

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT MWANZA**

APPEAL CASE NO. 80 OF 2010

BETWEEN

MAYUNGA JOSEPH..... 1ST APPELLANT
SELEMANI ISMAIL 2ND APPELLANT

AND

CHATO DISTRICT COUNCIL RESPONDENT

CORAM:

- | | |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mrs. R. Mang'anya | - Member |
| 3. Ms. E. Manyesha | - Member |
| 4. Ms. B.G. Malambugi | - Secretary |

SECRETARIAT:

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

FOR THE 1ST AND 2ND APPELLANTS

1. Mr. Justinian Byabato – Advocate, BLC Advocates
2. Mr. Mayunga Joseph – Businessman

FOR THE RESPONDENT

1. Mr. Fredrick Nyoka– District Land/Natural Resources Officer
2. Mr. Anicet Byabato – Accountant
3. Mr. Machage E. Mwema– Procurement Officer
4. Mr. Robert R. Matungwa – State Attorney

This decision was scheduled for delivery today 3rd December, 2010, and we proceed to deliver it.

The appeal at hand was lodged by **MAYUNGA JOSEPH** (hereinafter to be referred to as "**the 1st Appellant**") and **SELEMANI ISMAIL** (hereinafter to be referred to as "**the 2nd Appellant**") against **CHATO DISTRICT COUNCIL** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. LGA/039/2010/2011/N.01 for Council Agent for Collection of Revenue at Fishing Points/Local Markets/Livestock Markets/Bus Stand. However, the Appellants complaints are confined to the tender for Revenue Collection at Fishing Points and specifically at Kasenda (hereinafter to be referred to as "**the Tender**").

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

The Respondent invited tenders for the Council's Agent for Revenue Collection at Local Markets, Fishing Points and Livestock Markets for Financial Year 2010/2011 *vide*

Mtanzania newspaper of 21st May, 2010. The tender advertisement was also posted on various Notice Boards including, the Council's Notice Board, various local markets, fishing points and livestock markets.

The tender attracted five tenders, including those of the 1st and 2nd Appellants.

The tender opening took place on 21st June, 2010, whereby the five tenders were submitted as follows:

S/No	Name of a tenderer	Price Quoted per month
1.	Tumaini Fish Traders Group	Tshs. 2,500,000/-
2.	Jikomboe Fisheries Society	Tshs. 3,000,000/-
3.	Swaibu Juma	Tshs. 3, 500,000/-
4.	Suleiman Ismail	Tshs. 4,000,000/-
5.	Mayunga Joseph	Tshs. 4,500,000/-

The tenders were evaluated and the award was made in favour of Jikomboe Fisheries Society who was to remit a total of Tshs. 9,000,000/- every three months for a period of one year.

On 28th June, 2010, the 1st and 2nd Appellants received letters referenced CDC/03/11/vol.VI/41 and CDC/03/11/vol.VI/42 respectively from the Respondent informing them that their tenders were not successful.

On 27th July, 2010, the Appellants submitted an application for administrative review to the Respondent inquiring on the reasons for their disqualification as they had tendered at higher prices than the awarded tenderer. The said letters were copied to the Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**").

On 16th August, 2010, the Respondent replied to the Appellants' applications for administrative review *vide* letters referenced CDC/3/42/24 and CDC/3/42/24 respectively, informing them that their tenders were rejected at the Preliminary Examination Stage for failure to comply with the mandatory requirements of Items 11, 33 and 34 of the Bid Data Sheet.

On 1st September, 2010, the Appellants being dissatisfied with the Respondent's replies, filed appeals to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**").

SUBMISSIONS BY THE 1st AND 2ND APPELLANTS

The Appellants' 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 had provided similar services for revenue collection in other Districts Councils, hence they were competent and eligible for award of the tender.

That, the Tender Document and the advertisement, did not contain the evaluation criteria and therefore the only acceptable basis of comparison was the price.

That, the Appellants grounds of Appeal are as follows:

- (i) The two paged tender advertisement posted on Notice Boards did not contain any requirements

which had to be complied with by the tenderers before submission of their bids.

