

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 41 OF 2022-23

BETWEEN

M/S M+M ARCHITECTS COMPANY LIMITED.....APPELLANT

AND

NATIONAL DEVELOPMENT CORPORATION.....RESPONDENT

RULING

CORAM

- | | |
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| 1. Hon. Justice (rtd) Suda Mjasiri | - Chairperson |
| 2. Mr. Pius Mponzi | - Member |
| 3. Ms. Ndeonika Mwaikambo | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Violet Limilabo | - Senior Legal Officer |

FOR THE APPELLANT

- | | |
|------------------------|---------------------|
| 1. Arch. Ismail Mvungi | - Managing Director |
| 2. QS. Said Mrisho | - Director |

FOR THE RESPONDENT

- | | |
|----------------------|-----------------|
| 1. Ms. Anitha Joseph | - Legal Officer |
|----------------------|-----------------|

2. Ms. Pulkeria Shao - Procurement Officer
3. Mr. Godfrey Mahundi - Chairperson Evaluation Committee

M/S M + M Architects Co. Limited (hereinafter referred to as "**the Appellant**") has lodged this Appeal against National Development Corporation (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. PA/068/2022/2023/C/01 for Consultancy Services for Assessment of Favorable Investment Potentials for NDC Industrial Parks at TAMCO in Pwani Region, KMTC in Kilimanjaro Region, Nyanza Glass Sheet in Mwanza Region and Kange in Tanga Region and come up with Suitable Investment Proposals on Each of the Industrial Parks including Preparation of Master Plan (hereinafter referred to as "**the Tender**").

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

The Tender was conducted through Restricted National Competitive 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 as "**the Regulations**").

The Tender commenced with an expression of interest process that was advertised on 14th September 2022. The deadline for submission of expressions of interest was 30th September 2022. On the deadline five tenderers, the Appellant inclusive submitted their expressions of interest. The submitted expressions of interest were evaluated and thereafter three

tenderers, the Appellant inclusive, were found to have qualified for the second stage of being issued with the Request For Proposal (RFP).

On 14th January 2023, the Respondent through Tanzania National electronic Procurement System (TANePS) issued the RFP to three firms. The deadline for submission of proposals was set for 26th January 2023. On the deadline, the Respondent received Technical and Financial proposals from the three firms.

The Technical Proposals were opened first and subjected to evaluation that was carried out in two stages, namely preliminary and technical evaluation. The evaluation report indicates that during preliminary evaluation, the Appellant's proposal was disqualified for failure to submit Tender Security with a value of TZS 50,000,000.00.

The remaining two tenders were subjected to technical evaluation and after completion they were found to have scored above the minimum score. Consequently, the firms were recommended to be invited for the opening of the Financial Proposals. The Tender Board through Circular Resolution No. 35 of 2022/23 circulated on 17th February 2023 approved the evaluation committee's recommendations.

The Financial Proposals of the remaining two firms were opened and subjected to evaluation. After completing the evaluation process, the evaluation committee recommended an award of the Tender to M/S City Plan Consultancy (T) Limited at the evaluated contract price of Tanzanian Shillings Three Hundred Fifty Eight Million Six Hundred Two Thousand only (TZS 358,602,000.00) VAT inclusive, subject to negotiations. The



evaluation committee's recommendations were approved by the Tender Board through Circular Resolution No. 44 of 2022/23 circulated on 16th March 2023. Negotiations successfully took place on 21st March 2023.

