



## Legal significance of signing covenant forms by evaluation committees in tendering processes in Tanzania Mainland

Mohammed Saheb Hussain<sup>1</sup>, Moh'd Masoud Khartoum<sup>2</sup>

<sup>1</sup> Professor of Law, Manair College of Law, Khammam, Telangana, India

<sup>2</sup> Faculty Member, College of Humanities and Social Science, School of Science, Department of Law, University of Dodoma, Dodoma, Tanzania. At present Ph. D Research Scholar in Law, At UDSM School of Law, Dar- Es –Salaam, Tanzania, East Africa

### Abstract

The paper focuses on legal significance of signing covenants forms by evaluation committee in tendering processes in Tanzania Mainland. The authors of the paper believe that, when an importance of signing covenant forms is realized perfectly by evaluation committee members; there is a high possibility of building a robust procurement system in Tanzania Mainland. The main purpose of signing covenant forms by evaluation committee members is to enable them performing evaluation functions transparently and with high integrity.

The first part of the paper deals about the introduction. The second part is about Tender Evaluation Process in Public Procurement in Tanzania Mainland. Tender evaluation process is mainly meant to be steps that are the Evaluation Committee normally follows when making evaluation of the tender assigned. The third part spells on legal framework on covenant forms in evaluation process in Tanzania Mainland. This encourages evaluation committee members to observe equality and preserve confidentiality in respect of bids submitted by the Bidders. The part covers signing covenants forms by evaluation committee members, in terms of the procurement laws and regulations in place, is mandatory and not an option. Every committee member participating in the evaluation process is therefore, obliged to sign the covenants forms. The last part is concluded in this paper that, it is a requirement under current public procurement laws applicable that each and every evaluation committee member to sign covenants forms which are provided to them during evaluation process.

**Keywords:** signing covenant forms-evaluation committees-tendering processes, Tanzania Mainland

### 1. Introduction

The paper focuses on legal significance of signing covenants forms by evaluation committee in tendering processes in Tanzania Mainland. The 2011 Public Procurement Act, amended by the 2016 Public Procurement (Amendment) Act, the Accounting Officer is under obligation to form an Evaluation Committee, for purposes of making evaluation of the tenders and prepare reports thereof [1] The evaluation report is eventually prepared after evaluation is over. It is then submitted to the Tender Boards for further deliberations. The authors of the paper believe that, when an importance of signing covenant forms is realized perfectly by evaluation committee members; there is a high possibility of building a robust procurement system in Tanzania Mainland. This also enhances accountability and transparency in tendering processes. It also helps performing procurement functions in openness and transparent ways. This is because, through signing covenant forms by evaluation committee members, and from the contents contained in the covenant forms, make and compel evaluation committee members to conduct evaluation in effective, efficiency and integrity ways. The main purpose of signing covenant forms by evaluation committee members is to enable them performing evaluation functions transparently and with high integrity.

### 2. Tender Evaluation Process in Public Procurement in Tanzania Mainland

A 'tender' is the process of an entity/organisation inviting suppliers to provide a formal written submission for a good or service. Since the study covers tender or bid evaluation process, this part, among other things, discusses criteria used by Tender Evaluation Committee in completing Bid Evaluation Process. The purpose of an evaluation process in sourcing is to identify which bid offers the best value for money. In other words, the Evaluation Team considers the most economically advantageous tender or proposal. The criteria that are specified in the invitation to tender document are the basis for the buying decision [2] The best practice is to provide a costing template for the bidders to complete so that comparison of the bids can be easily made without a lengthy calculation and analysis process. Tender evaluation process is mainly meant to be steps that are the Evaluation Committee normally follows when making evaluation of the tender assigned. Tender evaluation process for goods, works and services are done based on the following procedural steps as indicated hereunder:

#### 2.1 Preliminary Examination of Tenders

This is a first important stage in evaluation process in public procurement. This stage basically involves the examination

of all tenders that have been received by the entity. In this stage, the Evaluation Committee looks for substantive, technical and commercial responsiveness in relation to Invitation to Tenders (ITT) or Tender Bidding Document (TBD) <sup>[3]</sup> The Evaluation Committee in this stage mainly performs this exercise, with aim at eliminating tenders that are not responsive to technical specifications and other important commercial requirements as set out in the Tender Bidding Document. The Evaluation Committee further examines the extent to which the tenders submitted are either entirely unacceptable or have merit for further consideration in other evaluation stages. The Evaluation Committee while conducting preliminary examination of the bid, there are a number of aspects to be taken into consideration. The Committee considers if bids are completed and signed. The Committee also examines if all documents instructed in the tendering document have been submitted. The team again examines if all documents haven't been initiated and signed accordingly. The team further examines if tender security, bond or declaration have been submitted in terms of Tender Bidding Document. Other important aspects that the Evaluation Committee considers while conducting evaluation is whether the bidder is responsive to eligibility conditions and if the goods are responsive to eligibility criteria. The team also looks if there are any major deviations from commercial tender conditions as provided for in the Public Procurement Regulations in place <sup>[4]</sup>.