- (ii) Clause 3 of the Special Conditions of Contract indicated that the Tender Document was specifically for Revenue Collection at Local Markets and not for Revenue Collection at Fishing Points or Livestock Markets. That is to say, the Tender Document for the disputed tender did not exist.
- (iii) The evaluation criteria specified in the Tender Document was solely for Revenue Collection at Local Markets.
- (iv) The outside cover of the Tender Document contained general information relating to revenue collection but the content therein were specifically for Revenue Collection at Local Markets. Thus, it cannot be said that the outside cover is part of the Tender Document.
- (v) The Tender Document did not contain the signature of the Respondent's Accounting Officer.

(vi) The said Tender Document had the following shortfalls;

- The tender advertisement required the tender to be awarded to the highest evaluated tenderer while the Tender Document required the lowest evaluated tenderer to be considered for award.
- The Respondent requested tenderers to submit, among other things, National identity cards while knowing that they are currently not in existence. Hence the Appellants wanted to know whether the Successful Tenderer had complied with the said requirement, and if so, what kind of identity card did they attach.
- The Tender Document did not specify the type of identity card to be submitted where a tenderer is a group of persons. Hence, the Appellants wonder whether

the identity cards submitted by the Successful Tenderer were for the whole the group or a single person had submitted on behalf of the group.

That, the Appellants did not seek for clarification but the Respondent had a duty to prepare a tender document which is in compliance with the law.

That, the evaluation process was based on criteria that were not contained in the Tender Document which is contrary to Section 65(1) and (2) of the Public Procurement Act of 2004, (Cap. 410) (hereinafter to be referred to as "**the Act**") read together with Regulation 90(18)(a) of the Public Procurement (Goods, Works, non Consultant services and disposal of public assets by tender) Government Notice No. 97 of 2005 (hereinafter to be referred to as "**GN No. 97/2005**").

That, during the tender opening it was evident that the 1st Appellant had offered to remit Tshs. 4,500,000/- per month while the 2nd Appellant had offered to remit Tshs.

4,000,000/- per month. On the basis of competitive tendering, the tender was to be awarded to the 1st Appellant and in case of default the same should have been awarded to the 2nd Appellant or to Swaibu Juma who quoted Tshs. 3,500,000/- per month. However, the tender was awarded to the tenderer who had offered a lower amount compared to the aforementioned three tenderers contrary to Regulation 95(5) & (7) of GN No.97/2005.

Therefore, the Appellants prayed to the Authority for the following reliefs:

- a) to investigate the matter for remedial measures;
- b) to order annulment of the contract as the process was conducted contrary to the law; and
- c) to order the Respondent to compensate the Appellants for the following costs:

S/ No.	Item	Total Amount Tshs.
1	Appeal filing fees - Tshs 120,000 x 2 Appellants = 240,000/-	240,000/-
2	Legal fees for preparation of the Appeal	1,500,000/-
3	Air ticket Dar-Mwanza-Dar and accommodation for the Appellants' Counsel	1,000,000/-
4	1 st Appellant's costs for attending Appeal Proceedings (i) Bus fare - Chato-Mwanza -Chato = Tshs. 20,000/- (ii) Accommodation Tshs. 35,000x 4 days= Tshs. 140,000/- (iii) Meals Tshs. 15,000 x 4 days= 60,000/-	220,000/-
5	General damages at the Authority's discretion.	
TOTAL		2,960,000/-

(d) Any other relief as the Authority may deem fit.

SUBMISSIONS BY THE RESPONDENT

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

That, the Tender Document and the tender advertisement contained the criteria to be used as the basis for tender evaluation.

That, the Respondent conceded that there were minor deficiencies in the Tender Document, but the same could have been rectified or clarified if the Appellants had sought for clarification.

That, it was conceded that the tender advertisement was not signed by the Respondent's Accounting Officer but the same did not prejudice the Appellants in anyway.

That, according to the Tender Document, a tenderer was required to submit, among other things, a copy of Tanzanian citizenship identity card or a recommendation letter from the local leaders (Ward Executive Officer (**WEO**) or Village Executive Officer (**VEO**) as well as three recent passport size photographs. The Appellants did not attach any of the above mentioned documents which were mandatory requirements.

That, the Appellants cited a wrong and irrelevant provision of the law to support their argument that the tender was awarded to a tenderer who had offered a lower sum.

That, the Appellants did not qualify for Detailed Evaluation where price comparison was made. Hence, they cannot claim that their tenders ought to have been awarded.

