

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

APPEAL CASE NO. 105 OF 2011

BETWEEN

MPOMABIVA INVESTMENT LTD.....APPELLANT

AND

KIGOMA DISTRICT COUNCILRESPONDENT

DECISION

CORAM:

- | | |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mr. K.M Msita | - Member |
| 3. Mr. F.T. Marmo | - Member |
| 4. Mr. H.S. Madoffe | - Member |
| 5. Ms. B.G. Malambuigi | - Secretary |

SECRETARIAT:

- | | |
|---------------------|-----------------|
| 1. Ms. F.R. Mapunda | - Legal Officer |
|---------------------|-----------------|

FOR THE APPELLANT:

1. Mr. Samwel Shadrack–Advocate, Upright Attorneys
2. Mr. Zablon P. Mpomabiva- Executive Director
3. Mr. Salum Ruhomvya- Engineer

FOR THE RESPONDENT

1. Mr. Iddi A. Ndabhona – Solicitor, Advocate

This decision was scheduled for delivery today 2nd September, 2011, and we proceed to deliver it.

This appeal was lodged by **MPOMABIVA INVESTMENTS LTD**, (hereinafter to referred to as "**the Appellant**") against **KIGOMA DISTRICT COUNCIL** (hereinafter to be referred to as **the Respondent**)

The said Appeal is in respect of Tender No.KDC/DADP/W/10 for the construction of the Kandaga-Simbo Road (hereinafter to be referred to as "**the Tender**)

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

On 9th December, 2010, the Respondent vide "***Kamati ya Mradi wa DADP***", the Kandaga Village Committee responsible for overseeing the works (hereinafter referred to as the "**Village Committee**") advertised the Tender for the Construction of the Kandaga-Simbo Road (hereinafter to be referred to as "**the first tender**").

The first Tender opening took place on 11th January, 2011, whereby three tenders were received from the following firms;

1. M/s Mpomabiva Investments Co. Ltd
2. Kilemba Construction Co. Ltd
3. Malagarasi Enterprises Co. Ltd

After completion of the opening ceremony, on the same day, the Village Committee deliberated on the tenders submitted and determined the winning bidder through voting; whereby the Appellant scored the highest number of votes, and was recommended for award of the "**1st Tender**". However, some members of the Village Committee disagreed with the procedure followed as there was no evaluation of tenders, thus, it was agreed that few members among themselves should carry out the evaluation exercise. After the evaluation M/s Kilemba Construction Company Ltd was recommended for award of the tender. However, this second recommendation of award was also not supported by other members of the Village Committee. This disagreement led to the

recommendations for award to be forwarded to the Respondent for further directions and approval.

Upon receiving the said recommendations from the Village Committee, the Respondent reviewed the tender process adopted in reaching the decision and noted that the process did not adhere to the procedures laid down under the law. Hence, it was directed that the tender should be re-advertised.

The tender under Appeal was re-advertised on the 9th March, 2011.

The tender opening took place on 24th March, 2011; whereby five tenders were received as follows:

S. No	Name of Tenderer	Tender Price (Tshs)
1.	M/s Mhini and Brothers Investment Ltd	38,590,000/=
2.	M/s OBD and Company	38,210,000/=

3.	M/s Otonde Group of Companies	38,400,000/=
4.	M/s Mpomabiva Investments Ltd	38,845,000/=
5.	M/s Rames Co and Ben	39,250,000/=

The evaluation of the tender was done by members of Village Committee who also reached their tender award decision through voting. The Respondent again noted that, the Village Committee had not followed the proper procedure in making their decision since they had not conducted an evaluation of tenderers; but chose the winner through voting. The Respondent therefore appointed an Evaluation Committee which conducted evaluation and recommended the award in favour of M/s Otonde Group of Companies (hereinafter to be referred to as "**the Successful Tenderer**") at a contract price of Tshs. 38,400,000/=.

On 5th May, 2011, having received no communication on the tender results, the Appellant, wrote a letter to the

Village Committee on 5th May, 2011, requesting to know the outcome of the Tender.

On 15th May, 2011, the Appellant received a reply from the Village Committee informing them that their tender was unsuccessful and that award had been made to the Successful Tenderer.

The Appellant was dissatisfied with the tender results and on 24th May, 2011, submitted 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 Village Committee advertised the tender for construction of the Kandaga – Simbo Road on 9th December, 2010.