Usually, for a particular tender to be considered responsive, there are certain issues that need to be taken into consideration as well. The Evaluation Committee, among other things, examines if there is no major exceptions, deviations to commercial tender conditions, and also compliance with technical specifications, where all tenders should always meet the letter and intent of specifications. It is important to note that, when Bids meet all above indicated conditions, then such Bids are declared to be substantially responsive. In terms of Public Procurement (Amendment) Regulations, 2016 <sup>[5]</sup>, clearly provides for material deviations to commercial terms and conditions, that can be used by the Evaluation Committee to reject a particular tender submitted to the Entity. Those terms and conditions that may be used in rejecting the tenders, in terms of the Public Procurement (Amendment) Regulations, 2016 include failure to sign the Bid Form and Price Schedule by

the responsible or authorized person or persons <sup>[6]</sup>. The other reason for rejection is failure to satisfy eligibility requirements of the tender concerned. The rejection can also happen for failure to submit a tender security as specified in the tendering documents. The Bid can also be rejected for failure to satisfy the tender validity period. Another reason for rejection of the Bid during tender evaluation process is inability to meet the critical delivery schedule or work schedule as clearly specified in tendering documents, where such schedule is a crucial condition with which all tenderers should comply. Other important reasons for rejection of Bid are failure to comply with minimum experience criteria as specified in the tendering documents as well as a conditional tender such as conditions in a tender which provides limitations with regard to tenderer's responsibility in accepting an award. The Bid may also be rejected for want of inability to accept the price adjustment formulae of the tendering documents. It can occur when stipulating price adjustment when fixed price tenders were invited or even subcontracting in a substantially different amount or manner than that permitted. Furthermore, the Evaluation Committee can reject the Bid for failure to submit major supporting documents required by the tendering documents to determine substantial responsiveness of a tender <sup>[7]</sup> It should also be noted that, the procuring entity can reject the Bids submitted by the any Bidder when it is found by the price in combination with other constituent elements of the submission is abnormally low in relation to the subject matter of the procurement tendered by the Bidder <sup>[8]</sup>.

## 2.2 Technical Evaluation of Tenders

This is a second important stage in the making of evaluation of tenders in public procurement. The stage mainly involves a comparison of each Bid submitted for evaluation process. Such comparison of each Bid is made considering to the technical requirements of the description of goods, works or services on either pass or fail grounds. The main duty of the Evaluation Committee is, to make determination on whether the Bids are technically responsive or otherwise. As earlier stated, the Evaluation Committee conducts a technical evaluation by making comparison of each and every Bid to the technical requirements of the description of goods, works and service in the Tender Bidding Document. This is carried out basically to determine the responsiveness of Bids

<sup>3</sup> *Ibid*, Instructions to Tenderers (ITT), section II, Clause 3 and 4 of the Standardized Bidding Document as issued by PPRA.

<sup>4</sup> See Regulation 204 (2) of the 2013 Public Procurement Regulations, amended by 2016 Public Procurement (Amendment) Regulations. See also Cholopray, A. K. D., "The Bid Evaluation Process" The Procurement Classroom, 2020. p.12. See also Lynch, J., "Evaluation of Offers: Preliminary Considerations", The Procurement Classroom, 2020, pp. 2-5. See also Interagency Procurement Working Group (IAPWG), "Evaluation Process", Procurement Network, 2012. pp. 10-15. See also IBRD-IDA, "Evaluation Criteria: Use of Evaluation Criteria for Procurement of Goods, Works and Non-Consulting Services Using RFB and RFP", Procurement Guidance, July 2016, pp. 5-6. See also PPIAF, "Evaluation Criteria and Evaluation Process Regulations", APMG International, 2020, p. 7. See also Boateng, V., "An Examination of Tender Evaluation Practices in Metropolitan, Municipal and District Assemblies of Ashanti Region", A Thesis Submitted to the Department of Building Technology, Kwame Nkrumah University of Science and Technology in Partial Fulfillment of the Requirement for the Degree of Master of Science in Procurement Management, June 2014. pp. 15-17.

<sup>5</sup> *Ibid*, Regulation 204 (2) of the 2013 Public Procurement Regulations amended by 2016 Public Procurement (Amendment) Regulations.

<sup>6</sup> Regulation 16 (1) of the 2013 Public Procurement Regulations, amended by 2016 Public Procurement (Amendment) Regulations. The rejection of tenders at preliminary evaluation stage was also observed in celebrated case of *M/S M. A. K. Engineering Co. Ltd & M/S Softnet Ltd JV v. National Institute of Transport*, Appeal Case No. 113 of 2011. This was an Appeal in respect of Tender No. PA/028/2010/2011/T3Revised/001/1. The Tender was for Supply and Installation of Air Condition and Ventilation System for Proposed Construction of Library Phase III. The Appeal was allowed and Respondent was ordered to start the tender process afresh in observance of the laws.

<sup>7</sup> See Instructions to Tenderers (ITT); section II, Clause 11.1 of the Standardized Bidding Document as issued by PPRA.

