

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 123 OF 2012

BETWEEN

M/S TANZANIA BUILDING

WORKS LIMITED.....APPELLANT

AND

MUHIMBILI ORTHOPAEDIC INSTITUTERESPONDENT

DECISION

CORAM

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|---------------------------------|--------------|
| 1. Hon. A. G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Mr. H. S. Madoffe | -Member |
| 3. Mr. K. M Msita | -Member |
| 4. Mrs. R. A .Lulabuka | -Member |
| 5. Mrs. N. S. N. Inyangete | - Member |
| 6. Ms. B.G.Malambugi | -Secretary |

SECRETARIAT

- | | |
|-----------------------|---------------------------|
| 1. Ms. E.V.A Nyagawa | - Principal Legal Officer |
| 2. Ms. F. R. Mapunda | - Legal Officer |
| 3. Ms. V. S. Limilabo | - Legal Officer |
| 4. Mr. H. O. Tika | - Legal Officer |

FOR THE APPELLANT

1. Mr. Beatus Malima -Advocate, Law Associates Advocates.
2. Mr. Lodia Million - Contract Manager-TBW Ltd.
3. Mr. Adram Cinbole - Estimator-TBW Ltd.
4. Mr. Iqbal Noray - Managing Director-TBW Ltd.
5. Mr. Gaspar Peter - Quantity Surveyor –TBW Ltd.

FOR THE RESPONDENT

1. Mr. Joachim .B. Marandu- Advocate
2. Mr. Charles Sarkodie- Quantiy Surveyor- MOI
3. Ms. Maria Kasangala- Ag. Head PMU-MOI

This decision was scheduled for delivery today 09th August, 2012 and we proceed to deliver it.

The appeal at hand was lodged by M/s TANZANIA BUILDING WORKS LIMITED (hereinafter to be referred to as “the Appellant”) against MUHIMBILI ORTHOPAEDIC INSTITUTE commonly known by its acronym MOI (hereinafter to be referred to as “the Respondent”).

The said Appeal is in respect of Tender No. PA-008/2011/2012/W/09 for the Proposed Construction of MOI Phase III - Hospital Block within Muhimbili Complex (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 Respondent vide Nipashe, The Daily News and The East African newspapers dated 22nd , 23rd and 28th March, 2011, respectively, invited Building Contractors

registered in Class One to apply for Pre-qualification for the Proposed Construction of MOI Phase III - Hospital Block within Muhimbili Complex.

Six contractors were prequalified and invited to submit tenders.

The deadline for submission of tenders was set for 27th April, 2012, on which date the tender opening took place.

The following six tenders were submitted;

Tenderer's Name	Quoted Price Tshs.	Completion Period (weeks)
M/s Tanzania building works	16,505,532,979.30	52
M/s China Civil Engineering Construction Corporation Ltd	18,957,635,739.00	54
M/s Catic International Engineering Ltd	17,680,633,486.00	65
M/s Group Six International Ltd.	18,515,139,389.00	86
M/s China Railway Jianchang Engineering Co. Ltd	17,091,760,762.10	52
M/s Beijing Construction Engineering Group Co. Ltd.	17,573,788,707.00	58

The above listed tenders were then subjected to preliminary evaluation where two tenders, including the one submitted by the Appellant were disqualified at this stage for being substantially non-responsive. The two disqualified tenderers and the reasons thereof were as follows:

- M/s Tanzania Building Works Ltd for failure to submit a properly drawn Power of Attorney. The Power of Attorney presented was signed by the same person purported to be given the authority contrary to the requirement that it should be signed by the person/ persons delegating the Power of Attorney.
- M/s China Civil Engineering Construction Corporation Ltd for failure to submit a properly drawn Power of Attorney. The Power of Attorney presented was signed by the same person purported to be given the authority. According to the Evaluation Committee the Power of Attorney submitted was a general one

issued in 2010 which was considered to be unacceptable.

The remaining four tenders were checked for technical responsiveness and found qualified for detailed evaluation.

Having been subjected to detailed evaluation, the four tenders were then ranked as follows:

Tenderes Name	Quoted price (VAT Inclusive) Tshs.	Ranked
M/s China Railway Jianchang Engineering Co. Ltd.	17,495,315,050/=	1 st
M/s Beijing Construction Eng. Group Ltd.	17,600,310,722/=	2 nd
M/s Group Six International Ltd.	18,514,812,117/=	3 rd
M/s Catic International Engineering (T) Ltd.	18,671,590,519/=	4 th

The Evaluation Committee recommended the award of contract to be made to M/s China Railway Jianchang

Engineering Co. Ltd at a contract price of Tshs. 17,495,315,050/=.

The Tender Board deliberated on the Evaluation Report on 17th May, 2012, and having noted some shortcomings ordered a re-evaluation of the tenders.

On 23rd May, 2012, the Tender Board met and was informed that the Evaluation Committee had not been able to include all the corrections directed earlier by the Tender Board due to the urgency of the matter and time constraints. These shortcomings notwithstanding, the Tender Board approved the award of the tender to M/s China Railway Jianchang Engineering Co. Ltd at a contract price of Tshs17,495,315,050/= and a contract period of 52 weeks.

