

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

APPEAL CASE NO. 131 OF 2012

BETWEEN

M/S M.A.K ENGINEERING CO. LTD...1ST APPELLANT

M/s COOL CARE SERVICES LTD2ND APPELLANT

AND

NATIONAL SOCIAL SECURITY FUND....RESPONDENT

DECISION

CORAM:

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

SECRETARIAT:

- | | |
|-------------------------|------------------------|
| 1. Ms. E.V.A. Nyagawa – | Principl Legal Officer |
| 2. Ms. F.R. Mapunda – | Legal Officer |
| 3. Ms. V.S. Limilabo – | Legal Officer |

FOR THE 1st APPELLANT:

1. Mr. Athuman A. Kibodya – Managing Director
2. Mr. Hassan A. Mwanyonza – Technical Director

FOR THE 2nd APPELLANT:

1. Eng. Andrew Mwaisemba – Managing Director

FOR THE RESPONDENT:

1. Mr. Jamal Hamad Mwasha – Legal Officer
2. Mr. Randolph Shaaban Shimbo – Legal Officer
3. Eng. Karim Mattaka – Ag. Project Manager
4. Mr. Hussein Meena – Procurement Manager
5. Mr. Ally Mikella – Procurement Officer
6. Mr. Sadiki George – Legal Intern Trainee

This decision was scheduled for delivery today 29th October, 2012 and we proceed to deliver it.

The appeal at hand was lodged by **M/S M.A.K ENGINEERING COMPANY LIMITED** (hereinafter to be referred to as "**the Appellant**") against the **NATIONAL SOCIAL SECURITY FUND** commonly known by its acronym **NSSF** (hereinafter to be referred to as "**the Respondent**"). After notification of this Appeal to the other tenderers who had participated in the tender process, **M/S COOL CARE SERVICES LIMITED** opted to join this Appeal as a party thereto (hereinafter to be referred to as "**the 2nd Appellant**").

The said Appeal is in respect of Tender No. PA/004/2011-2012/W/25 Lot I for Air Conditioning and Ventilation Installations for the proposed Ilala Regional Offices and Benefit Paying Centre (Mafao House) on Plot No. 40 Uhuru Street in Ilala Municipality, Dar es Salaam (hereinafter to be referred to as "**the tender**").

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

The invitation for tenders was advertised in the Daily News of 24th May, 2012.

The deadline for submission of tenders was initially set for 22nd June, 2012, but it was later extended to 12th July, 2012, whereby the following seven tenders were submitted;

S/ No	Tenderer's Name	Quoted price Tshs.
1	M/s Unicool East Africa Ltd	2,000,370,220.00 VAT inclusive
2	M/s Remco International Ltd	1,925,749,530.00 VAT inclusive
3	M/s M.A.K Engineering Company Ltd	1,736,851,750.00 VAT inclusive
4	M/s TanPile Limited	1,582,996,190.00 VAT exclusive
5	M/s Cool Care Services Ltd	1,980,220,776.00 VAT inclusive
6	M/s Berkeley Electrical Ltd	2,217,059,973.00 VAT inclusive
7	M/s Derm Electrics (T) Ltd	2,739,853,840.00 VAT inclusive

The tenders were subjected to preliminary evaluation whereby five of them were found to be non responsive for failure to comply with the requirements of the Tender Document, including the tenders submitted by the two Appellants.

Two tenders submitted by M/s Derm Electrics and M/s Tanpile (T) Limited were found to be substantially responsive, thus, qualified for detailed evaluation as per Clause 27.1 of the Instructions to Bidders (hereinafter to be referred to as "**ITB**").

During detailed evaluation the tenders were checked for arithmetic errors, whereby the tender submitted by M/s Derm Electrics was found to have errors in summation and transfer of totals. The relevant corrections were made and the said tenderer was notified of the corrections made.

The two tenders which were found to be substantially responsive were subjected to post-qualification and thereafter ranked as follows:

Name of Tenderer	Post Qualification summary	Corrected tender price Tshs	Ranking
M/s Tanpile Limited	Qualify for award	1,867,935,504.00	1 st
M/s Derm Electrics Ltd.	Qualify for award	3,503,461,600.00	2 nd

The Evaluation Committee recommended award of the tender to M/s Tanpile Limited at a contract price of Tshs. 1,867,935,504.00 VAT inclusive. Their quoted price at tender opening was Tshs 1,582,996,190 excluding VAT.

On 27th July, 2012, the Tender Board approved award of the tender to M/s Tanpile (T) Limited as recommended by the Evaluation Committee.

On 06th August, 2012, the Respondent vide a letter referenced NSSF/HQ/N.12/144/VOL.V/110 communicated the award of the tender to the Successful Tenderer.

On 29th August, 2012, a contract with the Successful tenderer was signed.

On 12th September, 2012, the Appellant wrote a letter referenced NSSF/Mafao/tender/2012/02 to the Respondent inquiring on the tender results. A reply was received from the Respondent on 19th September, 2012, through a letter referenced NSSF/HQ/N.12/146 dated 12th September, 2012, informing them that, their tender was not successful. However, the name of the winning tenderer was not disclosed.

The 1st Appellant being dissatisfied with their disqualification wrote to the Respondent requesting to be informed the reasons for their disqualification.

The Respondent through a letter referenced NSSF/HQ/T.17/1667/29 informed the 1st Appellant that their tender was disqualified due to the following reasons:

- The submitted Power of Attorney was not signed by a competent person (legal expert).

- Anti bribery policy was not submitted as required under Section XI of the Tender Document.
- Total monetary value of construction works performed for each of the last five years did not meet the requirement. The Appellant's annual volume was Tshs. 582,000,000.00 while the required amount was Tshs. 1,500,000,000.00.
- Evidence of experience in works of a similar nature and size for each of the last five years was not submitted.

The Appellant was dissatisfied with reasons given for their disqualification, therefore, on 27th September, 2012, the 1st Appellant filed an Appeal to the Public Procurement Appeals Authority, (hereinafter to be referred to as "**the Authority**").

On receiving notification of the Appeal by the 2nd Appellant, the Respondent raised two points of Preliminary Objection against both the 1st and 2nd

Appellants. In the first instance the Respondent objected to both Appeals claiming that the Appeals had been lodged against a wrong party and therefore both appeals were not properly before the Authority. Secondly, the Respondent stated that the 2nd Appellant had lodged documents which were neither signed nor dated; hence such an appeal could not be entertained by the Authority.

In view of the objections raised, as a matter of procedure, the Authority is deems it necessary to resolve the Preliminary Objection before addressing the merits of the Appeals.

THE RESPONDENT'S SUBMISSIONS ON THE PRELIMINARY OBJECTION

The Respondent's preliminary objection was that;

- a) This Appeal is incompetent and bad at law for contravening the provisions of Section 53(1) and (2) of the National Social Security Fund Act, 2007(sic) whereas the Respondent herein is incapable of being sued.

