, 2010, lodged an appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as “the **Authority**”).

SUBMISSIONS BY THE APPELLANT

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

That, at the public opening of the tenders, the Appellant’s offers for Lots No. 1 and 2 were the lowest.

That, the Appellant’s tender was rejected for failure to comply with Clause 3.3 of the ITB.

That, the Respondent’s reasons for rejecting the Appellant’s tender, to wit, failure to submit TIN and VAT registration certificates, and valid business licenses are not valid as such conditions apply to national tenderers.

The said conditions do not apply to the Appellant as they are a foreign tenderer.

That, they have worked with the Respondent for ten years during which period they have noticed some elements of favouritism being practiced but could not report the same to the relevant bodies as it is difficult to prove such allegations.

That, during the said period of 10 years, the Appellant transacted their business through Eliezer & Sons Co. Ltd which was later changed to Nile Office Supplies Co. Ltd.

That, had the Appellant's tender not been falsely rejected, the Government would have saved a lot of money.

The Appellant therefore prayed for the following reliefs;

- (a) The tender process be reviewed and if it is established that the disqualification was not proper, the tender be restarted afresh.

(b) The Respondent be given a stern warning not to apply favoritism when undertaking official work.

(c) Compensation for the following costs:

S/ No.	Item	Amount Tshs.
1	Consultation legal fees at 3% of the bid price i.e. Tshs. 466,466,029/=	13,993,981/=
2	General damages 5% of the bid price i.e. Tshs. 466,466,029/=	23,323,301/=
3	Tender purchase fee	100,000/=
4	Tender preparation costs: <ul style="list-style-type: none"> - DHL costs - 409,600/= - Secretarial work 5 books - 200,000/= - Photocopy and transport - 90,400/= 	700,000/=
5	Appeal fees - PPAA	120,000/=
TOTAL		38,237,282/=

REPLIES BY THE RESPONDENT

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

During the hearing the Respondent raised a Preliminary Objection, to wit, that the Appellant did not observe the dispute settlement procedures provided for under the Act.

Arguing on the merits, the Respondent stated that, the Appellant's complaints cannot be accepted due to the following reasons;

- (a) The Appellant has an agent in Tanzania for quite a long time and therefore the said agent is obliged to have a business license and be registered by statutory organs.

- (b) That, the Respondent had expected the Appellant to submit the local agent's licenses and registration documents.
- (c) The Respondent decided to correct their previous mistake of transacting with the Appellant without the latter meeting the eligibility criteria, by disqualifying them as they knew they were not locally registered as required.

That, the Appellant had won a similar tender (contract agreement No. GCLA/PR/01/078) where the exemption stipulated under Clause 3.3 of the ITB was accorded to them.

That, had the Appellant complied with Clause 3.3 of the ITB they would have passed the eligibility test and qualified for further evaluation.

That, the allegations of favouritism are unfounded as the Appellant had supplied various goods to the Respondent for many years.

That, the contract which the Appellant is appealing against was signed on 20th May, 2010, and the successful tenderer has been partially paid, hence the option of re-starting the tender process is impracticable.

That, the Appeal be dismissed in its entirety.

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 Appellant's disqualification on the basis of Clause 3.3 of the ITB was proper**
- **Whether the award of the tender to the successful tenderers 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

During the hearing the Respondent raised a Preliminary Objection which centres on the jurisdiction of this Authority to entertain the Appeal. In their submissions the Respondent contended that the Appellant did not observe the dispute settlement mechanism provided for under the Act as they were supposed to direct their complaints first to the Accounting Officer, then to the Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**") and thereafter to this Authority.

The Authority wishes to enlighten the Respondent that, Section 80(3) which is in *pari materia* with Clause 48.3 of the ITB, read together with Section 82(2)(a) of the Act and Clause 52.1 of the ITB, ousts the jurisdiction of the Accounting Officer and PPRA to handle complaints once a procurement contract enters into force. The said Clauses 48.3 and 52.1 as well as Section 82(2)(a) read as hereunder:

“Clause 48.3 The head of a procuring entity shall not entertain a complaint or dispute or continue to do so after the procurement contract has entered into force.