The Respondent therefore prayed for dismissal of the Appeal with costs incurred in pursuit of this Appeal.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral submissions from parties, the Authority is of the view that, this Appeal is centred on the following issues:

- (a) Whether the tender advertisement and the Tender Document were in accordance with law.**
- (b) Whether the evaluation process was conducted in accordance with the law.**
- (c) Whether the disqualification of the Appellants was justified.**
- (d) Whether the award to the successful tenderer was proper at law.**
- (e) 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 tender advertisement and the Tender Document were in accordance with law

In its endeavour to ascertain whether the tender advertisement and the Tender Document were in accordance with the law, the Authority, reviewed the documents submitted and the contesting oral submissions by parties *vis-a-vis* the applicable law. In the course of so doing, the Authority formulated two sub-issues as follows:

- **whether the tender advertisement complied with the law; and**
- **whether the Tender Document issued was for the tender under Appeal and if so whether it was in accordance with the law.**

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

i) Whether the tender advertisement complied with the law

In resolving this sub-issue the Authority revisited the Appellants' submission that, the tender advertisement did not contain the evaluation criteria as it had only two pages which showed the addresses and types of services to be tendered for. Hence, the Appellants were not aware of which requirements were to be complied with before submission of their tenders.

In reply, the Respondent submitted that the tender advertisement was published in Mtanzania newspaper and posted on various Notice Boards and that it had three pages whereby the last page contained the bidding conditions to be complied with by the tenderers. Furthermore, the Tender Document included the three pages of the tender advertisement which also contained some of the bidding conditions. Hence, it cannot be argued that the tender advertisement did not contain the tender requirements.

In ascertaining the validity of the arguments by parties, the Authority revisited the tender advertisement and noted that the advertisement was issued in two languages that is Kiswahili and English. A copy of the Kiswahili advertisement availed to the Authority had two pages which showed the Respondent's address and types of services to be tendered for. The English advertisement which formed part of the Tender Document had three pages of which the first two pages were the same as the Kiswahili advertisement and the third page contained the bidding conditions. The said tender document was issued to the tenderers, the Appellants inclusive, at a non refundable fee of Tshs. 60,000/-. The Authority also noted that, during the hearing, the 1st Appellant admitted that he was not conversant with English language.

In order to establish whether the contents of the tender advertisement thereof were in accordance with the law, the Authority revisited Regulation 81 of GN No. 97/2005 which provides guidance as to the content of the tender advertisement. The said regulation is reproduced herein below;

“The invitation to tender shall contain at the minimum the following information:

- a) The name and address of the procuring entity; the nature and quantity and place of delivery of the goods to be supplied or the nature, quantity and location of the works to be effected or the nature of services and location where they are to be provided;
- b) The description of the assets to be disposed of ...;
- c) The desired or required time for supply of the goods or for completion of the works or the time table for provision of services;
- d) A declaration which shall later on not be altered to the effect that contractors, suppliers or service providers, or asset buyers may participate in the procurement or disposal proceedings regardless of nationality or declaration that participation is limited on the basis of nationality;

- e) The means or conditions of obtaining the solicitation documents and the place from which they may be obtained;
- f) The price if any charged by the procuring entity for the solicitation documents;
- g) The currency and means of payment for solicitation documents;
- h) Language or languages in which solicitation documents are available;
- i) The place of submission of tenders;
- j) The deadline for submission of tenders as well as the place hour and the date for opening of tenders;
- k) The source of financing”.

Based on the above provision the Authority is of the view that, it is a mandatory requirement of the law that the content of the tender advertisement should be in accordance with Regulation 81 of GN No. 97/2005. It goes without saying therefore that, tender requirements and evaluation criteria are not among the items that need to be included in the tender advertisement.

Upon further review of the Respondent's tender advertisement the Authority noted that, it contained most of the requirements provided for under Regulation 81 of GN No. 97/2005. That means the advertisement was in compliance with the law.

The Authority further considered the Appellant's contention that the tender advertisement posted in Notice Boards had only two pages vis-à-vis the Respondent's submission that it had three pages. The Authority had initially been supplied with a copy of the advertisement in Kiswahili which had only two pages. However, a copy of the newspaper advertisement submitted by the Respondent after the hearing contained some of the tender conditions. The Authority is inclined to accept the Appellant's contention on this particular point that the tender advertisement posted on Notice Boards had only two pages. However, the said shortfall was not fatal as the tender conditions are not required to be included in the tender advertisement as per Regulation 81 of GN. No. 97/2005.