- b) That, the Statement of Appeal of the 2nd the Appellant is incompetent and bad at law as it is neither dated nor signed by the Appellant as required by law.

In expounding on the reason for the first point of Preliminary Objection, the Respondent submitted as follows:

- i) The Appellants had sued National Social Security Fund (hereinafter to be referred to as "**NSSF**") which is neither a natural nor a legal person capable of being sued.
- ii) The act of the Appellants lodging the Appeal against NSSF offends Section 53(2) (a) of the National Social Security Fund Act, Cap 50 of 1997 Revised Edition 2002 (hereinafter to be referred to as the "**NSSF Act**"). According to that provision the right person to be sued is the Board of Trustees of the National Social Security

Fund (hereinafter to be referred to as "**Board of Trustees of NSSF**")

- iii) The powers to sue or to be sued are vested unto the Board of Trustees of the National Social Security Fund. Thus, the Appellants ought to have exercised due diligence in order to know the right person to be sued.
- iv) The Appellant's negligence in exercising due diligence on who is the right party to be sued cannot be treated as a typographical error but a serious omission on the part of the Appellants.
- v) The fact that the Tender Document for the tender under Appeal was issued by the NSSF cannot be a justifiable ground for the Appellants to file an Appeal against a wrong party as they were required to know the right party to be sued.
- vi) The same point of Preliminary Objection was also raised in Civil Case No. 46 of 2008 between M/s Express Design Ltd versus National Social

Security Fund and in Commercial Case No. 62 of 2011 between Nakara Hotels Ltd versus National Social Security Fund, whereby both courts held that the Appellant's negligence in knowing who is the right party to be sued cannot be treated as typographical error but an omission on their part. The objections were upheld and the plaints were struck out since the defendant was not a legal entity, capable of being sued.

- vii) The NSSF sued by the Appellants had never entered into any contract as it did not have the legal capacity to do so.

- viii) The Respondent urged the Authority not to entertain the Appeal as NSSF against whom the appeal is preferred is non-existent; hence, the decision which would be issued against it, will not be enforceable against the Board of Trustees of NSSF.

- ix) The Appeal has been preferred against the wrong party, thus, they prayed that the same be struck out with costs.

In relation to the second point of Preliminary Objection the Respondent stated that, the Statement of Appeal by the 2nd Appellant filed to this Authority and served to them was neither dated nor signed. The 2nd Appellant's failure to sign and date the statement of Appeal contravenes the requirements of the law. Thus, they prayed that the Appeal be struck out with costs.

THE 1ST AND 2ND APPELLANT'S REPLIES ON PRELIMINARY OBJECTION

The 1st and 2nd Appellants' oral replies on the Preliminary Objection may be summarized as follows;

- i) The Respondent should understand that this matter is before the Public Procurement Appeals Authority and not before a court of law. Thus, the issue that the Appellants' had sued the wrong party cannot be raised before this

Authority as those are legal technicalities which are governed by court procedures while the governing law for the dispute at hand is the Public Procurement Act, Cap 410 of 2004 (hereinafter to be referred to as "**the Act**").

- ii) The Appellants had responded to an invitation made by the National Social Security Fund (NSSF) in the Newspapers and purchased a Tender Document from their office. The Tender Document under Clause 16 of the Bid Data Sheet (hereinafter to be referred as "**BDS**") provides that the Procuring Entity is **NSSF** and is the one who advertised the Tender. Hence the reason for the Appeal being preferred against them. The Board of Trustees of NSSF does not appear anywhere in the Tender Document thus, the Appeal cannot be lodged against them.

With regard to the 2nd point of Preliminary Objection the 2nd Appellant submitted that, they had filed a Statement of Appeal which was dated and signed. The argument

that the Statement of Appeal was not dated or signed is unfounded as it is not true. Thus, they prayed that, the Preliminary Objection should not be entertained by this Authority and the matter be heard on merit.

ANALYSIS BY THE AUTHORITY AND RULING ON THE PRELIMINARY OBJECTION

Having gone through the documents submitted and having heard the oral submissions by parties in relation to the objections raised, the Authority wishes to resolve them by framing the following issue:

Whether the Appeal is properly before the Authority.

In resolving this issue the Authority framed the following sub-issues;

- **Whether it was proper for the Appellants to lodge their Appeal against NSSF**
- **Whether the statement of Appeal filed by the 2nd Appellant was in compliance with the law.**

Having identified the sub-issues, the Authority proceeded to resolve them as hereunder;

a) Whether it was proper for the Appellants to lodge the Appeal against NSSF.

The Respondent's arguments on the first point of preliminary objection were based on Section 53 (1) and (2) of the NSSF Act, which prescribes that the organ empowered to inter alia, enter into contracts, to sue and be sued is the "**Board of Trustees of NSSF**". The Authority deems it necessary to reproduce the cited section herein below:

"53(1) There is established a Board of Trustees of the National Social Security Fund".

"53 (2)(a) The **Board** shall in its Corporate name be capable of -

(a) **suing and being sued**

- (b) taking, purchasing or otherwise acquiring, holding, charging and disposing of property, movable or immovable; and
- (c) entering into contracts and performing all such other acts for the proper performance of its functions under this Act which may lawfully be performed by a body corporate".
(Emphasis supplied)

From the above cited provision, the Authority observes that, the "**Board of Trustees of NSSF**" has been vested with, amongst others, **powers to sue or to be sued, purchasing, acquiring property and entering into contracts.**

The Authority also revisited Section 3 of the NSSF Act which established the National Social Security Fund and its functions. The said section states as follows;

"There is established **a Fund** to be known as the **National Social Security Fund** into which shall be paid all contributions and other monies required by this Act". (Emphasis added)

Furthermore, the Authority examined Section 4 of the NSSF Act and noted that, it provides that the **management and administration** of the Fund are vested in the "**Board of Trustees**".

Having established that the "**Board of Trustees of NSSF**" is vested with such powers, the Authority deemed it necessary to review the document submitted in order to satisfy itself as to what led the Appellants to lodge their Appeal against NSSF and not the Board of Trustees of NSSF.

In the course of doing so, the Authority examined the Tender Advertisement and the Tender Document issued by the Respondent and observed that, both documents indicated that, the procuring entity is the "**NATIONAL SOCIAL SECURITY FUND**". For purposes of clarity the Authority reproduces some of the provisions contained in the said documents as hereunder;

- a) Paragraph 2 of the Tender Advertisement states that :

“The National Social Security Fund has set aside funds for financing the construction...”

This implies that the **NSSF** is the procuring entity which has set aside funds for that project.

- b) The Tender Document under Clause 1.1 of the Bid Data Sheet identifies the procuring entity as follows:

“The procuring entity is the National Social Security Fund”.

