

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
APPEAL CASE NO. 01 OF 2015-16**

BETWEEN

M/S TRANSSYS SOLUTIONS FZE.....1ST APPELLANT

**M/S MACRO SOFTWARE
SYSTEMS (T) LIMITED.....2ND APPELLANT**

AND

TANZANIA PORTS AUTHORITY.....RESPONDENT

**TWENTY THIRD CENTURY
SYSTEMSINTERESTED PARTY**

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. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|---------------------------|---|-------------------------|
| 1. Mrs. Toni S. Mbillinyi | - | Principal Legal Officer |
| 2. Ms. Florida R. Mapunda | - | Senior Legal Officer |
| 3. Ms. Violet S. Limilabo | - | Legal Officer |

FOR THE 1ST APPELLANT

1. Mr. Salim Abbas Khatri - Managing Director, ERP Software Technologies (1st Appellant's representative in Tanzania)

FOR THE 2ND APPELLANT

1. Mr. Peter J. Rogers - General Manager, Macro Software Systems (T) Ltd

FOR THE RESPONDENT

1. Mr. Erasto Lugenge - Senior Legal Officer
2. Ms. Marcellina Mhando - Systems Development Manager
3. Mr. Alex Seneu - Legal Officer
4. Mr. Ronald Temba - Assistant Legal Officer
5. Mr. Isaack Godson - Senior Procurement Officer
6. Mr. Daudence Mwano - Legal Officer

FOR THE INTERESTED PARTY

1. Mr. Robert Gitau - Managing Director, Twenty third Century System
2. Mr. Andrew Mbagga - Infrastructure LEAD
3. Mr. Calistus Kapinga - Legal Officer
4. Mr. Paul Justin Mgaya - Legal Officer

This decision was scheduled for delivery today 10th August 2015 and we proceed to do so.

The Appeal at hand was lodged by M/s Transsys Solutions FZE (hereinafter referred to as "**the 1st Appellant**") and M/s Macro Software Systems (T) Limited (hereinafter referred to as "**the 2nd Appellant**") against the Tanzania Ports Authority (hereinafter referred to as "**the Respondent**") and M/S Twenty Third Century Systems (hereinafter referred to as "**the interested party**"). The 2nd Appellant and the Interested Party joined this Appeal after being notified by the Public Procurement Appeals Authority (hereinafter called "**the Appeals Authority**"). The notification was done for purposes of informing all tenderers who had participated in the bidding process on the existence of the Appeal inviting them to exercise their rights as provided for under the law.

The said Appeal is in respect of Tender No. AE/016/2014-15/CTB/G/39 for Supply, Installation, Testing and Commissioning of Enterprise Resource Planning (ERP) System for TPA (hereinafter referred to as "**the tender**").

After going through the record of tender proceedings submitted to 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 17th February 2015, the Respondent invited tenderers to submit tenders for the tender under appeal. The deadline for the submission of the tenders was initially set for 17th March 2015; however, it was later on extended to 30th April 2015 due to various amendments that were done on the Tender Document. On the date of the tender opening, eight (8) tenders were received from the following firms;

S/N	Name of a Tenderer	Quoted price in USD
1.	M/s Macro Software Systems (T) Ltd	7,200,000.00
2.	M/s Imatic Technologies Ltd	2,607,800.00 VAT Inclusive
3.	M/s KPMG EA Limited	5,704,645.00
4.	M/s Techno Brain Ltd	7,621,668.00 VAT Inclusive
5.	M/s Transsys Solutions FZE	4,979,903.91
6.	M/s Technet Ltd	3,254,485.00
7.	M/s Quality Trade and Distribution Ltd	11,136,008.19
8.	M/s Twenty Third Century PVT LTD	6,485,407.83 VAT Inclusive

The tenders were then subjected to evaluation which was conducted in three stages namely; preliminary, technical and detailed evaluation. During preliminary evaluation tenders were checked for substantial responsiveness so as to ensure completeness of the tenders and compliance with the eligibility criteria. In that evaluation stage, seven tenders including those of Appellants were found to be non-responsive for failure to comply with various tender requirements. The tender submitted by M/s Twenty Third Century PVT Ltd was the only tender which was found to be responsive, hence subjected to technical evaluation.

