

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

**APPEAL CASE NO. 60 OF 2009**

**BETWEEN**

**M/S PRINCE GENERAL**

**INVESTMENT LTD.....APPELLANT**

**AND**

**KILIMANJARO REGIONAL**

**SECRETARIAT.....RESPONDENT**

**DECISION**

**CORAM:**

- |   |                      |
|---|----------------------|
| <b>1. Hon. A.G. Bubeshi, J. (rtd) -</b> | <b>Chairperson</b>   |
| <b>2. Mr. M.R. Naburi -</b>             | <b>Member</b>        |
| <b>3. Mr. K.M. Msita -</b>              | <b>Member</b>        |
| <b>4. Ms. E. Manyesha -</b>             | <b>Member</b>        |
| <b>5. Ms. E.V.A Nyagawa -</b>           | <b>Ag. Secretary</b> |

**SECRETARIAT:**

**Ms. F. Mapunda - Legal Officer, PPAA**

**FOR THE APPELLANT**

**Mr. Crispin Meela – Meela & Co. Advocates**

**FOR THE RESPONDENT**

- 1. Mr. Hassan M. Bendeyeko – Asst. Regional  
Administrative Secretary**
- 2. Mr. Abubakar A. Minhaj- Supplies Officer**

**INTERESTED PARTIES:**

- 1. Mr. Samwel S. Lema – Managing Director,  
Elerai Construction Co. Ltd**
- 2. Mr. James S. Mashasi – Quantity Surveyor,  
Italframe Ltd**

This decision was scheduled for delivery today 18<sup>th</sup> December, 2009 and we proceed to deliver it.

This Appeal was lodged by **M/s Prince General Investment Ltd** (hereinafter to be referred to as "**the Appellant**") against **Kilimanjaro Regional Secretariat** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. RAS/KIL/005/2009/2010W/03 for Construction of Maternity Block Complex at Mawenzi Regional Hospital – Moshi - Phase II (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:

On 21<sup>st</sup> September, 2009, the Respondent invited various tenders for the year 2009/2010, which included the tender under Appeal, through an advertisement which appeared in the Daily News.

The said tender advertisement attracted seven tenderers whose tenders were opened on 19<sup>th</sup>

October, 2009 and their names and prices are as shown in the Table below:

<b>S/ No</b>	<b>Tenderer</b>	<b>Tender Price Tshs.</b>	<b>Completion period (weeks)</b>
1.	M/s Elerai Construction Co. Ltd	675,049,090/=	24
2.	M/s Stance Technical & Civil Engineering Ltd.	705,568,204/=	20
3.	M/s United Builders Ltd	702,429,397/=	12
4.	M/s ItalFrame Ltd	755,200,260/=	12
5.	M/s Mavundas Investment	749,989,002/=	24
6.	M/s KXG Contractor Ltd	881,026,833/80	24
7.	M/s Prince General Investment Ltd	658,220,402/=	20

According to the tender opening proceedings, the Pre-tender Estimate for the said works was Tshs. 690,461,306/=.

Preliminary Evaluation was carried out whereby two out of the seven tenders were disqualified for being non responsive. The remaining five tenders were subjected to Detailed Evaluation.

On 6<sup>th</sup> November, 2009, the Tender Board approved an award in favour of M/s Elerai Construction Co. Ltd at a contract price of Tshs. 671,561,600/=.

On 11<sup>th</sup> November, 2009, the Appellant requested for information on the tender results from the Respondent, *vide* letter referenced PGIL/RAS/KILIMANJARO/011.

The Respondent informed the Appellant that, the standard processing time in respect of evaluation of tenders and notification of award was thirty days from the date of the tender opening and that the award should be made within seven days as per the Third Schedule to GN. No. 97 of 2005.

On 13<sup>th</sup> November, 2009, the Respondent *vide* letter referenced FA/29/265/01/99 communicated their

acceptance to the Successful tenderer namely, M/s Elerai Construction Co. Ltd.