Clause 52.1 The Bidder not satisfied with the decision of the Public Procurement Regulatory Authority or whose complaint cannot be entertained by the Head of the Procuring Entity or the Public Procurement Regulatory Authority shall appeal to the Public Procurement Appeals Authority (PPAA).

S. 82(2) A supplier, contractor or consultant entitled under section 79 to seek review may submit complaint or dispute to the Public Procurement Appeals Authority;

a) **if the complaint or dispute cannot be entertained under section 80 or 81 because of entry into force of the procurement contract** and provided that the complaint or dispute is submitted within fourteen days from the date when the supplier, contractor or consultant submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when supplier, contractor or consultant should have become aware of those circumstances.” (Emphasis added)

The above quoted provisions entail that the Authority has sole original jurisdiction on complaints where a procurement contract has already entered into force. For purposes of clarity, the Authority reproduces Section 55(7) of the Act which stipulates as to when a

procurement contract enters into force. The said subsection provides as follows:

“S. 55(7) the procurement contract shall enter into force when a written acceptance of a tender has been communicated to the successful supplier, contractor or consultant” (Emphasis added)

According to the facts of this Appeal, the Respondent communicated their acceptance to the Successful Tenderers on 6th May, 2010. Thus, the procurement contract entered into force on that particular date. Accordingly, when this Appeal was lodged by the Appellant, the procurement contract had already entered into force by virtue of Section 55(7) of the Act.

The Authority is of the settled view that, given the facts of this Appeal, the Appellant could neither submit their complaints to the Accounting Officer nor to PPRA as the only recourse open for them was to appeal directly to this

Authority in accordance with Section 82(2)(a) of the Act and Clause 52.1 of the ITB.

In the light of the above findings, the Authority rejects the Preliminary Objection raised and concludes that, this 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 Appellant's disqualification on the basis of Clause 3.3 of the ITB was proper

In order to ascertain whether the Appellant's disqualification was justified, the Authority, reviewed the documents submitted and the contesting oral submissions by parties *vis-a-vis* the applicable law. In so doing, the Authority's review hinges on Clause 3.3 of the ITB which is the centre of the controversy as well as the submissions by parties.

To start with, the Authority revisited submissions by parties on this point. It is not disputed that, the Appellant was disqualified during Preliminary Evaluation for failure to meet the eligibility criteria. The Respondent submitted that, the Appellant did not meet the eligibility criteria as they had tendered through an agent whose licences and registration documents were not attached to their bid as required under Clause 3.3 of the ITB. They added that, the Appellant's agent has an office in Tanzania and that any business operation must have a business licence and be duly registered with the relevant statutory bodies. The Respondent further submitted that, they disqualified the Appellant on the basis of past experience, in that, despite being awarded several contracts in the past, the Appellant never acquired local registration in accordance with the laws of the Land.

The Appellant on the other hand contended that, they are a foreign tenderer as the Principal, namely, M/s Mesacom (UK) Ltd is based in the United Kingdom while Nile Office Supplies Co. Ltd whose proprietor, one Bethuel Eliezer Mwanyika signed and submitted the tender on

behalf of the Principal in his capacity as the authorised agent. The Appellant disputes the reasons given by the Respondent for their disqualification because as a foreign tenderer they were supposed to acquire local licensing and registration with the relevant bodies after being awarded the contract pursuant to Clause 3.3 of the ITB and not before winning the tender. For purposes of clarity the Authority reproduces the said Clause 3.3 which states as follows:

“National Bidders shall satisfy all relevant licensing and/or registration requirements with the appropriate statutory bodies in Tanzania. **Foreign Bidders are exempted from this requirement but where selected as having submitted the lowest evaluated bid the successful Bidder shall register with the appropriate statutory body and shall be required to submit evidence of registration as an approved Service Provider in Tanzania before signing the Contract.**”
(Emphasis supplied)

The Authority noted that, the controversy on this issue lies on two matters. Firstly, whether by using the agent the Appellant was required to attach documents of the Agent to substantiate eligibility under Clause 3.3 of the ITB. Secondly, notwithstanding the fact that the Appellant is a foreign tenderer, they were supposed to have the relevant licenses as well as be registered with the relevant bodies as they had executed several contracts in the past.