<sup>8</sup> See Regulation 17(1) of the 2013 Public Procurement Regulations, amended by the 2016 Public Procurement (Amendment) Regulations. For further information on preliminary evaluation of tenders, see also ADB, "Guide on Bid Evaluation", Asian Development Bank, June, 2018, pp. 1-21. See also IBRD-IDA, "Abnormally Low Bids and Proposals: Guide to the Identification and Treatment of Abnormally Low Bids and Proposal", Procurement Guidance, July, 2016. pp. 6-7. See also Perez, A., and Armijo, A., "Governance Module", RAGTIME, European Union's Horizon 2020 Research and Innovation Programmes, 2020. pp. 1-5.

submitted by the tenderers. Procedurally, in this stage, when the Evaluation Committee make evaluation in this stage, it determines on whether Bids submitted are, or are not, substantially responsive to the technical standards and requirements as indicated in the Tender Bidding Document. More importantly, as to what are the technical standards or requirements to be used in conducting Technical Evaluation, all these are clearly stated in the Tender Bidding Document. These requirements or technical standards that are mostly considered while conducting technical evaluation of the tender include conformity to specifications, standards, drawings or terms of reference, without material deviation or reservation<sup>[9]</sup> The Committee also dwells into satisfactory understanding of an assignment, which normally demonstrated by a particular methodology or design as planned by the tenderer concerned. The Committee further examines suitability of staffing, equipment and other machinery capability and other arrangements for supervision, monitoring and management of the project in particular. The Committee also takes into account any other criteria that has a direct relationship with regard to the performance of the procurement contract, without keeping aside the issue of timely delivery of the procurement within a time frame as agreed between parties to the procurement contract. The Public Procurement (Amendment) Regulations, 2016 stipulates clearly that all tenders will be evaluated for substantial responsiveness to the technical requirements of the tendering documents and non-conformity to technical requirements as issued by the entities<sup>[10]</sup> This non-conformity to technical requirements can be justifiable grounds for rejection of a tender. The non-conformity to technical standards or requirements, which is justifiable grounds for rejection of the tenders include, failure to tender for the required scope of work as instructed in the tendering documents, and where failure to do so has been marked as unacceptable. Another ground for rejection

of the tender based on technical evaluation is failure to meet major technical requirements, for instance, offering completely different types of equipments or materials from the types as specified, plant capacity below the minimum specified, or equipments not able to carry out the basic functions for the intended projects<sup>[11]</sup> Indeed, rejection of the tender based on technical evaluation can happen when presentation of absolutely unrealistic and inadequate implementation plans and schedules regarding performance, technical or service factors have occurred<sup>[12]</sup> It is also important to bear in mind that, at this stage, the Evaluation Committee when conducting evaluation, evaluation is conducted taking into consideration of the Tender Bidding Document. It is, therefore, noted that, any technical requirements which are not included or specified in the Tender Bidding Document should not be taken into consideration while conducting technical evaluation of the tenders. In other words, any requirements beyond Tender Bidding Document will not be considered for technical evaluation by the Evaluation Committee. It is contended that, when there is material deviation, this is taken as a ground in the rejection of the Bid, and in such a scenario, the Bid is not subjected for further financial evaluation and comparison. It is also said that, non-material deviations, however, is allowed and the Evaluation Committee may bless their corrections.

### 2.3 Financial or Commercial Evaluation of Tenders

Having conducted both preliminary and technical evaluation, the next important stage of evaluation in the evaluation process is financial evaluation of the tender. The Evaluation Committee, in this important stage, conducts financial evaluation to determine mostly the evaluated price of each Bid by making evaluation with comparison<sup>[13]</sup> This is mostly done by the Evaluation Committee by examining each tender price or prices as contained or specified in the Bid<sup>[14]</sup> The most important thing which the Committee takes into account while conducting financial evaluation is to determine the “Lowest Evaluated Bid”<sup>[15]</sup>, which is also

<sup>9</sup> Pursuant to Instructions to Tenderers, section II, Clause 29.2, the procuring entity is required to make Technical Evaluation of the Bids submitted in accordance with ITT, section II, Clause 12 to confirm that all requirements specified in section VI and VII of the Schedule of Requirements of the Standardized Bidding Document have been met without material deviation. This was also observed in a famous case of *Joseph Gleave v. Secretary of State for Defence, the Ministry of Defence*, MOD. In this case, the Ministry of Defence (MOD) was procuring 6,000 product lines of hand tools for the military. The tender documents set out the relevant product lines by reference to a particular manufacturer's part number. The claimant alleged that this was a breach of Regulation 42 of the Regulations, which provides that technical specifications should not generally refer to specific products, makes or trademarks which may have the effect of favoring certain bidders or eliminating others. If reference to a particular product is essential, then the reference should be accompanied by the words “or equivalent”. The court decided that in the particular circumstances of this case, there was no way the parties could be ready for trial before the contract is due to be awarded. This is also available online at [https://www.clarkslegal.com/Blog/Post/Public\\_Procurement\\_Challenging\\_the\\_Tender\\_Documents](https://www.clarkslegal.com/Blog/Post/Public_Procurement_Challenging_the_Tender_Documents). (Accessed on 10<sup>th</sup> September, 2018).

<sup>10</sup> See Regulation 125(2) of the 2013 Public Procurement Regulations, amended by the 2016 Public Procurement (Amendment) Regulations. See also Oladapo, A. A., and Odenyinka, H., “Tender Evaluation Methods in Construction Projects: A Comparative Case Study”, *Acta Structilia*, Vol. 13, No. 1, 2006, pp. 106-131. See also Kocak, S., Kazaz, A., and Ulubeyli, S., “Subcontractor Selection with Additive Ratio Assessment Method”, *Journal of Construction Engineering, Management and Innovation*, Vol. 1, No. 3, 2018, p. 6. See also Hafizah, N., Lamsali, H., and Sathyamoorthy, D., “Multi-criteria Decision Making for Technical Evaluation of Tenderers: A Review of Methods Employed”, *Defence and Technical Bulletin*. Vol. 8, No. 2, 2015. p.10.