- c) The Tender Document under Clause 16 of the Bid Data Sheet provides instructions on where the tenders should be submitted as follows:

“The procuring Entity’s address for purpose of submission of bids is THE DIRECTOR GENERAL SOCIAL SECURITY FUND...”

- d) The Tender Document under Clause 46.1 of the ITB states that;

“Any application for administrative review shall be submitted in writing to the head of a Procuring Entity...”.

According to the Tender Document the procuring entity had been identified to be NSSF.

- e) The Tender Document under Clause 1 of the Special Conditions of Contract indicates that **“the Employer is the Chief Executive Officer, National Social Security Fund”**

Having noted that, the Tender Document clearly stipulates that the procuring entity is NSSF, the Authority revisited Section 79(1) of the Act which provides for the tenderers’ right to review when dissatisfied with decisions made during the procurement process. The said Section 79 (1) states as follows:

“Subject to sub-section (2) of this section, any supplier, contractor or consultant who claims to have suffered or that may suffer any loss or injury as a result of **a breach of duty imposed on a procuring entity or an approving Authority** by this Act **may seek a review** in accordance with **Section 80, 81 and 82 of this Act** provided that the application for review is received by **the procuring or approving authority** within twenty-eight days of the supplier ...” (Emphasis supplied).

The above quoted provision entails that, all procurement complaints are required to be lodged against the **“procuring entity”** or **“approving authority”**.

Section 3 of the Act defines “procuring entity” and “approving authority” as follows:

“Procuring Entity” means a **Public Body or any other body, or unit established and mandated**

by the government to carry out public functions” (Emphasis Supplied)

“Approving Authority” means an **Accounting Officer or Chief Executive, a Ministry tender board, a regional tender board, a district tender board, a local government tender board or a parastatal tender board”** (Emphasis added)

The Authority considered the above quoted definitions together with Section 53(2) of the NSSF Act quoted earlier and observes that, the **“procuring entity”** for the disputed tender process is the **“Board of Trustees of NSSF”**. Based on that finding the Authority is of the view that, the NSSF which has purported to be the procuring entity in the documents submitted to this Authority does not have legal personality.

However, having established that the proper procuring entity for the disputed tender is the Board of Trustees of NSSF and having noted that the Respondent had indicated in their Tender Document that the procuring entity is **“NSSF”** while it does not have such status or

powers to do so, the Authority observes that, the Respondent had deliberately misled the tenderers in the disputed tender process by inviting tenders, issuing Tender Documents and continued to process the tender as NSSF while it does not have mandate to procure. The Authority is of the firm view that the Respondent did so inspite of the following;

- i) Having express and constructive knowledge of over 15 years of their governing statute (**i.e. the NSSF Act, 1997**) that the procurement function is vested in the "**Board of Trustees**" of NSSF.
- ii) Fully cognizant of the High Court decisions in **Civil Case No. 46 of 2008** between M/s Express Design LTD and National Social Security Fund and **Commercial Case No. 62 of 2011** between Nakara Hotels and National Social Security Fund, where it was categorically stated that the legal personality of the Respondent is vested in the Board of Trustees of the NSSF.

The Authority observes further that, the Respondent is using the legal personality principle simultaneously as a sword and as a shield. In the Tender Document they expressly identified NSSF to be the procuring entity. They proceeded to process the tender and award the contract to the Successful Tenderer happily in accordance with the Tender Document. However, faced with the Appeal against their decision, they had a bizarre courage to defend themselves by arguing that the Appellants had sued a party with no legal personality.

To the Respondent, when the going is good for them NSSF can as well be the right party to deal with, but when the going is against them the right party is the Board of Trustees of NSSF. It should be noted that, the Appellants did not invent NSSF as they simply addressed the party that was duly identified to be the procuring entity. Therefore, the Appellants are not to blame.

The Authority considered further the Respondent's argument that the contents of Tender Document and Tender advertisement are issues of fact and not law; hence, these should not be considered when issues of law

are to be determined. The Authority rejects this argument on the reason that the said documents are derived from the Procurement Act and its regulations. Thus, it cannot be argued that, they were merely facts as they are part and parcel of the procurement law.

This notwithstanding, the Authority proceeded to examine the true intention of the Respondent when they floated and proceeded to process the tender in question. The Authority is satisfied that, the Respondent would not have done the following without intending to commit the rightful party, that is, the NSSF Board of Trustees unless they were blessed corporate tricksters;

- i) Prepared, issued the Tender Document and conducted the tender process as "**NSSF**".
- ii) Replied to the Statement of Appeal lodged by the 1st Appellant without raising such a query.

- iii) Appeared before this Authority on the date fixed for hearing before it was adjourned without raising such a point.
- iv) Appeared before this Authority as NSSF, in Appeal No 114 of 2011, Appeal No. 115 and Appeal No. 129 of 2012, without raising the issue of legal personality and had complied with the orders issued by this Authority. Indeed, when the Respondent appeared before this Authority in respect of the Appeal at hand, they did not indicate that, they could not implement the orders of this Authority issued in the above cited Appeals; inspite of the fact that in those Appeals they appeared as NSSF.
- v) Ultimately a contract was signed between M/S Tanpile (T) Limited and the main contractor which was a product of the Tender Document issued by the Respondent.

Considering their clearly discernable intent, the Authority finds the Respondent's act to be binding on the "**Board of Trustees of NSSF**" as per Section 75(1) of the Act which states as follows;

"S.75 (1) Any conduct engaged in or on behalf of a body corporate:-

- (a)** By a director, servant or agent of the body corporate within the scope of the **actual or apparent Authority**; or
- (b)** By any other person at (sic) the director or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, whether giving of the direction, consent or agreement is within the scope of the actual or apparent Authority of the director, servant or agent **shall be deemed for the purposes of this Act to have been engaged in the body corporate"**

From the above quoted provision the Authority is of the settled view that, the shortfalls identified

notwithstanding, the Authority believes that the same was done on behalf of the Board of Trustees of NSSF.

Accordingly, the Authority concludes that it was proper for the Appellants to lodge their Appeal against NSSF. Thus, the Respondent's first point of preliminary objection is therefore rejected.

b) Whether the statement of Appeal filed by the 2nd Appellant was in compliance with the law.

The Authority considered the Respondent's second point of preliminary objection that, the Statement of Appeal of the 2nd Appellant is incompetent and bad at law as it is neither dated nor signed by the Appellant as required by law.

In order to ascertain the validity of the Respondent's argument on the point of Preliminary Objection, the Authority revisited the 2nd Appellant's Statement of Appeal submitted and noted that, three copies were

submitted to this Authority. Two of the said statements were signed and dated while the third copy was not. The

Authority inadvertently served the Respondent with the unsigned and undated copy. The Authority concedes to that oversight. The 2nd Appellant is therefore not to blame.

With regard to this point therefore the Authority concludes that, the Appeal cannot be incompetent for the Authority's oversight and the signed copy was therefore, provided to the Respondent for their custody and further action.