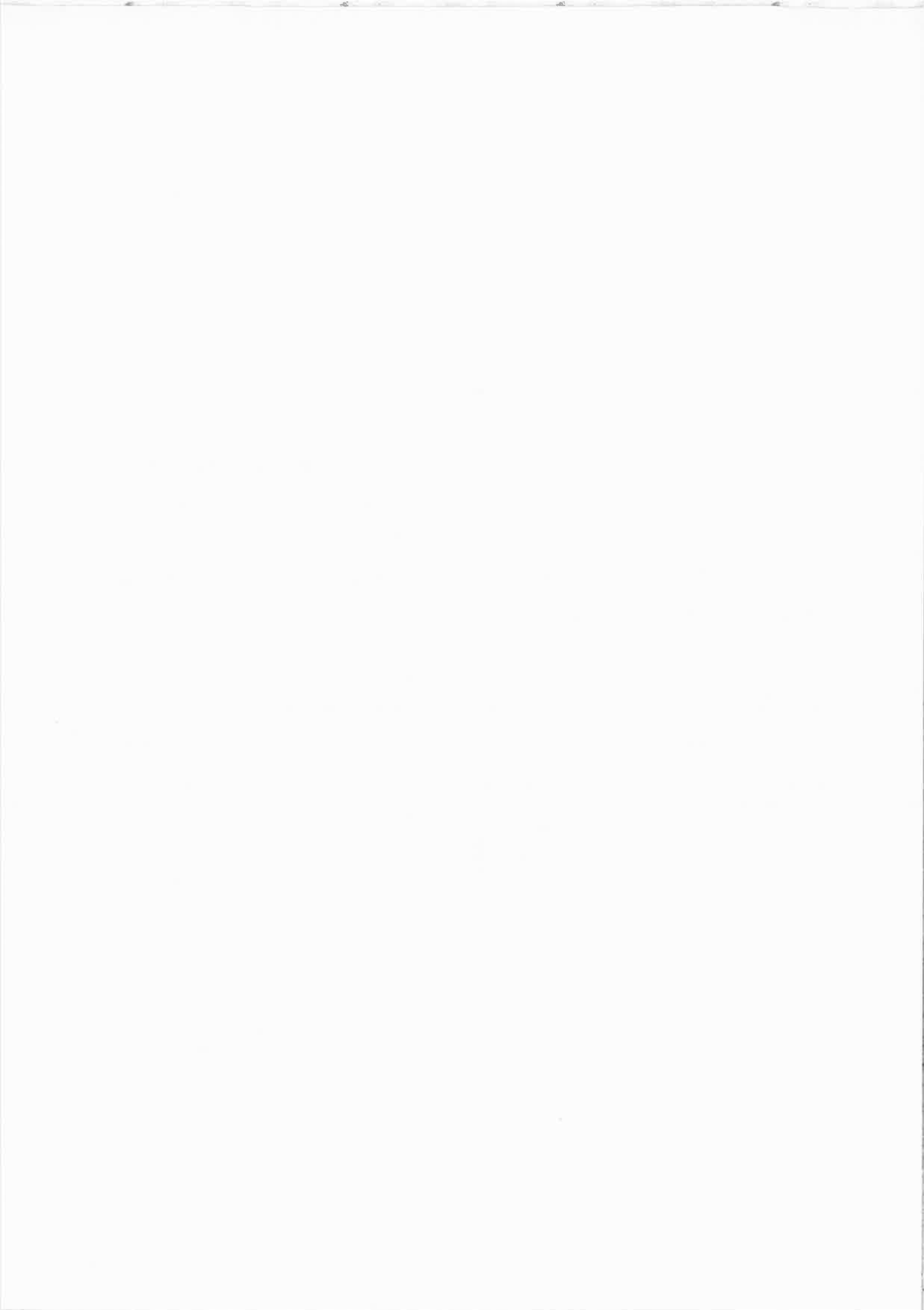
The Respondent through a letter dated 29th March 2023 issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender process. The Notice informed the tenderers that the Respondent intends to award the Tender to M/S City Plan Consultancy (T) Limited at the contract price of Tanzanian Shillings Three Hundred Fifty Eight Million Six Hundred Two Thousand only (TZS 358,602,000.00) VAT inclusive. Additionally, the Notice also informed the Appellant that its tender was disqualified and not considered for award as its price was higher than that of M/S City Plan Consultancy (T) Limited.