<sup>11</sup> In a famous case of *SC Enterprise Focused Solutions Srl v. Spitalul Judetean de Urgenta Alba Iulia*, [2015] EUECJ C-278/14. In this case, a Romanian supplier, EFS, brought proceedings against a hospital where its bid for the supply of computing systems and equipment had been rejected. The hospital had published tender documents including a detailed technical specification which, amongst other things, provided that the central unit of the computing system must have a processor equivalent to at least an Intel Core i5 3.2 GHz. The ECJ found that contracting authorities would not be able to comply with their transparency obligations if they were able to disregard conditions they had themselves imposed. The hospital was not therefore permitted to amend the award criteria during the course of the tender, and its rejection of EFS's tender was unlawful.

<sup>12</sup> A Bid may be rejected by the Evaluation Committee and consequently disqualified in terms of Instructions to Tenderers (ITT), section II, Clauses 4.1, 7.4, 17.2, 17.4, 17.5, 18.1, 18.3, 25.1, 26.2, 27.1, 28.1, 29.2, 31.3, 32.1 and 33.1 of the Standardized Bidding Document as issued by PPRA.

<sup>13</sup> This normally is done by the Evaluation Committee pursuant to Instructions to Tenderers (ITT), section II, Clause 31.1 of the Standardized Bidding Document as issued by PPRA.

<sup>14</sup> See Instructions to Tenderers (ITT), section II, Clause 12.1, 12.2, 12.3 (a), (b) and (c), 12.4, 12.5, 12.6, 13.1, 13.2, 13.3, 15.1, 15.2, 15.3, 15.4, 15.5, 15.6(a) and (b) of the Standardized Bidding Document as issued by PPRA.

<sup>15</sup> In terms of section 3 of the 2016 Public Procurement (Amendment) Act, “lowest evaluated cost” means the price offered by a tenderer that is found to be the lowest price after consideration of all relevant factors and the calculation of any weighing for these factors, provided that such factors have been specified in the tender documents. See also

considered as substantially responsive to the requirements of the Tender Bidding Document <sup>[16]</sup>. As a matter of practice, the evaluated price for each Bid is always determined by the Evaluation Committee by taking the Bid price as read out during tender opening ceremony. The Committee also in this stage makes correction of any arithmetic errors in terms of the methodology indicated in Tender Bidding Document <sup>[17]</sup>. The Committee may also apply any non-conditional discounts as stated in the Bidding Document. The evaluated price for a particular Bid can be determined by making adjustments for any non-material, non-conformity, error or omission. The evaluated price can be determined by the Committee by applying any additional evaluation criteria, through an increase or decrease to the Bid price in accordance with weighting system established in Tender Bidding Document. The Committee in the making financial evaluation may further convert all Bids to a single currency, use of the currency, sources and date of exchange rate as stated in Tender Bidding Document. In this stage, the Committee also has a mandate to apply any margin of preference as shown in the Tender Bidding Document. More importantly, especially during financial evaluation, the Evaluation Committee must also ensure that all Bids are compared by ranking them in accordance to their evaluated price, and finally choose the Bid with the lowest evaluated price. Again, in a case where the bidding documents has included more than one Lot <sup>[18]</sup> and permitted Bidders to offer their discounts that are conditional on the award of one or more Lots, in this situation, the Evaluation Committee is required to conduct another financial evaluation so that it can determine the lowest combination of all Bids. When the whole evaluation exercise is over, then all Evaluation Committee members, in order to observe transparency and accountability principles in the assignment they have done, are required to sign “Personal Covenant 2” <sup>[19]</sup> which is

Form No. 9B as issued by Public Procurement Regulatory Authority, to observe equality and preserve confidentiality in respect of Bids submitted by the Bidders <sup>[20]</sup>. With the exception of EU Directives, all of the Instruments include provisions on conflict of interest. Most notably, the World Bank Guidelines require that suppliers or contractors must not have a conflict of interest. In the same vein, the UNCITRAL Model Law envisages conflict of interest or unfair competitive advantage as cause for rejection of a supplier or contractor. Distinct from the other Instruments, it further introduces the requirement for a code of conduct for procuring entity staff. The GPA and the UNCAC, on the other hand, require the member states to take the necessary steps to establish appropriate procurement systems. This should be based on transparency and objective criteria so as to avoid conflict of interest <sup>[21]</sup> In the event when evaluation procedures are not over yet, a clarification may be required by the Evaluation Committee from the Bidder. Considering fairness and transparency in the whole process of evaluation, the Evaluation Committee is not permitted to seek a clarification directly from the Bidder. Instead, the Evaluation Committee should seek a clarification of such the Bidder through Procurement Management Unit. The PMU eventually is required to communicate with the Bidder. Such clarification needed from the Bidder once

Instructions to Tenderers (ITT), section II, Clause 34.1 of the Standardized Bidding Document as issued by PPRA. See also Bergman, M. A., and Lundberg, S., “Tendering Design When Price and Quality is Uncertain”, *International Journal of Public Sector Management*, Vol. 30, Issue No. 4, 2017. p.15.