During technical evaluation, the tender submitted by M/s Twenty Third Century PVT Ltd was found to have complied with all technical requirements; hence, subjected to financial evaluation. During financial analysis the tender was found to have some errors and after arithmetic corrections thereof, the tender price changed from USD 6,458,407.83 to

USD 6,635,387.16 which is equivalent to TZS 11,911,183,490.92. Thus, the Evaluation Committee recommended M/s Twenty Third Century PVT Ltd for the award of the tender subject to the following;

- i) Submission of warranty from software manufacturer (SAP)
- ii) Conducting Post qualification analysis by visiting tenderer's premises for purposes of verifying operations of ERP system.

The Tender Board at its meeting held on 27th May 2015, approved the recommendation of the Evaluation Committee that the award be made to M/s Twenty Third Century PVT Ltd at a contract price of USD 6,635,387.16 for a completion period of nine months subject to conducting post-qualification and successful tenderers' submission of warranty from software manufacturer.

On 1st June 2015 the Respondent by its letter Ref No. PMU/2013-14/G39 informed all tenderers, including the Appellants, its intention to award the tender to M/s Twenty Third Century PVT Ltd. The 1st Appellant received the said letter on 3rd June 2015 and on the same date by his letter Ref No ERPST/TZ/TPA/020 the Appellant requested the Respondent to inform him reasons which lead to the disqualification of its tender.

On 3rd June 2015 the Respondent through its letter Ref No PMU/2014-15/G39 replied that, its tender was disqualified on the reason that, Bid Security submitted was in favour of M/s Transsys Solutions of Dar es Salaam and not for M/s Transsys Solutions FZE of UAE who was the tenderer. Thus, the Respondent found the Bid Security to have not protected the procuring entity against tenderer's conduct as required by

Clause 18.2 of Instructions To Bidders (hereinafter referred to as "**ITB**") read together with Clause 20 of the Bid Data Sheet (hereinafter referred to as "**BDS**") because it was issued in favour of a company which did not participate in the tender.

Being dissatisfied with reason given for its disqualification, on 10th June 2015 the 1st Appellant submitted a complaint to the Respondent challenging the said reason as well as the intent to award the tender to M/s Twenty Third Century PVT Ltd on the ground that the latter does not have two references in port industry. The said letter was received by the Respondent on 11th June 2015.

Having not received replies from the Respondent within fourteen days from the date a complaint was lodged, the 1st Appellant on 1st July 2015 lodged an appeal to this Appeals Authority.

Upon receiving notification of the Appeal, the 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 Appeal is time barred.
- ii) The Appeal is unmaintainable in law and before this Honorable Authority.

As a matter of procedure, the Appeals Authority is obliged to resolve the two points of PO raised so as to determine its jurisdiction before addressing the merits of the appeal. In the course of so doing, the Appeals Authority observed that the two points of preliminary objection revolve on the same ground since there is no difference between the

two. The Respondent concurred with observations of the Appeals Authority and proceeded to submit its arguments by treating the two points of PO as one.

SUBMISSIONS OF THE RESPONDENT ON THE PO

In support of the PO, the Respondent submitted that, the 1st Appellant was among the tenderers who participated in the disputed tender. On 3rd June 2015 the 1st Appellant lodged a complaint to the Respondent challenging the notice of intention to award issued on 1st June 2015. In the said complaint letter the 1st Appellant wanted to be informed reasons for its disqualification. On the same date, that is 3rd June 2015, the Respondent informed the 1st Appellant reasons for its disqualification. On 11th June 2015, the 1st Appellant re-submitted a complaint letter to the Respondent challenging reason given for its disqualification.

Based on the prevailing facts, the Respondent argued that, the complaint lodged by the 1st Appellant on 3rd June 2015 was the proper complaint, hence after receiving replies thereof from the Respondent and being dissatisfied, the 1st Appellant was required to lodge its appeal directly to this Appeals Authority pursuant to Section 97(2) (b) of the Public Procurement Act No 7 of 2011 (hereinafter referred to as "**the Act**"). Thus, the 1st Appellant's act of re-submitting the complaint to the Respondent after the same has already been dealt with has made his appeal to this Appeals Authority to be out of time since the same ought to have been lodged within fourteen days from the date of receipt the Respondent's decision, that is 3rd June 2015.