M/s Elerai Construction Co. Ltd confirmed their willingness to execute the contract on 14<sup>th</sup> November, 2009, *vide* letter referenced EL/TD/MAWENZI/PHS.II/06/09.

On 21<sup>st</sup> November, 2009, the Appellant lodged an Appeal with the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**").

On 25<sup>th</sup> November, 2009, the Respondent *vide* letter referenced FA/29/265/01/121 informed the other tenderers, the Appellant inclusive, that their tenders were not successful.

## **SUBMISSIONS BY THE APPELLANT**

The Appellant's documentary, oral submissions as well as responses from questions raised by the

Members of the Authority during the hearing were as follows:

That, the tender in dispute was marred by illegalities, improprieties and irregularities from the tender advertisement stage to the tender award.

That, the tender advertisement that appeared in the Daily News of 21<sup>st</sup> September, 2009, had mistakes as it contained criteria which excluded other tenderers from participating contrary to Section 61(2) and 3 of the Act.

That, the tender advertisement appeared once contrary to Regulation 80(5) of GN. No. 97 of 2005.

That, the Respondent had informed the Appellant that the tender results would be communicated to them within 30 days from the date of the tender opening and subsequently the award of the contract of tender in seven days.

That, up to 21<sup>st</sup> November, 2009, when the Appellant lodged the Appeal, the said results were not yet availed to them.

That, the Respondent's failure to communicate the tender results had raised concern on the part of the Appellant in that, the evaluation was complete and it was based on the newspaper advertisement that eligible contractors were from Class II and above.

That, the Contractor's Class limit for the works pertaining to the tender under Appeal were within Class IV and above. Furthermore, the Pre-tender Estimate for the said tender stood at Tshs. 690,000,000/= which was within the confines of Contractor's Class IV and above, whose threshold is Tshs. 1.2 billion.

That, Clause 7.3 of the Instructions to Tenderers (hereinafter to be referred to as "**ITT**") referred to the limit of Classes for the tender in dispute. The said Clause 7.3 states that:

“The invitation for Tenderers (Section I) issued by the Procuring Entity is not part of the Tendering Documents. In case of discrepancies between the Invitation for Tender and the Tendering Documents, listed in sub-Clause 7.1 above the said Tendering Documents will take precedence.”

If this criterion was used in evaluating the tenders, then it was wrongly applied contended the Appellant.

That, the fact that, the acceptance was communicated to the Successful tenderer on 13<sup>th</sup> November, 2009, while the response thereof was made on 14<sup>th</sup> November, 2009, casts doubts as the other tenderers were not notified. This implied that the Respondent was not transparent.

That, the Successful tenderer, namely, M/s Elerai Construction Co. Ltd had the second lowest price of Tshs. 675,040,090/= . The Appellant casted doubt on the criteria and the circumstances applied leading to

the award being made to the second lowest tenderer. The Appellant viewed the same as unfair and hence the need for review.

That, the Appellant feels that, notwithstanding the competition involved in competitive tendering, award of tenders should be made in a fair and transparent manner.

That, the Appellant prayed for the award to be quashed and the Respondent be ordered to compensate them a sum of **Tshs. 11,093,306/03** being costs incurred as per the following breakdown:

- (a) Legal costs – **Tshs. 9,873,306/03;**
- (b) Purchase of tender documents – **Tshs. 100,000/=;**
- (c) Travelling expenses (fuel) Dar – Moshi – Dar for 2 trips (to collect tender documents and submission of the same on the tender opening date) Tshs. 400,000/= x 2 = **800,000/=;**
- (d) Subsistence allowance Tshs. 100,000/= x 2trips = **200,000/=;**

(e) Appeal fees – **Tshs. 120,000/=**

## **THE RESPONDENT'S REPLIES**

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

That, when the Appellant requested for tender results the Respondent informed them that, the results would be communicated to them as the process was incomplete. This was in line with Section 66(5) of the Act read together with the Item (a) of the Third Schedule to GN. No. 97 of 2005 which requires a period of 37 days from the tender opening to the award of tender. The Appellant was therefore entitled to inquire the same after the expiry of the said period, that is, on or after 26<sup>th</sup> November, 2009.