<sup>16</sup> See Instructions to Tenderers (ITT), section II, Clause 30 of the Standardized Bidding Document as issued by PPRA.

<sup>17</sup> *Ibid.*, Instructions to Tenderers; section II, Clause 30 of the Standardized Bidding Document as issued by PPRA. See also in *Nuclear Decommissioning Authority v. Energy Solutions EU Ltd* (now called ATK Energy EU Ltd, [2017] UKSC 34.

<sup>18</sup> Lot is a compilation of tenders in a particular Zone, comprising of regions or districts. Lot1, for Mwanza Region, may include Mwanza, Nyakato, Ilemela, Nyamagana and Sengerema. As for Lot2, for Geita, it may include Geita, Chato, Bukombe, Mbogwe and Nyang’hwale. As for Lot3, for Mara, it includes Bunda, Butiama, Serengeti, Rorya, Tarime, Musoma Urban and Rural. As for Mbeya Zone, for example, Bids can be conducted in Lots as well. Take, for instance, Mbeya, Lot1 can be kept for Mbeya itself, Lot2 for Iringa, Lot3 for Rukwa, Lot4 for Njombe and Lot5 for Songwe. Lots can also be kept in different categories, indicating different prices of each category. Let say, Category A, Bid with Tshs. 3,400,000/-, and Category B, Bid with Tshs. 8,300,000/-, VAT Inclusive or Exclusive. It is, however, important to note that, Zone can perform Bids of up to one Billion Tanzania Shillings, provided that the purchase is in Lots, and when it is only one Bid or tender, then the requirements of purchase ceiling applies as usual. This is also articulated under Regulation 42(2) of the 2013 Public Procurement Regulations, amended by the 2016 Public Procurement (Amendment) Regulations.

<sup>19</sup> The Personal Covenant 2 is a special Form, which must be signed by Evaluation Committee Members as well as Tender Board Members. This Form is taken as an oath by every committee members participating in either evaluation or attends Tender Board Meetings. The Forms contains various statements that a member or members have no any conflict of interest, pecuniary or otherwise, directly or

indirectly in any of the Suppliers or Service Providers that have submitted the tenders or quotations. The Form indeed states that, members all acknowledge, reports or any other materials not within the public domain which members acquire from the process, by virtue of the performance of their duties as members of the Boards, will for all time and for all purposes be taken as strictly confidential and will not be divulged them to persons not officially concerned with adjudication process. The Form also indicates a statement that a member or members will at all times adhere strictly with terms and conditions contained in the 2016 Public Procurement (Amendment) Act, and the 2016 Public Procurement (Amendment) Regulations. Indeed, the Form contains statement which indicates that, the breach of the Covenant or any provisions of the existing procurement laws, that does not preclude the institution of criminal proceedings pursuant to the Penal Code, the Prevention of Corruption Act, 2007 or any other written laws against the Members. This is also articulated under Regulation 7 of the 2013 Public Procurement Regulations, amended by the 2016 Public Procurement (Amendment) Regulations.

<sup>20</sup> Halonen, K. M., ‘Disclosure Rules in EU Public Procurement: Balancing between Competition and Transparency’ (2016) *Journal of Public Procurement*, 16(4), 2016, p. 528. Also see Sanchez-Graells, A., ‘The Difficult Balance between Transparency and Competition in Public Procurement: Some Recent Trends in the Case Law of the European Courts and a Look at the New Directives’ (2013) Univ. of Leicester School of Law Research Paper No. 13-11. See section 40(6) of the Public Procurement (Amendment) Act, 2016, which amended the 2011 Public Procurement Act. The importance of preserving confidentiality in tendering process, and ensuring equality among Bidders was discussed in a number of case laws, which include in *Stichting Natuur en Milieu and Others*, C-266/09, EU:C:2010:546, paragraph 77, in *Cosepuri v. EFSA*, T-339/10 and T-532/10, EU:T:2013:38, paragraphs 95 and 101; and in *Secolux v. Commission*, T-363/14, EU:T:2016:521, paragraphs 47 and 49. Also in *Commission v. Technische Glaswerke Ilmenau* (C-139/07 P, EU:C:2010:376) (T-136/15, para 19). Also in *Sweden and Turco v. Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 50; of 29 June 2010, in *Commission v. Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 54; of 21 September 2010, *Sweden and Others v. API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 74, and of 27 February 2014, in *Commission v. EnBW*, C-365/12 P, EU:C:2014:112, paragraph 65) (T-136/15, para 47. It is also found in *LPN v Commission*, T-29/08, EU:T:2011:448, paragraph 114) (T-136/15, para 48). Also in *Evropäiki Dynamiki v. Parliament Judgment*, (T-136/15).