On 29th May 2012, the Respondent communicated the award of the tender to the Successful Tenderer. The said letter was copied to the other unsuccessful tenderers, including the Appellant.

The Appellant was dissatisfied with the tender award decision and therefore submitted the matter for administrative review to the Public Procurement Regulatory Authority (hereinafter to be referred to as 'PPRA'), vide a letter referenced TBW/ADM/Mr/78/12 dated 01st June, 2012.

PPRA wrote to the Respondent through letter referenced PPRA/PA/008/"A"/55 dated 8th June, 2012, requesting them to submit an explanation on the tender process.

On 13th June, 2012, the Respondent replied to PPRA's letter through their letter referenced CD.145/296/45 in which they showed their dissatisfaction on how PPRA handled the matter despite the tenderer's failure to observe the dispute resolution procedures provided under the Public Procurement Act (hereinafter to be referred to as "the Act").

On 28th June, 2012, PPRA wrote to the Respondent vide letter referenced PPRA/PA/008/"A"/57 apologizing

for improper intervention on the matter and promised to advise the Appellant to follow the proper channel for determination of their complaint.

On the same date, PPRA vide their letter referenced PPRA/PA/008/"A"/58 advised the Appellant to refer the matter to the Public Procurement Appeals Authority (hereinafter to be referred to as "the Authority") since the contract has already entered into force by virtue of Section 55(7) of the Act.

Having receiving PPRA's letter, the Appellant lodged an Appeal to this Authority on 6th July, 2012.

On receiving notification of the Appeal, the Respondent raised a point of Preliminary Objection on the ground that the appeal was time barred.

As a matter of procedure, the Authority is obliged to resolve the Preliminary Objection raised before addressing the merits of the Appeal.

THE RESPONDENT'S SUBMISSIONS ON THE PRELIMINARY OBJECTION

The Respondent's Preliminary Objection was that;

The Appeal before the Authority is incompetent and bad in law for failure to comply with Sections 82(2) of the Act and Regulation 6 of the Appeal rules GN 205 of 2005.

Having stated the Preliminary Objection, the Respondent proceeded to expand it as follows:

That, Section 82(2) of the Act provides for the circumstances under which a complaint can be lodged.

That, the Appellant has specifically stated in their Statement of Appeal that the Respondent had issued the Notice of award on 29th May, 2012, which was received by the Appellant on 30th May, 2012. Further that, by virtue of Section 55(7) of the Act the procurement

contract enters into force once the Notice of award has been communicated to the successful tenderer. It is clear and apparent that the Appellant filed the appeal out of the prescribed time thus the Appeal should be dismissed.

That, the Appellant ought to have filed a Notice of Intention to appeal within 7 days by virtue of Rule 6 of the Public Procurement Appeal Rules (herein after to be referred to as "GN. No. 205 of 2005"). Further that, the notice was filed to this Authority on 06th July, 2012, which is in contravention of the Act which requires that Notice of Intention to Appeal be filed 7 days from the date when he became aware of the matter or decision complained off. However, the said notice states that it intends to appeal against the award made by the Respondent on 26th day of June, 2012. The Respondent denied having issued any notice or decision on that particular date to warrant the Appellant to appeal against it.

That, since the notification of award of the tender was made on 29th May, 2012 and was received by the

Appellant on 31st May, 2012; the notice by the Appellant to the Authority ought to have been filed within 7 days from the date when they became aware of the circumstances giving rise to the Appeal. That means, the notice should have been filed on 07th June, 2012 (seven days) as stated under the Act. To the contrary the Appellant did not adhere to it.

The Respondent therefore prayed that the appeal be struck out as was done in two previous Appeals decided upon by this Authority namely, Appeal Case No. 109 of 2011 between M/s Business Machines Tanzania Limited versus Tanzania Electric Supplies Company Limited and Appeal No. 121 of 2012 between M/s PSM Architects Co. Ltd versus Parastatal Pensions Fund which specifically emphasized on adherence to dispute settlement the procedures provided for under the Act.

On the strength of these submissions, the Respondent prayed for the dismissal of the Appeal.

APPELLANT'S REPLIES ON THE PRELIMINARY OBJECTION

The Appellant's replies on the Preliminary Objection may be summarized as follows;

That, the Respondent has misconstrued Section 82(2)(a) of the Act and has deliberately omitted Section 80(1) of the Act which provides for an exception. The Respondent's submission has been misconceived, in that, the fourteen days requirement would have been applicable if the Appellant had not submitted the matter for administrative review to PPRA.

That, they sought for administrative review to PPRA on 01st, June, 2012. On 08th, June, 2012, PPRA requested the Respondent to furnish explanation on the tender process. If that was the case, Section 82(2)(a) of the Act was not applicable since the matter in dispute was to be dealt with administratively.

That, having submitted their complaint to PPRA, they received a response on 28th, June, 2012, whereby they

were advised to appeal to this Authority since the contract had entered into force. Thus, they properly followed the procedures before resorting to this Authority.

That, in view of the fact that the matter was first submitted for administrative review, Section 82 (2)(a) cannot be applied. The said provision would have been binding if no administrative action were sought by the Appellant.

That, with regard to the objection in respect of Rule 6 of the Appeal Rules, the notification of award by the Respondent was a decision in itself which can be appealed against and should not be taken as mere a notice to be used by the Respondent to violate the Appellant's rights.