That, due to the nature of the project, the Respondent invited contractors registered with the

Contractors Registration Board (hereinafter to be referred to as "**CRB**") as building contractors Class II and above. Since this requirement was not changed, the Respondent did not expect any contractor registered below Class II to apply for the works.

That, the Tender Document was silent on the Class of prospective tenderers as the said item had been earlier on restricted in the advertisement which appeared in the Daily News dated 21<sup>st</sup> September, 2009.

That, with regard to the evaluation process, seven tenderers were subjected to Preliminary evaluation in which two of them, including the Appellant, were disqualified for the following reasons:

- (a) The Appellant being registered as Class IV Contractor contrary to the requirements specified in the tender advertisement.

- (b) The Appellant modified the standard Form of Tender and in so doing, key issues such as the contract period were omitted.

The Successful tenderer, M/s Elerai Construction Co. Ltd was the second lowest tenderer and after detailed evaluation and Post-qualification, they were recommended for award by the Evaluation Committee and subsequently the award was approved by the Tender Board.

That, according to the prices read out during the tender opening, the Appellant had the lowest price; however, this was not the only criteria for evaluation. Section 67(1) of the Act states clearly that the lowest submitted price may not necessarily be the basis for award of contract.

That, the Respondent had promised the Appellant that, the tender results would be availed to them before the expiry of the tender processing time. However, on 26<sup>th</sup> November, 2009, the Appellant

lodged an Appeal; five days before the expiry of the said period.

That, the Respondent had employed the Tanzania Building Agency to be the consultant of this project who advised to use contractors of Class II and above for purposes of obtaining good results of the proposed works.

That, the award was fair and transparent contrary to the Appellant's allegations.

That, the Respondent prayed for the appeal to be dismissed and the Appellant's prayer for costs be rejected as they were raised during the hearing and that the Respondent was not prepared for the same. Further that, equally the Respondent had incurred costs in pursuit of this Appeal and they are therefore entitled to compensation.

## **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 four main issues;

- **Whether the Appellant was unfairly disqualified?**
- **Whether the award of the tender to M/s Elerai Construction Co. Ltd was justified?**
- **Whether there was delay in communicating the tender results to the tenderers who were not successful, and if so, whether the Appellant was prejudiced.**
- **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 Appellant was unfairly disqualified?**

In its endeavour to resolve this issue the Authority deemed it prudent to address the Appellant's grounds of Appeal which led to the framing of the following sub-issues:

- **Whether the Contractor's Class limitation for the tender under Appeal was justified;**  
and
- **Whether the Appellant's Form of Tender was properly filled.**

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

### **1.1 Whether the Contractor's Class limitation for the tender under Appeal was justified;**

In resolving this issue, the Authority examined the tender advertisement, the Tender Document and the applicable law *vis a vis* contentions by parties. It is not disputed that, the issue of Class limit in respect of eligible contractors was only mentioned in the tender advertisement to be Class II and above. However, the said requirement was not stated anywhere in the Tender Document. The Authority revisited the submissions made by parties on this point. The Appellant claimed that, they were eligible to tender as their threshold as Class IV Building Contractors was Tshs. 1.2 billion as per the New Class Limits, Registration Criteria and Fees By-laws made by the Minister of Infrastructure Development which came into effect in January 2009. The Appellant further argued that, it was wrong for the Respondent to apply the Class limit as a criterion in the evaluation of the said tenders.

The Respondent, on the other hand, contended that, the tender invitation was specifically confined to Contractors of Class II and above; following expert advice sought from the Tanzania Building Agency

that the said works be executed by the aforementioned classes of contractors. The Respondent further argued that, the decision was triggered by the need to ensure competitiveness and quality work, in its totality, as it was a multi-billion project.

