

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
APPEAL CASE NO. 49 OF 2014-15**

BETWEEN

**M/S NYANZA LAUNDRY AND
GENERAL SERVICES LTD APPELLANT**

AND

BUGANDO MEDICAL CENTRE.....1ST RESPONDENT

AKO CATERING SERVICES LTD.....2ND 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. Monica P. Otaru | - | Member |
| 6. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|---------------------------|---|----------------------|
| 1. Ms. Florida Mapunda | - | Senior Legal Officer |
| 2. Ms. Violet S. Limilabo | - | Legal Officer |

FOR THE APPELLANT

- | | | |
|------------------------|---|----------------------------------|
| 1. Mr. Frank Samwel | - | Advocate, Frank and Co Advocates |
| 2. Mr. George Rushekya | - | Managing Director |
| 3. Mr. Erasto Theonest | - | Company Secretary |
| 4. Mr. Seif Slaim | - | Director of Finance |
| 5. Mr. Misalaba Peter | - | Supervisor |
| 6. Mr. Sinani Said | - | Witness |

FOR THE 1ST RESPONDENT

- | | | |
|-----------------------|---|------------------|
| 1. Mr. Edwin Elias | - | Supplies Officer |
| 2. Mr. Anaclet Kamara | - | Legal Officer |

FOR THE 2ND RESPONDENT

- | | | |
|--------------------------|---|-----------------------------|
| 1. Mr. Daudi F. Momburi | - | Platinum Law Firm Advocates |
| 2. Happiness E. Kategele | - | Director of Legal Services |
| 3. Sabrina Mtega | - | Legal Officer |

On 16th July, 2015, following the hearing of this Appeal parties were informed that this decision scheduled for delivery on 23rd July 2015 would be dispatched to them after it is signed thereby dispensing with the need of their presence on the stated date.

The Appeal at hand was lodged by M/s Nyanza Laundry and General Services Ltd (hereinafter referred to as "**the Appellant**") against the Bugando Medical Centre (hereinafter referred to as "**the 1st**")

Respondent") and M/s AKO Catering Services Ltd (hereinafter called **"the 2nd Respondent"**).

The said Appeal is in respect of Tender No. BMC/HQ/NC/2015-2016/05 for Provision of Laundry Services (hereinafter referred to as **"the tender"**).

After going through the record of tender proceedings submitted to the Public Procurement Appeals Authority (hereinafter called **"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 20th April 2015, the 1st Respondent invited tenderers to submit tenders for the tender under appeal. The deadline for the submission of tenders was set for 12th May 2015, whereby according to the 1st Respondent three tenders were received from the following firms:-

1. M/s Nyanza Laundry and General Services Ltd
2. M/s AKO Catering Services Ltd
3. M/s Khalid Laundry & Dry Cleaners Ltd

According to the 1st Respondent, the three tenders were then subjected to evaluation which was conducted in two stages namely; preliminary evaluation and detailed evaluation.

During the preliminary evaluation tenders were checked for substantial responsiveness so as to ensure completeness of the tenders and compliance with the eligibility criteria. At that stage of evaluation, two tenders, which were submitted by M/s AKO Catering Services Ltd and M/s Khalid Laundry & Dry Cleaners Ltd were disqualified for failure to

comply with various tender requirements. The tender submitted by the Appellant was found to be responsive and was thus subjected to detailed evaluation.

After completion of detailed evaluation process, the Appellant's tender was found to be responsive for complying with all requirements of the Tender Document and it was recommended for award.

The Evaluation Committee submitted its recommendations to the Tender Board which held its meeting on 16th June, 2015. At the said meeting, the Tender Board observed that the Appellant's tender had a number of anomalies and ought to have been disqualified at the preliminary stage. In addition, the Tender Board observed that the Appellant was the current service provider for that financial year, its services quite unsatisfactory and that it ought not to have been recommended for award of the contract.