Having revisited the documentary as well as the oral submissions by parties, the Authority deemed it necessary to analyse closely the content of Clause 3.3 of the ITB. The Authority is of the considered view that, the said clause is quite explicit as it gives two scenarios. Under the first scenario, national tenderers are obliged to fulfil the requisite licensing and registration requirements with relevant statutory bodies in Tanzania prior to submitting their tenders. Under the second scenario, foreign tenderers are exempted from this requirement but are required to obtain licenses and the necessary registration after being awarded the tender prior to

contract signing. That is to say, foreign tenderers are required to obtain the necessary licenses and registration after winning the tender and not otherwise.

During the hearing it was evident that, both parties did not dispute the fact that the Appellant is a foreign tenderer. The issue in dispute was therefore, whether the Appellant's tender should have been accompanied by the agent's licenses and registration documents pursuant to Clause 3.3 of the ITB.

Relating the above interpretation of Clause 3.3 of the ITB to the facts of this Appeal, the Authority observes that the Appellant being a foreign tenderer was exempted from attaching documents showing their eligibility as that would have been a material requirement after winning the tender. The Authority further observes that, the requirement for foreign tenderers to register with the relevant local bodies should have become relevant after the tender award and not during the evaluation of the tenders. This position is further cemented by Item 14.6 of the Bid Data Sheet which confines the requirement to

submit “**evidence to substantiate the legal status**” to local tenderers only. Moreover, the previous contracts between the Respondent and the Appellant are not relevant to this Appeal, as Clause 3.3 of the ITB is not general as it dwells on each specific tender separately.

With regard to the issue of the eligibility of the Appellant’s agent, the Authority is of the view that, the tenderer in the tender under Appeal was M/s Mesacom (UK) Ltd and not the Agent. This fact is further evidenced in the previous contract between the Respondent and the Appellant where the agreement was between the Principal and the Respondent. This means the Agent’s mandate is confined to the matters stated in the power of Attorney. The Authority therefore opines that, the Respondent erred in assuming that the agent should have met the eligibility criteria as the said agent was not a tenderer. The Authority emphasizes that, Clause 3.3 of the ITB comes into play where a national tenderer participates in a tender, and the Agent in this Appeal, namely, Nile Office Supplies Co. Ltd did not take part in this particular tender.

The Authority is also concerned with the conduct of the Respondent on this point, while the Appellant was said to have been disqualified for failure to meet the eligibility criteria simply because they tendered through an agent, another foreign tenderer, namely, M/s Egerton Mercantile who did not use an agent was also disqualified for, amongst other things, the same reason as the Appellant's. This shows clearly that, the Respondent is either ignorant of the application of Clause 3.3 of the ITB or purposely misapplied it.

Accordingly, the Authority concludes that, the disqualification of the Appellant on the basis of Clause 3.3 of the ITB was not proper at law.

3.0 Whether the award of the tender to the successful tenderers was proper at law.

In resolving this issue which emanated from the Appellant's contention that, the award of the tenders was

based on favouritism, the Authority reviewed the evaluation of the tenders. In the course of doing so, the Authority discovered that the evaluation process was not properly conducted as evidenced in the shortfalls detected first in the Appellant's tender followed by the three tenders which had qualified for Detailed Evaluation. The said shortfalls are as hereunder:

(i) **Review of the Appellant's tender:**

The Appellant's tender had some inconsistencies and an anomaly as hereunder:

