IN THE

PUBLIC PROCUREMENT APPEALS AUTHORITY

AT DAR ES SALAAM

APPEAL CASE NO. 40 OF 2014/15

M/S WHITENIGHTS INVESTMENT REAL ESTATE.....APPELLANT

VERSUS

NATIONAL COLLEGE OF TOURISM ..... RESPONDENT

DECISION

CORAM

1. Hon. Vincent K.D Lyimo, J. (rtd) - Chairman
2. Mrs. Rosemary A. Lulabuka - Member
3. Mr. Louis P. Accaro - Member
4. Eng. Aloys J. Mwamanga - Member
5. Ms. Florida Mapunda - Ag. Secretary

SECRETARIAT

1. Ms. Violet S. Limilabo - Legal Officer
2. Mr. Hamisi O. Tika - Legal Officer

FOR THE APPELLANT

1. Dr. Medard Geho - Managing Director

2. Mr. Mathias Nkanawa - Partner

FOR THE RESPONDENT

1. Mr. Frank Latamani - Head, Procurement Management Unit
2. Mr. Meinrad T. Rweyemamu - Principal Legal Officer
3. Ms. Kimshen Lim - Supplies Officer

FOR THE OBSERVER

Ms. Veronica Hollela - Legal Advisor, Edgemark in association with M&R Agency Limited

This decision was scheduled for delivery today 22nd May 2015 and we proceed to do so.

The Appeal at hand was lodged by M/s Whiteknights Real Estate Investment Analysts Company Ltd (hereinafter referred to as "the Appellant" against the National College of Tourism (hereinafter referred to as "the Respondent").

The Appeal is in respect of Tender NO. PA-079/2014-2015/NCT/C/06 for Provision of Consultancy Services to Carry out Verification and Valuation of Fixed Assets and Preparation of Fixed Asset Register (hereinafter referred to as "the tender").

According to the record of proceedings submitted to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals

Authority"), as well as the oral submissions by the parties during the hearing, the facts of the Appeal may be summarized as follows:

On 26th November 2014, the Respondent invited ten (10) short listed firms to submit their proposals for the tender. In order to guide the related procurement process including preparation and the submission of Technical and Financial Proposals, the Respondent issued Request for Proposal (hereinafter referred to "as RFP") to the shortlisted consultants.

The deadline for the submission of proposals was set for 29th December 2014, while the opening of the technical proposal was on 6th January 2015. Only four proposals were received from the following consultants:-

1. M/s Capital Sherter Works;
2. M/s Edgemark Ltd in association with M & R Agency Ltd;
3. M/s Whiteknights Real Estates Investment Analysts Company Ltd;
4. M/s TAN-Valuers and Property Consultants.

Immediately after the opening, all technical proposals were subjected to preliminary and detailed evaluation, whereby all consultants were found to be in compliance with the RFP by scoring above the minimum score, which was 75 points. Therefore, the Evaluation Committee recommended all four firms to be invited for opening of their financial proposals.

The opening of the financial proposals took place on the 16th January 2015, and the read out price were as follows:-

S/N.	Consultancy name	Quoted price in Tshs.(VAT Inclusive)
1.	M/s Edgemark Ltd in Association with M and R Agency Ltd	45,726,500/-
2.	M/s TAN-Valuers and Property Consultants	64,026,800/-
3.	M/s Whiteknights Real Estate Investment Analysts Co. Ltd	36,965,467/-
4.	M/s Capital Shelter Works	76,126,785/-

The financial Proposals were subjected to arithmetic correction of errors, whereby the proposals submitted by three consultants were found with arithmetical errors which were corrected and the consultants were notified accordingly. Two of the consultants admitted their errors and the corrected sums but the Appellant refused to admit the corrections except a few. Finally, the Evaluation Committee ranked the financial proposals in accordance to their technical scores as follows;-

S/No	Consultancy name	Technical Scores	Quoted price in Tshs.(VAT Inclusive)	Corrected Price	Position
1.	M/s Whiteknights	84	36,965,467.00	46,403,500/-	1st