The Respondent submitted further that, assuming the 1st Appellant's complaint lodged to the Respondent on 11th June 2015 was the proper application for administrative review, the Respondent was required to issue a written decision within fourteen days pursuant to Regulation 106(6) of the Public Procurement Regulations, GN 446 of 2013 (hereinafter referred to as "**GN 446 of 2013**"). Upon failure of the Respondent to issue a decision within the prescribed time, as it was in this appeal, the Respondent argued that, the 1st Appellant was then required to exercise his rights provided under Regulation 106(9) of GN 446 of 2013 which requires the complaint to be lodged to this Appeals Authority within fourteen days. However, the Respondent insisted that, the 1st Appellant had failed to exercise his right as provided by the law. He thus submitted that the Appeal was lodged on 10th July 2015, thus out of time.

The Respondent contended further that, assuming that the 1st Appellant's letter of 11th June 2015 was a proper complaint before the Respondent, the same failed to comply with Regulation 105(3) of GN 446 of 2013. Regulation 105(3) guides as to the contents of an application for an administrative review, but the 1st Appellant's application failed to comply with the said regulation as some of the information were missing.

Therefore, the Respondent prayed for the dismissal of the appeal as it is improperly before the Appeals Authority.

THE 1ST APPELLANT'S REPLIES ON THE PO

In reply to the Respondent's submission on the PO, the 1st Appellant submitted that, his letter dated 3rd June 2015 to the Respondent was not a formal complaint; instead, it was a letter which clearly indicates that the latter wanted to be informed reasons for disqualification of its tender. The 1st Appellant was forced to request for the said reasons because the same were not provided for in the notice of intention to award as required by Regulation 231(4) of GN 446 of 2013. Having received reason for its disqualification on 3rd June 2015, the 1st Appellant lodged a formal complaint to the Respondent on 11th June 2015. Therefore, the letter of 11th June 2015 from the 1st Appellant to the Respondent was the proper application for review and the same was lodged in accordance with the law.

The 1st Appellant submitted further that, the appeal to this Appeals Authority was lodged within the prescribed time as required by the law. This is due to the fact that, having lodged a formal complaint to the Respondent on 11th June 2015, the same ought to have been determined by the Accounting Officer within fourteen days. After lapse of the fourteen days and there being no decision issued by the Respondent, the 1st Appellant lodged his appeal to the Appeals Authority on 1st July 2015 well within fourteen days as required by the law. Thus, the Appeal was lodged within time.

ANALYSIS BY THE APPEALS AUTHORITY ON THE PO

Having gone through the documents submitted and having heard the oral submissions by the parties, the Appeals Authority is of the view that, the PO by the 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:

In resolving the PO, the Appeals Authority revisited the documents submitted before it so as to determine the date when the 1st Appellant lodged his complaint to the Respondent. There are two conflicting dates. While the Respondent alleges that a formal complaint was filed on 3rd of June 2015, the 1st Appellant asserts to the contrary that its letter dated 11th June 2015 is the application for administrative review. The Appeals Authority has observed that, the letter by the 1st Appellant dated 3rd June 2015 addressed to the Respondent was written after the former had received the notice of intention to award which lacked reasons for disqualification of its tender. The said notice of intention to award just informed the 1st Appellant the name of the proposed successful tenderer, the contract price and the completion period.

It was noted further that, although the letter of 3rd June 2015 was titled "complaint on the notice of intention to award", the contents therein clearly indicate that the 1st Appellant wanted to be informed reasons for disqualification of its tender. For purposes of clarity the Appeals Authority reproduces some of the paragraphs as hereunder;

"...would like to request your good office the following;

1. To provide us with the reasons as to why our tender was not successful as per Regulation 231(4) of GN 446 of 2013
2. Since the reasons were not provided at first notice, the fourteen days for lodging complaints should be extended and should start from the date when the reasons will be made available..."

