

PUBLIC PROCUREMENT APPEALS AUTHORITY
APPEAL CASE NO. 33 OF 2023 - 2024

BETWEEN

**M/S HITACHI ENERGY SOUTH AFRICA
Pty LTD TANZANIA BRANCH.....APPELLANT**

AND

**TANZANIA NATIONAL ELECTRIC SUPPLY
COMPANY LTDRESPONDENT**

RULING

CORAM

- | | |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Mr. Pius Mponzi | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|-------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Agnes Sayi | - Senior Legal Officer |
| 3. Ms. Violet Limilabo | - Senior Legal Officer |
| 4. Mr. Venance Mkonongo | - Legal Officer |

FOR THE APPELLANT

1. Mr. David Sarakikya

- Advocate – Law field Attorneys



- | | |
|---------------------------|-----------------------------|
| 2. Mr. Michael Otonya | - Country Managing Director |
| 3. Mr. Tony Mushi | - Sales Specialist |
| 4. Mr. Harish Vasanthappa | - Tender Manager |

FOR THE RESPONDENT

- | | |
|-------------------------|-----------------------|
| 1. Ms. Elizabeth Kimaro | - State Attorney |
| 2. Mr. Mkumbo Elias | - State Attorney |
| 3. Mr. Fratern Michael | - Procurement Officer |
| 4. Mr. Abdi Seleman | - Procurement Officer |
| 5. Mr. Fransisco Nari | - Electrical Engineer |

This Appeal was lodged by **M/S Hitachi Energy South Africa Pty Ltd Tanzania Branch** (hereinafter referred to as "**the Appellant**") against the **Tanzania Electric Supply Company Ltd** commonly known by its acronym as "**TANESCO**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. PA/001/2022-23/HQ/G/06 for Procurement of Mobile Substations (Transformers Complete with Switchgear) in Voltage Level of 220/33kV and 132/33kV (hereinafter referred to as "**the Tender**").

The background of this Appeal may be summarized from the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") as follows: -

The Tender was conducted through a Restricted Tendering Method as specified in the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement



Regulations, GN. No. 446 of 2013 as amended (hereinafter referred to as **"the Regulations"**).

On 9th June 2023, the Respondent through Tanzania National Electronic Procurement System (TANePS) invited three tenderers namely: - M/S Hitachi Energy South Africa (Pty) Ltd, M/S Siemens Energy S.A.S Ltd and M/S General Electric International Inc to participate in the Tender. The deadline for submission of tenders was set on 6th July 2023. On the deadline, the Respondent received two tenders from M/S Siemens Energy S.A.S Ltd and the Appellant.

The received tenders were subjected to evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/S Siemens Energy S.A.S Ltd subject to successful negotiations. The recommended contract price was Euro Eleven Million Nine Hundred Eleven Thousand Eight Hundred and One (EUR 11,911,801) exclusive of VAT, taxes, customs duties and surcharges.

The Evaluation Committee's recommendations were tabled at the Tender board meeting held on 25th August 2023. After deliberations, the Tender Board approved the award as recommended by the Evaluation Committee subject to negotiations. Negotiations successfully took place on 10th October 2023. The Tender Board at its meeting held on 3rd November, 2023 approved the negotiation report and the award of the Tender to M/S Siemens Energy S.A.S Ltd. The approved contract price was Euro 11,792,682.00 exclusive of VAT, taxes, customs duties and surcharges.

The Respondent through a letter dated 9th November 2023 issued a Notice of Intention to award the Tender to M/S Siemens Energy S.A.S Ltd. The Notice was received by the Appellant through email on 18th December 2023. The said Notice informed the Appellant that its tender was disqualified for the following reasons: -

- i) The submitted manufacturer's authorization letter for 45MVA, 220/33kV does not originate from the proposed manufacturers, Siemens/ Hitachi (ABB)/General Electric (GE) /Schneider Electric as indicated in the Tender Document. Instead, it submitted manufacturer authorization from Liaoning - Efacec Electrical Equipment Company Ltd.
- ii) Drawings and brochures submitted for high voltage switchgears (220kV and 132kV) are not gas insulated switchgear but hybrid (combination of gas insulated and air switchgear) contrary to the requirement provided in the Tender Document;
- iii) The submitted details for secondary technical specifications for high voltage switchgear are not gas insulated switchgear as specified in the Tender Document;
- iv) The Appellant submitted detail specifications for High Voltage Switch Gears (220kV and 132kV) which are not Gas Insulated Switchgear; and
- v) The Appellant quoted a higher price of USD 12,368,018.00 and TZS 3,354,439,984.00 VAT exclusive than the proposed successful tenderer.