Dissatisfied with the reason given for its disqualification, on 10th April 2023, the Appellant applied for administrative review to the Respondent. In its application, the Appellant challenged its disqualification by asserting that its price was lower compared to the price of M/S City Plan Consultancy (T) Limited. The Respondent issued its decision with respect to the Appellant's complaint through a letter dated 20th April 2023. Dissatisfied with the decision issued, on 4th May 2023, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's submissions as contained in the Statement of Appeal may be summarized as follows:-

- i) That, the Appellant disputes its disqualification for having quoted a higher price than that of M/S City Plan Consultancy (T) Limited. The



Appellant claimed that its quoted price was TZS 287,400,000.00 VAT inclusive while M/S City Plan Consultancy (T) Limited quoted TZS 358,602,000.00 VAT Inclusive. Thus, it is obvious that the Appellant's quoted price was lower than that of the proposed successful tenderer. To the Appellant's surprise the Respondent intends to award the Tender to M/S City Plan Consultancy (T) Limited who had a higher price than that of the Appellant.

- ii) That, the Respondent's award proposal is not in conformity with the principles of the public procurement policy that imposes a duty to procuring entities to conduct a procurement process in a fair, transparent and equal treatment of tenderers so as to attain the best value for money in service delivery.
- iii) That, having quoted the best offer, the Appellant ought to have been proposed for award of the contract. The Respondent's act of intending to award the contract to M/S City Plan Consultancy (T) Limited who quoted a higher price than that of the Appellant contravenes the requirement of the Act and its Regulations. The Appellant added that the proposed award price is artificial and non-competitive therefore depriving the Government the benefits of free and fair competition.
- iv) That, the Respondent's act of intending to award the Tender to M/S City Plan Consultancy (T) Limited who quoted a higher price contravenes Regulation 115(1)(a) of the Regulations which requires procuring entities to ensure that economy and efficiency is attained in the use of public funds.

The Appellant stated further that, the Respondent's act also contravened Regulation 184(1) and (2) of the Regulations which requires evaluation of tenders to be in accordance with the criteria provided for in the RFP so as to encourage competition. The Respondent's act of intending to award the Tender to a tenderer who quoted a higher price indicates that the evaluation of tenders was not conducted in accordance with terms and conditions provided for in the RFP, thus contravening Regulations 220(1), 184(1) and (2) of the Regulations.