The Authority observes that, according to the By-laws issued by the Minister for Infrastructure Development in 2009, on the Contractor's class limits, the Appellant is eligible to participate in tenders such as the tender in dispute. Moreover, the said By-laws allow Class IV Contractors to build a structure not exceeding four storeys under supervision of an engineer. During the hearing, the Respondent submitted that, the subject matter of this Appeal was a four storey building which was within the Appellant's capability in accordance with the aforementioned classification.

The Authority is of the considered view that, the Appellant was eligible to participate in the tender in dispute and the Respondent's tender advertisement

which barred other eligible classes from taking part in the tender was discriminatory contrary to Section 62(3) of the Act. The said Section 62(3) states as hereunder:

“Tender documents shall not include requirements and terminologies which **discriminate unfairly against participation by suppliers, contractors** or consultants.”  
(Emphasis added)

Moreover, the Authority does not accept the Respondent’s contention that, the restriction relating to Classes was also intended to relieve the prospective tenderers of lower classes, such as the Appellant, from wasting their resources to pay for tender fees had they been invited. The Authority further wishes to quote Regulation 9(b) of GN. No. 97 of 2005 which provides for, among others, equality of participation in the following words:

“9. **To ensure the widest possible participation** by suppliers, **contractors,**

service providers or buyers **on equal terms in invitations to tender for goods, works,** services or disposal of assets, as appropriate, procuring entities and **approving authorities shall take the necessary measures to:**

(b) **eliminate discriminatory practices or technical specifications which might stand in the way of widespread participation on equal terms;**" (Emphasis added)

The Authority is of the view that, by limiting the invitation to Contractors of Class II and above, the Respondent discriminated other contractors who were eligible in accordance with the afore-cited By-laws.

The Authority further agrees with the Appellant that, Clause 7.3 of the ITT stated categorically that, the Invitation for Tenders was not part of the Tender Document as it states that:

**“ The Invitation for Tenders (SECTION I) issued by the Procuring Entity is not part of the Tendering Documents.** In case of discrepancies between the Invitation for Tender and the Tendering Documents listed in sub-clause 7.1 above, the said **Tendering Documents will take precedence.**” (Emphasis supplied)

The Authority observes that, since the issue of classification appeared in the tender advertisement only which according to Clause 7.3 of the ITT is not part of the Tender Document, the tenderers' eligibility was not confined to Class II and above as the same was not mentioned anywhere in the Tender Documents which should have contained all the requirements. The Authority also agrees with the Appellant that, the Evaluation Committee erred in using Contractors' Class limit as a criterion for evaluation as it was not among the criteria contained in the Tender Document contrary to Regulation 90(4) of GN. No. 97 of 2005 which states as follows:

**“The tender evaluation shall be consistent with the terms and conditions set forth in the tender documents and such evaluation shall be carried out using the criteria explicitly stated in the tender documents.”**

(Emphasis added)

In the light of the above quoted provision, the Authority observes that, since the issue of class limits was not contained in the Tender Document issued by the Respondent, it was wrongly applied and should not have formed part of the grounds for the Appellant’s disqualification.

The Authority further considered the Respondent’s contention that, the tender was confined to Contractors of Class II and above because the project being a multi-billion one; they needed highly qualified contractors to ensure that the foundation thereof met the required standards. They further argued that, the works were to be done in phases due to budgetary constraints. The Authority is of the view that, had the Respondent wished to restrict the

tender to Contractors of Class II and above, they could have done so through restricted tendering in accordance with Regulation 67(1)(c) of GN. No. 97 of 2005 which states as follows:

“67(1) A procuring entity may restrict the issue of tender documents to a limited number of specified suppliers, contractors, or service providers when:  
(c) The estimated contract values are within the limit for restricted tendering prescribed in the Second Schedule to these Regulations;”

However, no proof was availed to the Authority to establish that, this was a restricted tender and that the conditions set forth under Regulation 67 of GN. No. 97 of 2005 were complied with nor did the Respondent produce any record thereof in accordance with Regulation 67(2) of GN. No. 97 of 2005 which states as follows:

“The justification for restricting procurement further to sub-regulation (1) must be shown in the record of procurement proceedings made further to Regulation 19.”