On the other hand, the Tender Board noted that, the 2nd Respondent, ought not to have been disqualified because the alleged missing information pointed out by the Evaluation Committee was contained in one of the two of its tender documents. Therefore, the Tender Board disagreed with the recommendations by the Evaluation Committee; instead, it awarded the tender to the 2nd Respondent.

The 1st Respondent by its letter Ref. No. BMC/TB/09 dated 17th April 2015 (sic) informed the Appellant that its tender was unsuccessful for failure to comply with the following requirements;

- Current Bank Statement for six months,
- Equipment relevant to service,

- Information regarding labour,
- Occupational health and safety record of the company,
- Audited Accounts for past three years, and,
- Lines of credit were not fully indicated.

The Appellant received the above quoted letter on the 17th June, 2015. On that same date, the 1st Respondent accompanied by the 2nd Respondent went to the Appellant's workplace whereby the former introduced the latter as the successful tenderer and the new service provider.

Dissatisfied, the Appellant lodged his Appeal to this Authority on 24th June, 2015.

Upon receiving notification of the Appeal, the 1st Respondent filed a Preliminary Objection (hereinafter referred to as **PO**) raising points of law challenging among other issues the jurisdiction of the Appeals Authority, to wit:

- (i) This complaint is not maintainable before this honorable tribunal for lack of original jurisdiction to entertain it and that it is brought before the tribunal pre-maturely;
- (ii) That this complaint is incompetent for failure to disclose any cause of action against the 1st Respondent for adjudication in this tribunal and it should be rejected force-with with costs.

- (iii) That the honorable tribunal has no jurisdiction to entertain the tenant/landlord's dispute under the Lease Agreement;

In response to the above PO, the Appellant filed a cross preliminary objection, contesting the Respondents' replies that :-

- (i) The statement of reply of the 1st and 2nd Respondents does not comply with Rule 12(2) of the Public Procurement Appeals Rules, GN 411 of 2014.
- (ii) The verification clause of both statements of reply of the Respondents are defective for failure to disclose the name of the verifying person contrary to O.VI r. 15(1) of the Civil Procedure Code (Cap 33 RE 2002).

At the beginning of the hearing, when the Appeals Authority was at the stage of drawing up the issues to be determined in respect to the POs that had been filed, the 1st Respondent withdrew the 2nd and 3rd points of his PO and thereafter, the Appeals Authority considered submissions by the 1st Respondent on the 1st leg of his PO. i.e. whether this Appeals Authority lacks original jurisdiction to determine this Appeal.

In support of his arguments, the 1st Respondent submitted that upon receipt of the letter of notification of intention to award the tender, the Appellant was duty bound to respond to the same and raise complaints, if any, with the Respondent's Accounting Officer. Further, the Appellant was required to do so within fourteen days as per Section 60(3) of the Act. He went on to state that as long as the Appellant did not follow the procedures referred to, his appeal before this Appeals Authority should be considered to have been brought prematurely. The 1st Respondent

further submitted that the Appeals Authority lacks original jurisdiction to hear and determine procurement complaints in a situation where the aggrieved tenderer has opted not to lodge a complaint to the Accounting Officer as it was in this case. Therefore, the 1st Respondent prayed for dismissal of the Appeal for failure to comply with the available review mechanism procedures.

APPELLANT'S REPLIES ON THE PRELIMINARY OBJECTION

In reply to the 1st Respondent's submission on the preliminary objection, the Appellant submitted that, the Respondent's letter which notified him about the tender result clearly shows that, it was not a notice of intention to award in the eyes of the law. He stated that the said letter did not provide him with the statutory fourteen days to lodge a complaint because on the same date he had received the notice of intention to award, the 1st Respondent introduced the 2nd Respondent as the new service provider. Thus, the 1st Respondent's act clearly indicated that the award had already been made to the 2nd Respondent. Therefore, the only available avenue for the Appellant was to lodge his complaint with this Appeals Authority.