In the same letter, the 1st Appellant had quoted Regulation 231(4) of GN 446 of 2013 which provides as follows;

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

- (a) Name of the successful tenderer;**
- (b) The contract sum and the completion period or delivery period;**
- (c) Reasons as to why tenderers were not successful”**

(Emphasis supplied)

Furthermore, the Appeals Authority considered the Respondent’s argument that, the reason for disqualification of unsuccessful tenderers were provided in the notice of intention to award and observed that, the last paragraph in the said letter contained a general statement that “the tender is awarded to the lowest evaluated bid i.e lowest evaluated bid price from among those bids which are eligible...”. From the quoted words the Appeals Authority is of the firm view that, the same cannot be construed to mean reasons for disqualification of all unsuccessful tenderers, since the nature of disqualification are not the same for all the tenderers. According to Regulation 231(4)(c) of GN 446 of 2013, specific reasons for disqualification of each tenderer are to be included in the notice of intention to award. The Appeals Authority observes that the Respondent did not comply with that specific requirement. Therefore, the 1st Appellant was justified to request for the said reasons and challenge them if he was not satisfied pursuant to Regulation 231(2) and (9) of GN 446 of 2013 read together with Section 96 of the Act.

Furthermore, from the facts of this appeal, the Appeals Authority is satisfied that, the 1st Appellant's complaint letter of 11th June 2015 to the Respondent was the proper complaint and the same ought to have been entertained in accordance with Regulation 106(6) of GN 446 of 2013 which provides as follows:

"An accounting officer shall, within fourteen days after receipt of the complaint or dispute, deliver a written decision to a complainant and other tenderers who participated in the proceedings". (Emphasis supplied)

Consequently, the Appeals Authority rejects the Respondent's argument that, the 1st Appellant's complaint filed on 11th June 2015 was a repetition of the complaint lodged on 3rd June 2015.

Furthermore, the Appeals Authority considered the Respondent's argument that the Appeal was lodged out of time and deemed it proper to revisit the facts of this appeal so as to substantiate the validity of the said argument. In the course of so doing, the Appeals Authority observed that, a formal complaint was lodged on 11th June 2015 and the Respondent ought to have determined the same within fourteen days, that is, by 25th June 2015. However, the Respondent did not give a decision on the complaint so filed as they treated the same to be a repetition of the complaint filed on the 3rd June 2015. The 1st Appellant lodged his appeal to this Appeals Authority on 1st July 2015. According to Section 97(2) of the Act read together with Regulation 106(9) of GN 446 of 2013, a tenderer is allowed to lodge his complaint to this Appeals Authority within fourteen days from the date the Accounting Officer

ought to have issued its decision. For purposes of clarity the Authority reproduces Regulation 106(9) of GN 446 of 2013 as follows;

“Where the accounting officer does not issue a decision within the time specified in sub-regulation (6), the tenderer submitting the complaint or dispute shall within fourteen days after such specified time, institute proceedings under section 97 of the Act, and upon instituting such proceedings, the competence of the accounting officer to entertain the complaint or dispute shall cease”. (Emphasis added)

From the facts of this appeal and the above quoted provision, the Appeals Authority is of the view that, the 1st Appellant had a right to file his complaint to this Appeals Authority after the Respondent’s failure to entertain the same. Further to that, counting from 25th June 2015 the date within which the Respondent ought to have issued the decision, the fourteen days within which the 1st Appellant was required to lodge his complaint to the Appeals Authority expired on 9th July 2015. The 1st Appellant lodged his appeal to this Appeals Authority on 1st July 2015. Therefore, the Appeals Authority is satisfied that the appeal was lodged well within time.

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 PO raised, the Appeals Authority proceeded to determine the appeal on its merits.

SUBMISSIONS BY THE 1ST APPELLANT

In this Appeal the 1st Appellant raised three grounds of Appeal which could be stated as follows:

- (i) That, the bid security submitted was in favor of the Respondent (procuring entity) and not in favour of M/s Transsys Solutions of Dar es salaam. The beneficiary of the bid security in question was the Respondent as it is addressed to them and the text of the bid security confirms that the guarantor binds itself to the Respondent. Therefore, it is wrong to claim that the bid security was in favor of any other than the Respondent.