<sup>21</sup> LEGOP, Comparison of the International Instruments on Public Procurement, Review of the World Bank’s Procurement Policies and Procedures, Background Paper, 2013. p. 21.

obtained, is then communicated back to the Evaluation Committee by the PMU. The reason here is that, the Evaluation Committee and the Bidders are barred to make any kind of communication for want of fairness and transparency in the whole evaluation process in the procurement competition<sup>[22]</sup> This is also done for sake of avoiding any kind of corruption or any other irregularities during evaluation process. The same appears to be true as to the User Department seeking clarification to the Bidders. In this situation; PMU should seek clarifications from the Bidders and then communicate clarification sought to the User Department concerned<sup>[23]</sup> Internationally, international procurement rules provides for requisites which can be used by procuring entities when making evaluation of Bids. UNCAC, for example, does not prescribe details but merely provides that its State Parties must establish procurement systems and tendering rules. This includes selection and award criteria on the basis of the principles of transparency, competition and objective criteria in decision making. All of the other Instruments, namely, the GPA, EU Directives, UNCITRAL Model Law and the World Bank Guidelines, contain specific provisions on evaluation criteria. The basis for determining the successful Bidder and thus for contract award should always be taken into account. Such considerations, however, differ among the Instruments<sup>[24]</sup> All the Instruments provide that bidding documents for a particular procurement should specify the relevant criteria in addition to price to be considered in bid evaluation. The manner in which they will be applied for purposes of determining the successful Bidder should also be considered<sup>[25]</sup> The same appears to be true as to the EU Directives and UNCITRAL Model Law. The World Bank Procurement Guidelines envisage the possible use of non-price criteria. Such must include payment schedule, delivery time, operating costs, efficiency and compatibility of equipment, availability of after sale services and spare parts<sup>[26]</sup> The World Bank Procurement Guidelines, however, differs from the other Instruments by requiring that the evaluation criteria should be, to the extent practicable. This should be expressed in monetary terms in the evaluation provisions of the bidding documents. The Procurement Guidelines in some exceptional circumstances allows deviations from this requirement. Such deviation is allowed in cases when the specifications cannot be precisely defined or factors other

than price. It is also acceptable in connection with the procurement of complex information technology and textbooks<sup>[27]</sup>.

As a matter of practice, the evaluated price for each Bid is always determined by the Evaluation Committee by taking the Bid price as read out during tender opening ceremony. The Committee also in this stage makes correction of any arithmetic errors in terms of the methodology indicated in Tender Bidding Document<sup>[28]</sup> The Committee may also apply any non-conditional discounts as stated in the Bidding Document. The evaluated price for a particular Bid can be determined by making adjustments for any non-material, non-conformity, error or omission. The evaluated price can be determined by the Committee by applying any additional evaluation criteria, through an increase or decrease to the Bid price in accordance with weighting system established in Tender Bidding Document. The Committee in the making financial evaluation may further convert all Bids to a single currency, use of the currency, sources and date of exchange rate as stated in Tender Bidding Document. In this stage, the Committee also has a mandate to apply any margin of preference as shown in the Tender Bidding Document. More importantly, especially during financial evaluation, the Evaluation Committee must also ensure that all Bids are compared by ranking them in accordance to their evaluated price, and finally choose the Bid with the lowest evaluated price. Again, in a case where the bidding documents has included more than one Lot,<sup>[29]</sup> and permitted Bidders to offer their discounts that are conditional on the award of one or more Lots, in this situation, the Evaluation Committee is required to conduct another financial evaluation so that it can determine the lowest combination of all Bids.

### 3. Legal Framework on Covenant Forms in Evaluation Process in Tanzania Mainland

When the whole evaluation exercise is over, then all Evaluation Committee members, in order to observe transparency and accountability principles in the assignment they have done, are required to sign "Personal Covenant 2."<sup>[30]</sup>

<sup>27</sup> See Par. 2.52 of the Procurement Guidelines.

<sup>28</sup> *Ibid*, Instructions to Tenderers; section II, Clause 30 of the Standardized Bidding Document as issued by PPA. See also in *Nuclear Decommissioning Authority v. Energy Solutions EU Ltd* (now called ATK Energy EU Ltd, [2017] UKSC 34.

<sup>29</sup> Lot is a compilation of tenders in a particular Zone, comprising of regions or districts. Lot1, for Mwanza Region, may include Mwanza, Nyakato, Ilemela, Nyamagana and Sengerema. As for Lot2, for Geita, it may include Geita, Chato, Bukombe, Mbogwe and Nyang'hwale. As for Lot3, for Mara, it includes Bunda, Butiama, Serengeti, Rorya, Tarime, Musoma Urban and Rural. As for Mbeya Zone, for example, Bids can be conducted in Lots as well. Take, for instance, Mbeya. Lot1 can be kept for Mbeya itself, Lot2 for Iringa, Lot3 for Rukwa, Lot4 for Njombe and Lot5 for Songwe. Lots can also be kept in different categories, indicating different prices of each category. Let say, Category A, Bid with Tshs. 3,400,000/-, and Category B, Bid with Tshs. 8,300,000/-, VAT Inclusive or Exclusive. It is, however, important to note that, Zone can perform Bids of up to one Billion Tanzania Shillings, provided that the purchase is in Lots, and when it is only one Bid or tender, then the requirements of purchase ceiling applies as usual. This is also articulated under Regulation 42(2) of the 2013 Public Procurement Regulations, amended by the 2016 Public Procurement (Amendment) Regulations.