The Appellant then embarked to address the Appeals Authority on his PO. The Appeals Authority drew his attention to the provisions of Section 105 (2) (g) of the Public Procurement Act (hereinafter referred to as **the Act**), together with Regulation 107(2) of the Public Procurement Regulations, GN 446 of 2013 (hereinafter referred to as "**GN 446 of 2013**") which require determination of the procurement complaints before the Appeals Authority to be in accordance with the

Public Procurement Appeals Rules, GN 411 of 2014. The Appellant having understood the provisions referred to, withdrew the PO.

ANALYSIS BY THE AUTHORITY ON THE PRELIMINARY OBJECTION

Having gone through the documents submitted and having heard the oral submissions by the parties, the Appeals Authority is of the view that, the Preliminary Objection by the 1st Respondent is based on the issue **whether the Appeal is properly before it**. Having formulated the issue, the Appeals Authority proceeded to resolve it as follows:

The Appeals Authority deemed it proper to revisit the facts of this Appeal and in the course of doing so, the Appeals Authority observed that on 17th June, 2015 the Appellant received a letter from the 1st Respondent which informed him that his tender was disqualified. The documents submitted to the Appeals Authority show that, the award letter to the successful tenderer (2nd Respondent) was written on 16th June 2015 and received on the same date. Further, on 16th June 2015, the 2nd Respondent wrote a letter to the 1st Respondent acknowledging the receipt of the letter of award, accepting the award made and confirmed to be ready for negotiations and contract arrangements.

Based on the above facts, the Appeals Authority is of the view that, the letter dated 16th June 2015 from the 1st Respondent to the 2nd Respondent was not a letter indicating an intention to award the tender; instead, it was an award letter. Furthermore, the Respondent's letter dated 17th April 2015(sic) addressed to the Appellant and shown to have been received on 17th June 2015, was not a letter indicating notice of

intention to award. From its wording it can simply be construed to mean that an award has already been made to the successful tenderer and the other tenderers were informed of being unsuccessful.

From the above facts, the Appeals Authority is of the settled view that the 1st Respondent had not issued a notice of intention to award as required by the law. The letter or Notice of Intention to award has to be in compliance with Section 60(3) of the Act read together with Regulation 231(2) and (4) of GN 446 of 2013. For purposes of clarity the Authority reproduces Regulation 231(2) and (4) as hereunder:-

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 working 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.**

Reg. 231(4) **The notice referred in sub-regulation (2) shall contain-**
(a) Name of the successful tenderer
(b) The contract sum and the completion or delivery period
(c) Reasons as to why the tenderers were not successful
(Emphasis supplied)

Furthermore, the act of the 1st Respondent issuing the letter of award to the 2nd Respondent on the same date that the Tender Board decided to award, suggest that the procurement contract had entered into force immediately after that communication. According to Section 60(11) of the Act **"a procurement contract enters into force when a written acceptance of tender is communicated to the successful tenderer"**.

Section 60(3) of the Act, requires the Accounting Officer after approval of award by the Tender Board, to issue a notice of intention to award and give tenderers fourteen days to file complaints, if any, to the Accounting Officer. In the disputed tender, tenderers were not accorded such an opportunity as an award letter was communicated immediately after the Tender Board meeting, hence the procurement contract entered into force as per Section 60(11) of the Act.

According to Section 97(3) of the Act, once the procurement contract had already entered into force, all complaints arising thereafter have to be lodged directly to the Appeals Authority. The said Section 97(3) provides as follows:-

S.97 (3) A tenderer may submit a complaint or dispute directly to the Appeals Authority if the complaint or dispute cannot be entertained under section 96 because of entry into force of the procurement or disposal contract, and provided that the complaint is submitted within fourteen days from the date when the tenderer submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when the tenderer should have become aware of those circumstances. (Emphasis added)

From the above analysis, the Appeals Authority is satisfied that, the Appeal is properly before it, as it has been lodged pursuant to Section 97(3) of the Act which gives sole original jurisdiction to the Appeals Authority to hear and determine procurement complaints when the procurement contract is already in force.

In view of the above findings, the Appeals Authority is of the settled view that, the Appeal is properly before it and the PO so raised is hereby dismissed.