In view of the above findings, the Authority’s conclusion in respect of the first sub-issue is that, the Contractor’s Class limitation for the tender under Appeal was discriminatory and therefore not justified.

### **1.2 Whether the Appellant’s Form of Tender was properly filled**

In analyzing the second sub-issue, the Authority examined the Tender Document and the applicable law *vis a vis* the tender submitted by the Appellant in order to ascertain the validity of the Respondent’s contention. The Authority started by revisiting the contentions by parties on this particular point. The Appellant conceded that their Form of Tender did not indicate the contract period, but claimed that the same was shown in their covering letter (submission

letter) to be 20 weeks and hence the defect was cured and the same should have been considered as a minor deviation.

Moreover, the Appellant relied on the decision of this Authority in Appeal No. 47 of 2009, between M/s Trio Hardware Ltd and Ngorongoro Conservation Area Authority. The Appellant claimed that, in the said Appeal, this Authority held that failure to indicate delivery period was not fatal. The Respondent, on their part, counter argued that, the Appellant did not fill the said Form as it was required and that they made some alterations therein contrary to the requirements of the Tender Document.

The Authority analyzed the Appellant's arguments relating to the decision of this Authority in Appeal No. 47 of 2009. The Authority observes that, had the Appellant read carefully the said decision, they would have realized that, the facts of that Appeal are not in *pari materia* with the facts of the Appeal at hand. The difference between the two appeals, amongst others, is that, the Tender Data Sheet in Appeal No.

47 of 2009, specified the completion date for supply of the goods to be **20<sup>th</sup> February, 2009**, while in the Appeal at hand it was not specified and tenderers were obliged to fill in the gap contained in the Form of Tender. Moreover, Item 22 of the Bid Data Sheet in the present Appeal indicates that tenderers were required to fill in the gap as it reads:

**“completion time ..... weeks”**

The Authority therefore finds that, its decision in Appeal No. 47 of 2009, was relevant to the circumstances pertaining to that Appeal and cannot be applied in the Appeal at hand as the facts are different.

Furthermore, the Authority proceeded to review the Appellant’s submissions on this point by revisiting Clause 14.1 of the ITT which provides answers in the following words:

“The Tenderer **shall** fill the Form of Tender furnished in the Tendering Documents. The

Form of Tender **must** be completed **without any alterations to its format** and **no substitute shall be accepted.**" (Emphasis supplied)

The Authority observes that, Clause 14.1 of the ITT was intended to ensure that compliance as to both the format and content of the Form of Tender was met by the tenderers since the said Form was contained in the Tender Document issued by the Respondent. The Authority is satisfied that, the Appellant's Form of Tender had an omission in that, it did not show the contract period but also its format was altered in contravention of Clause 14.1 of the ITT. Had the Appellant filled the Form of Tender that was attached to the Tender Document, they would have found the place where they were required to indicate the contract period. The Authority does not accept the Appellant's argument that, the said omission and alteration were tantamount to minor deviations as the said Clause stated categorically the consequence thereof would be rejection.

In view of the above findings, the Authority concludes that, the Appellant's Form of Tender was not properly filled; thus rendered the tender to be substantially non responsive.

The Authority's conclusion therefore in respect of the First issue is that, notwithstanding the discriminatory Class limits, the Appellant's disqualification was justified.

## **2.0 Whether the award of the tender to M/s Elerai Construction Co. Ltd was justified?**

In order to answer this question, the Authority revisited its findings with regard to the issue of classification and observes as hereunder:

- As it has already been pointed out, the contractors classification was not only discriminatory but also contravened the law. The Authority is of the view that, since the invitation to tender did not ensure the widest possible

participation of eligible contractors, it defeated the basic principle of competitive tendering.