Moreover, the aim of bid security as stipulated in Clause 18.2 of ITB is to protect the procuring entity against tenderer's conduct by warranting forfeiture of the submitted security. The forfeiture of the bid security is guaranteed by the text of the guarantee where the guarantor is obliged to pay the beneficiary upon first written demand without the beneficiary having to substantiate its demand. The 1st Appellant argued that the bid security was an unconditional payable on demand without further proof. Thus, it is completely wrong to assume that the contact address of bid security's requesting party (ERP Software Technologies) shown in the bid security along with applicant's name (**Transsys Solutions**) as an address of "registered office" or "principal place of business" to conclude that the company that appears as an applicant in the bid security is a different company to the tenderer.

It was submitted further that, the inclusion of M/s ERP Software Technologies' address in the bid security does not constitute material deviation as it does not meet any of the characteristics of the same as stipulated under Clause 28.2 of the ITB. Further to that, Regulation 207(2)(b) of GN 446 of 2013 gives procuring entity flexibility to ignore minor deviations which could have been easily clarified as per Regulation 207(1) of GN 446 of 2013. Thus, the Respondent's act of making conclusions without seeking any clarifications as permitted by the law, deprived them the benefits of free and open competition.

- (ii) That, the Tender Document and addenda require tenderers to have 2 references in the port industry. M/s Twenty Third Century Systems, to whom the Respondent intends to award the contract, does not have such references. This is due to the fact that the reference letters attached to the statement of appeal do not confirm that M/s Twenty Third Century Systems has 2 references in port industry as required by the Tender Document; hence, its tender ought to have been disqualified.
- (iii) That, Clause 1.2.50 of Technical Specifications (Section VII of the Tender Document) stipulates the implementation period to be within a minimum of six (6) months which can be extended to nine (9) months. The delivery period indicated in the notice of intention to award the contract is nine (9) months. That indicates that M/s Twenty Third Century PVT Ltd had failed to comply with requirements of the Tender Document, hence his bid ought to have been disqualified.

Finally the 1st Appellant prayed for the following reliefs;

- i) Declaration that the Respondent had failed to conduct the disputed tender process in a manner that maximizes competition, efficiency, transparency and value for money contrary to Section 63(2) of the Act,
- ii) Nullify the Respondent's decision to disqualify the 1st Appellant's tender,
- iii) Annul the decision of the Respondent to award the tender to M/s Twenty Third Century PVT Ltd and order re-evaluation or retendering of the tender,
- iv) Order the Appellant to be compensated costs incurred in preparation of the bid document, particularly cost of issuing bid security and the cost of traveling and living expenses for consultant who prepared the bid document,
- v) Order the Appellant be compensated costs incurred in pursuing this Appeal, and
- vi) Any other relief that the Appeals Authority may deem fit.

SUBMISSIONS BY THE 2ND APPELLANT

The 2nd Appellant was among the tenderers who participated in the tender under Appeal. On 1st June 2015, the 2nd Appellant received a notice of intention to award which indicated that the Respondent intends to award the said tender to M/s Twenty Third Century PVT Ltd. On 11th June 2015, the 2nd Appellant by his letter Ref No MS/TPA/004/15

requested the Respondent to inform them the reasons as to why the tender submitted by M/s Twenty Third Century PVT Ltd qualified for the award than other submitted bids. On 15th June 2015 the Respondent through his letter Ref No PMU/2014-15/G39 informed the 2nd Appellant that its tender was disqualified on the ground that the Power of Attorney submitted did not show the signature of the donee. Upon being notified on the existence of this appeal, the 2nd Appellant joined and raised the following grounds of Appeal;

- i) That, submission of a Power of Attorney which lacked the signature of the donee does not make the tender submitted by the 2nd Appellant to be substantially non responsive as that could be treated as minor deviation. The Respondent ought to have considered proposed solutions for the project and not to disqualify the 2nd Appellant's tender on the preliminary evaluation stage as the noted defect in the Power of Attorney was minor and could have been corrected.
- ii) That, under Clause 32 of the BDS tenderers were required to show that the proposed system had been successfully implemented by the manufacturer, tenderer or both of them in at least two sites of similar scope and scale in the ports industry in sub-Saharan Africa over the last five years. According to the 2nd Appellant, Clause 32 limits participation of tenderers in the disputed tender process contrary to the requirement of the law which requires tender criteria to be neutral and standard so as to encourage participation of tenderers and increase competition.