- The Form of Tender as well as the Bidder's information Form in the Appellant's tender, indicated that they tendered as M/s Mesacom (UK) Ltd through their agent, namely, Eliezer & Sons Co. Ltd. The said Form of Tender was signed by one Mwanyika in his capacity as an agent. The Authority does not accept the Appellant's submission that this was an error occasioned by use of standard forms which were

previously used by Eliezer & Sons Co. Ltd that was later changed into Nile Office Supplies Co. Ltd. The Authority is of the view that, the purported error is unacceptable as the Form of Bid forms the basis of the tender. According to the Form of Bid, the Appellant's agent in the tender under Appeal was Eliezer & Sons Co. Ltd and not Nile Office Supplies Co. Ltd.

- The power of Attorney was issued by Nile Office Supplies Co. Ltd to its director one Bethuel Eliezer Mwanyika and it was witnessed by Mesacom (UK) Ltd. The Authority is of the considered view that, the power of Attorney was defective in two ways. Firstly, the delegation of powers was supposed to be issued by M/s Mesacom (UK) Ltd to the Agent. Secondly, the name of the agent should have been the same as the one stated in the Form of Bid, that is, Nile Office Supplies Co. Ltd.

The above mentioned anomalies rendered the Appellant's tender to be defective as it was signed by a person who was not duly authorised to do so in accordance with Clauses 11.1(f) and 28.1(b) of the ITB which state as hereunder:

"11.1 The Bid prepared by the Bidder shall constitute the following components:

(f) Written Power of Attorney authorizing the signatory of the Bid to commit the Bidder, in accordance with ITB Clause 20.2;

28.1 Prior to the detailed evaluation of bids, the Procuring Entity will determine whether each bid:

(b) has been properly signed;" (Emphasis supplied)

- The Appellant submitted **unaudited financial reports** for three years contrary to Items 11 and 13 of the Bid Data Sheet which required them to attach

audited financial reports. It should be noted that this requirement was mandatory.

In view of the above mentioned anomalies, the Authority observes that, the Appellant should have been disqualified during Preliminary Evaluation for being substantially non responsive. Linking these findings to the Authority's conclusion on the second issue, the Authority is of the settled view that, the Respondent's reasons for disqualifying the Appellant were wrong. That is to say, had the evaluation process been properly done the Appellant would have been disqualified anyway.

(ii) Review of the tenders submitted by the other tenderers:

- The power of Attorney submitted by M/s Immunolabs Medical Supplies Ltd, who won four out of the five lots, is defective as it was not signed by any director purporting to transfer the said powers to the deponent. This means, the said delegation was not valid as the transferor did not have the mandate to

do so. Hence their tender was not valid as it was signed by a person who was not duly authorised in the eyes of the law as it contravened Clause 20.2 of the ITB read together with Item 26 of the Bid Data Sheet. The said Item 26 states that,

“Written confirmation of authorization is Power of Attorney.” (Emphasis added)

The Authority observes that, had the Evaluation Committee been diligent, the tender submitted by M/s Immunolabs Medical Supplies Ltd should also have been disqualified at the Preliminary Evaluation stage for being substantially non responsive. Accordingly, the award of Lots 1, 3, 4 and 5 made to them was not proper.

- The tender submitted by M/s HighTech Systems (T) Ltd indicated to have attached Audited Financial reports under Annexure F but the said Financial Reports were not attached. This omission should have rendered their tender to be substantially non

responsive as the said requirement was mandatory under Items 11 and 13 of the Bid Data Sheet. This tender should have been equally disqualified during Preliminary Evaluation for non compliance. Thus, the award for Lot 2 made in their favour was not proper as the tender should have been rejected for being non responsive in accordance with Regulation 90(11)(c) of GN. No. 97/2005.