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Dissatisfied with the reasons given for its disqualifications, on 22nd December 2023, the Appellant filed an application for administrative review to the Respondent. On 19th January 2024, the Respondent issued its decision which was received by the Appellant on 22nd January 2024. Aggrieved further, on 29th January 2024, the Appellant filed this Appeal to the Appeals Authority.

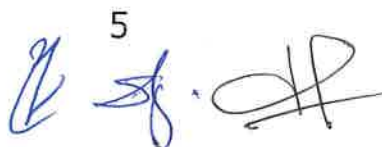
Before hearing the Appeal on merits, the Appeals Authority *suo motu* brought to the attention of the parties that there is a point of law to be determined. It informed the parties that after reviewing the record of Appeal in line with the requirements of Section 97(1) and (2) of the Act, it observed that there was a need to determine if the Appeal has been filed properly before it. Given this observation, the following issues were framed: -

- 1. Whether the Appeal is properly before the Appeals Authority;**
- 2. Whether the disqualification of the Appellant's Tender was justified; and**
- 3. What reliefs, if any, are the Parties entitled to?**

Having framed the issues, the Appeals Authority required the parties to address all the three issues in their submissions.

SUBMISSIONS BY THE APPELLANT

The Appellant's submissions were made by Mr. David Sarakikya, learned advocate. He commenced his submissions on the first issue by stating that

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the Appellant received the Notice of Intention to award dated 9th November 2023 through email on 18th December 2023. The Notice informed the Appellant that its tender was disqualified for failure to comply with technical requirements of the Tender. He contended that the Appellant was dissatisfied with the reasons given for its disqualification. On 22nd December 2023, the Appellant filed an application for administrative review to the Respondent challenging its disqualification.

The learned counsel stated that having not received a response from the Respondent and considering the existing business relationship between the Appellant and the Respondent, on 10th January 2024 the Appellant wrote a letter to the Respondent. The said letter reminded the Respondent to issue its decision on the filed application for administrative review. On 22nd January 2024, the Appellant received the Respondent's decision on its application for administrative review which was dated 19th January 2024. Dissatisfied with the Respondent's decision, the Appellant filed this Appeal on 29th January 2024.

The learned counsel submitted that Rule 9(1) of the Public Procurement Appeals Rules, GN. No. 411 of 2014, as amended (hereinafter referred to as "**the Appeals Rules**") requires an appeal to this Appeals Authority to be filed within seven working days of becoming aware of the circumstances giving rise to a dispute. He stated that the Appellant became aware of the circumstances giving rise to this Appeal on 22nd January 2024. This was after it received the Respondent's decision on its application for administrative review. The Appellant filed this Appeal on 29th January 2024 within seven working days as required by the law. The learned counsel

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urged the Appeals Authority to consider Rule 9 of the Appeals Rules and give it a wider interpretation under the circumstances of the Appeal at hand.

In view of the above submissions, the learned counsel asserted that the Appeal was lodged within the prescribed time limit under the law. Therefore, it is properly before the Appeals Authority.

On the second issue, the learned counsel commenced his submissions by adopting the Appellant's written Statement of Appeal. He went on stating that the Appellant complied with all the requirements provided in the Tender Document. Thus, it should not have been disqualified from the Tender process. He submitted that one of the reasons which disqualified the Appellant was failure to submit manufacturer's authorization as per the Tender Document. The learned counsel contended that the Respondent stated clearly on its general particulars of the Tender that the manufacturer of the transformer would either be Hitachi Energy or Liaoning-Efacec Electrical Equipment Company Ltd. The Appellant attached to its Tender manufacturers' authorization from Hitachi Energy and Liaoning-Efacec Electrical Equipment Company Ltd. The learned counsel asserted that the Appellant's aim of submitting manufacturer's authorization from Liaoning-Efacec Electrical Equipment Company Ltd was to provide the Respondent with an alternative manufacturer of the required equipment.