- iii) That, the whole tender process was biased as it was conducted in a way which clearly indicates that the award was intended to be made to M/s Twenty Third Century PVT Ltd. The successful tenderer was the only bidder who qualified or meets the additional information provided in the Tender Document.

Therefore, the 2nd Appellant prayed for nullification of the whole tender process.

REPLIES BY THE RESPONDENT

The Respondent's replies in relation to the Appellants grounds of Appeal were as follows;

- i) That, according to Regulation 3 of GN 446 of 2013 Bid Security "means a guarantee or bond from a tenderer's bank or an insurance company which should be provided by the tenderer as part of its bid with the aim of protecting the procuring entity against the risk of tenderer's conduct during the tender process which would warrant the security's forfeiture or otherwise returned to the tenderer after tender process".

From the above quotation the Respondent argued that, bank or insurance company issues protection in favor of the tenderer and not a procuring entity. However, the beneficiary of the security is intended to be the procuring entity. Thus, in the disputed tender process the bid security was rightly issued in favor of **M/s**

TRANSSYS SOLUTIONS of **DAR ES SALAAM** who did not participate in the tendering process.

Moreover, the Respondent argued that he was not expected to assume that the bid security issued was in favour of the 1st Appellant's company. He asserted that the evaluation process was conducted in accordance with Regulation 206(1) of GN.446 of 2013 which requires evaluation of tenders to be based on the contents of the tender itself and procuring entities being prohibited to direct themselves to extrinsic evidence. He contended further that, Regulations 204 (2) (b) (k) and 210 (d) of GN 446 of 2013 require procuring entity to reject a tender not accompanied by appropriate tender security. Further, the Evaluation Committee was required to check compliance of the tenders submitted vis-a-viz the Tender Document. Thus, the 1st Appellant's tender was rightly rejected.

ii) That, with regard to the 1st Appellant's argument that the proposed successful tenderer ought to have been disqualified for failure to have two references in port industry, the Respondent submitted that, M/s Twenty Third Century PVT Ltd complied with all tender requirements by submitting evidence which proves that the proposed system had been successfully implemented in five ports in Sub-Saharan Africa.

iii) With regard to the 2nd Appellant's grounds of Appeal, the Respondent submitted that the tender process was conducted in a fair and transparent manner and it cannot be argued that, the same intended to favour M/s Twenty Third Century PVT Ltd. The

specifications issued were neutral and same geared to encourage competition so as to obtain value for money. In addition the Respondent insisted that the 2nd Appellant upon being notified the reasons for its disqualification took no action until he was prompted by the Appeals Authority.

SUBMISSIONS BY THE INTERESTED PARTY

The arguments by the Interested Party may be summarized as follows;

- i) That, the company had complied with Clause 32.4(h) of the BDS. He mentioned various ports in Africa wherein M/s Twenty Third Century PVT Ltd had implemented the same projects. Those were Kenya Ports Authority, Transnet Ports Authority (South Africa), Transnet Ports Operations (South Africa), Namibian Ports Authority (Namibia) and Maputo Ports in Mozambique. The tender submitted by M/s Twenty Third Century PVT Ltd clearly indicated how successfully the projects were implemented in the above listed ports.
- ii) That, in relation to implementation period pursuant to Clause 1.2.50 of the Technical specifications, the Interested Party submitted that, its tender indicated that the project will be implemented within nine months period. That was in accordance with Clause 1.2.50 of Technical Specifications which requires the project to be implemented within a minimum of six months and maximum of nine months. Thus, the tender submitted by the M/s Twenty Third Century PVT Ltd quoting the maximum completion period had taken opportunity of the time factor embedded in the Tender Document.

Therefore, the interested party prayed for dismissal of the Appeal as it has no merits.

ANALYSIS BY THE APPEALS AUTHORITY ON THE MERITS OF THE APPEAL

In this Appeal there were three triable issues namely;

- **Whether the Appellants were fairly disqualified;**
- **Whether the award made to M/s Twenty Third Century PVT Ltd was proper at law; and**
- **To what reliefs, if any, are the parties entitled**

Having identified the issues the Appeals Authority proceeds to determine them as hereunder;

1. Whether the Appellants were fairly disqualified

The Appeals Authority having heard arguments by all parties opted to begin with the appeal by the 2nd Appellant. It will be observed that the 2nd Appellant was dully notified by the Respondent on the notice of intention to award on 1st June 2015, he called for reasons for his disqualification on the letter dated 11th June 2015 and he was given the said reasons on 15th June 2015 and he took no action until prompted by the Appeals Authority. According to Regulation 231(9) of GN 446 of 2013, the 2nd Appellant waived his right to appeal. During the hearing, the 2nd Appellant argued that it was normal for tenderers to submit unsigned Powers of Attorney and he was no exception. The Appeals Authority does not agree that it was a minor deviation.