- The Authority could not find explanation as to why the Evaluation Committee misled the Tender Board by indicating that M/s HighTech Systems (T) Ltd had submitted Financial Reports while they did not.
- The tenders submitted by M/s HighTech Systems (T) Ltd and M/s Immunolabs Medical Supplies Ltd being substantially non responsive, yet were subjected to Detailed Evaluation contrary to Regulation 90(6) of GN. No. 97/2005 which is in *pari materia* with Clause 28.1 of the ITB. The said provisions require detailed evaluation to be carried out for only those tenders which are substantially responsive. For purposes of

clarity the Authority reproduces the said Regulation 90(6) which states as hereunder:

“Prior to detailed evaluation of tenders, the tender evaluation committee **shall carry out a preliminary examination of the tenders to determine whether or not each tender is substantially responsive to the requirements of the tender documents,** whether the required guarantees have been provided, whether the documents have been properly signed and whether the tenders are otherwise generally in order. ” (Emphasis added)

The Authority observes that, despite the two tenders being substantially non responsive, they were subjected to Post-qualification and subsequently awarded the tender.

The Authority also noted that the Evaluation Committee did not treat the tenders equally as some were

disqualified for being substantially non responsive, while others which were equally non responsive were subjected to further evaluation instead of being disqualified. Such conduct is discriminatory as it contravened Section 46(4) of the Act and also goes against the principles of equality and fairness of the tenderers as per Section 43(a) and (b) of the Act. The said provisions state as follows:

“S. 46(4) Any qualification criteria shall be made known to, and shall apply equally to all suppliers, contractors or consultants and a procuring entity shall impose no discriminatory criteria, requirement or procedure with respect to the qualifications of any supplier, contractor or consultant.

S. 43 In the execution of their duties, tender boards and procuring entities shall strive to achieve the highest standards of equity, taking into account:-

- (a) equality of opportunity to all prospective suppliers, contractors or consultants;**
- (b) fairness of treatment to all parties;"** (Emphasis added)

In view of the above findings, the Authority is of the considered view that, had the Preliminary Evaluation been conducted properly, all the five tenderers who took part in the tender under Appeal should have been disqualified at that stage for being substantially non responsive. The Authority is concerned that, the above mentioned shortfalls were neither detected by Procurement Management Unit (PMU) nor by the Tender Board. Such conduct leaves a lot to be desired.

The Authority also deemed it necessary to consider the Appellant's accusations of favouritism on the part of the Respondent. Much as it has been evident that the evaluation of the tenders was not properly done which is a clear contravention of the law, the Authority did not get

any proof to substantiate the prevalence of favouritism in the tender process conducted by the Respondent.

Accordingly, the Authority concludes that the award of the tender to the Successful Tenderers, namely, **M/s HighTech Systems (T) Ltd** and **M/s Immunolabs Medical Supplies Ltd** was not proper at law.

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

Having resolved the contentious issues, the Authority considered each party's prayers as follows:

(a) The Appellant's prayers:

The Authority revisited the Appellant's four requests and resolved them as hereunder:

- (i) Review the tender process and in case it is established that the disqualification was not justified then the tender process be**

restarted afresh or compensation be paid in lieu of

Having satisfied itself that, the tenders submitted by the Appellant as well as the Successful Tenderers were substantially non responsive, the Authority observes that the award thereof were a nullity in the eyes of the law. Thus, the Appellant's prayer is accepted and the Authority orders the tender process to be started afresh in observance of the law.

(ii) The Respondent's Tender Board be given a stern warning not to apply favours when undertaking official work:

The Authority rejects this prayer as the matter has already been aptly addressed under the third issue.

(iii) Compensation of Tshs. 38,237,282/=

Taking cognizance of the Authority's findings and conclusions in the second and third issues, the Authority

partially upholds this Appeal and finds that the Appellant is entitled to compensation for some costs incurred in pursuit of this Appeal as follows:

- Legal consultation fees – **Tshs. 2,000,000/=** only;
and
 - PPAA Appeal filling fees – **Tshs. 120,000/=**
- Total Tshs. 2,120,000/=.**

With regard to the claims for refund of tender purchase fee, tender preparation and payment of general damages, the Authority rejects them because if the evaluation of tenders had been properly done the Appellant could not have won the tender anyway.