In view of the above findings, the Authority's conclusion on the preliminary objection is that, the Appeal is properly before it and the hearing of the Appeal should proceed on the merits thereof.

Having delivered its Ruling in respect of the Preliminary Objection raised by the Respondent and having rejected it, the Authority proceeded to hear the Appeal on merit.

SUBMISSIONS BY THE 1ST APPELLANT ON THE MERITS OF THE APPEAL

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

That, the Appellant was among the tenderers who participated in the disputed Tender.

That, two months after the tender opening, the 1st Appellant wrote a letter to the Respondent requesting to be given the tender results.

That, they were aggrieved by the Respondent's decision to disqualify their tender as they believed that it met all the criteria stipulated under Regulation 14(1) (a) - (e) of the Public Procurement (goods, works, non-consultant Services and disposal of public assets by Tender) (hereinafter to be referred as "**GN. No. 97/2005**").

That, their tender had offered the best price for the required solution that is why they requested to be informed of the reasons for their disqualification.

That, they were not satisfied with the reasons given by the Respondent for disqualifying them due to the following;

- They submitted a proper Power of Attorney.
- They had duly signed and stamped the Standard Anti bribery form provided in the Tender Document.
- The requirement for an Annual Construction Volume turnover of Tshs 1,500,000,000.00 was not provided for in the Respondent's Tender Document.

That, they had complied with the requirement to show two years experience in works of similar nature and size as required by Clause 12.5 of the BDS and not five years experience as stated by the Respondent.

That, the Respondent did not consider value for money in reaching their decision for award as they ought to have sought for clarification from tenderers whose tender had minor omissions and low prices.

That, the Respondent did not disclose the name of the Successful Tenderer when notifying the 1st Appellant of the results contrary to the requirements of Regulation 97 (14) (a) of GN. No. 97/2005.

That, their tender was unfairly disqualified from the process contrary to Section 43 (b) of the Public Procurement Act, 2004.

Finally, the 1st Appellant prayed for the following:

- a) annulment of the decision of the Respondent which rejected their tender;
- b) order the Respondent to reach a lawful decision;
- c) the Respondent be ordered to pay compensation for the costs of the Appeal; and

d) take any other action as the Authority may deem necessary.

SUBMISSIONS BY THE 2ND APPELLANT ON THE MERITS OF THE APPEAL

The 2nd 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, they were among the tenderers who participated in the Tender under Appeal.

That, prior to submission of the tenders, they had submitted a request for clarification on some issues contained in the Tender Document through a letter with Ref. No. CCSL/TA/13/12. Upon being dissatisfied with the Respondent's replies on the clarification sought, they filed an application for review to the Respondent.

That, on 22nd June, 2012, they received a letter from the Respondent informing them about the extension of the deadline for submission of tenders from 25th June, 2012, to 12th July 2012. The reasons for extension were to allow the Respondent to have ample time to answer queries raised by the tenderers. However, until the tender submission deadline their queries had not been responded to.

That, the Tender opening took place on 12th July, 2012, whereby no tenders were announced to have failed to comply with the requirements of the Tender Document as they were checked if all the required documents were submitted and tenders were signed.

That, they were not informed about the tender results until they received notification of Appeal from this Authority. The Respondent failure to communicate the tender results contravened Section 58(2) of the Act and Reg.97 (14) (a) of GN. No.97 of 2005.

That, the Respondent's act of communicating tender results to the 1st Appellant only and not other tenderers contravened Regulation 17(3) of GN. No. 97/2005, which prohibits discrimination in tender process.

That, they were not informed of the reasons for their disqualification and the name of the Successful Tenderer was not disclosed.

That, the Respondent's failure to disclose the name of Successful Tenderer raises doubt if the award has been made fairly and to a competent firm.

That, the Annual Construction Volume of Tshs. 1,500,000,000.00 was not among the requirements provided for in the Tender Document. Hence, the Respondent's act of disqualifying the 1st Appellant on the basis of a criterion not provided in the Tender Document contravened Section 46(4) of the Act read together with Regulations 9 (c) and 90(4) of GN No. 97/2005.

That, the Tender Document had many shortfalls including the following;

- i) No equipment were required for execution of contract,
- ii) Two years experience was not sufficient for the nature of works,
- iii) Two years experience for the contract manager was not enough,
- iv) No capital was required,
- v) The Bid Securing Declaration was not proper for the intended project,
- vi) No annual construction volume was required.
- vii) No information form was provided

Finally, the 2nd Appellant prayed for the following;

- a) the Respondent be ordered to communicate the tender results to all tenderers,
- b) the Respondent be ordered to re-evaluate the tenders using the criteria given
- c) take any other action as the Authority may deem necessary.

REPLIES BY THE RESPONDENT ON THE MERITS OF THE APPEAL

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 Appellants' tenders were fairly disqualified as they failed to comply with the requirements of the Tender Document.

That, the Appellants submitted defective Powers of Attorney in the following respects:

- i) The Power of Attorney had to be signed by **three parties** namely the transferor, transferee **and a witness** by showing all details including signature, date signed, position and whether donor or donee. The transferee did not sign the document to acknowledge receipt of the powers in the Power of Attorney of the 1st Appellant.

- ii) Both Powers of Attorney were not witnessed by a Commissioner for Oaths as required by **Section 94 of the Law of Evidence Act, Cap 6 R.E 2002.**
- iii) The Power of Attorney of the 2nd Appellant was signed by the Managing Director transferring powers unto himself while the law requires the powers to be transferred from a donor to a donee.
- iv) The Powers of Attorney of the Appellants did not disclose the place where they were signed and sealed. The Appellants contravened Section 8 of the Notary Public and Commissioner for Oaths Act, Cap 12, R.E 2002 which requires the Commissioner for Oaths before whom any oath was taken to draw the *Jurat* of attestation showing the date, place of signing and delivery as well as the source of knowledge i.e. whether he knows the party personally or if he was introduced by another person. This is important

as the execution procedures depend on where the documents were prepared.

- v) Both Appellants' Powers of Attorney were defective and that in itself invalidated all the documents signed in that behalf.

That, the defects noted in the Appellants' Powers of Attorney were sufficient to disqualify them in the disputed tender. The decision in Appeal case No. 92 of, 2010, before this Authority between Dour Tanzania Co. Ltd and Kongwa District Council emphasizes on the importance of a Power of Attorney.

That, the 1st Appellant was disqualified for submitting a defective Power of Attorney, failure to show five years experience in works of similar nature and failure to meet Annual Construction Volume of Tshs. 1,500,000,000.00. The ground that they failed to attach Anti-bribery policy was withdrawn after realizing that it was included in their tender.