Having finalized on the POs raised, the Appeals Authority proceeded to determine the appeal on its merits.

SUBMISSIONS BY THE APPELLANT

In this Appeal the Appellant raised three grounds of Appeal which could be stated as follows:

- i) That, the 2nd Respondent was not among the tenderers who participated in the tender under Appeal. It's tender was neither opened nor recorded on the date of the tender opening. There were only two tenderers who participated in the disputed tender process; namely,
 - a) Nyanza Laundry and General Services Co. Ltd and
 - b) Khalid Laundry and Dry Cleaner Co Ltd.

Contrary to the Appellant's expectations, on 17th June 2015 the 1st Respondent introduced the 2nd Respondent who had not participated in the tender process, as the successful tenderer.

- ii) That the Appellant's disqualification based on the reasons given by the 1st Respondent cannot be justified. The Appellant insisted to have complied with all tender requirements and the reasons for disqualification were neither specified nor form part of the Tender Document. The Appellant's tender contained information regarding

labour, occupational health and safety records of the company, as well as lines of credit. Further the Appellant disputes that, the requirements of current Bank Statement for six months, equipment relevant to the services and Audited Accounts for the past three years were not provided for in the Tender Document.

- iii) That, the 1st Respondent erred in law for failure to issue notice of intention to award and accord tenderers an opportunity to lodge complaints, if any, to the Accounting Officer within fourteen days.

Finally the Appellant prayed for the following remedies;

- a. Award of the tender to the 2nd Respondent be nullified,
- b. Order award of the tender be made to the Appellant,
- c. Order compensation of Tshs. 350,000,000/- as general damages,
- d. Costs of the Complaint, and
- e. Any other remedy the Appeals Authority deems fit and necessary to grant.

REPLIES BY THE 1st RESPONDENT

The 1st Respondent, in reply to the appeal was rather contradictory and not focused. He submitted that the 2nd Respondent was among the tenderers who participated in the tender under appeal. Its participation is evidenced by a copy of tender purchase receipt No. 776185 dated 20th April, 2015 attached to its tender. He informed the Appeals Authority that the envelope which contained the tender by the 2nd Respondent was not sealed as per the requirements of the Tender Document. As a result, the said envelope was not opened during the tender opening

ceremony but it was considered for evaluation pursuant to Clause 20.4 of Instruction to Tenderers (hereinafter referred to as "**the ITT**").

Regarding the disqualification of the Appellant, the 1st Respondent submitted that the said Appellant had been disqualified for failure to comply with some of the tender requirements. He stated that although some of the requirements listed for disqualification of the Appellant were not provided for in the Tender Document, the Appellant was required to comply with them as they are general requirements of which every tenderer should be equipped with.

Addressing the issue of the letter of notice of intention to award the tender, the 1st Respondent asserted that once the Appellant was served, it was duty bound to reply to the same and raise complaints, if any, with the 1st Respondent's Accounting Officer so as to allow him to deliberate on the matter and give his decision which would be the subject matter of review by this Appeals Authority. The 1st Respondent admits that the said letter did not state specifically that it was a notice of intention to award and tenderers were not given fourteen days to complain. Nevertheless, the Respondent insisted that the Appellant ought to have exercised his right as provided by the law.

With regards to reliefs prayed by the Appellant, the 1st Respondent submitted that, the Appellant is not entitled to reliefs stated in the Statement of Appeal. The 1st Respondent's tender process was properly conducted in accordance with the law. Thus, the Appellant's claims in this Appeal have been motivated by his ill will and lack of

competitiveness in tendering process. The 1st Respondent prayed for the dismissal of the Appeal with costs.

REPLIES BY THE 2nd RESPONDENT

In its statement of reply, the 2nd Respondent submitted that, his company was among the tenderers who participated in the tender since they purchased the tender document on 20th April 2015 and submitted its tender timely to the 1st Respondent. He further stated that after being awarded the tender the 1st Respondent showed him various working places including the laundry area and introduced him to the Appellant and his employees. Thus, the 2nd Respondent prayed for dismissal of the Appeal as the award of tender to him is justifiable and in accordance with the law.