That, counting from the date when they received PPRA's letter to the date they lodged their appeal, it was their submission that they acted and filed their notice of

Appeal within the time prescribed by the law. Additionally, the Respondent has ignored the word may provided for under Rule 13 of the GN.No. 205 of 2005 which gives the Authority absolute discretion of rejecting or accepting an appeal for consideration.

In conclusion, they prayed that the Preliminary Objection be dismissed and the matter be heard on merit.

THE AUTHORITY'S ANALYSIS AND RULING ON THE PRELIMINARY OBJECTION

Having gone through the documents submitted and having heard the oral submission by the parties, the Authority is of the view that, the Preliminary Objection is based on the issue whether the Appeal is properly before it. Having identified the issue, the Authority proceeded to resolve it as follows:

To start with, the Authority revisited the Respondent's Preliminary Objection, to wit, that the Appeal is

incompetent and bad in law for failure to comply with Section 82(1) and (2) of the Act and Rule 6(1) of the Appeal Rules. In order to resolve this issue, the Authority deems it necessary to resolve the following sub-issues:

- whether the Appeal is incompetent and bad in law for failure to comply with Section 82(1) and (2) of the Act; and
- whether the Appeal is incompetent and bad in law for failure to comply with Regulation 6(1) of the Appeal Rules.

Having identified the sub-issues, the Authority resolved them as follows:

- (a) Whether the Appeal is incompetent and bad in law for failure to comply with Section 82(1) and (2) of the Act

The Authority noted that, in their submissions, the Respondent relied, to a great extent on Section 82(2)(a) of the Act as well as the Decisions of this Authority in Appeals Nos. 109 and 121. To start with, the Authority wishes to review the said provision before ascertaining if

the decisions of this Authority in the two cited cases are relevant to the Appeal at hand. Section 82(2)(a) of the Act provides 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 submitted or entertained under section 80 or 81 because of entry into force of the procurement contract and provided that the complaint or the dispute is submitted within fourteen days from the date when the supplier, contractor or consultant submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when the supplier, contractor or consultant should have become aware of those circumstances;
(Emphasis added)

The Authority agrees with the Respondent that, the above quoted provision, applies only where a procurement contract has already entered into force by virtue of Section 55(7) of the Act. However, with regard to the decisions of this Authority in Appeal Cases Nos. 109 and 121, the Authority wishes to distinguish those decisions with the Appeal at hand. The distinction lies on the fact that, in Appeal Case No. 109 the Appellant lodged their complaint directly to PPAA while in the Appeal at hand the Appellant first submitted their complaint to PPRA before appealing to PPAA. Additionally, the Statement of Appeal in Appeal No. 109 was lodged after the lapse of 14 days provided under the law, while in the Appeal at hand, the Appellant submitted their complaints to PPRA a day after being notified of the tender results.

In Appeal Case No. 121 the 1st Appellant therein bypassed the mandatory procedures provided for under the Act and filed their complaint directly to this Authority without first referring it to the Accounting officer as required under Section 80 of the Act. The main difference between Appeal No. 121 and the present

Appeal is that, the former related to complaints which arose before the procurement contract had entered into force, while in the latter the award has already been communicated to the successful tenderer. In view of the foregoing, the decisions of this Authority in the above mentioned cases are different from the Appeal at hand. Furthermore, the Authority is not barred from departing from its previous decisions where circumstances so demand.

Having distinguished its decisions in Appeals Nos. 109 and 121, the Authority proceeded to analyze the validity of the Appellant's replies on this sub-issue. The Authority noted that, the Appellant argued that, it is only the procuring entity that is barred by the law from entertaining a complaint upon entry into force of a procurement contract pursuant to Section 80(3) of the Act. Thus, they were right to submit their complaints to PPRA because powers to review grievances emanating from the decisions of the procuring entity or an approving authority are vested unto PPRA. The Appellant was of the view that, PPRA was the proper forum for them to lodge their complaint.

Having reviewed submissions by parties as well as the provisions relating to dispute resolution under the Act, the Authority revisited Section 81(1) of the Act which states as follows:

“S. 81(1) A supplier, contractor or consultant who is aggrieved by the decision of a procuring entity or the approving authority may refer the matter to the Authority for review and administrative decision”. (Emphasis supplied)

It should be noted that the word “Authority” in the above quoted provision refers to PPRA. In order to ascertain the intention of the lawmakers in enacting Section 81(1) of the Act, it is pertinent to refer to the definitions of the terms ‘accounting officer’ and ‘approving authority’. According to Section 3 of the Act, the said terms are defined as follows:

“ ‘Approving Authority’ means an Accounting Officer, or Chief Executive, a Ministry tender

board, regional tender board, a district tender board, a local Government tender board, or a parastatal tender board;"

"'procuring entity' means a Public Body and any other body, or unit established and mandated by the government to carry out public functions;" (Emphasis added)

Based on the above quoted definitions read together with Section 81(1) of the Act, the Authority is of the considered opinion that, the decision envisaged in Section 81(1) of the Act is not related to that made by an accounting officer pursuant to Section 80 of the Act for the following reasons:

- (i) The right to review accorded under Section 81(1) of the Act may be exercised where a decision has been made by any of the entities falling under the definition of procuring entity or approving authority. In other words, a complaint under Section 81(1) may lie from a decision made by an accounting officer, chief executive, a Ministerial tender board,

regional tender board, a district tender board, a local Government tender board, or a parastatal tender board.