That, apart from the reasons for disqualification which were communicated to the 1st Appellant, the Respondent's review committee which reviewed all tenders after the evaluation process was completed pointed out additional shortfalls in the 1st Appellant's tender as listed hereunder;

- Financial statements were incomplete as no balance sheets were attached,
- No evidence of adequate working capital was provided
- Authority to seek reference from the tenderer's banker was not provided
- Information regarding litigation history was not provided
- Information regarding labour occupational health and safety records of the company for the past five years was not provided.

That, in relation to the 2nd Appellant the reasons indicated in the Evaluation Report for their disqualification were that, they submitted a defective

Power of Attorney and did not attach Anti bribery policy. Moreover, the Respondent's Review Committee which reviewed all tenders detected additional shortfalls in the 2nd Appellant's tender which were not listed in the Evaluation Report. The said shortfalls were;

- Business license was not attached
- The Financial statement submitted were not certified by a competent person
- Information regarding litigation was not provided
- Information regarding labour occupational health and safety records of the company for the past five years was not provided.
- CV's of the proposed technical personnel as well as certified academic certificates were not provided.

That, the Respondent's Review Committee did not find any shortfalls in the tender submitted by the successful tenderer as they complied with all the conditions provided in the Tender Document. That is why, they were awarded the tender.

Finally, they prayed for the following orders:

- a) the Appeal be dismissed,
- b) the Appellants be ordered to pay costs of attending the appeal and incidental thereto,
- c) any other relief this Authority may deem fit to grant.

THE AUTHORITY'S ANALYSIS ON THE MERITS OF THE APPEAL

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

- **whether the evaluation of tenders was conducted in accordance with the law;**
- **whether the Appellants were fairly disqualified;**

- **whether award of the tender to M/s TanPile Limited was proper at law;**
- **whether communication of the tender results was done in accordance with the 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 evaluation of tenders was conducted in accordance with the law

In resolving this issue the Authority considered the Appellants' arguments that;

- i) Their Powers of Attorney complied with the requirements of the law; hence, it was not fair for their tenders to be disqualified.

- ii) The evaluation of tenders was not properly conducted as it applied some criteria which were not provided for in the Tender Document, for instance, the annual construction volume of Tshs. 1,500,000,000.00 was not amongst the criteria.
- iii) The criterion of five years experience in works of similar nature was not among the criteria provided for in the Tender Document, as the required experience was two years as per Clause 12.5(b) of the ITB.
- iv) The award of the tender to Successful Tenderer was wrongly made as they do not have the required experience.

In reply thereof the Respondent contended that;

- i) The Appellants' Powers of Attorney were defective for failure to meet the requirements of the law.

- ii) The annual construction volume of Tshs. 1,500,000,000.00 was not expressly stated in the Tender Document but due to the magnitude of the project to be executed and the experience required, it was expected that the tenderers would know that an adequate annual construction volume was required.
- iii) The requirement of five years experience was provided for under Clause 12.3(c) of the ITB.
- iv) The tender submitted by the Successful Tenderer had met all the requirements provided for in the Tender Document, that is why they were awarded the tender.

Having summarized the submissions by parties on this particular issue, the Authority reviewed the evaluation process in order to ascertain if it was conducted in accordance with the law. To start with the Authority revisited the Tender Document and noted that, evaluation of tenders was provided under Clauses 27 to 33 of the ITB. The said clauses indicated that the

evaluation was to be conducted in three stages, namely; preliminary evaluation, detailed evaluation and post-qualification.

The Authority reviewed the Evaluation Report and noted that during the first stage of evaluation, namely, preliminary evaluation tenders were checked for, amongst others, compliance with the eligibility criteria. The Authority noted that, at that stage, five tenders including those of the Appellants, were found to be non responsive to the tender requirements.

In ascertaining whether the evaluation process was conducted in accordance with the law or otherwise, the Authority deemed it pertinent to address each of the evaluation criteria which formed the basis of the disqualification of the Appellants as well as other criteria which were improperly evaluated and the evaluation stages. The Authority's analysis on some of the evaluation criteria as well as the evaluation stages is as follows:

(a) Power of Attorney

The Authority considered the Respondent's major reasons for disqualification of the Appellants' tenders, to wit that, they had submitted defective Powers of Attorney in the following aspects;

- i) The Power of Attorney submitted by the 1st Appellant was signed by the same person purporting to be granted the said powers and the name of the donor was not mentioned.
- ii) The Power of Attorney submitted by the 2nd Appellant was equally defective in that it did not show who is the donor or donee.
- iii) Powers of Attorney of both Appellants were not witnessed by a commissioner for oaths as per Section 94 of the Evidence Act.
- iv) Powers of Attorney did not disclose the date, place where they were signed, sealed and delivered as per Section 8 of the Notary public

and Commissioner for Oaths Act, Cap 12, R.E 2002.

In resolving this contentious argument the Authority revisited the Tender Document in order to substantiate if the Power of Attorney was among the required documents. In so doing the Authority noted that, according to Clause 11.1(g) of the ITB, submission of a Power of Attorney was a mandatory requirement. The said Clause provides as follows;

“11.1 The bid prepared by the Bidder **shall constitute the following components:**

g) **Written power of Attorney authorizing confirmation signatory of the bid to commit the Bidder in accordance with the Instructions to Bidders Clause 19”.**

(Emphasis supplied)

Having established that the Power of Attorney was amongst the mandatory documents to be submitted by the tenderers, the Authority considered Section 94 of the Evidence Act Cap. 6 RE 2002 and Section 8 of the Notary

Public and Commissioner for Oaths Act, Cap. 12, R.E 2002 which were relied upon by Respondent in proving defectiveness of the Appellants' Powers of Attorney. The said Section 94 of the Evidence Act reads:

“The court shall presume that every document purporting to be a Power of Attorney and to have been executed before and authenticated by a notary public, or commissioner for oaths, any court, judge, magistrate, registrar, foreign service officer or diplomatic representative of a commonwealth country, was so executed and authenticated”. (Emphasis supplied)

With all due respect to the Respondent's submission, the Authority does not see the relevance of Section 94 of the Evidence Act as quoted above, in prescribing the contents of a legally acceptable Power of Attorney. That provision does not say that it must be executed by the officers named therein; rather it simply states that if the instrument is executed before them it will be presumed to have been so executed.

The Authority also revisited Section 8 of the Notary Public and Commissioner for Oaths Act which states as follows;

“Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly *jurat* of attestation at what place and on what date the oath of Affidavit is taken or made”.

(Emphasis made).

With regard to the above quoted provision, the Authority observes that, it is only confined to an oath made before a Commissioner of Oaths and does not apply to oaths taken before persons mentioned under Section 94 of the Evidence Act. Furthermore, the said provision does not explain explicitly the contents of a Power of Attorney, save for, the *jurat* of attestation. It is the considered view of the Authority that, the provisions relied upon by the Respondent do not provide for the contents of Power of Attorney.