- Using the class limits as a criterion for evaluation, contravened the law and hence nullifies the evaluation process in its entirety.
- Since the award of the tender was based on the recommendations of the Evaluation Committee which used an evaluation criterion to the detriment of some tenderers, the subsequent award thereof is also a nullity in the eyes of the law.

Accordingly, the Authority concludes that, the award of the tender in favour of M/s Elerai Construction Co. Ltd was not justified.

### **3.0 Whether there was delay in communicating the tender results to the tenderers who**

**were not successful, and if so, whether the Appellant was prejudiced**

The Authority considered the Appellant's submissions in which they alleged that, the tender process was not transparent as the Respondent had failed to notify them on the tender results in time. The Authority noted that, during the hearing the Appellant could not explain how the alleged delay affected them. The Authority revisited Clause 39.3 of the ITT relied upon by the Appellant which reads:

“Upon the successful Tenderer's furnishing of the performance security pursuant to ITT Clause 41, the Procuring Entity will promptly notify unsuccessful Tenderers, the name of the winning Tenderer and the Contract amount and will discharge the tender security or tender securing declaration of the unsuccessful Tenderers pursuant to ITT sub-clause 18.7.”

The Authority is of the view that, the provision cited does not support the Appellant's contention that

communication of the tender results was delayed as it requires the said notification to be done after the successful tenderer had furnished performance security.

The Authority wishes to enlighten the Appellant that, the above cited provision should be read together with Clause 41 of the ITT which requires performance security to be furnished within 30 days from the date of receipt of the letter of acceptance. According to the facts of the Appeal, the acceptance was communicated on 13<sup>th</sup> November, 2009, while the notification to the unsuccessful tenderers, the Appellant inclusive, was made on 25<sup>th</sup> November, 2009, which was within the 30 days period. Accordingly, the Authority is satisfied that, there was no delay in communicating the tender results to the unsuccessful tenderers.

The Authority also noted that, the Appellant was referring to performance security and tender security interchangeably which is wrong as they two different types of securities.

The Authority's conclusion in respect of the Third issue is that, there was no delay in communicating the tender results to the Appellant; and thus they were not prejudiced.

#### **4.0 To what reliefs, if any, are the parties entitled to?**

Having resolved the substantial issues pertaining to the Appeal at hand, the Authority considered the Appellant's prayers as follows:

##### **4.1 The Appellant's prayers:**

**(a) The Authority should declare the tender process in its entirety to be unfair and be quashed:**

In light of the conclusion already made under the Second issue that, the award of the tender in favour of the Successful tenderer was a nullity, the Authority concludes that, there is nothing to be

quashed as there is no award in the eyes of the law.

With regard to the Appellant's prayer that the tender process be started afresh, the Authority accepts this prayer as the Respondent's breach of the law resulted in an invalid award. The Authority orders the tender process to be started afresh in observance of the law.

**b) The Appellant be compensated a sum of Tshs. 11,093,306/03 being Appeal costs**

The Authority observes that, since this Appeal has partly succeeded and had it not been for the Appellant's bold mind to lodge an appeal the anomalies detected in this tender would have passed unnoticed, the Appellant is entitled to compensation. However, the Authority finds the amount of **Tshs. 11,093,306/03** requested by the Appellant to be on the high side and therefore orders the Respondent to

compensate the Appellant a sum of **Tshs. 3,120,000/=** in respect of the following costs:

- (a) Legal costs – **Tshs.2,000,000/=;**
- (b) Travelling expenses (fuel) Dar – Moshi – Dar for 2 trips (to collect tender documents and submission of the same on the tender opening date) Tshs. 400,000/= x 2 = **800,000/=;**
- (c) Subsistence allowance Tshs. 100,000/= x 2trips = **200,000/=;** and
- (d) Appeal fees – **Tshs. 120,000/=.**

With regard to refund of Tshs. 100,000/= for purchase of tender document, the Authority finds that, the Appellant is not entitled to it because their tender was non responsive.