	Real Estate Investment Analysts Co. Ltd				
2.	M/s Edgemark Ltd in Association with M and R Agency Ltd	89	45,726,500.00	47,760,500/-	2nd
3.	M/s TAN-Valuers and Property Consultants	86	64,026,800.00	64,026,800/-	3rd
4	M/s Capital Shelter Works	78	76,126,785.00	74,887,785/-	4th

After the completion of the evaluation process, the Evaluation Committee recommended the award of the tender to the second ranked consultant; namely, M/s Edgemark Ltd in association with M and R Agency Ltd.; at a contract price of Tshs. 47,760,500/00 subject to negotiations. The Evaluation Committee did not recommend the award to the Appellant who was ranked first because it had refused to admit the arithmetical corrections made on its financial proposal.

The Tender Board, at its meeting held on 13th February 2015, approved the recommendation of award to M/s Edgemark Ltd in association with M and R Agency Ltd.

On 18th February 2015, the Respondent by his letter Ref. No. NCT/.199/513/01/32 notified the Appellant and other consultants his intention to award the tender to M/s Edgemark Ltd in association with M and R Agency Ltd. at a contract price of 47,760,500/00. It would appear that the Appellant did not receive his letter until after a while and after making strenuous follow up. The Appellant only got a copy of the said letter on 2nd March, 2015 because it later transpired that his letter had been routed through a wrong Postal Office Box number.

Being aggrieved by the Respondent's intention to award the tender, the Appellant on 11th March 2015, filed an application for administrative review to the Respondent's Accounting Officer asserting six issues, which could be conveniently put as follows:-

i. There was connivance or scheming by the Respondent to influence the Appellant to increase the tender sum;
ii. There was connivance or scheming by the Respondent's Tender Board to ensure the Appellant does not receive the notice of intention to award the tender;
iii. Breach of Regulation 231 of the Public Procurement Regulations, GN. 446 of 2013;
iv. Refusal to award the tender to the Appellant who was the highest ranked tenderer;
v. Wrong short-listing of the consultants and
vi. Award of the tender to an unregistered consultant valuation firm.

On 2nd April 2015, the Respondent's Accounting Officer delivered his decision and informed the Appellant that he could not find substantial reasons to invalidate his intention to award, thus the Appellant's application was dismissed for lack of merits.

Being dissatisfied by the Respondent's decision, on 9th April 2015, the Appellant lodged his appeal to the Appeals Authority. In his appeal, the Appellant has repeated almost verbatim the six grounds he had raised in the application for administrative review. The said grounds are as listed herein above.

SUBMISSIONS BY THE APPELLANT

In addressing the Members of the Appeals Authority on the first ground of the Appeal, the Appellant submitted that his technical proposal had scored 84% and that at the opening of the financial proposals, he had quoted the lowest price of Tshs. 36,965,467/= (VAT Inclusive). He was quick to add that on 21st January 2015, he received the Respondent's letter with Ref. No. NCT.199/513/01/34 calling upon him to confirm arithmetic correction of errors made in its financial proposal pursuant to Regulation 303 (2) of the G.N. 446 which showed that its contract sum had been changed to Tshs 46,403,500/=. The Appellant informed the Members of the Authority that he could not agree with the calculations by the Respondent. He believed that there was connivance or scheming by the Respondent in inflating the tender price so that it would ultimately become unresponsive. Consequently he made fresh calculations and submitted the same to the Respondent by his letter Ref. WHTS/NCT/26/15/001 dated 26th January

2015 and in which he quoted the contract sum of Tshs. 42,308,900/= (VAT inclusive). In the said letter, the Appellant while admitting to some aspects of the corrections of errors by the Respondent, stuck to his decision that subject to the application of Regulations 303 (1) and (2) of GN 446, the tender sum should not be more than Tshs. 42,308,900/= (VAT Inclusive). The Appellant argued that, there was bad motive on the part of the Respondent's Procurement Management Unit to require his firm to accept the corrected tender price.

Referring to the second ground of the appeal, the Appellant stated that at the end of February 2015, he sent his representative to the Respondent's office to find out whether the Respondent had issued the requisite notice of intention to award as required by the law. His representative was told by the Respondent that the notice had not been issued. However, the Appellant subsequently received a short message on his mobile phone requiring him to collect the letter from the Respondent's office but upon returning to the office, he was informed that the said letter had been dispatched through his mail box.