(ii) The decision envisaged under Section 80 of the Act, is only made by the accounting officer of the respective procuring entity as the first stage of review mechanism, while the decision under Section 81(1) may be made by even a tender board. This means, the award of tender may be the basis of a complaint and the Authority concurs with the Appellant in this respect, in that, an award is a decision in itself.

(iii) Section 80(3) of the Act specifically prohibits an accounting officer to entertain a dispute after a procurement contract has entered into force, while Section 81 of the Act which provides for PPRA's power to review complaints does not have such a restriction. The Authority is of the view that, had the legislators intended to curtail PPRA's power of review in that regard, the same should have been expressly stated. Although Section 82(1) of the Act,

inter alia, makes reference to Section 81 of the Act, but the link between the applicability of the two provisions is missing due to the lacunae already stated under first bullet above.

In view of the reasons stated above, the Authority is of the settled view that, nothing prohibits a tenderer aggrieved by a decision of, amongst others, a tender board to submit a complaint to PPRA in light of Section 81(1) of the Act. That said, the Authority is satisfied that, by submitting their complaints to PPRA, the Appellant did not contravene the law.

The Respondent's contention that the Appeal is incompetent and bad in law for failure to comply with Section 82(1) and (2) of the Act, is therefore overruled.

(b) Whether the Appeal is incompetent and bad in law for failure to comply with Rule 6(1) of the Appeal Rules

In resolving the second sub-issue, the Authority revisited the specific Rule cited by the Respondent which is reproduced hereunder:

“R. 6(1) A person who is dissatisfied with the matter or decision giving rise to a complaint or dispute may give notice of intention to appeal within seven days from the date when he became aware of the matter or decision.” (Emphasis added)

Based on the above quoted provision, the Authority is of the firm view that, non compliance with the said Rule does not invalidate the Appellant’s Appeal in any way because filing a notice of intention to appeal is optional and not mandatory. In this case therefore, the Authority concludes that the Appeal cannot be incompetent for failure to comply with Rule 6(1) of the Appeals Rules.

In view of the above findings and conclusions, the Authority’s conclusion on the main issue in dispute, 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 APPELLANT ON THE MERITS OF THE APPEAL

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, they applied for pre-qualification on 27th April, 2011.

That, the Respondent scrutinized and examined all documents submitted by all applicants.

That, after the said pre-qualification, the Appellant together with other five applicants were shortlisted and requested to submit their tenders.

That, the Respondent had informed PPRA that the Appellant was non responsive because the Power of Attorney they submitted was signed by the same person who purported to be given the said authority contrary to the requirement that it should be signed by a person(s) delegating such powers.

That, during the tender opening, their quoted price was the lowest while that quoted by the Successful Tenderer was the second lowest. Additionally, their disqualification was based on a ground which is not stipulated under the law, in that, the requirements provided for under Regulations 10(4), 14(1), 14(4), 94(4) and 94 (7) do not include a Power of Attorney.

That, the Respondent's act of disqualifying them was not proper at law since they were pre-qualified and found to

be responsive. Furthermore, at the stage the Appellant had reached, the only thing the Respondent was required to do was to consider the quoted prices.

That, the Power of Attorney is not amongst the requirements provided for under the Act; therefore, it was not supposed to form the basis of their disqualification. The inclusion of the Power of Attorney in the Respondent's tender document was intended to disqualify the Appellant unfairly. Furthermore, the applicable law has set only six conditions, for eligibility of a tenderer, which are to be used by procuring entities and not otherwise.

That, the Power of Attorney contained in their tender was a properly drawn document which complied with the requirements of Section 94 of the Tanzania Evidence Act, (Chapter 6 of the Laws of Tanzania) read together with Sections 37 and 38 of the Companies Act (Chapter 12 of the Laws of Tanzania). The said Section 94 provides as follows:

“a 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”.

That, the allegation that their Power of Attorney was defective is not correct as it met the requirements of the above quoted provision.

That, if submission of a Power of Attorney was a mandatory requirement, it was already considered at the pre-qualification stage as it formed part of the documents attached in the Appellant’s application. They wondered whether it is reasonable or proper for a public entity to forgo an amount of about shillings 1 billion on the basis of a criterion which is not a requirement of the law, or at best, it could have been treated as a minor deviation.

The Appellant therefore prayed for the following orders:

- that the decision of the Respondent to award this tender to the Successful Tenderer be nullified; and
- the Appellant be pronounced the winner of the tender.

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, they advertised the Pre-qualification of contractors for the proposed Construction of MOI Phase III Hospital Block, whereby 20 contractors purchased the Pre-qualification documents.

That, out of 20 contractors, only twelve (12) submitted their applications.

That, having evaluated the said applications, six contractors out of the 12 were pre-qualified including the Appellant. The pre-qualified applicants were thereafter invited to tender, whereby all six tenderers submitted their tenders.