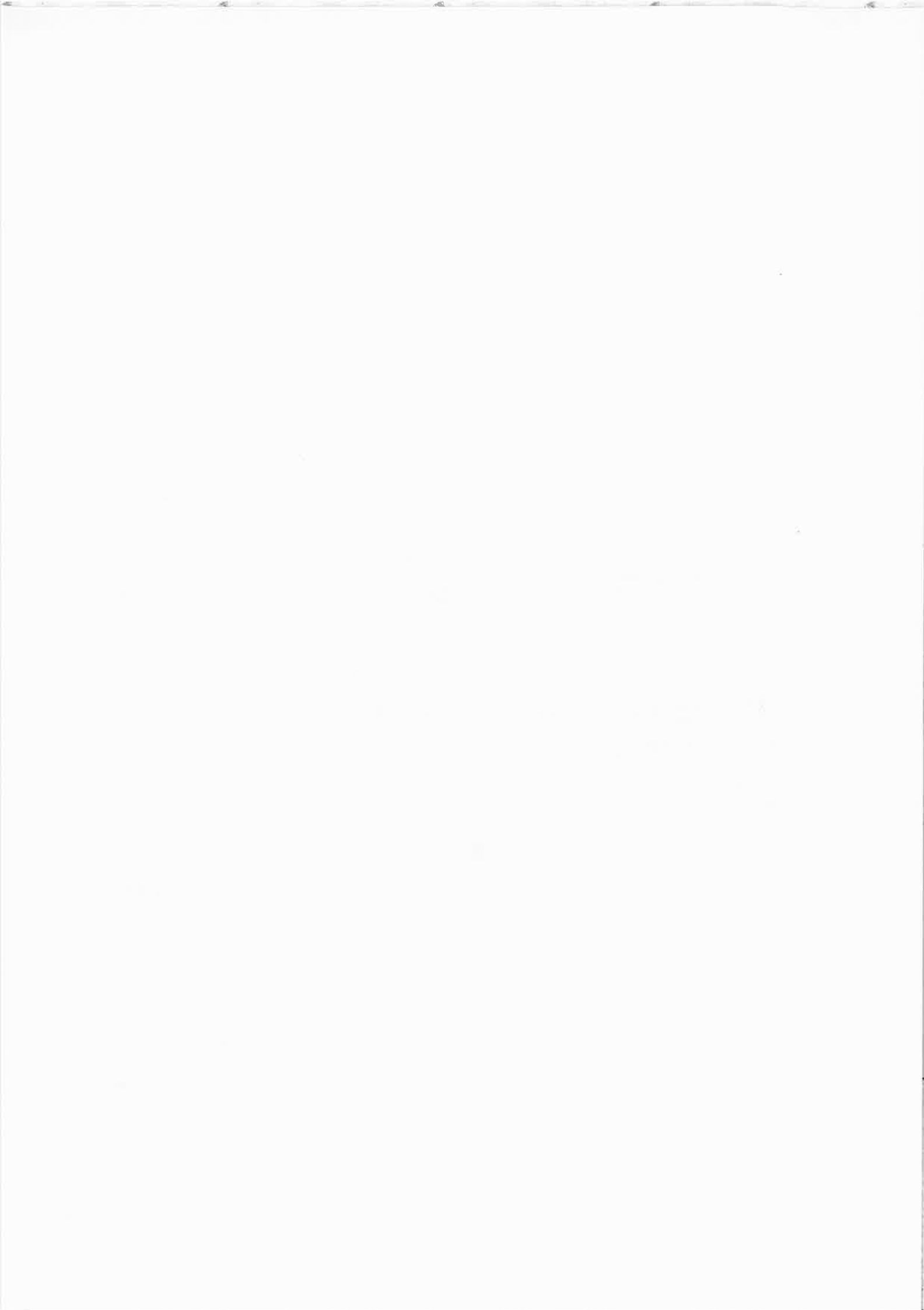
v) Finally, the Appellant prayed for the following reliefs:-

- a) The Appeals Authority to administratively review the Tender process;
- b) The Notice of Intention to award the Tender to M/S City Plan Consultancy (T) Limited be cancelled; and
- c) The Respondent be ordered to review the evaluation process in accordance with the laws.

REPLY BY THE RESPONDENT

The Respondent's reply to the Appellant's submissions as contained in the Statement of Appeal may be summarized as follows:-

- 1) That, there was no breach of the Act and its Regulations as the Appellant alleges in the disputed Tender process. The Appellant's dispute lies on the Notice of Intention to award which indicated that the Respondent intended to award the contract to M/S City Plan



Consultancy (T) Limited who quoted TZS 358,602,000.00 which is higher than the Appellant's price of TZS 287,400,000.00.

The Respondent stated that the Tender process was conducted in accordance with the requirements of the Act and its Regulations. The Respondent elaborated that this Tender was preceded with an expression of interest process whereby five tenderers, the Appellant inclusive participated. The received expressions of interest were subjected to evaluation and after completion three tenderers including the Appellant qualified to be issued with the RFP. The RFP was issued to three qualified tenderers through TANEPS. The Tender was therefore conducted through TANEPS and in observance of the Act, Regulations and other guidelines issued by the Public Procurement Regulatory Authority (PPRA).