That, the Appellant responded to the said tender advertisement by purchasing Tender Documents on 28th December, 2010.

That, having submitted the bid documents there was no communication on the outcome of the tender from the Respondent; instead, on 9th March, 2011, the same tender was re-advertised and no reasons were given to tenderers for the cancellation of the 1st Tender.

That, the Tender was open to contractors registered in Class VII or above and the Appellant being registered as a Contractor Class IV considered themselves to be qualified for the works and hence the reason for purchasing Tender Document for the second time on 11th March, 2011.

That, no communication was received from the Respondent on the outcome of “**the tender**” but it was later learnt that M/s Otonde Group of Companies was the Successful Tenderer.

That, the Appellant believes that the tender was awarded to the said winner under dubious circumstances without following the proper procedures.

That, on following up on the tender outcome with the Secretary of the Village Committee, the Appellant found that they had been recommended for award of the contract. It was further revealed that the said recommendations for award were sent to the Respondent who changed the results and awarded the tender to the Successful Tenderer without giving reasons as to why the Appellant’s tender was disqualified.

That, the tender process was interfered by the Village Chairman contrary to Section 73(1)(a),(2),(4),(5) and (6) of the Public Procurement Act of 2004 Cap 410 (hereinafter to be referred to as “**the Act**”).

That, the advertisement made by the Respondent on 9th March, 2011 was contrary to the law as it contravened Section 54(1),(2),(3),(4)and (5) of the Act.

That, the tender process which led to award of the tender to the Successful Tenderer was interfered with by the Village Executive Officer of Kandaga Village.

That, according to the advertisement the employer of the project is the Village Committee which is under Kandaga Village, whose Chief Executive Officer is the Village Executive Officer.

That, according to Section 33 of the Act, the Village Executive Officer was supposed to have overall responsibility for the execution of the procurement process but instead this was not followed.

That, in addition to unlawfully selecting the awarded contractor, the official of the said contractor together with officials from the Respondent took part in

intimidating and coercing the signatories to sign the contract.

That, in view of the fact that the contract has already entered into force, the Appellant prayed that the Authority grant remedies as provided under Section 82(2)(a), 82(2)(b) and 82(2)(d) and 82(4); particularly Section 82(4)(c) and 82(4)(f) of the Act.

That, if it is proven that officials of the Successful Tenderer did take part in coercing officials from the Village Committee, they should be punished pursuant to Section 76 of the Act.

The Appellant, therefore, prayed that the Authority grant the following reliefs;

- Cancellation of the award to the successful tenderer and award the tender to them
- Compensation of Tshs. 5,760,000 resulting from the following:

No.	Cost Item	Cost (Shs)
1.	Preparation of Case Documents	1,500,000/=
2.	Air Ticket to Kigoma(Return)	1,200,000/=
3.	Bus Tickets (Return) + Meal Allowances	500,000/=
4.	Cost for Purchase of Tender documents (Two tenders)	60,000/=
5.	Tender Preparation Costs (Two tenders)	500,000/=
6.	Bus Tickets To Kigoma (Return) submission of First Tender + Meals	500,000/=
7.	Bus Ticket Kigoma (Return)+ Meals -submission of Second Tender	500,000/=
8.	Bus Tickets To Kigoma (Return) + Meals -Complaint submission	500,000/=
9.	Bus Tickets To Kigoma (Return) + Meals on Collection of the Defense Minutes	500,000/=
	TOTAL CLAIM	TSh5,760,000/=

REPLIES BY THE RESPONDENT

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

That, the Appellant did not adhere to the complaint review process since he did not submit his appeal to the Kigoma District Executive Director and subsequently to PPRA prior to submitting the Appeal to this Authority.

That, the appeal has offended the provisions of Sections 81(1) and 2(b) of the Act and Regulation 42(1) **(Sic)** of the Public Procurement (Goods, Works, Non consultancy Services and Disposal of Public Assets by Tender) Regulations, Government Notice No. 97 of 2005 (hereinafter to be referred to as "**GN No. 97/2005**").

That, the procurement process for the tender under Appeal was carried out by the Village Committee under the supervision of the Respondent.

That, Respondent supervised the project on the reason that, they would be required to account for the said money after the project would be fully implemented.

That, the Respondent was the technical facilitator for this tender process and the same was done for purposes of ensuring that the public procurement principles are adhered to.