The Authority therefore concludes that, the tender advertisement was in accordance with the law.

ii) Whether the Tender Document issued was for the tender under Appeal and if so whether it was in accordance with the law.

Having established that the tender advertisement was in compliance with the law, the Authority embarked on establishing whether the Tender Document issued was in accordance with the law.

To start with, the Authority reviewed the Tender Document in order to ascertain whether it contained the requisite information as required by Regulation 83 of GN No. 97/2005. The said regulation requires the content of the Tender Document to include, among other things, eligibility criteria, technical and quality specifications, the manner in which the tender price is to be formulated and expressed, criteria other than the price to be used in determining the successful tenderer and the relative weight of such criteria. Having reviewed the Tender

Document, the Authority observes that, much as it contained some terms and conditions, the said document had the following shortfalls:

- (i) Item 11 of the Bid Data Sheet contained the following requirements:

“In addition to the requirements stated in ITB Clause 11 the following documents must be included in the bid

- a. Copy of Tanzanian citizen identity card.**
- b. Receipt of Tender Document fee (60,000/=).**
- c. 3 Recent passport size photographs**
- d. Recommendation letters from local leaders(WEO or VEO).**
- e. Information related to business.”**
(Emphasis added)

Based on the above quoted requirements the Authority is of the view that, the requirement of submitting a **“Tanzanian citizen identity card”**

was not practicable taking into account that the National identity cards are yet to be introduced. The Authority noted that, the said requirement as it appeared in the tender advertisement in Mtanzania newspaper was different from the one which was contained under Item 11 of the Bid Data Sheet, in that, the former was more explicit as it gave alternatives in the following words:

"Mwombaji awe raia wa Tanzania, awe na barua ya uthibitisho kutoka kwa mtendaji wa kijiji/kata au kitambulisho chochote kinachothibitisha uraia wake." (Emphasis added)

Literally translated, a tenderer was required to be a Tanzanian citizen and was required to submit a letter from a Village or Ward Executive Officer or any other identity to prove his citizenship. The Authority is of the firm view that, the contents of the Kiswahili version of the tender advertisement did not connote the same meaning as the content appearing on Item

11 of the Bid Data Sheet as reproduced above. The difference between the two provisions is that, while the Kiswahili version of the said requirement appearing in the tender advertisement can be easily understood by an ordinary person, the content of Item 11 of the Bid Data Sheet was not explicit and could not be easily comprehended.

Moreover, the Tender Document allows Joint Ventures or groups to participate in the tender process. However, the requirements for identification were not explicit as to how groups or joint ventures were to be identified.

Furthermore, with regard to the requirement to submit passport size photographs, the Authority agrees with the Appellants that the same was not specified in a situation where a tenderer was a group of persons. It was not stated as to whose photographs were to be submitted.

The Authority noted further that, the same Item 11 of the Bid Data Sheet required the tenderers to include **“information related to business”** but it was not clear as to what kind of business information was required to be submitted. The Authority finds the requirement to be too general.

- (ii) The Authority also noted that, Item 9 of the Bid Data Sheet provides as follows:

“Period to Respond for Clarification is 28 days”

“Period prior to deadline for submission of bids for the Bidders to request clarifications 28 days after the date of the advertisement” (Emphasis added)

The Authority finds the Respondent to have erred in law by specifying that, the period to respond to the clarifications sought to be 28 days and the clarification was to be requested **“28 days after the**

date of advertisement”. The Authority finds this requirement to have contravened Regulation 85(2) and (3) of GN No. 97/2005 which provides as follows;

“Reg. 85(2) The procuring entity shall respond to the request by a supplier, service provider, or asset buyer for clarification of the solicitation documents that is received by the procuring entity **at least two weeks prior to the deadline for the submission of tenders.**

(3) The procuring entity shall respond within three working days of receipt of a query so as to enable the supplier, service provider, contractor or assets buyer to take into account the clarification received for preparation of its tender...” (Emphasis added)

(iii) The Authority further noted that, the Evaluation Report indicated that tenderers were checked to see if they had the required experience. The Authority finds that, the said requirement was not included in the Tender Document. Furthermore, it was not indicated as to what kind of experience was required to be shown by the tenderers.