That, the said tenders were evaluated and that the Appellant's tender together with that of M/s China Civil Engineering Construction Limited were disqualified for being substantially non responsive. The said two tenderers had submitted improperly drawn Powers of Attorney.

That, if at all the company wanted to appoint the person named in the Power of Attorney submitted by the Appellant, the resolution to that effect was to be made by the Board of Directors of the respective company. However, in the documents submitted before them there was nothing signifying that the Board of Directors had authorized the named person to act on their behalf.

That, where a resolution has been made by a company as a legal entity, a seal is affixed thereto accompanied by the signature of the Secretary of the Board or a director thereof. None of the two featured in the Appellant's Power of Attorney.

That, if a Power of Attorney is defective, it means all documents in a tender which are signed by the person purported to have been given such powers, are equally defective for lack of proper authorization. This was a major deviation as the Appellant's tender was not properly signed.

That, the Tender Document under Clause 27.1(d) of the ITB categorically provided that, the determination of a tender had to be based on the contents of the tender document itself.

That, a Power of Attorney was a condition set forth in the Tender Document and the Bid Data Sheet; therefore, the Appellant was bound to adhere to it.

That, the Power of Attorney was not needed at the Pre-qualification stage. What the Respondent examined during that stage was only the competence and the capability of the tenderers to execute the works and not otherwise.

That, being pre-qualified for the tender, did not bar the Procuring Entity from further evaluating the said tender in the next levels. By evaluating the Appellant's tender, the Respondent did not breach the law as it was mandatory for the tenders to be evaluated.

That, the Act does not prohibit a procuring entity like the Respondent to insert any condition or criteria in the Tender Document provided that the said additions do not contravene the law.

That, the award of the tender to the lowest evaluated tenderer, namely, M/s China Railway Jianchang Engineering Co. Ltd at a contract sum of Tshs. 17,495,315,050/= was made in accordance with the law.

Finally, the Respondent prayed for dismissal of the Appeal.

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 disqualification of the Appellant was proper at law;
- whether the award of the tender to M/s China Railway Jianchang Engineering Co. Ltd was proper at law; and
- 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 disqualification of the Appellant was proper at law

In resolving this issue, the Authority deemed it necessary to consider the following three sub-issues:

- whether after being pre-qualified, the only consideration during the evaluation for award of tender should be comparison of the quoted prices *per se*;
- whether inclusion of the requirement to submit a Power of Attorney in the tender document was in compliance with the law; and
- whether the Power of Attorney submitted by the Appellant was in conformity with the law.

Having formulated the sub-issues, the Authority proceeded to resolve them as hereunder:

1.1 whether after being pre-qualified, the only consideration during the evaluation for award of tender should be comparison of the quoted prices *per se*

In tackling this question, the Authority will address the Appellant's main argument on this sub-issue, namely, that by being pre-qualified their capacity, capability and legal status had already been ascertained and therefore there was no need for their tender to be evaluated on the same criteria, save for price comparison. In addition, the Authority will also consider the Respondent's replies on this point, namely, that the Appellant's tender was required to be evaluated in accordance with the Tender Document.

In order to ascertain the validity of the submissions by parties on this particular point, the Authority deems it necessary to start by revisiting Section 3 of the Act which defines "pre-qualification" to mean:

“a formal procedure whereby suppliers, contractors or consultants are invited to submit details of their resources, and capabilities which are screened prior to invitation to tender on the basis of meeting the minimum criteria on experience, resources, capacity and financial standing;” (Emphasis added)

Based on the above definition, it is obvious that the purpose of conducting a pre-qualification is merely to ‘screen’ the applicants in order to shortlist those who have the minimum qualifications required for execution of the intended contract. In order to ascertain if the Appellant’s contention is backed by the law, the Authority revisited sub-regulations (4) and (6) of Regulation 90 of GN. No. 97 of 2005 which provide for the manner in which tenders should be evaluated. The said provisions state as follows:

Reg. 90(4) “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."

Reg. 90(6) "Prior to detailed evaluation of tenders, the tender evaluation committee shall carry out a preliminary examination of the tenders to determine whether or not each tender is substantially responsive to the requirements of the tender documents, whether the required guarantees have been provided, whether the documents have been properly signed and whether the tenders are otherwise generally in order." (Emphasis supplied)

The Authority is of the view that, the above quoted provisions require the tenders to be examined if they, *inter alia*, comply with the requirements of the tender document. The Authority observes that, Clause 27.1 of the ITB echoes the spirit of the above quoted Regulation as it states as follows:

“Prior to the detailed evaluation of the bids, the Procuring Entity will determine whether each bid;

(a) meets the eligibility criteria defined in ITB Clause 3;

(b) has been properly signed;

(c) is accompanied by the required securities;
and

(d) is substantially responsive to the requirements of the bidding documents.

The Procuring Entity’s determination of a bid’s responsiveness will be based on the contents of the bid itself.” (Emphasis supplied)

The Authority further observes that, Clause 27.3 of the ITB does not support the Appellant’s contention as it requires the procuring entity to ‘confirm’ that the tenders contain documents and information specified under Clauses 11, 12 and 13 of the ITB. Furthermore, this position is also cemented under Clause 27.6 of the ITB which requires a procuring entity to confirm, amongst others, that a “written confirmation of authorization to commit the bid (sic)” is provided in

the tender. For the benefit of the Appellant, the authorization required under Clause 27.6(g) of the ITB, is the Power of Attorney.