The Appellant contended that the Respondent had contravened the requirement of Regulation 12 (3) of G.N. 446 on the form of transmission of documents. He submitted that it was only after he had made strenuous efforts to trace the letter that on 2nd March 2015 he was issued with a copy of the letter which indicated that it been written on 18th February 2015. Further that upon reading it, he noted that the letter had been posted through the wrong address. It was posted through Post Office Box No.

35380 instead of Post Office Box No. 35480. The Appellant asserts that this was done intentionally in order that the Appellant should not receive the letter within the time to lodge complaints if any, as mandated by the law.

On the third ground, the Appellant centred his submissions on the main contents of the letter/Notice of Intention to award the tender. The Appellant strongly argued that the contents of the letter of intention to award did not conform to the specific requirements of Regulation 231 (2) of GN.446. He pointed out that the said letter is silent on the right to lodge complaints within 14 days if at all they are dissatisfied by the intention to award the tender. Further, the letter did not specify the reasons for the consultants' disqualification as stipulated under Regulation 231 (4) (c) of GN. 446. Thus, he argued that the Respondent intentionally contravened the law. As far as the Appellant was concerned, this was connivance by the Respondent aimed at ensuring that the Appellant missed any chances of winning the tender.

Making reference to the fourth ground, the Appellant touched on the arithmetic errors in respect to the financial proposals. The Appellant informed the Members of the Authority that after he had received the Respondent's letter on the said corrections, he reviewed his own calculations and his contract sum changed from Tshs. 36,965,476/= (VAT Inclusive) to Tshs 42,308,900 (VAT Inclusive). He noted that while the tender to be awarded to M/s Edgemark Ltd in association with M and R Agency Ltd had quoted the contract price of Tshs 47,760,500/00; it meant that his financial proposal was still lower than the proposed consultant's

price. He concluded on that ground by saying that it was not clear why the Respondent insisted on having the Appellant change his contract sum.

In the fifth ground of the appeal, the Appellant concentrated on the qualification of the consultants and their eligibility criteria. He submitted that in substance, the tender was specific for the provision of consultancy services. He pointed out that the invitation letter was issued to ten consulting firms including three non-valuation firms; viz- M/s Edgemark Ltd, M/s G2K Investment Co. and M/s Pangani Real Estate Services Ltd. He said that although M/s Edgemark Ltd was shortlisted alone, the said firm subsequently submitted its proposal in association with M/s M and R Ltd which was not in the list, contrary to Clauses 1.2 and 15.2 of the Information To Consultants ("ITC").

Last but not least, under the sixth ground of the appeal, the Appellant forcefully submitted that the Respondent had acted in blatant disregard of the Professional Surveyors (Registration) Act 1977. The said Act dictates that for a person to practice as professional valuer in Tanzania, he must be registered as such. The Appellant informed the Members of the Authority on the various steps he had taken to prove to the Respondent that M/s Edgemark Ltd. is not registered as a consultant valuation firm. He urged the Members of the Authority to find that that the Intention to award to a non-registered consulting firm is bad in law and ill-motivated.

Finally the Appellant prayed for the following remedies:

i. Nullification of the notice of intention to award the tender;
ii. Award the tender to the Appellant;
iii. Compensation of Tshs. 200,000/- being Appeal filing fees; and
iv. Any other relief the Appeals Authority deems fit to grant.

REPLIES BY THE RESPONDENT

In response to the Appellant's grounds of Appeal, the Respondent first addressed the issues raised in grounds one, two and four of the Appeal and submitted as follows-