(iv) The Authority also noted that, Item 45 of the Bid Data Sheet stated that “**Post-qualification would not be undertaken**”. The Authority finds this requirement to have contravened Section 48 of the Act which makes it mandatory for post-qualification to be undertaken where pre-qualification was not carried out.

Furthermore, Regulation 94(1) of GN No. 97/2005 emphasizes on the importance of conducting post-qualification, in that, it provides assurance that the tenderer to be awarded the

contract has the capability and resources to carry out the contract.

(v) Item 47 of the Bid Data Sheet provides that, Performance Security shall not be applicable. However, Item 2 of the Contract read together with Item 7 of the tender advertisement required the successful tenderer to remit a sum equal to three months collection, which is equivalent to performance security, prior to signing the contract.

(vi) The rates for liquidated damages prescribed in the contract are 10% to 30% of the contract value which are different from those prescribed in the Special Conditions of Contract as they range from 0.1% - 0.2% of undelivered services.

The Authority is of the opinion that, the Tender Document issued by the Respondent did not meet the minimum requirements. Accordingly, the Tender

Document was not in accordance with the law; given the deficiencies pointed out above.

Having analysed the Tender Document, the Authority considered the Appellants' submission on this sub-issue that, no Tender Document was issued by the Respondent in respect of the tender for Revenue Collection at Fishing Points as per Clause 3 of the Special Conditions of the Contract which indicated that the document issued was for tender relating to Revenue Collection at Local Markets. Hence, the Appellants preparation of their tenders was based solely on the tender advertisement. The Appellants also conceded that they did not seek for clarification.

The Authority also revisited the Respondent's reply that, the Tender Document issued was for all the four tenders as indicated in the advertisement attached to it. Hence, the Appellants were required to comply with the terms and requirements specified therein and they could have sought for clarification in case they did not understand

whether the said Tender Document was also applicable to the tender in dispute.

In order to establish the validity of the arguments by parties, the Authority revisited the Tender Document issued to the tenderers and noted that the first page contained the following words;

“TENDER DOCUMENT

Council Agent for Revenue collection at

.....
Fishing points/Local Markets/livestock Markets/Bus Stand”

From the above quotation the Authority observes that the first page of the Tender Document indicated that the Tender Document was for all the four tenders including the tender under appeal. However, the Authority noted that Item 1 of the Bid Data Sheet contained a different version of the particular tender to which the issued Tender Document was applicable as it states that:

**“The subject of procurement is
Council Agent for Revenue collection at**

.....
Local Market (GULIO)”

The Authority concurs with the Appellant that, the Tender Document contained contradictory information, in that, while the cover page indicated the Tender Document was for all the four tenders, the Bid Data Sheet confined the application of the document to **the tender for Revenue Collection at Local Markets** as evidenced by the opening sentence to the Bid Data Sheet which guides as to what should prevail in case of conflict in the provisions in the Tender Document as follows:

“The following specific data for the goods to be procured shall complement, supplement, or amend the provisions in the Instructions to Bidders (ITB).
Whenever there is a conflict, the provisions herein shall prevail over those in the ITB.”
(Emphasis supplied)

From the above quoted statement the Authority observes that, what is contained in the Bid Data Sheet under Item 28, which modified ITB 21.2 (a), supersedes what was prescribed in the ITB. Thus, with regard to the application of the document to this tender, the Authority is satisfied that the Tender Document issued to the tenderers was not for the tender under Appeal.

The Authority considered the Respondent's defense that the Appellants could have sought for clarification. The Authority agrees with the Respondent that, having found that the Tender Document was not applicable to the tender under Appeal, the Appellants should have sought for clarification in accordance with Regulation 85(1) of GN. No. 97/2005. However, the Authority noted that according to Item 9 of the Bid Data Sheet, the tenderers were required to seek for clarification **28 days after the date of advertisement**, that is, **two days** before the deadline for submission and the reply thereof **to be made after 28 days**. The Authority finds this provision to be impractical and in contravention of Regulation 85(2) and (3) of GN. No. 97/ 2005.

The Authority appreciates the dilemma faced by the Appellants given the contradictions in the Tender Document and therefore concurs with the Appellants' Legal Counsel that the Tender Document issued was not for the tender under Appeal.

From the above findings the Authority concludes that, the tender document issued was not for the tender under Appeal.

Accordingly, the Authority's conclusion in respect of the first issue is that, while the tender advertisement was in accordance with the law but the Tender Document issued was neither applicable to the tender under Appeal nor was it in accordance with the law.