<sup>30</sup> The Personal Covenant 2 is a special Form, which must be signed by Evaluation Committee Members as well as Tender Board Members. This Form is taken as an oath by every committee members participating in either evaluation or attends Tender Board Meetings. The Forms contains various statements that a member or members have no any conflict of interest, pecuniary or otherwise, directly or indirectly in any of the Suppliers or Service Providers that have submitted the tenders or

<sup>22</sup> This was discussed in a famous case of *Woods Building Services v Milton Keynes Council*, 2015 EWHC 2011. The claim was brought by Woods Building Services ("WBS") who disputed the decision of Milton Keynes Council not to award it an £8 million, 4 year single supplier framework agreement for the provision of asbestos removal services. WBS was the incumbent provider and its tender had been the cheapest of those submitted (price accounted for 60% of the marks available and quality for 40%). WBS argued that the Council's tender evaluation process breached the Public Contracts Regulations 2006 ("the Regulations") and in particular the general principles of equal treatment and transparency. Further, they argued that the Council had committed manifest errors of assessment in awarding the scores.

<sup>23</sup> This is pursuant to Instructions to Tenderers (ITT), section II, Clause 27.1, 27.2 and 27.3 of the Standardized Bidding Document as issued by PPA.

<sup>24</sup> LEGOP, Comparison of the International Instruments on Public Procurement, Review of the World Bank's Procurement Policies and Procedures, Background Paper, 2013. p. 23.

<sup>25</sup> See Article 9 (1) (b) of the UNCAC.

<sup>26</sup> The UNCITRAL Model Law, for example, provides an illustrative list of other possible criteria that may be used depending on the nature of a particular procurement competition which the procuring entity intends to undertake.

#### 4. Significance of Signing Covenants Forms by Evaluation Committee

Signing covenants forms by evaluation committee members, in terms of the procurement laws and regulations in place, is mandatory and not an option. Every committee member participating in the evaluation process is therefore, obliged to sign the covenants forms <sup>[31]</sup>. In view of statutory obligation imposed to evaluation committee members on signing covenant forms during evaluation process, it is also important to briefly examine significances of such noble exercise, taking place in all tendering processes as indicated hereunder.

##### 4.1 Giving Freedom to Evaluation Committee Members

It has been previously noted that, evaluation process is an important stage in any tendering process. Because of the nature and complexity of the evaluation process, it is important for evaluation committee members to perform evaluation task given, while they are free from all sorts of coercion and or anything which may threaten, or encourage them to get involved in malpractices such as corruption, etc. Signing covenants forms enables evaluation committee members to work independently in understanding that, they perform evaluation process in accordance to existing procurement laws and regulations in place, and therefore, they should do the same in integrity ways. In a similar point, the current procurement laws also insists that, each and every evaluation committee member is required to perform evaluation task free and independently, without interference from other evaluation members <sup>[32]</sup>.

##### 4.2 Encouraging Trustworthiness of Evaluation Members to Procuring Entities

It is an expectation of all procuring entities when conducting tendering processes to access and get qualified Bidders in offering either supplies or services, in respect of the requirements as set out in the Standardized Bidding Documents as recommended by Public Procurement Regulatory Authority (PPRA). In view of such expectations by the procuring entities, procuring entities put much confidence to the evaluation committee members in believing that, by signing covenants forms they will perform evaluation task considering that, they will be faithful and trustworthy.

##### 4.3 Recognizing Attendance of Every Evaluation Members Participated

In practice every procurement function which is conducted,

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quotations. The Form indeed states that, members all acknowledge, reports or any other materials not within the public domain which members acquire from the process, by virtue of the performance of their duties as members of the Boards, will for all time and for all purposes be taken as strictly confidential and will not be divulged them to persons not officially concerned with adjudication process. The Form also indicates a statement that a member or members will at all times adhere strictly with terms and conditions contained in the 2016 Public Procurement (Amendment) Act, and the 2016 Public Procurement (Amendment) Regulations. Indeed, the Form contains statement which indicates that, the breach of the Covenant or any provisions of the existing procurement laws, that does not preclude the institution of criminal proceedings pursuant to the Penal Code, the Prevention of Corruption Act, 2007 or any other written laws against the Members. This is also articulated under Regulation 7 of the 2013 Public Procurement Regulations, amended by the 2016 Public Procurement (Amendment) Regulations.

<sup>31</sup> *Ibid.*

<sup>32</sup> Section 41 of the 2011 Public Procurement Act, amended by the 2016 Public Procurement (Amendment) Act.

there are specific numbers of members which are recommended by PMU and eventually approved by the Accounting Officer of a particular procuring entity. Once a member is recommended by relevant authorities and empowered to undertake the evaluation, one is expected to perform such a work perfectly and diligently, and from perfection and diligence of the evaluation committee members, it is a great opportunity for the same members to be invited in the coming evaluation processes. This is in accordance to provisions of the current procurement laws applicable in Tanzania Mainland <sup>[33]</sup>.

##### 4.4 Discouraging Malpractices in Public Procurement Procedures

In public procurement, one among challenges and complain in this sector in various procurement proceedings conducted by procuring entities, relates to malpractice such as corruption and bribery in the selection of qualified Bidders. There have been many complains from Bidders alleging that, in some occasions, selection of Bidders participating in the procurement proceedings, are done with bias, without considering qualifications indicated in the Standardized Bidding Documents. This complains has also been raised towards Tender Boards of many procuring entities when making their deliberations. Such circumstances necessitate every evaluation committee member should sign covenants forms.