That, the financial proposal submitted by the Appellant contained some arithmetic errors which were corrected by the Evaluation Committee. The corrections so made, triggered the Appellant's read out price to change from Tshs 36,965,476/= (VAT Inclusive) during the opening of the financial proposal to Tshs 46,403,500/= (VAT Inclusive). In an effort to explain how the final contract price was arrived at, the Respondent told the Members of the Authority that his Evaluation Committee discovered from the Appellant's financial proposal various arithmetical errors in forms 5B3 and 5B4 on staff remuneration amounting to Tshs. 22,166,667/= and Tshs 9,160,000/= for reimbursable expenses respectively. Similarly, in form 5B5 there was an error of Tshs 5,638,800/= in respect to local taxes. The Respondent said that he communicated to all respective consultants, including the Appellant on the corrections made in their financial proposals, and required each of them to confirm the corrections. While two of the

tenderers quickly admitted the corrected errors, the Appellant not only refused to admit its errors but also went further to modify its financial proposal and made a counter offer on the contract sum. The Respondent vehemently denied the Appellant's contentions that the correction of arithmetic errors was intended to increase its quoted price for purpose of disqualifying it. He submitted that he had acted in accordance with the required rules of procedure and practice.

The Respondent argued that in correcting the above mentioned arithmetic errors in the financial proposals, he had complied with Regulations 4(2) and 303 (2) of GN.446. He said that going by the arguments put forward by the Appellant on this aspect, the Appellant ought not to have read Reg. 303(1) in isolation of the others.

The Respondent contended that the arithmetic corrections in the Appellant's financial proposal was not a result of the inconsistencies in the technical proposal as referred to under Reg. 303 (1), but rather, were numerical errors that had to be corrected in compliance with Regulation 303 (2) and not otherwise. The Respondent elaborated on the corrected contract sum and indicated that the Appellant wanted the Respondent to modify the form on financial proposal, to accommodate the Appellant's new contract sum, which was in effect a counter offer not forming part of the arithmetic corrections. Therefore, the Appellant had contravened Regulation 207 (1) of GN. 446. In effect, the Respondent argued that the Appellant had interchanged the inputs in the financial proposal to suit his

own interests and the Evaluation Team had no mandate to interchange inputs of the technical proposal.

Addressing the allegations of connivance by the Respondent or the Respondent's Tender Board, the Respondent denied the same and stressed that there was no bad intention at all on what had transpired. The Respondent argued that while it is true that the letter of intention to award had been wrongly routed, there was no prejudice occasioned to the Appellant since despite the late notification, the Appellant had managed to file his appeal as required by the law. Therefore, there was no contravention of Regulation 231 (2) as contented by the Appellant. Consequently, the Respondent submitted that he had not abrogated the provisions of Regulation 231(4) (c) of GN. 446 cited by the Appellant. Under the same spirit, the Respondent stated that the Appellant who was the highest ranked, could not be considered for award of the tender because he had refused to accept the correction of errors as required by Regulation 210 (b) of GN. 446.

With regard to the short-listing of non-registered firm, the Respondent submitted that, Clause 15.2 of the ICT provided that consultants may associate with other firms to enhance capacity to execute the contract. He did not elaborate on the manner or methods used to compile the list of consultants. The Respondent insisted that as far as he was concerned, the proposed successful bidder had met the necessary criteria to be awarded the tender.

On the issue of awarding the tender to unregistered firm, the Respondent submitted that, he could not rely on the list of the registered firms submitted by the Appellant because its source or origin could not be vouchsafed. He could only have acted on the same had it been proved that such information was released by the Registrar/Secretary, Professional Surveyors (Registration) Board. He insisted that Clause 15.2 of ITC allowed shortlisted consultants to form association with one another. Therefore, the Appellant's contention that the awarded consultant is unregistered is untenable.

Finally, the Respondent prayed for the dismissal of the appeal for lack of merits.

In its rejoinder to the above responses, the Appellant urged the Members of the Authority to find that the Respondent had not adhered to the requirements stipulated in Clauses 1.2 and 15.2 of the ITC. In addition, that the Respondent had failed to conduct due diligence on the shortlist of the Consultants who had been invited to participate in the tender under dispute.

ANALYSIS BY THE APPEALS AUTHORITY

In determining this Appeal, the Appeals Authority reviewed the tender proceedings through documents submitted to it as well as oral submissions by both parties at the hearing. Having done so, it is of the view that there are four issues calling for determination and these are:-

i. Whether disqualification of the Appellant's tender was justified;
ii. Whether the contents of the notice of intention to award was in compliance with the law; and if not whether the Appellant was prejudiced;
iii. Whether award of the tender to the successful consultant was proper at law; and
iv. To what reliefs, if any, are the parties entitled to.