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

Having established that the Tender Document was not applicable to the tender under Appeal, nevertheless the

Authority went further to review the evaluation process for purposes on enlightening the parties on the proper application of the law.

The Authority started by revisiting the Tender Document and noted that the evaluation was to be carried out in the following stages:

- Preliminary Evaluation as per Clause 28 of the ITB;
- Technical Evaluation as per Clause 29 of the ITB;
- Correction of arithmetic errors as per Clause 30 of the ITB and; and
- Commercial evaluation of bids as per Clause 32 of the ITB.

The Authority reviewed the Evaluation Report in order to ascertain whether the evaluation process was properly conducted. In so doing, the Authority noted that the evaluation process was conducted in two stages namely; Preliminary Evaluation and the Detailed Evaluation.

The Authority further noted that, during Preliminary Evaluation all tenders were checked if they had complied with item 11 of the Bid Data Sheet which required them to submit the following:

- “a. Copy of Tanzanian citizen identity cards.**
- b. Receipt of Tender Document fee (60,000/=).**
- c. 3 Recent passport size photographs.**
- d. Recommendation letters from local leaders (WEO or VEO).**
- e. Information related to business.**

During Preliminary Evaluation four tenders out of the five were found to be non responsive for failure to comply with the above mentioned conditions.

The Authority revisited Clause 28 of the ITB and noted that, during Preliminary Evaluation tenders were to be checked for eligibility and verification if they were properly signed and accompanied by the required securities. The Evaluators were also required to check if

the tenders complied with the requirements of Clauses 11, 12 and 13 of the ITB.

The Authority reviewed the five tenders and noted that none of them had met the requirements of Clauses 28, 11, 12 and 13 of the ITB. The Authority observes that, the tenderers were required to comply with the aforesaid Clauses 11, 12 and 13 of the ITB in addition to those specified under Item 11 of the Bid Data Sheet. However, it was evident during the hearing that, the Respondent's perception was that the said Clauses were not applicable as they were modified by Item 11 of Bid Data Sheet, whereas the said Item stated clearly that, **"In addition to the documents stated in ITB Clause 11, the following documents must be included with the bid..."**

According to Item 22 of the Bid Data Sheet tenderers were required to submit, a Bid Securing Declaration but it was not one of the items checked during the evaluation process. The Authority observes that, none of the tenderers had met this requirement. The Authority is of

the view that, had the Respondent intended to waive the requirement to submit a Bid Securing Declaration the same should have been stated in the Bid Data Sheet.

The Authority further revisited the Respondent's submission that, the Appellants were disqualified for failure to meet the requirements of the Tender Document. The Authority observes that, had the said requirements been communicated to the tenderers prior to submission of their bids, they would have been properly disqualified. However, according to the findings on the first issue, that the Tender Document issued was not applicable to the tender under Appeal, the Authority therefore observes that, the tender requirements were not known to the Appellants and therefore it was not proper to evaluate them using criteria that were not communicated to them. Furthermore, since the tender document in respect of the tender under Appeal was not issued, it goes without saying therefore that, there were no evaluation criteria which is contrary to Regulation 90(4) of GN No. 97/2005 which states as hereunder:

“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 revisited the tender submitted by the Successful tenderer, namely; Jikomboe Fisheries Society and noted that they had attached three passport size photographs and a Voters’ Registration Card of one Selemani Hamad Said but there was no explanation whatsoever as to his position or connection to the tenderer. During the hearing the Respondent submitted that, the said tenderer had attached a letter from Jikomboe Fisheries Society which introduced the above mentioned person as its Chairman. However, upon perusal of the said tender, the Authority could not find that document. The Authority wonders as to how the Evaluators satisfied themselves that the said person was a legally appointed representative of the said tenderer. The Authority observes that, since the Respondent knew the target group of the prospective tenderers, they

should have stated clearly the conditions which were applicable to groups of persons as opposed to individuals.

Upon further review of the tender submitted by Jikomboe Fisheries society, the Authority noted that they had submitted a TIN Certificate and a Certificate of Registration from the Registrar of Cooperative Societies under the name of **Jikomboe Fisheries Co-operative Society** as evidence of information relating to business. The Authority finds the names to be different as the name of the Successful Tenderer appearing in their tender, tender fee receipt as well as the signed contract is **Jikomboe Fisheries Society** and not **Jikomboe Fisheries Co-operative Society**. The Authority is of the considered view that, the Evaluators ought to have detected the said anomaly as the two names represent two different personalities.