The learned counsel submitted further that, had the Respondent failed to understand the Appellant's essence of attaching to its tender manufacturers' authorization from Hitachi Energy and Liaoning-Efacec



Electrical Equipment Company Ltd, the Respondent should have sought for clarification from the Appellant. This was to be done considering that the Appellant quoted the lowest price to that of the proposed successful tenderer. To the contrary, the Respondent failed to do so.

The learned counsel stated further that the Appellant offered to supply PASS Units for Gas Insulated Switchgear that complied with the specifications of the Tender Document. He elaborated that the Gas Insulated Switchgear that was required by the Respondent is for indoor use. Thus, having realized that mobile substations transformers that were required were for outdoor use, the Appellant offered to supply the gas and air insulated equipment under PASS technology which is suitable for outdoor use. The Appellant's PASS technology is an advanced technology and best for the outdoor use, he contended.

The learned counsel submitted further that the PASS Units offered for the Gas Insulated Switchgear complied with the specifications provided in the Tender Document since the circuit breaker and disconnector are housed in the SF6 Gas as required by the specifications. In addition, the external components such as current transformer as per Clause 3.7(b) and 4.7 of the specifications and LA, CVT as per Clauses 3.2.3 and 4.2.3 are Air Insulated Switchgear. Therefore, the Appellant complied with the requirement of the Tender Document.

He added that the Appellant's act of offering PASS technology was not a material deviation from the specifications of the Tender as alleged by the Respondent. The learned counsel contended that the Appellant has



offered an alternative solution to the Respondent's specifications and the same is allowed under Section 72(3) of the Act. He reiterated his earlier position that if the Respondent was not certain of the components offered by the Appellant it should have sought for clarification. However, the Respondent failed to do so.

The learned counsel stated that tenderers were required to include in their quoted prices shipping charges. According to the Tender Document, the specified shipping method for this Tender was DDP. The Appellant's quoted price included the DDP charges as required. However, as per the record of the Tender Opening, the readout price of the proposed successful tenderer did not include DDP charges. The learned counsel further stated that Regulation 206(2) of the Regulations requires that if a tender is not responsive to the Tender requirement it ought to be rejected and should not be made responsive by correction or reservation. He contended that it was obvious from the Tender opening record that the proposed successful tenderer's price did not comply with the requirements of the Tender. Therefore, the said tenderer should have been disqualified from the Tender process.

The learned counsel submitted further that the price quoted by the Appellant was lower to that of the proposed successful tenderer since the latter did not include DDP charges. He stated that the Respondent should have invited the Appellant for negotiations for having a lower quoted price. To the contrary, the Respondent negotiated with the proposed successful tenderer who had a higher price contrary to the requirement of Section 76(2)(c) of the Act. This provision prohibits negotiations which aim at



altering anything that formed a crucial deciding factor during evaluation of tenders. According to the Appellant, DDP charges which were to be included in the proposed successful tenderer's prices formed a crucial deciding factor on the prices quoted. Thus, the Respondent should have noted the proposed successful tenderer's anomaly and disqualified its Tender.

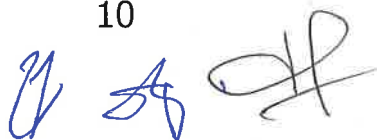
The learned counsel stated further that, the final negotiated price of the proposed successful tenderer was Euro 11,792,682 equivalent to USD 12,823,834. This was still higher compared to the price quoted by the Appellant of USD 12,368,018. He submitted further that, the Respondent negotiated down the quoted price of the proposed successful tenderer by 45% from the readout price. The learned counsel stated that the Appellant is challenging the Respondent's conduct in this regard since such a discount cannot be offered without a substantial change in scope or terms and conditions of the Tender. He further asserted that the Appellant should have been afforded the same right as given to the proposed successful tenderer.