Having framed the issues above, the Appeals Authority proceeded to resolve them seriatim as hereunder;

1. Whether disqualification of the Appellant's tender was justified

In resolving this issue, the Appeals Authority revisited the availed documents and the applicable law. In the course of doing so, the Appeals Authority observed that indeed, the Appellant's tender contained some arithmetic errors as correctly submitted by the Respondent which emanated from improper calculations of staff remunerations, particularly on the deputy team leader, fixed assets register expert, assistant valuers and the errors on calculation of local taxes.

Upon being notified of such errors as mandatorily required by Clause 36.3 of the RFP and Regulation 303(2) of GN. 446, the Appellant did not confirm the corrections made. To the contrary, he doubted the corrected contract sum and asserted that the sum had been deliberately inflated by the Respondent to defeat its bid in the tender process. And as the Appellant

was not agreeable to the corrected sum, he wrote back to the Respondent demanding that the Respondent should first invoke the provisions of Regulation 303(1) of GN.446 by reviewing the financial proposal in order to ascertain whether or not it was consistent with the technical proposal for necessary adjustments before performing arithmetic correction of errors. The Appellant said it was accepting some of the corrections made in respect to some of its staff but flatly refused to admit the final sums as put by the Respondent. Accordingly, the Appellant insisted that pursuant to his own calculations, the correct bid price should be Tshs. 42,308,900/= (VAT inclusive) and not Tshs. 46,403,500/= (VAT Inclusive) as communicated by the Respondent.

In order to ascertain the validity of the Appellant's arguments, the Authority revisited Regulation 303(1) of GN. 446, which requires procuring entity to check for inconstancies between technical and financial proposal when conducting evaluation of financial proposal. For purposes of clarity the said Regulation 303(1) is reproduced verbatim hereunder-

> "An evaluation committee shall first review the financial proposals for consistency with the technical proposal and if there are any inconsistencies they shall make necessary adjustment". (Emphasis supplied)

The Appeals Authority reviewed Technical and Financial proposals submitted by the Appellant in order to satisfy itself if there were inconsistencies in the two documents that were to be adjusted before correction of arithmetic errors. Having reviewed the two proposals, the

Authority did not find any such inconsistencies, especially on the part of breakdown of staff remuneration (assistant valuers). Input of staff per month for assistant valuers was 0.53 for head office and 4.00 for field in both technical and financial proposals. During the hearing, it turned out that the Appellant had wanted the Respondent to interchange the rate of staff input per month by looking into the shading that was made in the technical proposal. According to the Appellant the shading indicates that, inputs per month for head office was to be 4.00 and field 0.53. It was not the duty of the Respondent to check the shading and inputs stated. If there were any inconsistencies between the two, then the figures stated in the technical proposal Form 5A7 is taken to be final. And to this remark, the Respondent insisted that the Evaluation Committee is not allowed to alter or interchange the filings.

From the above findings, the Authority is of the settled view that, there were no inconsistencies between technical and financial proposals of the Appellant. The “corrections” which the Appellant claimed that they ought to have been effected to his technical proposal would have amounted to changing the proposals in its original form. Regulation 303 (1) requires adjustment to be done when there are inconsistencies and not to change what was initially provided for in the technical proposal. Thus, we are satisfied that the Appellant misconceived the applicability of Regulation 303(1) of GN. 446.

Furthermore, the Appeals Authority is of the view that, it was proper for the Respondent to invoke Regulation 303(2) of GN 446 read together with Clause 36.3 and 36.4 of ITC in conducting arithmetic correction of errors

on all the bids (including that of the Appellant) because it was patently clear that all the financial proposals had arithmetical errors which called for corrections. The Appellant was simply required to make unequivocal admission of the errors and nothing else. Clause 36.4 of the ITC states:-

> "If the Consultant does not accept the corrections of arithmetic errors, its proposal shall be disqualified".

His refusal to accept the said errors rendered his bid to qualify for rejection in terms of Clause 36.4 of the ITC as was rightly done by the Respondent.

At this juncture, it is pertinent to consider the allegations raised by the Appellant that the Respondent had committed connivance and scheming during the tender process.