- 2) That, during evaluation of this Tender, the Appellant's tender was found non-responsive at the preliminary evaluation of the Technical Proposals for failure to attach bid security with a value of TZS 50,000,000.00. The Appellant's technical proposal did not qualify for detailed evaluation. Therefore, its Financial Proposal was not opened for its price to be compared with other tenderers who reached the financial evaluation stage. Thus, the Respondent disqualified the Appellant from the Tender process.
- 3) That, throughout the Tender process, the Respondent acted diligently and in compliance with the law. There was no incident on the part of the Respondent that resulted into or could be inferred to have caused





- the alleged breach of the procurement legislations as contended by the Appellant.
- 4) That, the Respondent was not in a position to know the offer submitted by the Appellant as its Financial Proposal was not opened for failure to comply with bid security requirement. The Appellant's failure to comply with bid security requirement automatically denied it a right of the opening of its Financial Proposal. Thus, the Appellant's Financial Proposal was not opened and the Respondent could not have the knowledge of the Appellant's quoted price. The Respondent added that, even if the Appellant's Financial Proposal would have been opened, non-compliance with bid security requirement renders the Appellant's tender to be non-responsive and therefore not qualified for award despite that it offered a lower price than others.
- 5) That, regarding the Appellant's assertion that the Tender process was conducted in contravention of the law, the Respondent submitted that the Tender was conducted in observance of the law and the Appellant was fairly disqualified for failure to comply with the requirement of the RFP. The Respondent mistakenly when issuing the Notice of Intention to award communicated to the Appellant the Tender results of M/S Y and P Architects (T) Limited. However, the said mistake cannot be taken to vitiate the Tender handling process on the basis that the Tender was marred with irregularities as contended by the Appellant.
- 6) That, the Appellant was not supposed to be informed of the results of the Financial Proposal as it did not reach into that stage. Thus, a mere communication that was done mistakenly when the Respondent issued



the Notice of Intention to award, should not be taken as a justification for reinstating the Appellant into the Tender process and therefore accord it a right to challenge the same.

- 7) That, regarding the provisions of the law cited by the Appellant, the Respondent stated that the referred provisions of the law have been misplaced as the Appellant's bid was not considered during financial evaluation. In addition to that, the Government has never been deprived of the benefits of free and fair competition nor did the Respondent abuse the economy and efficiency of the public funds. Furthermore, the Appellant was notified of the mistake made by the Respondent in issuing a wrong reason for the Appellant's disqualification through a letter dated 20th April 2023. The Appellant ought to have taken note of the said mistake.
- 8) Regarding remedies the Respondent stated that the proposed successful tenderer was obtained in accordance with the law, therefore a prayer that the Notice of Intention to award be cancelled should be disregarded. Furthermore, a prayer that the evaluation process be reviewed should also be rejected since the process was not marred with irregularities as alleged by the Appellant. The Appellant was disqualified at the preliminary evaluation stage of the Technical proposals and therefore its quoted price could not have been considered for award.
- 9) Finally, since all the claims by the Appellant are unfounded and tainted with illegalities, the Appeal should be dismissed.



When the matter was called on for hearing and at the time of framing up the issues, the Appeals Authority informed the parties that, having reviewed the record of Appeal, particularly the sequence of events, it observed that there is a need to determine if the Appeal was filed within the time limit stipulated by the law. Given the circumstances, the following issues were framed:-

1.0 Whether the Appeal is properly before the Appeals Authority;

2.0 Whether the disqualification of the Appellant was justified; and

3.0 What reliefs, if any, are the parties entitled to?

Having framed the issues, the Appeals Authority required the parties to address the first issue which relates to the point of law raised *suo motu* by it before embarking on the substantive Appeal.

QS. Said Mrisho, Director who was one of the Appellant's representative, took the floor first and submitted that on 4th April 2023 the Appellant received via email the Notice of Intention to award from the Respondent dated 29th March 2023. The Notice informed the Appellant that its Tender was disqualified for having quoted a higher price than that of M/S City Plan Consultancy (T) Limited who is proposed to be awarded the Tender.