The Authority noted that, Clause 19.2 of the ITB provided some guidance to the tenderers on the contents of a Power of Attorney in the following words:

“The original and the copy or copies of the Bid shall be typed or written in indelible ink and **shall be signed by the Bidder or a person or persons duly authorized to sign on behalf of the Bidder.** This authorization shall consist of a written confirmation as specified in the Bid Data Sheet and shall be attached to the Bid. **The name and position held by each person signing the authorization must be typed or printed below the signature.** All pages of the Bid, except for un-amended printed literature, shall be initialed by the person or persons signing the bid.” (Emphasis added)

In analyzing the above quoted provision, the Authority observes that it required the Power of Attorney to be submitted to indicate the names and positions of persons whose signatures appear therein. Additionally, it required

all tenders to be signed and initialed by person legally authorized to do so.

In the light of the above quoted Clause 19.2 of the ITB, the Authority also considered the emphasis made by the Respondent during the hearing that, a properly drawn Power of Attorney should have, amongst others, the names and signatures of the '**donor**' and the '**donee**'. The Authority concurs with the Respondent that, the Tender Document specified clearly that the names and positions of persons signing the Power of Attorney should be shown therein.

Furthermore, the Authority agrees with the Respondent that, the Powers of Attorney submitted by the Appellants show that, their Managing Directors had conferred powers unto themselves as there was neither a **donor** nor a **donee** despite being signed by two persons whose titles were not indicated. In this case therefore the Authority observes that, the Powers of Attorney submitted by the Appellants did not comply with Clause 19.2 of the ITB as they did not indicate the positions of the signatories thereto. In addition to the above

mentioned defects, the 1st Appellant's Power of Attorney was not dated, which this Authority considers to be a serious omission. That said, the Authority is satisfied that, the Powers of Attorney submitted by the Appellants were not drawn in accordance with the law, hence, their disqualification on this ground was proper.

(b) Signing and initialing of tenders

The Authority also noted that, during preliminary evaluation, the Evaluators had waived the requirement that tenders should be properly signed and initialed as provided for under Clause 19.2 of the ITB. The said waiver was made in favour of M/s Derm Electrics (T) Ltd, on the grounds that, most tenders did not comply with such a requirement and for purposes of increasing competition. During the hearing Members of the Authority requested the Respondent to explain the legal basis for such waiver of a mandatory criterion. They clarified that, their action was based on Regulation 90(11)(b) of GN. No 97/2005 which allows waiver to any non conformity which does not constitute material deviation.

The Authority considers the Respondent's argument on this point to be an afterthought as they are neither corroborated by the content of the Evaluation Report nor the Tender Board's Minutes. The Authority emphasizes that, the signing of a tender is proof that the tender is authentic and initialing of documents attached thereto helps to protect tenderers' information from being tampered with during the tender process. Thus, the Authority failed to comprehend the motive behind waiving such an important requirement.

Furthermore, the Authority emphasizes that it was wrong for the Evaluators to waive such a mandatory criterion, as such an action was intended to make a non responsive tender to be responsive and was also likely to affect unfairly the competitive position of tenderers contrary to Clauses 27.2 and 27.5 of the ITB which provide as follows:

27.2 "A material deviation or reservation is one that:-

(c) if rectified, would affect unfairly the competitive position of other Bidders presenting substantially responsive bids.”

27.5 “If a Bid is not substantially responsive, it will be rejected by the Procuring Entity and **may not subsequently be made responsive by the Bidder by correction of non conformity”** (Emphasis supplied)

The Authority therefore is of the view that, had the evaluators been diligent enough they would have disqualified the tender submitted by M/s Derm Electrics (T) Ltd at the preliminary stage. It is the considered opinion of the Authority that, the Respondent’s act of noting a defect on the tender and deciding to waive such a criterion for purpose of qualifying that tender to the next stage raises doubt as to the credibility and integrity of the Evaluators in the disputed tender.

**(c) Annual Construction Volume of Tshs.
1,500,000,000.00**

In resolving the Appellants' argument on the annual construction volume of Tshs. 1,500,000,000.00, the Authority revisited the Tender Document and noted that the said criterion was not provided for therein. Clause 12.5(a) of the ITB states that the amount and the period required for the annual construction volume would be specified in the Bid Data Sheet. However, Item 12.5(a) of the BDS provides that;

“Period for which annual volume is to be submitted is two years” (Emphasis supplied)

Based on the above quoted provision, the Authority is of the view that, the required amount of the annual construction volume was not specified in the Tender Document as one of the criterion. Clause 9 of the BDS which purported to modify, amongst others, Clause 12.5(a) of the ITB, modified the time required but did not provide for the amount involved. It is the view of the Authority that, the annual construction volume criterion should not have been used for evaluation purposes.

The Authority considered the Respondent's argument that, based on the magnitude of the work involved, all tenderers, save for the Appellants, met the requirement of annual construction volume of Tshs 1,500,000,000.00. The Authority does not accept this argument, in that, although the said criterion was not provided for in the Tender Document, it was applied during the evaluation and the tender of the successful tenderer namely; M/s Tanpile Limited did not comply with this requirement as they had shown an annual construction volume of **Tshs. 1,121,861,293** and not Tshs 1,500,000,000.00. Surprisingly, the Evaluation Report indicated that the Successful Tenderer had complied with the said criterion. The Authority does not comprehend the conduct of the Evaluators in this regard.

The Authority finds the Evaluators' act of using an evaluation criterion alien to the Tender Document to have contravened Regulation 90(4) of GN No. 97/2005 which requires evaluation to be done in accordance with criteria set forth in the Tender Document. The said regulation 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)

The Authority further noted that, annual construction volume was not among the criteria which were evaluated during Preliminary Evaluation. The said criterion was evaluated at the Post-Qualification stage of which the 1st Appellant did not reach. Thus, the Authority wonders why the Respondents included it to be among the reasons for disqualifying the 1st Appellant’s tender.

(d) Five years Experience

With regard to the 1st Appellant’s contention that the required experience was two years and not five years the Authority observes that, Clause 12.3(c) of the ITB provides for the requisite experience in the following words;

“12.3 If the procuring entity has not undertaken pre qualification of potential Bidders, all Bidders

shall include the following information and documents with their bids....

- (c) **experience in works of similar nature and size for each of the last five years and details of work under way or contractually committed**; and clients who may be contacted for further information on those contracts” (emphasis added)

Based on the above quoted provision the Authority rejects the 1st Appellant’s argument, as Item 9 of the BDS which modified, inter alia, Clause 12.5(b) of the ITB is specifically related to **experience of prime sub contractors** and not experience in works of a similar nature.

The Authority reviewed the 1st Appellant’s registration certificate with Contractors Registration Board (hereinafter to be referred to as “**CRB**”) and noted that, they were registered as Contractors Class One in Air Conditioning on 20th July, 2010. That is to say, at the time the tenders were submitted they had two years

experience as Class One contractors in that particular field. Having reviewed the tender submitted by the 1st Appellant the Authority noted that there was no evidence proving that they have the required five years experience in works of a similar nature. Thus, the Authority is of the settled view that, the Respondent had fairly disqualified them, as they failed to comply with this particular criterion.