Finally, the Appellant prayed for the following orders: -

- i. The tender be awarded to the Appellant; and
- ii. Any legal and administrative costs that may be incurred by the Appellant in pursuing this Appeal.

REPLY BY THE RESPONDENT

The Respondent's submissions were made by Ms. Elizabeth Kimaro and Mr. Mkumbo Elias, learned State Attorneys. On the first issue, the Respondent



commenced its submissions by stating that the Appeal has been filed beyond the stipulated time limit as required by Section 97(1) and (2) of the Act. The Respondent contended that the Appellant was served with the Notice of Intention to award on 18th December 2023. Upon being dissatisfied with the reasons given for its disqualification, on 22nd December 2023 the Appellant filed an application for administrative review to the Respondent. The Respondent was required to issue its decision by 4th January 2024. However, the Respondent issued its decision on 19th January 2024.

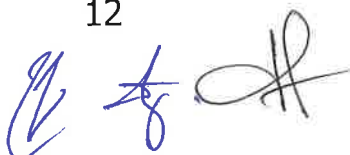
The Respondent contended that Section 97(1) and (2) of the Act, allows a tenderer to file an appeal to this Appeals Authority after a lapse of seven working days. Within these days, the procuring entity is required to issue a decision on the application for administrative review submitted to it. In this tender, the Appellant applied for administrative review to the Respondent according to the said provision. However, the Respondent failed to issue its decision within seven working days as required by the law. The Appellant was required within seven working days after the lapse of the period that the Respondent was required to issue its decision to file its Appeal to the Appeals Authority. To the contrary, the Appellant did not and instead it filed its Appeal on 29th January 2024. Thus, the Appeal has been filed out of time.

The Respondent submitted that Section 38 of the Law of Limitation Act, Cap 89 R.E 2019 requires an appeal that has been lodged out of time to be dismissed.

The Respondent asserted further that the Appellant's Appeal has been filed out of time without seeking extension of time to file an Appeal out of time. The Appellant should have sought for extension of time prior to filing this Appeal. The Respondent contended that the Appellant's act of filing this Appeal without extension of time, is as good as granting self extension. Thus, the Appellant's Appeal is improperly before the Appeals Authority.

In support of its argument on this point, the Respondent cited the case of **Aminiel Mbwambo versus Omary Mchengule & Others**, Civil Application No. 96 of 2015, Court of Appeal of Tanzania (unreported). In this case, the court cited with approval the case of **Godwin Ndewasi and Another versus Tanzania Audit Corporation** (1995) TLR 200 whereby the court stated that an application which fails to comply with mandatory provisions of the law is incompetent and should be struck out.

On the second issue, the Respondent submitted that the Appellant was fairly disqualified from the Tender process for failure to comply with the requirements of the Tender Document. The Respondent stated that the Appellant was among the tenderers which were issued with the Tender Document that contained technical specifications for this Tender. In responding to the invitation to tender, the Appellant submitted its bid whereby after evaluation it was found to have not complied with the requirements of the Tender. Thus, the Appellant's tender was disqualified. The Respondent contended that the Appellant's disqualification was in accordance with Regulation 205 (a), (b) and (c) of the Regulations which require a tender that fails to comply with the scope of work, major item of the package and technical requirements should be rejected.



The Respondent stated that Item 3.2.3 of the Technical Specifications clearly provided the specifications of each module to be supplied. The Appellant submitted technical specifications for 220kV and 132kV which are hybrid switchgears. The hybrid switchgears combine the components of air insulated switchgear (AIS) and SF6 Gas-Insulated Switchgear (GIS). This means the Switchgears are not complete GIS contrary to the Technical Specifications provided in the Tender Document.

The Respondent submitted that the Appellant offered a hybrid switchgear which is air and gas insulated type contrary to the specifications provided in the Tender. The Respondent asserted that the Appellant contravened the requirements of Item 3.2.2 of the technical specifications which require all elements for 132kV GIS system (breaker, busbar, disconnector, earth switch, instrument transformer etc.) to consist of metal enclosure which will completely cover all section under voltage. The Respondent elaborated further that PASS technology offered by the Appellant is a hybrid that is a combination of Air Insulated Switchgear and Gas Insulated Switchgear. The Respondent required Gas Insulated Switchgear which occupies a smaller space than air insulated switch gear. As per the Respondent's needs Gas insulated switchgears were appropriate for the project.