In his submissions, the Appellant stated that since this was a tender for consultancy services first, it was not immediately apparent why the Respondent's Procurement Unit was keen and insistent on the revision of the contract sum in complete defiance of Regulation 4 on basic procurement principles. More so when the Respondent required him to change the figure from the original bid price quoted to Tshs. 46,403,500/-. Second, that the Respondent's failure to serve him with the letter of intention to award the tender coupled with the subsequent refusal by the Respondent to interchange alleged inconsistencies in the financial proposal with those in the technical proposal were matters proving connivance and scheming.

First, we have shown that the Respondent had justifiably made arithmetical corrections to the financial and technical proposals submitted by all the bidders. Second, we have also shown that the Respondent was not allowed to interchange the filings in the standard Forms 5A7 and 5B3 already referred to above. In the absence of cogent evidence of malice or bad faith, we are of the settled view that the Appellant misconceived the provisions of the law and ICT in respect to the correction of errors. In this regard, the Appellant's contentions regarding connivance by the Respondent have not been proved.

Accordingly, the Appeals Authority's conclusion with regard to the first issue is that the Appellant's disqualification was within the law and the same was justified.

2. Whether the contents of the notice of intention to award was in compliance with the law; and if not whether the Appellant was prejudiced

In resolving this issue, the Appeals Authority revisited the contents of letters dated 18th February 2015 by the Respondent on his intention to award the tender and which letters were addressed to all participating consultants. The Appeals Authority has observed that the said letters did not conform to the requisite contents referred to under Regulation 231(2) and (4) of GN.446. The Regulation reads thus-

"Reg. 231 (2) Upon receipt of the notification of award decision from the tender Board, the accounting officer shall, having satisfied

himself that proper procedures have been followed and within three days, issue a notice of intention to award the contract to all tenderers who participated in the tender in question giving them fourteen days within which to submit a complaint if any.

(3) N/A

(4) The notice referred to in sub-regulation (2) shall contain-

a) Name of the successful tenderer;
b) The contract sum and completion or delivery period;
c) Reasons as to why the tenderers were not successful." (emphasis added)

The said letters contained only the names of the proposed successful tenderer, the awarded contract price and the appreciation clause. The said letter did not contain the reasons for the rejection of other consultants' proposals and the clause which entitles them to the right to lodge their complaint to the accounting officer as the law requires.

It is the Appeals Authority's considered view that indeed, the Respondent did not comply with the law on this matter as rightly submitted by the Appellant. Furthermore, the Respondent is being enlightened that despite Regulation 237(1) of GN. 446 which requires lowest evaluated tenderer to request reasons which lead to its disqualification, the regulation does not oust the responsibility of the accounting officer to inform all unsuccessful tenderers reasons for their disqualification when issuing a notice of intention to award. Regulation 237(1) provides for further rights to the

lowest evaluated tenderer. Thus, the Respondent's contravention of Regulation 231 is not acceptable.

However, the Respondent's failure did not prejudice the Appellant's right to lodge its complaints to the Accounting Officer and to this Appeals Authority. This is due to the fact that, after receiving the copy of the letter of notice of intention to award on 2nd March 2015, the Appellant managed to lodge his complaint to the Accounting Officer on 11th March 2015 and thereafter lodged his appeal with this Appeals Authority on 9th April 2015.

Under these premises, the Appeals Authority is of the firm view that the Appellant's contention that the Respondent had intended to hide the letter of notice of intention lacks evidence. While it may be true that the Respondent did not adhere to the specific requirements on the issuance of Notice of Intention to Award, nevertheless we are of the view there was no failure of justice or prejudice occasioned, since as can be seen, the Appellant managed to file his complaint and this appeal in line with the law.

3. Whether the award of the tender to the successful consultant was proper at law

In ascertaining the validity of the Appellant's contentions with regard to this matter, the Appeals Authority observed in the Evaluation Report and other correspondences by the Respondent to the consultants that the award of the tender was preferred to the association of two firms namely; M/s Edgemark Ltd and M/s M &R Agency Limited. The Appeals Authority

revisited the invitation letters and observed that the Respondent had invited ten shortlisted consultancies including M/s Edgemark Ltd. However, the modality used by the Respondent to obtain the list of shortlisted firms was not made clear. It is not known how these ten companies were picked.