It is the view of the Authority that, if the Appellant's assertion is correct, why should the applicable law require a preliminary as well as detailed evaluation of tenders to be conducted irrespective of whether pre-qualification was carried out. Furthermore, the Appellant did not cite any statutory provision or authority to support their contention that once a tenderer has been pre-qualified their tender should be evaluated on the basis of price only. The Authority therefore concurs with the Respondent that, Regulation 90 of GN. No. 97 of 2005 read together with Clause 27 of the ITB requires tenders to be subjected to preliminary evaluation before detailed evaluation is carried out. In this case therefore, the Appellant's contention on this particular point is a misconception.

In view of the above observations, the Authority's conclusion on the first sub-issue is that, the Appellant's

assertion that after being pre-qualified, the only consideration during the evaluation for award of tender should be the price *per se*, is erroneous in the eyes of the law.

1.2 Whether inclusion of the requirement to submit a Power of Attorney in the Tender Document was in compliance with the law

In resolving this sub-issue, the Authority deemed it prudent to start by revisiting the main submissions by parties. The Authority noted that, the Appellant’s main argument on this point was that, the requirement of submitting a Power of Attorney which was used by the Respondent to disqualify them, is not backed by the law. In support of their contention, the Appellant cited the following provisions:

Provision	A paraphrased version of the provision
Regulation 10(4) of GN. No. 97 of 2005	Guides on what information should be contained in a tender
Regulation 14(1)	Provides for the criteria to be met by prospective tenderers for them

	to be eligible to tender
Regulation 14(4) of GN. No. 97 of 2005	Restricts procuring entities not to impose criteria other than those stated in Regulation 14
Regulation 94(4) of GN. No. 97 of 2005	Provides that criteria for post-qualification should be limited to those which are necessary for the performance of the intended contract and should not be unduly restrictive
Regulation 94(7) of GN. No. 97 of 2005	Requires an approval of the Tender Board to be sought before a tender is rejected.

The Respondent's on their part, submitted that the said criterion was a mandatory requirement provided for in the Tender Document and the consequence of non compliance thereof is rejection of a tender.

Having reviewed the submissions by parties, the Authority agrees in principle with the Appellant that, the requirement of submitting a Power of Attorney is not stated anywhere in the Act. However, Regulation 10(4) of GN. No. 97 of 2005 which was cited by the Appellant is general in nature and does not prevent submission of additional information to that stated therein, as the term

used is “shall include”. This means the information to be submitted is not limited to that expressed in the aforementioned Regulation.

The Authority also examined Regulation 14 of GN. No. 97 of 2005 which has been the basis of the Appellant’s contention on this particular point and observes that it applies in pre-qualification proceedings and not at the tendering stage, the latter being the stage at which their tender was disqualified. However, had the Appellant been diligent they would have found that sub-regulation (2) of Regulation 14 of GN. No. 97 of 2005 allows a procuring entity to request the tenderers to submit other documents or information to prove that they have legal capacity to enter into contracts. For purposes of clarity, the Authority reproduces the said provision herein below:

“Subject to the right of suppliers, contractors, service providers or buyers to protect their intellectual property or trade secrets, a procuring entity may require suppliers, contractors, service providers or buyers participating in the procurement or disposal proceedings

to provide such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the suppliers, contractors, service providers or buyers are qualified in accordance with the criteria referred to in sub-regulation (1)(b).” (Emphasis supplied)

Based on the above quoted provision, the Authority is of the firm view that the legal capacity envisaged therein includes, *inter alia*, the authorization to sign documents on behalf of the tenderer, which is usually done through a Power of Attorney.

Furthermore, Regulation 14(4) of GN. No. 97 of 2005 which prohibits procuring entities from imposing criteria other than those stated in Regulation 14, is also not relevant as the entire Regulation applies in pre-qualification proceedings as per Regulation 15(3) of GN. No. 97 of 2005 which provides as follows:

“The provisions of Regulation 14 shall apply to pre-qualification proceedings.” (Emphasis supplied)

It is the view of the Authority that, Regulation 14 of GN. No. 97 of 2005 does not apply in the Appeal at hand, in that, the Appellant’s complaint originates from the tendering stage as opposed to pre-qualification stage.

The Authority considered Regulation 94 of GN. No. 97 of 2005 which was also relied upon by the Appellant. The Authority observes that the said provision is confined to post-qualification, which is an evaluation stage that the Appellant’s tender did not reach, thus not relevant to the Appeal at hand.

In order to establish whether the inclusion of the Power of Attorney in the Tender Document was proper or otherwise, the Authority revisited Regulation 83(1) of GN 97 of 2005 which guides on the contents of the tender documents, in the following words:

Reg. 83(1) "The solicitation documents shall include instruction to tenderers with at a minimum, the following information ..." (Emphasis added)

The Authority observes that, the information listed under the above quoted Regulation represents a minimum of what procuring entities should incorporate in the solicitation documents. This entails that, procuring entities are at liberty to add other criteria, if they so wish, provided that in so doing they do not contravene the law. Furthermore, in issuing solicitation documents, procuring entities are obliged to use standard tendering documents issued by PPRA by virtue of Section 63(1) of the Act read together with Regulation 83(3) of GN. No. 97 of 2005, which state as follows:

S. 63(1) "The procuring entity shall use the appropriate standard model tender documents specified in the Regulations for the procurement in question."