The Respondent contended further that the Appellant offered to supply 45MVA and 220/33kV transformer from Liaoning-Efacec Electrical Equipment Company Ltd. This was contrary to the list of recommended manufacturers provided in the Tender Document. The listed firms were Siemens or Hitachi (ABB), General Electric (GE) and Shneider Electric. The



Respondent added that, the drawings for the 45MVA and 220/33kV transformer offered by the Appellant indicated that the 220kV transformer bushing must be dismantled during transportation. Item 3.0 and 3.2.2 of the technical specifications provide clearly that transformers accessories, HV module Power Transformer accessories and HV Module Bay including SF6/Air bushing equipment should not be dismantled for transportation. Thus, the Respondent found the Appellant's act of indicating that 220kV transformer bushing would be dismantled to have contravened Item 3.0 and 3.2.2 of the technical specifications.

The Respondent considered the Appellant's contention that it quoted a lower price to that of the proposed successful tenderer, thus it was eligible for award of the Tender. The Respondent stated that award of the Tender is not determined solely on the tenderers' quoted price as claimed by the Appellant. The Respondent submitted that the quoted price is considered after the tenderer has complied with the preliminary and technical requirements provided in the Tender Document. In the Tender under Appeal the Appellant was disqualified at the earliest stage and did not reach the financial stage where its quoted price could have been compared with other tenderers. Thus, its argument that it was eligible for award should be disregarded.

In support of its submissions that the Appellant's disqualification was justified the Respondent cited the case of ***M/S China National Electric Engineering Company Ltd versus Tanzania Electric Supply Company Ltd***, PPAA Appeal Case No. 24 of 2023-24. In the referred case, the Appeals Authority stated clearly that a tender which fails to



comply with major technical requirements of the tender should be rejected. The Respondent stated that the Appellant failed to comply with major technical requirements of the Tender. Thus, the Respondent urged the Appeals Authority to apply the same principle and dismiss the Appeal for want of merits.

Finally, the Respondent prayed that the Appeal be dismissed in its entirety with costs.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the Appeal is properly before the Appeals Authority

In resolving this issue, the Appeals Authority revisited Sections 96(1) & (6) and 97(1) and (2) (a) and (b) of the Act. These provisions provide guidance on the time limit for determination of complaints before the accounting officer and filing of an appeal to the Appeals Authority. Sections 96(1) & (6) and 97(1) and (2) (a) and (b) of the Act read as follows: -

"96(1) Any complaints or disputes between procuring entities and tenderers which arise in respect of procurement proceedings, disposal of public assets by tender and awards of contracts shall be reviewed and decided upon a written decision of the accounting officer of a procuring entity and give reasons for his decision.

(6) The accounting officer shall, within seven working days after the submission of the complaint or dispute deliver a written decision which shall: -



- (a) *State the reason for the decision; and*
- (b) *If the complaint or dispute is upheld in whole or in part indicate the corrective measures to be taken.*

97(1) A tenderer who is aggrieved by the decision of the accounting officer may refer the matter to the Appeals Authority for review and administrative decision.

(2) Where-

- (a) the accounting officer does not make a decision within the period specified in this Act; or***
- (b) the tenderer is not satisfied with the decision of the accounting officer,*

the tenderer may make a complaint to the Appeals Authority within seven working days from the date of communication of the decision by the accounting officer or upon the expiry of the period within which the accounting officer ought to have made a decision.

[Emphasis Added)

The above quoted provisions state clearly that the accounting officer is required to issue its written decision within seven working days from the date of receipt of the tenderer's application for administrative review. If the accounting officer issues a decision and a tenderer is still dissatisfied or if the accounting officer fails to issue its decision within the specified time limit, a tenderer may file its Appeal to the Appeals Authority.