With regard to the remaining two grounds of appeal that the contents of the tender document minimizes competition and issue of bias in favour of the successful tenderer, the Appeals Authority observed that, these were issues which should have been raised to the Respondent's Accounting Officer before submission of the tender. The Appeals Authority strongly believes that the 2nd Appellant had an opportunity to seek clarifications before completing and submitting his tender. Thus, the grounds so filed are an afterthought.

Basing on the above findings, the 2nd Appellant's appeal is dismissed. The Appeals Authority now proceeds to determine the appeal as submitted by the 1st Appellant.

The Appeals Authority started by revisiting the 1st Appellant's contention that its bid has been unfairly eliminated from the tender process because the anomaly noted in its bid security could easily be corrected. In reply thereof, the Respondent argued that, the 1st Appellant did not submit bid security because the attached one was issued in favour of M/s Transsys Solutions of Dar es Salaam who was not a tenderer in the tender process. Rather, among the tenderers was one M/s Transsys Solution FZE of UAE. In resolving parties' argument in this regard, the Appeals Authority deemed it proper to revisit the Tender Document and observed that Clause 18 of the ITB read together with Clause 20 of the BDS guides as to the requirement of Bid Security. For purposes of clarity the Authority reproduces them as hereunder;

ITB 18.1 "Pursuant to ITB Clause 11, unless otherwise specified in the Bid Data Sheet, the bidder shall furnish as part of its bid, a Bid Security in its original form and in the amount and the currency specified in the Bid Data Sheet..."

ITB 18.2 "The Bid security or bid securing declaration is required to protect the Procuring Entity against the risk of Bidder's conduct which would warrant security's forfeiture".

BDS 20 "The amount of Bid Security is 3% of the bid price in the form of an unconditional Bank Guarantee or Banker's Cheque. Any other type of Guarantee is not acceptable. Tenders not accompanied by tender security will be rejected".

Furthermore, the Appeals Authority observes that Regulation 23 of GN 446 of 2013, also guides on the importance and applicability of the Bid Security. Moreover, Regulation 210 (d) of GN 446 of 2013 requires procuring entity to reject a tender which is not accompanied by appropriate Bid Security.

From the above provisions, the Appeals Authority is of the firm view that, bid security is among the mandatory requirements that have to be complied with by the tenderers during tender process and its non-compliance results to rejection of a tender. In order to establish if rejection of the 1st Appellant's tender based on the ground of non-compliance with requirement of Bid Security was proper in law, the Appeals Authority revisited the tender submitted by the 1st Appellant and observed that, Bid Security was issued in the name of "**TRANSSYS**

SOLUTIONS of P.O BOX 16609 DAR ES SALAAM” as a tenderer. It should be noted that the 1st Appellant admitted that M/s TRANSSYS SOLUTIONS of DAR ES SALAAM does not exist. It was noted further that the Form of Tender clearly indicates that the tenderer was “**TRANSSYS SOLUTIONS FZE of UAE**”. In as long as Transsys Solutions of Dar es salaam is a non-existent company but a mere contact address, there is no way a procuring entity can enforce the realization of the bid security.

Based on the above facts, the Appeals Authority is of the firm view that there was no bid security issued by **TRANSSYS SOLUTIONS FZE of UAE**. Therefore, the Appeals Authority finds the Respondent’s act of rejecting the 1st Appellant’s tender for failure to submit the required Bid Security was proper and in accordance with the law.

Thus, the Authority’s conclusion with regard to the first issue is that, the 1st Appellant has been fairly disqualified from the tender process.