Reg. 83(3) "A procuring entity shall use the appropriate standard tender documents

issued by the Authority with minimum changes, acceptable to the Authority, as necessary to address project specific issues.”
(Emphasis supplied)

It should be noted that, the term “Authority” in the above quoted provision refers to PPRA. Furthermore, PPRA has powers to issue standard tendering documents as per Section 7(1)(d) of the Act which reads as follows:

7(1)“ The functions of the Authority shall be to:-

(d) prepare, update and issue authorized versions of the standardized tendering documents, procedural forms and any other attendant documents to procuring entities;”
(Emphasis added)

It should also be noted that, even the procuring entities’ powers to modify the standard tendering documents are limited, in that, the changes effected must be acceptable to PPRA and that they should not amend the Instructions

to Bidders in accordance with Regulation 83(4) of GN. No. 97 of 2005 which provides as follows:

“Any such changes shall be introduced only through tender or contract data sheets, or through special conditions of contract and not by introducing changes in the standard wording of the Standard Tender Documents. Where no relevant standard tender documents have been issued, the procuring entity shall use other internationally recognized standard conditions of contract and contract forms acceptable to the Authority.” (Emphasis added)

The Authority observes further that, the Standard Tendering Documents issued by PPRA require, among other things, a Power of Attorney to be submitted as one of the documents constituting the tender. This is evident under Clause 11.1(g) of the ITB which reads as follows:

Clause 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 Instructions to Bidders Clause 19”;

As it has already been established that the Respondent did not impose, on their own volition, the requirement to submit a Power of Attorney, but it was a mandatory requirement as per Regulation 83(4) of GN. No. 97 of 2005, in that, they are not allowed to amend the Instructions to Bidders contained in the standard tendering documents issued by PPRA. In view of the foregoing, the Authority is of the considered opinion that, the inclusion of the requirement for a Power of Attorney was in accordance with the law.

The Authority observes further that had the Appellant deemed the inclusion of the said criterion to be contrary to the law, they had an opportunity to seek clarification from the Respondent on the matter prior to the deadline for submission of tenders pursuant to Clause 8 of the ITB.

In view of the above findings, the Authority's conclusion on the second sub-issue is that, the inclusion of the requirement to submit a Power of Attorney in the Tender Document was in compliance with the law.

1.3 Whether the Power of Attorney submitted by the Appellant was in conformity with the law

According to the submissions by parties, the Appellant's main arguments were twofold, namely;

- that, the Power of Attorney contained in their tender was a properly drawn document and the assertion that it was defective, is not correct.
- assuming their Power of Attorney did not meet the required standards, the same should have been treated as a minor deviation because a Power of Attorney is not a statutory requirement.

The Respondent, on the other hand, maintained that the Power of Attorney submitted by the Appellant was defective, in that, it was signed by the same person purporting to be granted the said powers and the name of the donor was not mentioned. These omissions contravened Clause 19.2 of the ITB. They also argued that, since the Power of Attorney was defective, it means the Appellant's tender was not properly signed, which is a material deviation as it was decided in the previous decisions of this Authority.

In order to ascertain the validity of the conflicting arguments by parties, the Authority revisited Clause 19.2 of the ITB read together with Item 15 of the Bid Data Sheet which requires submission of a Power of Attorney, in the following words:

Clause 19.2 "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)

Item 15. "...The written authorization of the Bidder: Power of Attorney - The Bidder shall insert the name and position held by person signing."

In analyzing the above quoted provisions, 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 Power of Attorney submitted by the Appellant was only signed by the donee, no disclosure was made as to the name or position of the donor and the signature of the donor was not there. It is the settled view of the Authority that, the Power of Attorney submitted by the Appellant was therefore defective.

Having found the Appellant's Power of Attorney to be defective, the Authority proceeded to analyze the Appellant's contention that, the aforesaid defects should have been treated as minor deviations vis-à-vis the Respondent's submission that it was a material deviation. In resolving this particular contentious point, the Authority deems it prudent to recap its previous decision in Appeal Case No. 62 of 2010 between M/s United Talent Services and Tanga Urban Water Supply and Sewerage Authority. In the said Appeal, the Appellant's Power of Attorney was held to be defective as their Director General purported to transfer power unto himself. In that Appeal, this Authority held, *inter alia*, that the "form of tender contained in each of the four tenders was legally unsigned for lack of proper

authorization.” Relating the said decision to the Appeal at hand, the Authority concurs with the Respondent that, the Form of Bid in the Appellant’s tender, which ‘constitutes the tender’, was legally unsigned for lack of proper authorization.

For the benefit of the parties, the Authority wishes to emphasize that since the Form of Bid is the tender in itself, it is imperative that the person signing it should have proper authorization which is granted through a Power of Attorney. That said, the Authority is satisfied that the defects in the Appellant’s Power of Attorney was a material deviation rendering it to be null and void.

The Authority’s conclusion on the third sub-issue is that, the Power of Attorney submitted by the Appellant was not in conformity with the law.