In his submissions before this Authority, the Appellant's contention was that M/s Edgemark Ltd is not among the registered land economy (valuation) firms. As such, the firm was not eligible to be shortlisted to participate in the disputed tender process. The Appellant informed the Members of the Authority on the steps he took to prove to the Respondent that the said Edgemark was not registered. He produced a letter from the Secretary, National Council of Professional Surveyors to that effect. At the Appellant's prompting, the said letter was issued to the Respondent and copied to PPRA among others, which indicated that M/s Edgemark Ltd was not a registered Consultant. It will be noted that the Respondent had been confronted with this fact on non-eligibility of M/s Edgemark but took no action to disprove the same. The Respondent conducted no due diligence to counter the documentary evidence put before him by the Appellant. On the balance of probabilities, it is clear that M/s Edgemark is not a registered consultant firm and we agree with the Appellant on this matter.

The Appeals Authority observed further that M/s M & R Agency (one of the proposed award partner) was not among those shortlisted and invited to participate in the tender under dispute. Upon perusal of the RFP, the Appeals Authority observed under Clauses 1.2 and 4.1 that the invitation

was restricted to only shortlisted consultants and not otherwise. The Clauses read as follows-

"Clause 1.2 Only shortlisted Consultants indicated in the Letter of Invitation are to submit a proposal for the supply of consulting services required for the assignment ... and

Clause 4.1. Only shortlisted Consultants are eligible to submit proposals."

Upon being asked by the Members of the Appeals Authority the significance of the above provisions and inclusion of M/s M & R Agency Limited in the proposal by M/s Edgemark Ltd, the Respondent submitted that Clause 15.2 of the RFP allowed association of the firms, provided that they are capable of executing the project in question. The Appeals Authority revisited closely the provisions of Clause 15.2 and very unfortunately for the Respondent, he is wrong. We have reproduced Clause 15.2 *in extenso* and it provides:-

"Clause 15.2 If a Consultant considers that it does not have all the expertise required for the assignment, it may obtain that expertise by associating with other Consultants or entities in a joint venture or sub consultancy as appropriate. *Association among the shortlisted Consultants at the time of submission of a proposal is not permitted*, and the Client shall disqualify such proposal. *Association of other Consultants (not shortlisted) in a joint venture at the time of submission of proposal is only*

permitted with the prior permission of the Client. A shortlisted Consultant associating with another firm, where that firm is a sub consultant will not require prior permission of the Client…" (Emphasis Added)

In his submissions, the Respondent admitted that M/s M and R were not among those ten (10) earlier shortlisted for the tender in question. In addition, the association between M/s Edgemark and M and R had not sought the requisite written permission from the Respondent. Above all, the Respondent confirmed to the Members of the Authority that the relevant ICTs referred to above had not been modified. Since M/s M & R Agency was neither a shortlisted consultant nor a sub consultant; by virtue of the application of *ejusdem generis* rule, in order to give meaning to the term "consultant" used in ICT and the RFP, it is imperative that only associations of consultants and sub consultants may team up to vie for tenders of such nature. Further, in terms of ICT 15.2 quoted above, prior written approval of the Respondent before submission of proposals was mandatory. The Respondent had opted to flout his own procedures on the eligible consultant. We declare that M/s Edgemark and M/s M & R were ineligible under the circumstances.

In view of the above findings, the Appeals Authority is of the settled view that, the proposed award of the tender to the proposed consultants is vitiated by procedural irregularities and cannot be upheld. The same is hereby quashed and set aside.

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

In view of the above findings, the Appeals Authority orders the Respondent to re-start the tender process afresh in observance of the law and compensate the Appellant the sum of Tshs. 200,000/- being Appeal filing fees.

Right of Judicial Review as per Section 101 of the PPA/2011 explained to parties.

Decision delivered in the presence of the Appellant and the Respondent this 22nd May, 2015.

.....

JUDGE (rtd) V.K.D. LYIMO

CHAIRMAN

MEMBERS:

1. MRS. R. A. LULABUKA .....
2. ENG. A. J. MWAMANGA .....
3. MR. L. P. ACCARO .....