2. Whether the award made to M/s Twenty Third Century PVT Ltd was proper at law

The Appeals Authority considers the 1st Appellant’s argument that, the tender by M/s Twenty Third Century PVT Ltd ought to have been disqualified for failure to comply with Clause 32.4 (h) of the BDS. Before ascertaining the validity of the 1st Appellant’s argument on this point, the Appeals Authority deemed it proper to reproduce Clause 32.4(h) as it was modified in the first Addendum;

“A qualified and successful bidder must provide verifiable evidence and documentation proving to the TPA evaluation team of having

successfully implemented the system that is similar in scope and scale at least 2 sites in the last five years; at least one of the implementation MUST be in Sub-Saharan Africa. The reference sites must involve supply, installation, implementation, change management/training for a project of a similar nature with a minimum value of USD 2,000,000. The implementation should have been carried out by the manufacturer of the software directly or the bidder or both”.

In order to satisfy itself if M/s Twenty Third Century PVT Ltd complied with Clause 32.4 (h) reproduced above, the Appeals Authority reviewed the tender submitted by said company and observed that, it contained a letter dated 30th March, 2015 from SAP South Africa addressed to Director General of Tanzania Ports Authority confirming that SAP software had been successfully implemented in five ports of sub-Saharan Africa. These are Kenya Ports Authority, Transnet Ports Authority (South Africa), Transnet Ports Operations (South Africa), Namibian Ports Authority (Namibia) and Grinrod Maputu Car Terminal in Mozambique. Further, it was observed that, the wording of the said letter does not show if the software was successfully implemented jointly by the successful tenderer and the manufacturer or solely by tenderer himself.

The Appeals Authority revisited the tender submitted by M/s Twenty Third Century PVT Ltd and observes that it contained manufacturer’s Authorization which confirms that, they have been authorized to supply and install the SAP ERP solutions. Furthermore, there is a letter from Transnet National Ports Authority which confirms that the manufacturer

SAP South Africa had successfully implemented the SAP software in Johannesburg. Also the Appeals Authority verified that the SAP software has been successfully implemented in Kenya Ports Authority by the manufacturer himself.

Based on the evidence attached in the tender submitted by M/s Twenty Third Century PVT Ltd the Appeals Authority is satisfied that, the tenderer complied with the requirement of Clause 32.4(h) of the BDS.

Furthermore, the Appeals Authority considered the 1st Appellant's argument that the tender submitted by M/s Twenty Third Century PVT Ltd ought to have been disqualified for quoting the maximum completion period of 9 months while the required minimum completion was 6 months. In order to substantiate the validity of the 1st Appellant's argument the Authority revisited Clause 1.2.50 of the Technical Specifications which states as follows;

“Proposed ERP shall be implemented within a minimum of six (6) months; which can be extended to nine (9) months only” (Emphasis supplied).

From the above provision, the Appeals Authority is of the view that, tenderers were required to show the implementation period which ranges from six months being a minimum period to nine months being the maximum period. The Form of Bid attached to the tender of M/s Twenty Third Century PVT Ltd indicates that the project will be implemented within a period of nine months. Thus, the Appeals

Authority is of the settled view that the implementation period indicated by M/s Twenty Third Century PVT Ltd is the maximum period specified in the Tender Document. Therefore, the Appeals Authority upholds the Respondent's decision on this point because the bid is within the allowable time frame.

Based on the above findings the Appeals Authority is satisfied that the proposed award of tender to M/s Twenty Third Century PVT Ltd is proper in law.

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

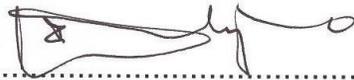
In determining prayers by the parties, the Appeals Authority took cognizance of its findings made on the first and the second issues above, that is, the 1st Appellant has been fairly disqualified and that the award of tender to M/s Twenty Third Century PVT Ltd is proper in law. Based on such findings the Appeals Authority hereby rejects all the prayers by the 1st Appellant and accepts prayer by the Respondent that the appeal be dismissed since it has no merits.

On the basis of the aforesaid conclusions, the Appeals Authority hereby dismisses the Appeal in its entirety.

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.

This Decision is delivered in the presence of the 1st Appellant, the Respondent, the Interested Party and in the absence of the 2nd Appellant this 10th August, 2015.



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

MEMBERS:

1. MRS. R. A. LULABUKA.....

2. ENG. A. J. MWAMANGA.....

3. MR. L. P. ACCARO.....