#### **4.2 The Respondent's prayers:**

With regard to the Respondent's prayer that the Appeal be dismissed and each part bear its own cost, the Authority is of the view that, the Respondent had

breached the law and therefore their prayers are rejected in their totality.

### **Other matters that caught the Authority's attention**

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

- (a) The Respondent erred in advertising the tender only once contrary to Reg. 80(5) of GN. No. 97 of 2005 which states in part as follows:

“The approved tender notice shall be advertised by the procuring entity **at least twice** in one or more newspapers of national circulation...” (Emphasis added)

- (b) There is a contradiction between Clause 7.1 and 7.3 of the ITT, in that, while the former

implies the Invitation for Tenders to be part of the Tender Documents the latter states categorically that it is not part of the same.

- (c) The tender opening check list was wrongly filled, in that, completion periods were filled in rows earmarked for tender validity periods while the tender prices were filled in rows intended for tender securities. Moreover, although the tender related to construction, the row designated for 'manufacturer's authorization' which was not applicable in this tender, was filled to indicate compliance by some tenderers.
  
- (d) The Authority noted that, during the evaluation process, correction of arithmetic errors was done whereby the prices quoted by, amongst others, the Successful tenderer was adjusted from Tshs. 675,049,090/= to Tshs. 671,561,600/= and the said tenderer was duly notified and confirmed the said changes. Surprisingly, the Respondent's letter

of acceptance referenced FA/29/265/01/99 dated 13<sup>th</sup> November, 2009, quoted the original tender price offered by the Successful tenderer despite the acknowledgement of the correction effected. The Authority observes that, when the corrected tender price was accepted by the respective tenderer, the original quoted price ceased to exist and therefore it was wrong for the Respondent to refer to it.

- (e) The Respondent's letter referenced FA/29/265/01/121 dated 25<sup>th</sup> November, 2009, which communicated the tender results to the Appellant neither stated who had won the tender nor the contract price as required under **sub**-Regulations (11) and (14(a) of Regulation 97 of GN. No. 97/2005. The said Regulation 97(11) reads in part as hereunder:

**"Upon entry into force of the procurement contract ... notice of the procurement or disposal contract shall be given to the other supplier, service**

**provider, contractor or asset buyer, specifying the name** and address of the ... service provider that has entered into the contract **and the contract price.**"  
(Emphasis added)

(f) Notwithstanding the anomalies pointed out herein above, the Authority commends the Respondent on the following:

- The evaluation process was professionally done; and
- The Respondent's prompt response to letters sent to them by tenderers signifies implementation of the Respondent's client's charter in accordance with the principles of Good Governance, which is a rare recipe to most public offices.

(g) The Authority is concerned with the Appellant's acquisition of official documents and information pertaining to the tender in dispute through unofficial means. The

Authority does not buy the Appellant's defense that, for them to prepare their case they had to look for the documents and information through various means, as it depicts lack of civility and could be an intentional breach of the existing laws.

Having considered all facts and evidence, the Authority concludes that, the Contractor's Class limit used by the Respondent was discriminatory; the Appellants disqualification was proper and the award of the tender in favour of M/s Elerai Construction Co. Ltd contravened the law and therefore a nullity.

On the basis of the aforesaid findings, the Authority upholds the Appeal and orders the Respondent to do the following:

- **Re-start the tender process afresh in observance of the law.**
- **Compensate the Appellant a sum of Tshs. 3,120,000/= being Appeal costs.**

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

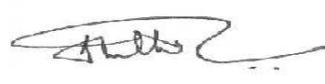
Decision delivered in the presence of the Appellant, the Respondent and Interested Parties this 18<sup>th</sup> day of December, 2009.



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

**MEMBERS:**

1. MR. M.R. NABURI ..... 

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

3. MS. E. MANYESHA ..... 