Furthermore, the Authority considered the submission by the 2nd Appellant on experience that, if the disputed tender had been awarded to M/s Tanpile (T) Limited, they did not qualify for award as they did not have the requisite five years experience as Class One Contractors in the field of air conditioning.

In order to ascertain the validity of the 2nd Appellant's argument, the Authority revisited the tender of M/s Tanpile (T) Limited and noted that, they were registered as Class One contractors in the field of air conditioning on 23rd October, 2009. That is to say, at the date of tender submission they had two and half years experience in that particular field. Upon further review of the said

tender, it was noted that, information on the experience attached did not show the period or nature of the works done to prove that they had the requisite five years experience in works of a similar nature and size. For purposes of clarity, the Authority reproduces a summary of the information relating to experience as contained in the tender submitted by M/s Tanpile (T) Ltd:

S No	Client	Contract price Tshs.
1.	Oysterbay Villa Ltd	365,851,580.00
2.	Tanzania Electric Supply Company Ltd	160,478,590.00
3.	Hotel& property development (Kendwa) Ltd, Zanzibar	575,880,323.00
4.	Tanzania Revenue Authority (Mikocheni- works under way)	39,664,000.00

Based on the information contained in the above Table the Authority observes that, none of the contracts executed was of equivalent value. Furthermore, in absence of the details with regard to the nature of the works executed in the above-listed projects, the Authority wonders how the Evaluators were able to ascertain whether the works executed were of similar

nature or otherwise. In addition, the Authority wonders how the Evaluators were able to satisfy themselves that the said tenderer was capable of executing the awarded contract valued at Tshs. 1,867,935,504.00

The Authority is therefore of the firm view that, had the Evaluators been diligent, fair and consistent, the tender submitted by M/s Tanpile Limited ought to have been disqualified for lack of the required experience of five years in works of similar nature.

The Authority could not understand how the Evaluators could detect the 1st Appellant's lack of the required experience in works of a similar nature, but failed to notice a similar shortfall in the tender of the Successful Tenderer, namely, M/s Tanpile Limited.

(e) Post-qualification stage

The Authority noted that, after preliminary evaluation the two tenders which were found by the Evaluators to be substantially responsive were subjected to detailed evaluation whereby correction of errors was done to the

tender of M/s Derm Electrics (T) Ltd. The two tenders were thereafter Post-qualified and ranked according to their prices. The Authority finds the Respondent's act of ranking the tenders after Post-qualification to have contravened Section 48(1) of the Act read together with Regulation 94(5) of GN No. 97/2005 which require ranking to be done in order to identify the lowest evaluated tender for purposes of conducting Post-qualification. The said provisions state 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 has been determined to offer the lowest valuated tender**, in case of procurement or the highest evaluated tender in case of disposal of public assets by tender **has the capability and resources to carry out effectively the contract as offered in the tender**" (Emphasis supplied)

"Reg. 94(5) Post-qualification shall be undertaken for the lowest evaluated tenderer only". (Emphasis added)

The Authority observes further that, Section 48(2) of the Act read together with Regulation 94(6) of GN No. 97/2005 provide for the importance of Post-qualification to be done to the lowest evaluated tender, in that, if the lowest evaluated tender fails to meet the criteria the procuring entity can have recourse to the second lowest evaluated tender, if any.

(f) Inclusion of Value Added Tax (VAT)

The Authority noted that, in the course of ranking the tenders, the Evaluators added VAT to the price of M/s Tanpile (T) Limited. It was noted further that, among all the seven tenders who submitted their tenders, M/s Tanpile (T) Limited was the only tenderer whose price excluded VAT. The Authority revisited Clause 14.3 of the ITB and noted that it required the tenderers to include all taxes, duties and levies in their quoted prices. The said Clause states as follows;

“All duties, taxes and other levies payable by the contractor under the contract, or for any

other cause as of the date 28 days prior to the deadline for submission of bids, **shall be included in the rates, prices and total bid price submitted by the Bidder**".(Emphasis supplied)

The Authority also revisited Paragraph 5 of the Bill of Quantities (BOQ) which emphasizes on the requirement that the price quoted should include, amongst others, all taxes, levies and duties. The said paragraph 5 states so in the following words;

"The rates and prices tendered in the priced Bills of Quantities shall, except in so far as it is otherwise provided for under the contract, include all contractor's Equipment, labour, supervision, Materials, Erection, remedying of Defects, Insurance, Overheads, Profit, **taxes and duties,** together with all risks, liabilities and obligation set out or implied in the contract". (Emphasis supplied)

The Authority noted further that, the Standard Forms contained in the Tender Document under a Form titled "General Summary" which has a specific spot where VAT

should be indicated. Thus, the Authority is of the view that the tender of M/s Tanpile (T) Limited ought to have been disqualified for being substantially non-responsive for failure to indicate a price which was VAT inclusive which was a mandatory requirement.

The Authority finds the Respondent's act of adding VAT to the price quoted by M/s Tanpile (T) Limited to have contravened Regulation 90(8) of the Act read together with Clause 27.7 of the ITB. For purposes of clarity the Authority reproduces Clause 27.7 of the ITB which states as follows;

“The Procuring Entity may waive any minor informality, non-conformity or irregularity in a bid that does not constitute a material deviation and does not prejudice or affect relative ranking of any Bidder as a result of the technical or commercial evaluation pursuant to ITB Clause 26 and 28.” (Emphasis added)

Based on the above quoted provision the Authority is of the considered view that, the Respondent's act of adding

VAT to the price quoted by M/s Tanpile (T) Limited affected the relative ranking of other tenderers and it also made a non responsive tender to be responsive contrary to Clause 27.5 of the ITB.

Having reviewed the evaluation process and having pointed out the shortfalls detected in the process the Authority proceeded to review the other processes which were conducted by the Respondent in respect of the tender under Appeal. According to the Respondent, a Review Committee was later established by the Respondent, for purposes of reviewing the Evaluation Report and the tenders, whereby more shortfalls were detected in the tenders submitted by the Appellants.

According to the Respondent, no shortfalls were detected in the tender submitted by the Successful Tenderer, namely, M/s Tanpile (T) Limited. The Authority does not buy the Respondent's submission that a Review Committee was formed, in that, no evidence was availed to this Authority to prove that the said Committee was actually established, and if so, whether its findings were submitted to the Tender Board for deliberation.

Furthermore, the Minutes of the Tender Board availed to this Authority; do not show that such shortfalls were ever deliberated upon since if that was the case it would have necessitated a re-evaluation of tenders in accordance with Section 68(b) of the Act. Thus, it is the view of the Authority that, the shortfalls pointed out by the Respondent were an afterthought after they became aware of the existence of this Appeal.