That, at the time the appeal was being lodged, the Village Committee had already signed the contract with the Successful Tenderer and that the execution of works is currently in progress and hence the process cannot be suspended.

That, it is not disputed that the Village Committee prepared the advertisement and tender document with the help of the Procurement Department of the Respondent.

That, after the opening tender of the disputed appeal, the evaluation was done by way of voting by the Village

Committee members and recommendations for award were sent to the Respondent for approval.

That, the said recommendations were subjected to further scrutiny by the Respondent's Procurement Management Unit and subsequent consideration and advice by the Respondent's Tender Board.

On reviewing the said recommendations, the Respondent discovered that the said evaluation process did not adhere to the laid down procedures; hence, forcing the Respondent to form an Evaluation Committee conducted performed the evaluation in accordance with Regulation 90 of GN No. 97/2005. Thereafter, the Successful Tenderer was recommended for award of tender which was subsequently approved by the Respondent's Tender Board.

That, the Appellant's tender was disqualified at the preliminary evaluation stage on the ground that they failed to indicate the completion period.

With regard to the first tender, the Respondent submitted that, the Respondent's Tender Board noted a number of irregularities in the said tender process and advised the Village Committee to suspend the tender process and re-advertise the same. The irregularities noted in the first tender process were as follows;

- No evaluation was conducted as the award decision was reached by voting.
- The awarded company did not fill in the priced Bill of Quantities (BoQ)
- All companies which tendered did not show the time to be used for execution of the works.
- There were signs of corruption in the process.
- The other companies did not meet the criteria.

The Respondent therefore prayed that, the Appeal be dismissed with costs.

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 centred on the following issues:

- **Whether the Appeal is properly before the Authority**
- **Whether the tender process was conducted in accordance with the law**
- **Whether the Appellant was unfairly disqualified;**
- **Whether the award of the tender to the Successful Tenderer was proper at law**
- **To what reliefs, if any, are the parties entitled to.**

Having identified the issues in dispute, the Authority proceeded to resolve them as follows:

1.0 Whether the Appeal is properly before the Authority

In their written replies to the Statement of Appeal, the Respondent raised a Preliminary Objection on a point of law, which centred on the jurisdiction of this Authority to entertain the Appeal. The Authority's analysis on the said point of Preliminary Objection is as follows:

- **The Appeal in issue offended the provisions of Sections 81 (1) and (2)(b) of the Act**

During the hearing, 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 Respondent contended further that, the point of objection has been raised so that for the Authority can provide guidance to parties on the procedure for filing of appeals to this Authority.

In its endeavor to ascertain whether the Appeal is properly before it, the Authority decided to give a brief account of the procedures pertaining to settlement of disputes arising from the procurement process for purposes of providing guidance to the parties.

The dispute settlement mechanism under Part VII of the Act provides for two avenues which tenderers may follow in submitting procurement complaints or appeals. The two avenues are as follows;

a) **The first avenue.**

Sections 79(1), 80(1), 81(1) and 82(1) of the Act stipulate the procedure to be followed in submitting complaints or appeals in the normal

course of business prior to entry into force of a procurement contract.

According to the above cited sections complaints arising during the procurement process **before a procurement contract enters into force** must be submitted for review first to the Accounting Officer then to PPRA and finally to this Authority.

b) **The second avenue.**

Sections 80(3) and 82(2)(a) of the Act require complaints arising **after the procurement contract has entered into force** to be submitted directly to this Authority. In other words, the Authority has sole original jurisdiction over such complaints. Section 55(7) of the Act provides that the contract enters into force when the notice of acceptance has been communicated to the successful tenderer. For purposes of clarity, the Authority reproduces Section 55(7) of the Act 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)

Having pointed out the two alternative avenues which have to be followed by tenderers in submitting procurement complaints, the Authority revisited the documents submitted before it in order to establish if the Appellant complied with the procedural avenues pointed out above.

In so doing the Authority revisited the facts of this Appeal and noted that, the Respondent vide a letter dated 21st April, 2011, notified the Village Committee that, the tender had been awarded to the Successful Tenderer. The signing of the contract between the Successful Tenderer and Village Committee took place on 6th May, 2011. The Authority noted further that, the information

that the Appellant's tender was not successful was communicated to them on 15th May, 2011, by the Village Committee when responding to the Appellant's letter of inquiry dated 5th May, 2011. On being dissatisfied with the said results the Appellant lodge the Appeal to this Authority on 24th May, 2011.