The Authority further noted that Clause 3.3 of the ITB required national tenderers to satisfy all relevant licensing and/or registration requirements with the appropriate statutory bodies in Tanzania. However, the

Successful Tenderer had attached a licence for Fishing or Dealing in Fish or Fish Products issued under the name of **Jikomboe Fisheries Co-operative Society**. The Authority finds the licence not only containing different names but also involves a different business not similar to revenue collection. The Authority observes that, given the nature of the tender and the targeted group of tenderers, the Bid Data Sheet should have indicated that this requirement was not applicable.

The Authority therefore is of the firm view that, assuming the Tender Document issued was valid and the Evaluators were diligent enough, they would have detected the anomalies and found that even Jikomboe Fisheries Society was not qualified for Detailed Evaluation as they did not meet all the requirements contained in the Tender Document.

Having reviewed the Preliminary Evaluation and found that it was not properly done, the Authority proceeded to review Detailed Evaluation whereby the tenderers were assessed for the following:

- if they had any debt with the Council;
- experience; and
- the amount to be collected per month.

According to the Evaluation Report, the Successful Tenderer had the required experience, but the Authority found that their tender did not contain any documentary proof that they had experience in revenue collection. The Authority wonders where the Evaluators got such information. Furthermore, the Authority noted that, the Evaluation Report does not show the kind of experience that was assessed during that stage of evaluation. The Authority also noted that, some of the tenderers in the other tenders had no experience at all yet they were recommended for award of tenders.

In view of the foregoing, the Authority is of the firm view that, Detailed Evaluation was also not properly conducted.

The Authority further revisited the Appellants' submission that the tender had been awarded to the tenderer who had offered the lowest price contrary to Regulation 95(5) and (7) of GN No.97/2005. In reply thereof the Respondent stated that, the Appellants had relied on the wrong provisions of the law as Regulations 95(5) and (7) of GN No. 97/2005 relate to negotiation of tenders and not price comparison or **award to the highest evaluated tenderer**. The Authority agrees with the Respondent that, the provisions relied upon by the Appellants are not relevant.

Furthermore, the Authority noted that, although the Tender Document indicated that evaluation would be carried out in four stages, the Evaluation Report shows that the same was done in two stages as analysed above.

Furthermore in perusing the Tender Document issued the Authority noted that, Item 45 of the Bid Data Sheet indicated that post-qualification would not be done. The Authority observes that, this was in contravention of Section 48 of the Act which makes it mandatory to carry

out post-qualification where tenderers were not subjected to pre-qualification. Therefore the Authority finds that, the Respondent erred in dis-applying the requirement to post-qualify the successful tenderer prior to awarding the contract as it has already been stated in this decision.

Having reviewed the evaluation process and having established that it was not properly conducted, the Authority is of the view that, the process was marred by irregularities.

In the light of the above findings, the Authority is of the firm view that, the evaluation process was not conducted in accordance with the law.

3.0 Whether the disqualification of the Appellants was justified

In resolving this issue, the Authority took cognizance of its findings in issues number one and two above that, the disqualification of the Appellants' tenders was not justified given that the tender document issued was not

for the disputed tender and the criteria used to evaluate them were contained in a document which was not applicable to the tender under Appeal. Therefore, the Authority finds that, the disqualification of the Appellants' tenders was unjustified.

4.0 Whether the award of the tender to the successful tenderer was proper at law

In resolving this issue, the Authority took into account its findings in issues number one and two above that, the evaluation process was not conducted in accordance with the law since it was based on a document which was not applicable to the tender under Appeal. Accordingly, the Authority concludes that the award to the Successful Tenderer was not proper at law.

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

Having analyzed the main issues in dispute, the Authority deems it prudent to consider prayers by the parties.