Assuming that the Respondent conducted two reviews as claimed, and in the course of doing so discovered additional shortfalls in the tenders submitted by the Appellants but none from the Successful Tenderer's tender, the Authority observes that such an act raises a lot of doubts as to their motive. It seems to the Authority that, the Respondent turned a blind eye to the glaring defects in the tender submitted by the Successful Tenderer as detected by this Authority.

The Authority observes further that, had the evaluators been diligent enough in their evaluation, they would have disqualified all the tenders for failure to comply with the requirements of the Tender Document. Given the

shortcomings in the evaluation process, as pointed out by this Authority, the Evaluators' competence and integrity are indeed questionable.

In view of the above findings, the Authority is of the firm view that, the evaluation process was not conducted in accordance with the law as the Respondent's act has contravened Section 46(4) of the Act which provides as follows;

“Any disqualification 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”.

(Emphasis supplied)

Accordingly, the Authority's conclusion in the first issue is that the evaluation of tenders was not conducted in accordance with the law.

2.0 Whether the Appellants were fairly disqualified

In analyzing this issue the Authority took cognizance of its findings in issue number one that both Appellants had failed to comply with the requirements of the Tender Document.

The Authority also considered the 2nd Appellant's argument that, the Tender Document was ill prepared and as a result the requirements were not clear. The Authority observes that, the issue of unclear and ambiguous terms ought to have been raised before submission of tenders. The documents submitted to this Authority indicate that the same issue was raised during tendering by the 2nd Appellant but they opted not proceed further even though they were dissatisfied with the Respondent's replies. The Authority is thus of the view that the same issue cannot be taken up at this stage as they had decided to forgo their rights.

Therefore, the Authority concludes that, the Appellants were fairly disqualified.

3.0 Whether the award made to the M/s Tanpile (T) Limited was proper in the eyes of the law.

In resolving this issue, the Authority relied in its findings on issue number one that the award made to the Successful Tenderer was not proper in the eyes of the law, as their tender ought to have been equally disqualified for being substantially non responsive.

Accordingly, the Authority is of the settled view that the award made to M/s Tanpile (T) Limited was not proper at law.

4.0 Whether communication of the tender results was done in accordance with the law.

In resolving this issue, the Authority revisited the 2nd Appellant's argument that, the tender results were not communicated to them contrary to Regulation 97(14) of GN No. 97/2005. The 2nd Appellant contended further that, the Respondent's act of notifying the tender results to the 1st Appellant only, contravened Regulation 17(3) which prohibits discrimination in the tender process. Furthermore, both Appellants failed to understand why the name of the successful tenderer has not been disclosed.

In reply thereof, the Respondent contended that, the tender results were yet to be communicated to unsuccessful tenderers, as they were waiting for the successful tenderer to furnish the performance security, in case they failed to do so the Respondent should have recourse to the next lowest evaluated tenderer.

In resolving the conflicting arguments by parties the Authority revisited the documents submitted and noted that, the award was communicated to the successful tenderer on 6th August, 2012 and the contract was signed on 29th August, 2012. The Authority noted that,

Regulation 97(11) of GN No. 97/2005 read together with Clause 38.3 of the ITB require the Respondent to communicate the tender results to unsuccessful tenderers after the performance security had been furnished by the successful tenderer. The said provisions read:

Reg. 97(11) "Upon entry into force of the procurement or disposal contract and, if required, the provision by the supplier, service provider, contractor or asset buyer of a security for the performance of the contract, **notice of the procurement** or disposal contract **shall be given to other** supplier, service provider, **contractor** or asset buyer, **specifying the name and address of the** supplier, service provider, **contractor** or asset buyer **that has entered into the contract and the contract price.**" (Emphasis supplied)

Clause 38.3 "Upon the successful Bidder's furnishing of the performance security pursuant to ITB Clause 40, the procuring entity will promptly notify each unsuccessful bidder, notify the name of the winning

bidder and the contract amount and will discharge the Bid Security and Bid Securing Declaration". (Emphasis added).

From the above quoted provisions, the Authority is of the view that, the Respondent ought to have communicated the tender results to all unsuccessful tenderers immediately after receiving the performance security.

Based on the facts of this Appeal, the Respondent was not sure whether the performance security was already furnished, as it ought to have been sent to the main contractor who had already signed the contract with M/S Tanpile (T) Limited. The Authority gives the benefit of doubt to the Respondent that the performance security was yet to be furnished, and if that is the case, the Authority is of the firm view that, the Respondent's act of communicating the tender results to the 1st Appellant prior to the receipt of the performance security contravened the law.

Furthermore, the Authority concurs with the 2nd Appellant that communication of the tender results to the 1st Appellant only was discriminatory and contrary to Regulation 17(3) of GN No. 97/2005.

Accordingly, the Authority's conclusion on the fourth issue is that the communication of the tender results was not done in accordance with the law.

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

Having resolved the issues in dispute and having satisfied itself that, the Powers of Attorney submitted by both Appellants were defective and that the tender of the M/s M/s Tanpile (T) Limited also did not comply with the requirements of the Tender Document and having found that all tenders should have been rejected at the preliminary evaluation stage, the Authority revisited the prayers by parties.

The Authority considered the 1st Appellant's prayer that the award of the tender to M/s Tanpile (T) Limited be nullified, and observes that there is nothing to nullify as the purported award of the tender is null and void. With regard to the 1st Appellant's request that the Respondent be ordered to reach a lawful decision by awarding the

tender to them, the Authority is of the firm view that, they did not deserve to be awarded the tender as they did not comply with the requirements of the Tender Documents.

The Authority considered the 2nd Appellant's prayer that the Respondent be ordered to notify them of the tender results and the name of the successful tenderer. The Authority cannot grant that prayer as it has been overtaken by events.

With regard to the 2nd Appellants prayer that, the Respondent be ordered to re-evaluate the tenders, the Authority observes that, since all the tenders did not comply with the requirements of the Tender Document, re-evaluation cannot be ordered.

As regards to the Respondent's prayer that the Appeal be dismissed, the Authority rejects that prayer and partly upholds the Appeal as it has some merit. That said, the Authority orders the Respondent to start the tender process afresh in observance of the law.

On the basis of the aforesaid conclusions, to wit, non compliance with the law, the Authority partly upholds the Appeal and orders the Respondent to:

- **start the tender process afresh in observance of the law; and**
- **pay the Appellants a total of Tshs. 220,000.00 only being Appeal filing fees as per the following breakdown;**
 - i) **Tshs. 120,000.00 to the 1st Appellant**
 - ii) **Tshs. 100,000.00 to the 2nd Appellant**

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

This decision is delivered in the absence of the 2nd Appellant and in the presence of the 1st Appellant and the Respondent this 29th day of October, 2012.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MR. MARMO 
2. MR. H.S MADOFFE 
3. MR. K. M. MSITA 