According to the facts of this Appeal the Authority is satisfied that, by the time the Appellant lodged the Appeal to this Authority, the procurement contract had already entered in force. Moreover, once a procurement contract enters into force, the accounting officer ceases to have jurisdiction to entertain such a complaint as per Section 80(3) of the Act which states as hereunder:

"The head of a procuring entity or of the approving authority **shall not** entertain a complaint or dispute **after the procurement contract has entered into force.**" (Emphasis added)

Given the facts of this Appeal, the Authority is of the firm view that, the Appellant could neither submit their complaint to the Accounting Officer nor to PPRA as the contract had already entered into force; hence, the only recourse open to them was to appeal to this Authority in accordance with Section 82(2)(a) of the Act which states as follows:

“S.82(2) A supplier, contractor or consultant entitled under section 79 to seek review may submit a 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 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 Authority observes that the Appellant lodged their Appeal within nine days of becoming aware of the tender results in line with the above requirements and is thus of the settled view that the Appellant had filed their Appeal in accordance with the law.

In the light of the above findings, the Authority concludes that, the Appeal is properly before it and rejects the Respondent’s point of Preliminary Objection.

2.0 Whether the tender process was conducted in accordance with the law

The Authority states that, for any procurement process to be properly conducted it has to satisfy all the legal requirements provided for under the Act and its Regulations. In order to satisfy itself as to whether the tender process pertaining to the tender under Appeal was

properly conducted, the Authority deemed it prudent to review the procurement process so as to ascertain whether all legal requirements were adhered to. In its endeavour to do so, the Authority also considered the Appellants' grounds of Appeal which led to formulation of two sub-issues as follows:

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

- **Whether award of the tender was made within the tender validity period**

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

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

In resolving this sub issue the Authority revisited the Appellant's contention that, according to the letter of 15th May, 2011, from the Village Committee which notified

them of the tender results indicated that they were the successful tenderers as they had scored four votes out of six votes of the members of the Village Committee who conducted the evaluation. The recommendations for award were sent to the Respondent for approval. To the contrary and without justification, the Respondent and the Village Executive Officer changed the said tender results by awarding the tender to M/s Otonde Group of Companies. Thus, the Appellant felt that they had been unfairly disqualified as they were supposed to be the successful tenderers.

In reply thereof, the Respondent submitted that, after receiving the letter of 24th March, 2011, from the Village Committee, they noted that the evaluation was conducted by way of voting and that the award had been recommended in favour of the Appellant. The Respondent found that such an evaluation process was contrary to the laid down procurement procedures. Hence, to rectify such a situation, the Respondent appointed an Evaluation Committee which was comprised of four members, whereby three of them were from the Village Committee

and one member from the Respondent's office. The said Evaluation Committee conducted the evaluation and recommended the award in favour of the Successful Tenderer. The said recommendations for award were also approved by the Respondent's Tender Board. Thus, the Appellant's claim that the Respondent deliberately changed the tender results were not true as what was done by the Respondent was to make sure that the evaluation process adhered to the requirements of the law.

In order to ascertain the validity of the conflicting arguments by parties, the Authority revisited the documents submitted before it, and noted that the minutes of tender opening which took place on 24th March, 2011, clearly show that there was no evaluation of tenders since the winner was determined by way of voting. As a result of the voting process the Appellant was recommended for award of the tender. When the said recommendations were submitted to the Respondent, it was also observed that the procedure adopted by the Village Committee was flawed. Thus, the

Respondent recommended for a proper evaluation to be conducted. As a result thereof, an Evaluation Committee consisting of four members was formed. The said Evaluators were;

- Robert Massawe- District Agricultural Officer
- Esta B. Ntiboneka –Member Village Committee
- Fidea Piusi –Member Village Committee
- Maria Andrea –Member Village Committee

During the hearing, the Authority asked the Respondent to state the qualifications of the Evaluators from the Village Committee. The Respondent submitted that, the three evaluators were ordinary villagers while the fourth evaluator, namely, Mr. Robert Massawe was the District Agricultural Officer (***Afisa Kilimo wa Wilaya***).