He submitted that upon being dissatisfied with the reason for its disqualification, on 7th April 2023 the Appellant submitted a complaint to the Respondent who never replied. Having not received any response thereof, on 10th April 2023 the Appellant filed an application for

administrative review to the Respondent. The said application was responded by the Respondent through a letter dated 20th April 2023 and was received by the Appellant via email on 22nd April 2023.

The Appellant submitted further that since the Respondent's decision was issued after the expiry of the time limit stipulated by the law, prior to the receipt of the Respondent's decision on 21st April 2023, the Appellant submitted an application for administrative review to the Appeals Authority. Upon receipt of the Appellant's letter, the Appeals Authority informed the Appellant that in order to file an appeal, it has to fill the requisite form PPAA Form No. 1 and pay the required filing fees. Following the guidance given, the Appellant submitted PPAA Form No. 1 via email on 30th April 2023 and paid the requisite filing fee on 4th May 2023. Thus, the Appeal was officially filed on 4th May 2023.

Having been asked by the Members of the Appeals Authority to explain as to when the Respondent was required to have issued its decision and the Appellant to have filed an Appeal to this Appeals Authority, the Appellant submitted that since the application for administrative review was filed on 10th April 2023, the decision thereof ought to have been issued by the Respondent on 18th April 2023. Since the Respondent failed to issue its decision within the stipulated time limit, the Appellant ought to have filed its Appeal to the Appeals Authority within seven working days. Counting from 19th April 2023, the Appeal ought to have been filed on or by 2nd May 2023. The Appeal was therefore filed on 4th May 2023. Based on the above sequence of events, the Appellant conceded to have filed its Appeal out of



time. Despite the said admission, the Appellant prayed that the Appeal be heard on merits.

On her part Ms. Anitha Joseph, the Respondent's Legal Officer, in replying to the Appellant's submissions stated that, according to Rule 9 of the Public Procurement Appeals Rules, GN. No. 411 of 2014 as amended (hereinafter referred to as "the Appeals Rules") an appeal to this Appeals Authority has to be filed within seven working days from the date a tenderer becomes aware of the circumstances giving rise to the Appeal. She added that Rule 14 of the Appeals Rules requires an appeal to be filed upon payment of the requisite filing fees.

She submitted that the Appellant has conceded to have filed the Appeal out of time on 4th May 2023 when it paid the filing fee. She stated that an appeal that has been filed out of time has to be treated as if it was never filed. Therefore, according to her the issue of time limit is pertinent and it affects the jurisdiction of this Appeals Authority. That is to say, the Appeals Authority cannot determine an appeal that has been lodged out of time as prescribed by the law. Under the circumstances, the Respondent prayed that the Appeal be dismissed for being filed out of time.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the Appeal is properly before the Appeals Authority

In resolving this issue, the Appeals Authority took cognizance of the Appellant's admission on the point of law raised by it *suo motu*. The Appeals Authority finds it proper to analyse the above framed issue for the



sake of enlightening the parties on the requirements of the law regarding filing of an Appeal before it.

According to Section 97 of the Act, an Appeal to this Appeals Authority has to be filed within seven working days from the date a tenderer becomes aware of the circumstances giving rise to the Appeal. Section 97(1) and (2) of the Act reads as follows:-

"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 under 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 supplied)

Rules 10(1) and 14(1) of the Appeals Rules require an Appeal to be filed by filing PPAA Form No. 1 and making payment of the requisite fee as prescribed in the Second Schedule to the Appeals Rules. Rule 14(2) of the Appeals Rules requires the Appeals Authority not to entertain any appeal

unless the requisite fee has been paid. Rules 10(1) and 14(1) & (2) of the Appeals Rules read as follows:-

*"10(1) The Appeal under Rule 9 shall be in writing or in electronic form and **shall be filed in accordance with PPAA Form No. 1 as set out in the First Schedule to these Rules.***