ANALYSIS BY THE APPEALS AUTHORITY

In dealing with this Appeal, the Appeals Authority having gone through the tender proceedings including various documents submitted by parties and oral submissions during the hearing, it is of the view that, the Appeal has been centred on three main issues; and these are:-

- **Whether the award made to the 2nd Respondent was proper at law;**
- **Whether the Appellant was fairly disqualified;**
- **To what reliefs, if any, are the parties entitled.**

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

1. Whether the award made to the 2nd Respondent was proper at law

In resolving this issue the Appeals Authority considered the Appellant's contention that the award made to the 2nd Respondent was not proper at law, since it has been made to a tenderer who had not participated in tender. The Appellant contended further that, on the date of the tender opening only two tenders were opened. The said tenders were from the Appellant himself and M/s Khalid Laundry & Dry Cleaners Ltd. As already shown above, the 1st Respondent submitted that, the 2nd Respondent was among the three tenderers who participated in the tender; hence, it cannot be argued that they were not part of the tender.

In order to substantiate the validity of the above contentions, the Appeals Authority deemed it necessary to revisit the documents submitted before it. In the course of so doing, the Appeals Authority noted that, minutes of the tender opening and the evaluation report indicate that there were three tenderers. However, "Form No 8 - Record of Receipt of Tenders" (Annexure BMC 7) indicates that there were two tenders submitted in respect of the said tender and these were from the Appellant and the 2nd Respondent. It was noted further that, the evidence presented by the 1st Respondent on the number of tenderers who were present was not only contradictory but also differs with submission of the Appellant hence creating doubt as to the actual number of tenderers.

The Appeals Authority revisited three tender documents submitted by the 1st Respondent to prove that three tenderers participated in the tender and observed that, the tender submitted by the Appellant was

marked "**1 and Last**" while the other two tenders from the 2nd Respondent and M/s Khalid Laundry & Dry Cleaners Ltd were not numbered. During the hearing the 1st Respondent was asked to explain reasons which caused these other two tenders not to be numbered as was the case for the Appellant's tender. The 1st Respondent explained that the two tenders were not sealed as per the tender requirements; as a result they were neither opened nor numbered.

Having reviewed the documents submitted before it, the Appeals Authority is of the considered view that the 1st Respondent clearly failed to substantiate how many tenderers participated in the tender. Moreover, the Appeals Authority observed that, the tender opening process did not comply with Regulation 198 of GN 446 of 2013 which provides as follows;

"while the tender opening proceedings are in progress, tenders shall be numbered consecutively, the last one being endorsed 'and last' and initialed by the members of the tender opening committee in presence of tenderers or their representative" (Emphasis supplied)

From the evidence submitted before this Appeals Authority, only the Appellant's tender can be seen to have been marked in compliance with Regulation 198 quoted above which indicates that only one tender was presented during the tender opening ceremony.

The Appeals Authority finds the 1st Respondent to have erred in law for evaluating the tenders that were not opened during the tender opening. The 1st Respondent's act in this regard contravened Clause 24.4 of the ITT which provides as follows:-

"Tenders and modifications that are not opened and not read out at the tender opening shall not be considered further for evaluation, irrespective of the circumstances..." (Emphasis added)

The wording of the above quoted provision is similar to item 8 of the Invitation To Tender which also insists that, unopened tenders should not be considered for evaluation. From the evidence submitted before the Appeals Authority, it was clear that only one tender was opened on the date of tender opening. Thus, the 1st Respondent ought not to have considered tenders submitted by 2nd Respondent and M/s Khalid Laundry & Dry Cleaners Ltd for evaluation.

Having established that the tender opening procedures were not conducted in accordance with the law, the Appeals Authority deemed it proper to review the evaluation report so as to satisfy itself if the evaluation was properly conducted and whether the 2nd Respondent deserved to be awarded the tender in question. In the course of so doing, the Appeals Authority revisited the Evaluation Report and noted that, the evaluation was conducted in two stages (preliminary and detailed evaluation) contrary to Clauses 27, 28, 29, 31 and 34 of the Tender Document which require evaluation to be conducted in three stages namely; preliminary, detailed and post qualification.