From the above facts the Authority is of the view that, the three villagers who were part of the Evaluation Committee did not have the appropriate level of seniority and experience. The Authority therefore finds that the Respondent's act of appointing such evaluators to be

contrary to the requirements of Section 37(4) of the Act which provides as follows;

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

The Authority also noted that the members of the Evaluation Committee did not sign the Personal Covenants as required by Section 37(6) of the Act. The said section state as follows;

“All members of the Evaluation Committee shall sign the Code of Ethics provided under the Regulations made under the Act, declaring that they do not have a conflict of interest in the procurement requirement”. (Emphasis added)

Having noted that the Evaluators did not possess the required expertise to conduct the said evaluation, the Authority went further and reviewed the Evaluation Report so as to ascertain if the evaluation process was conducted in compliance with the laid down procedures.

In so doing the Authority reviewed the Evaluation Report and noted that, the Evaluators considered the following criteria during Preliminary Evaluation;

- **Business License (In English)**
- **Registration with CRB**
- **Completion time**
- **Anti-Bribery Policy**
- **Filling and signing of all the pages of Bill of Quantities (BoQ)**

The Authority noted further that, during Preliminary Evaluation stage the following tenderers were disqualified;

S. NO	NAME OF TENDERER	REASONS FOR DISQUALIFICATION
1.	M/s Mhini and Brothers Investment Ltd	Lack of business license
2.	M/s OBD and Company	Not registered with CRB
3.	M/s Mpomabiva Investments Ltd	completion time was not specified
4.	M/s Rames Co and Ben	Lack of business license and completion time was not specified.

It has further been observed by the Authority that, the tenderers were not required to submit Powers of Attorney. The Authority therefore, wonders how, in the absence of such a mandatory requirement, the Respondent could be certain that the tenders submitted were signed by duly authorized persons pursuant to Regulation 90(6) of GN. No. 97/2005 which state as follows;

“Prior to the 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)

Moreover, the Authority observed that, after Preliminary Evaluation was completed only the Successful Tenderer qualified for detailed Evaluation.

Under detailed evaluation, the evaluators checked for correctness of the filled Bill of Quantities. They further checked for arithmetic errors. Thereafter they filled the table for comparison of tenders. Since there was no other tender with which to compare, the tender of the Successful Tenderer was ranked number one and was recommended for award.

However, it is noted that, the Evaluators failed to evaluate the following important criteria which were part of their own Tender Document. Those criteria were;

- Previous experience in similar works,
- Experience and education of the key personnel
- Availability of equipment

The above mentioned criteria would have enabled them to at least obtain the requisite information with regard to tenderer's ability to execute the intended project; considering that there was no pre-qualification prior to invitation of tenders. This signifies that Post-Qualification was not conducted contrary to the requirements of Section 48(1) of the Act, read together with Regulation 94(1) of GN. No 97/2005. For purposes of clarity the said provisions are reproduced as follows;

“S.48(1) If tenderers have not been pre qualified, the procuring entity and the tender board shall determine **whether the tenderer whose tender or proposal has been determined to offer the lowest evaluated tender in case of procurement or the highest evaluated tender in the case of disposal of public asset by tender, has the**

capability and resources to carry out the contract as offered in the tender". (Emphasis added)

Reg.94(1) Where appropriate Post qualification may be undertaken to determine **whether the lowest evaluated tender has the capability and resources to carry out the contract"**. (Emphasis supplied)

The Authority finds that, the Evaluator's failure to conduct the evaluation process in accordance with the stipulated criteria contravened Regulation 90(4) of GN No. 97/2005 which states as follows;

"The tender evaluation shall be consistent with the terms and conditions set forth in the tender documents and such evaluation shall be carried out using the criteria explicitly stated in the tender documents."
(Emphasis added)

In view of the above observations, the Authority finds that the evaluation process was not conducted in accordance with the law.

ii) Whether award of the tender was made within the tender validity period.

In resolving this sub issue the Authority revisited the oral submissions of the Appellant that, though the Respondent disqualified the Appellant's tender for not specifying the completion period, the award of the said tender and the signing of the contract thereof was not done within the tender validity period.

In reply the Respondent conceded that the contract was signed after expiry of the tender validity period.

In order to establish the validity of the Appellant's arguments, the Authority reviewed the Tender Document and noted that, it had specified the tender validity period to be thirty days from the date of the tender opening.

The Authority noted that, the tender opening took place on 24th March, 2011. The letter from the Respondent to the Chairperson of the Village Committee informing them that the award had been approved to the Successful Tenderer is dated 21st April, 2011, while the contract between the Village Committee and the Successful Tenderer was signed on 6th May, 2011. However, the Authority could not establish when the Successful Tenderer was notified of the award by the Village Committee. Furthermore, the Authority noted that the signing of the contract on 6th May, 2011, was made twelve days after the expiry of the tender validity period.