(b) The Respondent’s prayer:

With regard to the Respondent’s prayer that the Appeal be dismissed for lack of merit, the Authority rejects it as the appeal has some merit.

Other matters that caught the attention of the Authority

In the course of handling this Appeal the Authority discovered the following matters which are worth mentioning:

- (a) Item 1.0 of the Evaluation Report refers to the tender for **“supply of Calendars, Diaries and Printed Stationeries”** instead of **“Supply of DNA Reagents, Instruments, Supplies, Service/Repair and Spare Parts”**. This clearly shows the Evaluators did not proof read their Report.

- (b) Page 5 of the Evaluation Report contained Table 2 whose sub-item 2.3(a) – (c) indicated wrong dates regarding the tender advertisements. The said dates were **13th October, 2010; 12th October, 2010** and

15th October, 2010 respectively. It should be noted that, even at the time of the delivery of this decision the said dates are not yet due.

- (c) The minutes of the Tender Board meeting of 14th April, 2010, do not indicate the contract amounts awarded to the Successful Tenderers. The Authority is of the view that, the decision of the Tender Board ought to have stated categorically the awarded tender prices.

- (d) The Respondent communicated the tender results to the Appellant vide letter referenced MK/B.40/1/D/8 dated 31st May, 2010, in which neither the names of the Successful Tenderers nor the contract sum was disclosed. This contravened Clause 40.3 of the ITB which states as hereunder:

“Upon the successful Bidder’s furnishing of the performance security pursuant to ITB Clause 42, **the Procuring Entity will promptly notify each unsuccessful Bidder, the name of the successful Bidder and the Contract amount** and will discharge the bid security or bid securing declaration of the Bidders pursuant to sub-clause 18.7.”
(Emphasis supplied)

(e) The Respondent’s Written Replies to the Statement of Appeal dated 26th July, 2010, signed by Head of the PMU had the following shortfalls:

(i) The Written Replies states in part as follows:

“Soon after receiving your notification of the Appeal, I reviewed the Evaluation Report

for the Tender and bidding documents...” (Emphasis supplied)

The Authority observes that, the Respondent did not have powers to do so as per Clause 48.3 of the ITB which ousts such powers in the following words:

“The head of a procuring entity shall not entertain a complaint or dispute or continue to do so after the procurement contract has entered into force.” (Emphasis added)

- (ii)** The Authority doubts the competence of the Head of the PMU, in the light of this Written Reply whose content lack clarity and the language used leaves a lot to be desired. For instance, Item 3 on page 1 of the said Written Replies reads:

“According to the procurement records available at the GLCA office, MESACOM (UK) Ltd **has ever worn** a similar tender ... It was expected that MEASACOM (UK) Ltd, **had he complied to ITT 3.3 he would have all the required licensing and registrations. Failure to that he loses the trust offered to him at the first time.**” (Emphasis added)

- (f) During the hearing the Appellant conceded that they had been supplying goods to the Respondent for the past 10 years and that in executing the various contracts awarded, they never complied with the requirement to acquire licensing and registration with relevant bodies in Tanzania. The Appellant further submitted that, they transacted through Eliezer & Sons Co. Ltd which was later changed into Nile Office Supplies Co. Ltd. The Authority is of the view that, this was highly irregular as it contravened

Section 46(3) of the Act which is in *pari materia* with Clause 3.3 of the ITB. The Respondent should have ensured that the said requirement is met before signing the respective contracts.

Having considered all facts and evidence, the Authority concludes that, the evaluation process was not properly conducted hence leading to awards being made in favour of non responsive tenders in contravention of the law.

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

- **Start the tender process afresh in observance of the law.**
- **Compensate the Appellant a sum of Tshs. 2,120,000/= being costs incurred in pursuit of this appeal.**

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

Decision delivered in the presence of the Appellant and the Respondent this 8th October, 2010.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MR. M. R. NABURI



2. MRS. N.S.N INYANGETE



3. MR. K. M. MSITA