The Appeals Authority reviewed the Evaluation Report and noted further that, two tenders were disqualified at the preliminary evaluation stage, and this includes the tender submitted by the 2nd Respondent. The 2nd Respondent's tender was found to be non responsive for failure to comply with; amongst others, valid business license, valid TIN

certificates, Business Registration Certificates and VAT certificates, just to mention a few. The Appeals Authority revisited the Tender Document issued by the 1st Respondent and observed that, the requirements which disqualified the 2nd Respondent were provided under Clauses 11 and 12 of the ITT read together with Clause 10 of the Tender Data Sheet (hereinafter referred to as "**the TDS**"). In order to ascertain if the 2nd Respondent was fairly disqualified, the Appeals Authority reviewed the tender by 2nd Respondent and observed the following;

- Business license provided is for provision of catering services and not laundry services,
- TFDA certificates attached are in relation to production of food and beverage and selling of the same,
- Certificate of occupational safety and health at the workplace attached relates to catering services and not laundry services,
- Evidence of registration with GPSA indicates that, they were awarded a framework agreement for provision of catering services and not laundry services,
- Three years experience in provision of laundry services were not shown, the experience shown was in relation to provision of catering services

From the above findings, the Appeals Authority is of the firm view that the 2nd Respondent was fairly disqualified at preliminary evaluation stage for failure to furnish documents to evidence his eligibility and qualifications to perform the contract. It should be noted that, apart from failure to meet the eligibility criteria, the Tender Board at its

meeting held on 16th June 2015 disagreed with the recommendations made by the Evaluation Committee. It should further be noted that, the Tender Board having disagreed with the recommendation of the Evaluation Committee, acting as an Evaluation Committee called for the documents of the 2nd Respondent, reviewed the same and thereafter made an award to him.

The Appeals Authority is of the considered view that, the act of the 1st Respondent's Tender Board contravened Section 33(1) of the Act which clearly stipulates the functions of the Tender Board. Among the duties of the Tender Board under Section 33(1) is to approve the recommended award. However, if the Tender Board is not satisfied with the recommendations given by the Evaluation Committee, Regulation 52(1) of GN 446 of 2013 provides guidance on what has to be done. For purposes of clarity the said Regulation 52(1) is reproduced as follows;

"where a tender board disagrees with the recommendations of the procurement management unit, the tender board shall return the submission to the procurement management unit for review and shall, in addition give reasons, in writing for such decision" (Emphasis supplied)

From the above extract, the Appeals Authority is of the view that the Tender Board was bound to refer the submission to the Procurement Management Unit (PMU) giving reasons for that decision. The Tender Board turned itself into an Evaluation Committee in clear contravention of Section 41 of the Act which requires procurement organs within the procuring entity to discharge its functions independently. The said Section 41 states as follows;

"Subject to the provisions of this Act, the accounting officer, the tender board, the procurement management unit, user department and the evaluation committee shall act independently in relation to their respective functions and powers". (Emphasis added)

In addition, the Appeals Authority observed that in general, the evaluation of the tenders was not conducted in accordance with the law. The Tender Document stipulated that the evaluation will be conducted in three stages as mentioned earlier. However, this Appeals Authority has observed that the evaluation was conducted in two stages, that is, preliminary and detailed evaluation.

In preliminary evaluation, tenders were to be checked for eligibility, completeness of tenders and compliance with the commercial and technical requirements. In the instant case, the Evaluation Report submitted shows that, technical responsiveness of tenders was not assessed. Tenders were just checked for completeness, compliance with eligibility criteria and commercial responsiveness. Furthermore, under the detailed evaluation, while tenders were to be checked for any corrections of errors or modifications or discounts, the same were checked for their financial stability and experience. Lastly, it was observed that while Clause 34 of the ITT stated categorically that post qualification was mandatory, no such post qualification was conducted.