The Authority revisited Regulation 87(2) of GN. No. 97/2005 which provides as follows;

“The Period fixed by the procuring entity shall be sufficient to permit evaluation and comparison of tenders for obtaining all necessary clearance and approvals, and for notification of the award of the contracts and finalise a contract”. (Emphasis added)

Contrary to the above quoted provision, the tender process was not completed within the tender validity period of thirty days as stipulated in the Tender Document.

Therefore, the Authority's conclusion on the second sub issue is that, although it could not be established whether the award was communicated to the Successful Tenderer within the tender validity period, the above analysis proves that the contract was signed after expiry of the tender validity period.

In view of the observations and findings made in the two sub-issues above, the Authority's conclusion on the second issue is that, the tender process was not conducted in accordance with the law, as the process was marred by irregularities.

3.0 Whether the Appellant was unfairly disqualified

In resolving this issue the Authority revisited the Appellant's contentions that, their tender had been unfairly eliminated while it had complied with all the terms and conditions provided for in the Tender Document.

In reply the Respondent contended that the Appellant's tender was disqualified for failure to specify the duration within which the works would be completed.

In order to establish the validity of the parties' arguments, the Authority reviewed the documents submitted before it and noted that, the original tender submitted by the Appellant did not specify the completion period as the space at which they were required to fill in the completion period was left blank.

The Authority revisited the Tender Document and noted that it was mandatory for the tenderers to indicate the completion period. The said requirement was provided for under item D where it was written;

**"MUDA WA KUANZA NA KUKAMILISHA
KAZI** literally translated to mean
**"TIME OF STARTING AND COMPLETING
WORKS"
SIKU TANGU SIKU YA
KUSAINI MKATABA"
DAYS..... FROM DATE OF
SIGNING THE CONTRACT** (emphasis added)

The Authority therefore accepts the Respondent's reason for disqualification of the Appellant's tender for failure to comply with the requirements of the Tender Document as the same is in accordance with Regulation 90 (7) of GN No. 97/2005 which provides as follows;

"A substantially responsive tender is one which conforms to all the terms, conditions and specifications of the tender document(s) without material deviation or reservations" (Emphasis added)

Therefore, the Authority's conclusion in respect of the third issue is that the Appellant's tender was fairly disqualified.

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

As it has already been established under the first issue that, the procurement process contravened the law, it goes without saying therefore that, the purported award of the tender to the Successful Tenderer equally contravened the law. That said, the Authority's conclusion on the fourth issue is that, the award of the tender to the Successful Tenderer was not proper at law.

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

Having resolved the contentious issues, the Authority revisited the Appellant's prayers as hereunder:

- With regard to the prayer for cancellation of the award and that the same be awarded to the Appellant, the Authority observes that, there is nothing before this Authority to be cancelled as the procurement process was flawed. Further, the Authority cannot order that the award be made to the Appellant as that prayer is outside its powers.
- With regard to the prayer of compensation of Tshs. 5,760,000/- the Authority is of the firm view that, the Appellant is not entitled to any compensation as they were fairly disqualified for failure to meet the requirements set out in the Tender Document.

The Authority also considered the Respondent's prayer that, the Appeal be dismissed with costs, the Authority does not agree with the Respondent as the submissions made by the Appellant have some merit. Furthermore, the Authority does not award costs to Procuring Entities upon Appeal on their procurement decisions. Accordingly, this prayer is hereby rejected

Other matters that caught the attention of the Authority:

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

- a) The Authority observe that, the contract was signed between the Successful Tenderer and the Village Committee, the Authority failed to establish if the Village Committee had legal capacity to enter into contract.

On the basis of the aforesaid findings, the Authority partly upholds the Appeal as it has some merit. However, as it was submitted during the hearing that the contract has been fully executed the Authority cannot issue any order as it has already been over taken by events.

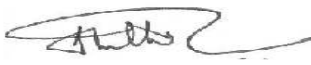
Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

Decision delivered in the presence of the Appellant and in the absence of the Respondent this 2nd September, 2011.



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

MEMBERS:

1. MR. K.M. MSITA 

2. MR. F. T. MARMO 

3. MR. H. S. MADOFFE 