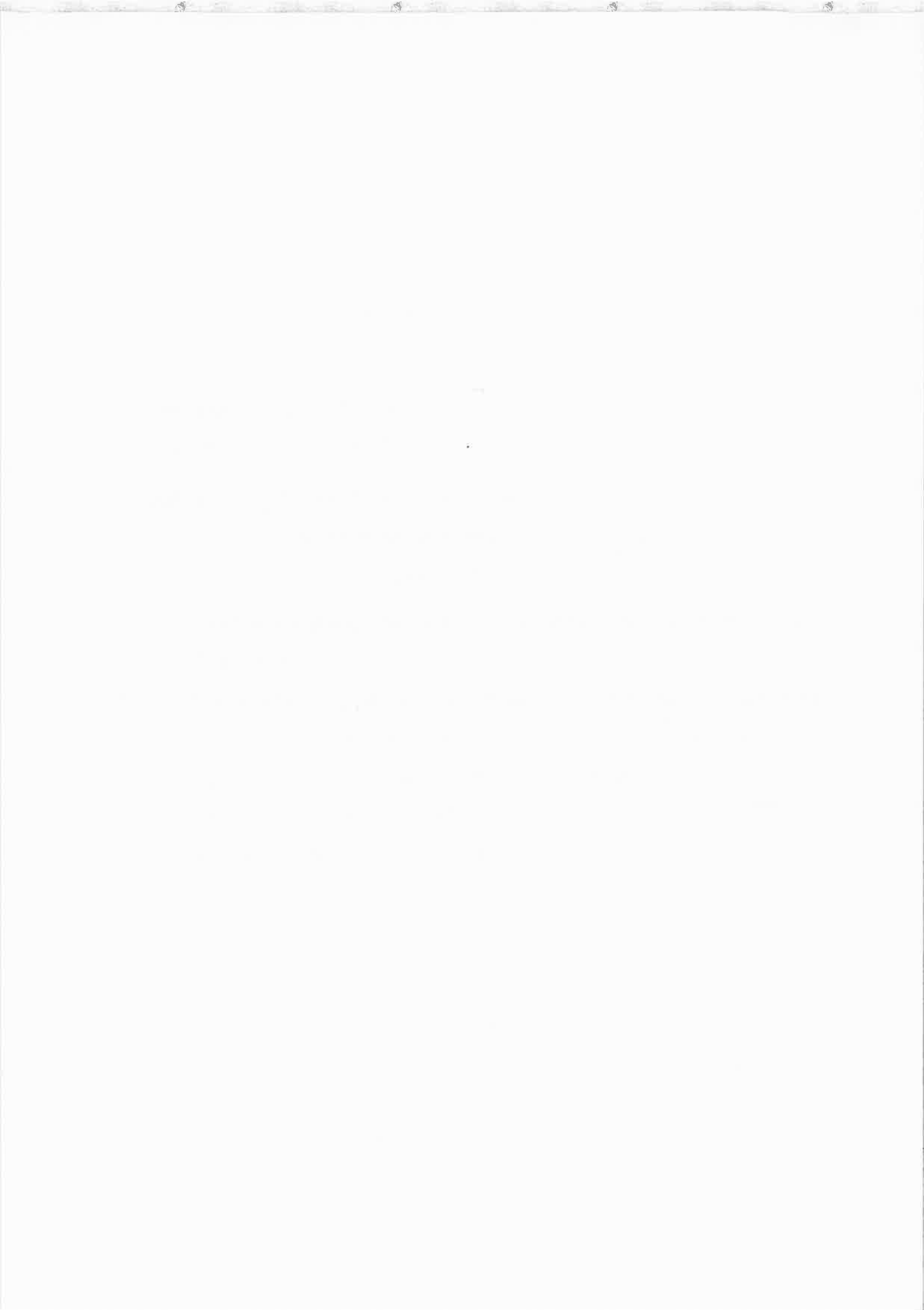
*14(1) **The Appellant shall at the time of filing his Appeal pay fees as set out in the Second Schedule to these Rules.***

*14(2) **The Appeals Authority shall not entertain any appeal unless the appropriate fees have been paid".***

(Emphasis supplied)

Having pointed out the requirement of the law regarding the procedure for filing of an Appeal, the Appeals Authority revisited the record of Appeal. It observed that this Appeal emanated from the Notice of Intention to award issued by the Respondent through a letter dated 29th March 2023. According to the Appellant, it received the said Notice via email on 4th April 2023. The record of Appeal indicates that upon being dissatisfied with the reason for its disqualification as contained in the Notice of Intention to award, the Appellant on 10th April 2023 filed an application for administrative review to the Respondent.