##### 4.5 Necessitate Evaluation Committee Members be Accountable and Transparent

The significance of signing covenants forms by evaluation committee members during evaluation processes in various procurement functions, also necessitate evaluation committee members to be accountable and transparent while performing such the duty. It is obvious that, when evaluation committee members are accountable and transparent in exercising their evaluation duties, this apart from establishing a robust procurement system, it may also encourage implementation and compliance to procurement principle as stipulated under current procurement laws in Tanzania Mainland <sup>[34]</sup>.

#### 5. Conclusion

It is concluded in this paper that, it is a requirement under current public procurement laws applicable that each and every evaluation committee member to sign covenants forms which are provided to them during evaluation process. The most important issue in this part of the conclusion is that, signing of covenants forms exercise should not be traditionally done as some members filling in, and some do not fill in. This should always be done considering procurement laws in place and diligence in the public sectors. It is further concluded that, on the other hand, apart from evaluation committee members to be under obligation to sign covenants forms, evaluation committee members should be instructed and educated on how these covenants forms are properly signed during evaluation processes. This should purposely done in order to eliminate unnecessary complains against evaluation committee. During evaluation processes, among complains raised by

<sup>33</sup> Section 40(4) and (5) of the 2011 Public Procurement Act, amended by the 2016 Public Procurement (Amendment) Act.

<sup>34</sup> Section 4A of the 2011 Public Procurement Act, amended by the 2016 Public Procurement (Amendment) Act.

various procurement stakeholders, especially Bidders, include but not limited to, inexperience of the Bidders participating in the procurement proceedings, financial and number of expertise involved, and more importantly the need of conducting financial auditing. From observations mentioned above, it is highly recommended that, procuring entities across Tanzania Mainland, should make use of their respective legal secretary in instructing evaluation committee members on how signing of covenants forms exercise should be carried out. In public procurement, there is nothing more important than a close follow up on how the entire procurement proceeding was conducted. In this respect, it is also recommended that, there is a high need for responsible authorities in all procuring entities, especially PMU, to keep a close eye on this issue of signing covenants forms by evaluation committee members.

## References

1. ADB. "Guide on Bid Evaluation", Asian Development Bank, 2018.
2. Cholopray AKD. "The Bid Evaluation Process" The Procurement Classroom, 2020.
3. Halonen KM. 'Disclosure Rules in EU Public Procurement: Balancing between Competition and Transparency' *Journal of Public Procurement*. 2016; 16(4):528.
4. Hafizah N, Lamsali H, Sathyamoorthy D. "Multi-criteria Decision Making for Technical Evaluation of Tenderers: A Review of Methods Employed", *Defence and Technical Bulletin*, 2015, 8(2).
5. Interagency Procurement Working Group (IAPWG), "Evaluation Process", Procurement Network, 2012.
6. IBRD-IDA. "Abnormally Low Bids and Proposals: Guide to the Identification and Treatment of Abnormally Low Bids and Proposal", Procurement Guidance, 2016.
7. IBRD-IDA. "Evaluation Criteria: Use of Evaluation Criteria for Procurement of Goods, Works and Non-Consulting Services Using RFB and RFP", Procurement Guidance, 2016.
8. Kocak S, Kazaz A, Ulubeyli S. "Subcontractor Selection with Additive Ratio Assessment Method", *Journal of Construction Engineering, Management and Innovation*. 2018; 1(3):6.
9. LEGOP. Comparison of the International Instruments on Public Procurement, Review of the World Bank's Procurement Policies and Procedures, Background Paper, 2013.
10. Lynch J. "Evaluation of Offers: Preliminary Considerations", the Procurement Class Room, 2020.
11. PPIAF. "Evaluation Criteria and Evaluation Process Regulations", APMG International, 2020.
12. Perez A, Armijo A. "Governance Module", RAGTIME, European Union's Horizon 2020 Research and Innovation Programmes, 2020.
13. Sanchez-Graells A. 'The Difficult Balance between Transparency and Competition in Public Procurement: Some Recent Trends in the Case Law of the European Courts and a Look at the New Directives' *Univ. of Leicester School of Law Research Paper No*, 2013, 13-11.
14. Oladapo AA, Odenyinka H, "Tender Evaluation Methods in Construction Projects: A Comparative Case Study", *Acta Structilia*, 2006, 13(1).
15. Tiwari S, Puri D. "Evaluating the Criteria for Contractors' Selection and Bid Evaluation", *International Journal of Engineering Science Invention*, 2014, 3(7).
16. Boateng V. "An Examination of Tender Evaluation Practices in Metropolitan, Municipal and District Assemblies in Ashanti Region", A Thesis Submitted to the Department of Building Technology, Kwame Nkrumah University University of Science and Technology in Partial Fulfillment of the Requirement for the Degree of Master of Science in Procurement Management, 2014.
17. <https://www.purchasing-procurement-center.com/tender-evaluation.html>
18. [https://www.clarkslegal.com/Blog/Post/Public\\_Procurement\\_Challenging\\_the\\_Tender\\_Documents\\_](https://www.clarkslegal.com/Blog/Post/Public_Procurement_Challenging_the_Tender_Documents_)