In ascertaining if the Appellant complied with the requirements of the above quoted provisions of the law when filing this Appeal, the Appeals Authority reviewed the record of appeal. It observed that, on 18th December 2023 the Appellant received the Notice of Intention to award from the Respondent. The said Notice was dated 9th November, 2023. Upon being dissatisfied with the reasons for its disqualification as contained in the Notice of Intention to award, on 22nd December 2023, the Appellant filed an application for administrative review to the Respondent. On 19th January 2024, the Respondent issued its decision. The said decision was received by the Appellant on 22nd January 2024. Aggrieved further, on 29th January 2024, the Appellant filed this Appeal.

The Appeals Authority related the above sequence of events to the requirements of Sections 96(1) & (6) and 97(1) and (2) (a) and (b) of the Act. It observed that after receipt of the Notice of Intention to award and being dissatisfied with the reasons for its disqualification, the Appellant filed an application for administrative review to the Respondent. According to the record of Appeal, the Notice of Intention to award was received by the Appellant on 18th December 2023 and the Application for administrative review was filed on 22nd December 2023. Thus, the same was filed within seven working days.

Section 96(6) of the Act requires the Respondent to issue its decision within seven working days from date of receipt of an application for administrative review. As per the record of Appeal, the Respondent received the Appellant's application for administrative review on 22nd December 2023. The seven working days within which the Respondent



ought to have issued its decision lapsed on 5th January 2024. However, the Respondent did not issue its decision as required by the law.

Section 97(1) and (2) (a) of the Act allows a tenderer to file an Appeal to this Appeals Authority if the procuring entity fails to issue its decision within the specified time limit. Counting from 5th January 2024, the last date for the Respondent to have issued its decision, the Appellant was required to file its Appeal to this Appeals Authority by 17th January 2024. However, the Appellant filed its Appeal on 29th January 2024, after a lapse of seven (7) working days it ought to have filed its Appeal.

In justifying the legality of the existence of this Appeal, during the hearing the learned counsel for the Appellant stated that it did not timely appeal to this Appeals Authority as per Section 97(1) and (2) (a) of the Act, due to the existing business relationship between the parties. He asserted that having not received the Respondent's decision within seven working days, on 10th January 2024, it wrote a reminder to the Respondent. However, there was no response. The learned counsel contended that it filed this Appeal as per Rule 9(1) of the Appeals Rules.

The Appeals Authority revisited Rule 9 of the Appeals Rules which reads as follows: -

"9(1) A person who is dissatisfied with the matter or decision giving rise to a complaint or dispute may lodge an appeal with the Appeals Authority within seven working days from the date when he became aware of the circumstances giving rise to the complaint or dispute or when the tenderer should have become aware of those circumstances, whichever is earlier".

The above quoted provision requires a tenderer to file an appeal to this Appeals Authority within seven working days of becoming aware of the circumstances giving rise to an Appeal or when the tenderer should have become aware of those circumstances.

As per the record of Appeal, the Appellant became aware of the circumstances giving rise to this Appeal after a lapse of the seven working days within which the Respondent ought to have issued its decision. The Appellant should have filed its Appeal within seven working days after the lapse of the period for the Respondent to issue its decision, but failed to do so.

In view of this observation, the Appeals Authority is of the firm view that Section 97(1) and (2) (a) of the Act and Rule 9 of the Appeals Rules both require a tenderer who had not received the procuring entity's decision within the specified time limit, to file its Appeal to this Appeals Authority.

Given the above position, the Appeals Authority is of the settled view that the Appeal is improperly before it for being filed contrary to the requirements of Section 97 (1) and (2) (a) of the Act and Rule 9 of the Appeals Rules.

Taking cognizance of the findings on the first issue, the Appeals Authority would not delve into the remaining issues. The Appeal is hereby dismissed with no order as to costs since the point of law was raised *suo motu* by the Appeals Authority.

It is so ordered.

This Ruling is binding and can be enforced in accordance with Section 97(8) of the Act.

The Right of Judicial Review as per Section 101 of the Act is explained to the parties.

This Ruling is delivered in the presence of the parties this 23rd day of February 2024.

HON. JUSTICE (rtd) SAUDA MJASIRI



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CHAIRPERSON

MEMBERS: -

1. ENG. STEPHEN MAKIGO.....

2. MR. PIUS MPONZI.....