Section 96(6) of the Act requires the Accounting Officer to issue its decision within seven working days from the date it receives a complaint. Section 96(6) of the Act reads as follows:-



"96(6) The accounting officer shall within seven working days after the submission of the complaint or dispute deliver a written decision which shall:-

(a)..." (Emphasis supplied)

In order to ascertain as to when the Respondent was required to issue its decision, the Appeals Authority counted the seven working days from 12th April 2023 based on the fact that the 10th of April 2023 was a public holiday, therefore it is assumed that the Respondent received the said application on 11th April 2023. Thus, the seven working days within which the Respondent ought to have issued its decision starts to run from 12th April 2023 to 20th April 2023.

The Respondent issued its decision through a letter dated 20th April 2023 and the Appellant claimed to have received the same on 22nd April 2023. Since the Respondent never disputed as to when its decision was communicated to the Appellant, it is certain that the said decision was communicated on 22nd April 2023. As it has already been pointed out above the Respondent ought to have issued its decision by 20th April 2023, therefore its act of communicating the decision on 22nd April 2023 is considered to have been issued out of time.

According to Section 97(2)(a) of the Act, if the procuring entity does not issue a decision within the specified time limit, a tenderer is required to file an appeal to this Appeals Authority within seven working days from the date the decision ought to have been issued. Since the Respondent's



decision ought to have been issued by 20th April 2023 and the same was not issued, the Appellant ought to have filed its Appeal by 3rd May 2023.

The Appellant claimed to have submitted its complaint to the Appeals Authority on 21st April 2023. Having reviewed the Appellant's letter on the mentioned date, the Appeals Authority observed that the same was not a proper appeal before it. Therefore, the Appellant was directed to fill completely PPAA Form No. 1 and to pay the requisite filing fee pursuant to Rules 10 and 14(1) & (2) of the Appeals Rules. The Appellant submitted the PPAA Form No. 1 through email on 30th April 2023 at 11:01 hours. Since 30th April 2023 was a Sunday and 1st May 2023 was a public holiday, on 2nd May 2023 which was the first working day of the week, the Appeals Authority issued a control number for payment of filing fees to the Appellant through the email of mvungi20@hotmail.com sent at 10:17 hours. The said email was also copied to khalidmtoni@gmail.com, mrisho26@gmail.com, jmzanzwa@yahoo.com and masterbillqs@gmail.com. The control number was also sent to the Appellant via normal text message from the Appeals Authority's official mobile number (0743 505505).

The Appellant effected payment on 4th May 2023 at 11:27 hours. According to Rule 14(1) of the Appeals Rules, the Appellant's Appeal was considered to have been filed upon payment of the requisite fee. Therefore, the Appeal was filed on 4th May 2023, a day late.

Given the requirements under Section 97(1) and (2)(a) of the Act, it is crystal clear that the Appeal is not properly before the Appeals Authority

for being filed out of time. Under the circumstances the Appeals Authority hereby dismiss the Appeal for being filed out of time.

Given our findings made herein above, the Appeals Authority would not delve into the remaining other issues. We make no order as to costs.

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 Respondent and in the absence of the Appellant though duly notified this 13th day of June 2023.

HON. JUSTICE (rtd) SAUDA MJASIRI



CHAIRPERSON

MEMBERS: -

1. MR. PIUS MPONZI

2. MS. NDEONIKA MWAIKAMBO