Having found the defects in the Power of Attorney submitted by the Appellant to be a material deviation, the Authority observes that, it was proper for the Respondent to reject the Appellant’s tender as it was

substantially non responsive as per Clauses 27.2 and 27.3 of the ITB which are reproduced hereunder:

Clause 27.2 "A substantially responsive bid is the one which conforms to all the terms, conditions, and specifications of the bidding documents, without material deviation or reservation."

Clause 27.3 "The Procuring Entity will confirm that the documents and information specified under ITB Clause 11, ITB Clause 12 and ITB Clause 13 have been provided in the Bid. If any of these documents or information is missing, or is not provided in accordance with the Instruction to Bidders, the Bid shall be rejected". (Emphasis supplied)

In view of the findings and conclusions in the three sub-issues above, the Authority's conclusion on the first issue is that, the disqualification of the Appellant was proper at law.

2.0 Whether the award of the tender to M/s China Railway Jianchang Engineering Co. Ltd was proper at law

The Authority noted that, in their submissions the Appellant was aggrieved by, inter alia, the Respondent's decision to award the tender to M/s China Railway Jianchang Engineering Co. Ltd, despite their quoted price being higher by almost shillings 1 billion compared to the price quoted by the Appellant. In order to resolve this issue, the Authority deemed it necessary to examine if the award of the tender in favour of the said tenderer was made in accordance with the law.

Having reviewed the tender submitted by the Successful Tenderer, the Authority discovered that their Power of Attorney had the following defects:

- The Chairman of Board of Directors purported to transfer the said powers in his own capacity, it did not indicate that he was doing so on behalf of the

Company. For purposes of clarity, the Authority reproduces the relevant part hereunder:

“THE CHAIRMAN OF THE BOARD OF DIRECTORS OF CHINA RAILWAY JIANCHANG ENGINEERING COMPANY (T) LTD of P.O. Box 77198 Dar es Salaam (hereinafter referred to as “THE PRINCIPAL)

WHEREAS the Principal is desirous of appointing and constituting MR. SHI YUAN as its true attorney and Do hereby constitute and by the presents Do make, constitute and appoint MR. SHI YUAN ...”

- The name of the said Chairman was not disclosed contrary to Clause 19.2 of the ITB.
- It did not comply with the Respondent’s own standard that there should be a ‘Donor’ and a ‘Donee’.
- Despite stating that the Company’s seal was affixed thereto, no seal was affixed as claimed.

- The attestation clause was erroneous as neither the 'Donor' nor the 'Donee' were personally known to the Commissioner for Oaths who attested it or were identified by any other person known to the Commissioner for Oaths.

During the hearing the Respondent was asked to comment on the above listed shortfalls detected in the Power of Attorney submitted by the Successful Tenderer, namely, M/s China Railway Jianchang Engineering Co. Ltd, whereby they conceded that it was equally defective by all standards.

The Authority is of the considered view that, since the Successful tenderer M/s China Railway Jianchang Engineering Co. Ltd did not submit a properly drawn Power of Attorney, as it was the case for the Appellant, the award of the tender to them was not proper. Had the Evaluators applied this criterion fairly and consistently they would have disqualified both the Appellant and the Successful Tenderer at the preliminary stage for being substantially non responsive. The Respondent's conduct

of choosing to ignore the defects in the Successful Tenderer's Power of Attorney while rejecting the Appellant's tender for defects in a similar document, contravened Section 43 of the Act which emphasizes on, *inter alia*, fairness and equality of opportunity to all tenderers, in the following words:

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

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

Having found that the Successful Tenderer's Power of Attorney was defective, the Authority did not see the need to review the evaluation process in its entirety as the said defects were sufficient to disqualify the said tenderer. It is the considered view of the Authority that, legally speaking, there is no award in the eyes of the law.

In view of the above analysis, the Authority's conclusion on the second issue is that, the award of the tender to M/s China Railway Jianchang Engineering Co. Ltd was equally not proper at law.

3.0 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 the Appellant and the Successful Tenderer were defective and their tenders should have been rejected at the preliminary evaluation, the Authority revisited the prayers by parties.

The Authority considered the Appellant's prayer that the award of the tender to M/s China Railway Jianchang Engineering Co. Ltd 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 Appellant's request that they be pronounced winners of the tender in dispute, the Authority is of the firm view that, they did not

deserve to be awarded the tender as their Power of Attorney was defective.

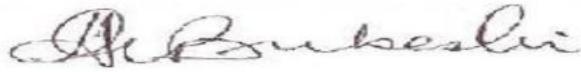
With regard to the Respondent's prayer that the Appeal be dismissed, the Authority rejects the prayer and partly upholds the Appeal as it has some merit. That said, the Authority orders the Respondent to start the tender process afresh in observance of the law and each party is to bear their own costs.

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

- the Respondent to start the tender process afresh in observance of the law; and
- each party is to bear their own costs.

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

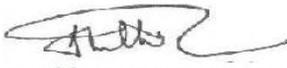
Decision delivered in the presence of the Appellant and the Respondent this 09th August, 2012



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MR. H. S. MADOFFE.....


2. MR. K.M. MSITA.....


3. MRS. R. A. LULABUKA.....


4. MRS. N.S.N. INYANGETE.....