From the aforementioned anomalies in the Evaluation Report, the Appeals Authority is of the settled view that, evaluation of the tenders was conducted contrary to Clauses 27, 28, 29, 31 and 34 of the ITT read together with Regulation 203(1) of GN 446 of 2013 which requires

evaluation to be consistent with the terms and conditions of the Tender Document.

Furthermore, the Appeals Authority observed that, the evaluation criteria provided for in the Tender Document were not quantifiable. The tender was for provision of laundry services. Apart from stipulated criteria, the Tender Document under Section VI provided for prices of the items to be washed (Estimated Cost). Thus, the Appeals Authority hereby observes that there were no quantifiable criteria to determine the successful tenderer. Based on that fact, the Appeals Authority is of the firm view that, the evaluation criteria were not quantifiable contrary to Section 72(2) of the Act which states as hereunder;

"The tender documents shall specify factors, in addition to price, which may be taken into account in evaluating a tender and how much such factors may be quantified or otherwise evaluated".
(Emphasis supplied)

From the above analysis, the Appeals Authority is of the settled view that, the evaluation of the tender was not conducted in accordance with the law. The noted irregularities are as follows;

- i) It was not clear how many tenderers participated in the tender
- ii) The Tender Board converted itself into an Evaluation Committee and disagreed with the recommendation made by the Evaluation Committee without returning the submission to PMU
- iii) The evaluation criteria provided in the Tender Document were not quantifiable

- iv) The evaluation which ought to have been conducted in three stages was conducted in two stages

Therefore, the Authority's conclusion with regard to the second issue is that the award of the tender to the 2nd Respondent was not proper at law.

2. Whether the Appellant was fairly disqualified;

On the same premises, there are no grounds to support the findings of neither the Evaluation Committee nor the Tender Board in respect to disqualification of the Appellant or award of tender to the 2nd Respondent. The Appeals Authority is satisfied that the whole tender process was tainted with serious irregularities which cannot be vouchsafed and therefore it cannot be determined whether or not the Appellant was fairly disqualified.

3. To what reliefs, if any, are the parties entitled.

Having resolved the issues in dispute the Appeals Authority considered the prayers by the parties.

To start with, the Appeals Authority considered the Appellant's prayer that award of the tender to the 2nd Respondent be nullified. Since it has already been established on the first issue that the award of tender to the 2nd Respondent was not proper in the eyes of the law, the Appeals Authority hereby upholds the prayer and nullifies the award of tender made to the 2nd Respondent.

With regard to the Appellant's prayer that he be awarded the contract, the same cannot issue for the following reasons;

- i) It has not been possible to establish the validity and correctness of the tender process,
- ii) This Appeals Authority takes cognizance of its findings that the whole process was marred by irregularities
- iii) The enabling provisions which establishment of this Appeals Authority do not confer the power to this Appeals Authority to award procurement contract since the same is within the mandate of procuring entities' tender board.

As regards the Appellant's prayer for payment of general damages amounting to TZS 350,000,000.00 the Appeals Authority cannot grant the same because the said general damages arising out of the tenants/landlord relationship is a matter subject to civil litigation and outside the mandate of this Appeals Authority.

For the foregoing, this Appeal partly succeeds and partly fails albeit for reasons other than those advanced by the Appellant. Subsequently, the Appeals Authority orders the 1st Respondent to compensate the Appellant the sum of TZS 200,000.00 being Appeal filling fees.

On the basis of the aforesaid conclusions, the Appeals Authority, orders the Respondent to re-start the tender process afresh in observance with the law and its regulations.

This decision is binding upon the parties and may be enforced in any court of competent jurisdiction in terms of Section 97 (8) of the Act.

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



.....
JUDGE (rtd) VINCENT K. D. LYIMO

MEMBERS:

1. MRS. R. A. LULABUKA


.....

2. ENG. A. J. MWAMANGA


.....

3. MR. L. P. ACCARO


.....

4. MS. M.P. OTARU


.....