(a) The Appellant's prayers:

The Authority revisited the Appellants' prayers and resolved them as hereunder:

- i) The Authority investigate the matter and take remedial measures; and in the event it is established that the tender process was conducted contrary to the law; order annulment of the contract**

Having satisfied itself that, the tender advertisement was in accordance with the law but the Tender Document issued was not applicable to the under Appeal and further that the evaluation process was conducted contrary to the law, the Authority observes that the tender process and the award thereof were a nullity in the eyes of the law. Thus, the Authority is of the considered view that, since the award was a nullity there is nothing for it to annul. The Authority orders the Respondent to restart the tender process in observance of the law.

ii) Compensation of Tshs. 2,960,000/-

Based on the Authority's findings and conclusions in the first, second, third and fourth issues, the Authority upholds this Appeal and finds that the Appellants are entitled to compensation for some costs incurred in pursuit of this Appeal and orders the Respondent to compensate the Appellants a total of **Tshs. 2,840,000/-** as per the following breakdown:

S/ No	Costs	Tshs.
1.	PPAA Appeal fees Tshs. 120,000 x 2 Appellants =	240,000/-
2.	Tender purchase fees Tshs. 60,000 x 2 Appellants =	120,000/-
3.	Legal fees – Tshs.	1,500,000/-
4.	Legal Counsel's costs for transportation and accommodation – -Air tickets – 360,000/- -Food and accommodation 80,000 x 5 days=400,000/-	760,000/-
5.	1 st Appellant's cost for transportation and accommodation Tshs. 220,000/-	220,000/-
Total Tshs.		2,840,000/-

(b) The Respondent's prayer:

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

Other matters that caught the Authority's attention

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

- a) Clause 34 of the ITB indicates that the tender with the lowest evaluated price from among those which are eligible, compliant and substantially responsive shall be the lowest evaluated tender. From the experience of the Authority, this is a common problem in tenders relating to revenue collection such as the one under Appeal. The Authority is of the view that, the law is not exhaustive enough as it is confined to award of tender to the lowest

evaluated tenderer for procurement or highest evaluated tenderer for disposal as provided for under Regulation 90(18)(b)(i) of GN No.97/2005. The Authority recommends that, PPRA should take into account the said lacunae in the law and include it in the proposed new law.

- b) The Authority is concerned with the Respondent's act of issuing advertisement in two languages one being in Kiswahili and the other in English. The Authority is of the view that given the targeted audience the Kiswahili advertisement was more appropriate for this kind of tender as most of the tenderers are not conversant with English language as the 1st Appellant conceded during the hearing.
- c) The Respondent's Tender Document contained a lot of information much of which was not relevant to this kind of tender. The Authority is of the view that, most of the tenderers failed to

comply with the requirements despite purchasing the Tender Document because they could not comprehend the instructions provided therein. This fact came out clearly during the hearing when the 1st Appellant claimed that up to that time he was not aware that he was required to submit documents such as nationality identification, photographs and so forth. The Authority therefore wishes to advise the Respondent under guidance from PPRA to issue simplified tender documents in Kiswahili which will be understood by the intended tenderers as per the requirements of Section 63(2) of the Act.

- d) The contract between the Successful Tenderer namely, Jikomboe Fisheries Society and the Respondent was signed, on behalf of the Successful Tenderer, by a person whose designation has not been stated and there is no official stamp of the said tenderer to verify that

the person who signed was indeed a representative of the group.

- e) Item 6 of the Bidding Conditions contained in the tender advertisement appearing in the Tender Document shows that the deadline for submission of bids was **21st June 2009**, while the tender was advertised on **21st May, 2010**. Also Clause 6 of the contract had indicated that the successful tenderer will not be required to submit a receipt book when remitting the first instalment by **1st July, 2009**. This shows that the members of Procurement Management Unit (PMU) did not discharge their duty diligently as they ought to have noted the anomalies and rectified the same.
- f) The Authority doubts the competence of the Members of the Tender Board as well as the PMU for issuing a defective Tender Document and using it in evaluating tenders.

- g) The Authority is of the view that the fee of 60,000/- charged on the Tender Document was on the high side and hence contrary to Regulation 82(3) of GN No. 97/2005.

Having considered all facts and evidence, the Authority concludes that, tender process was not properly conducted.

On the basis of the aforesaid findings, the Authority upholds the Appeal and orders;

- **The tender process be started afresh in observance of the law.**
- **The Respondent to compensate the 1st and 2nd Appellants a total sum of Tshs. 2,840,000/- being costs incurred in pursuit of this appeal.**

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

Decision delivered in the presence of the 1st Appellant and the Respondent this 3rd December, 2010.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

- 1. MRS. R. MANG'ENYA 
- 2. MS. E. MANYESHA 