

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT MTWARA

APPEAL CASE NO. 143 OF 2013

BETWEEN

M/S MOCROPS
TANZANIA LIMITED.....APPELLANT

AND

CASHEWNUT INDUSTRY
DEVELOPMENT TRUST FUND.....RESPONDENT

DECISION

CORAM:

- | | |
|-------------------------------|----------------|
| 1. Hon. A.G. Bubeshi, J.(rtd) | -Chairperson |
| 2. Mr. H.S. Madoffe | - Member |
| 3. Eng. F.T. Marmo | - Member |
| 4. Ms. F.R. Mapunda | -Ag. Secretary |

SECRETARIAT:

- | | |
|------------------------|-----------------|
| 1. Mr. Hamisi. O. Tika | - Legal Officer |
|------------------------|-----------------|

FOR THE APPELLANT:

1. Mr. Bryson Shayo - Advocate, Brass Attorneys
2. Mr. Johnson Stanley - Company Secretary
3. Mr. Patrick Mwalunenge - Director, Mocrops Ltd.

FOR THE RESPONDENT:

1. Mr. George Mandepo - Advocate
2. Mr. Ramadhani A. Mmari - Ag. Chairman CIDTF
Tender Board
3. Mr. Frederick J. Shangali - Secretary, CIDTF
Tender Board.
4. Mr. Athuman S. Nkinde - Chairman, CIDTF
5. Mr. Mathei .B.Makwinya - Member CIDTF Board
6. Salum Chinkambi - Ag. Manager, CBT.

This decision was scheduled for delivery today 15th March, 2013 and we proceed to deliver it.

The Appeal at hand was lodged by M/S MOCROPS TANZANIA LIMITED (hereinafter referred to as "the Appellant") against the CASHEWNUT INDUSTRY DEVELOPMENT TRUST FUND (hereinafter referred to as "the Respondent").

The said Appeal is in respect of Tender No. ME012/2012-2013/CIDTF/G/01 for Supply of Cashewnut Pesticides and Blowers. The said tender had ten Lots but the Appeal at hand is confined to Lot No. 4 which was for supply of Triadimenol 250 EC (100,000 Litres) (hereinafter referred to as "the tender").

According to the documents submitted to the Authority, as well as oral submissions by the parties during the hearing, the facts of the Appeal may be summarized as follows:

On 15th October, 2012, the Respondent through the Daily News and Habari Leo newspapers invited tenderers to submit their bids in respect of the tender under appeal.

The deadline for submission of tenders was set for 19th November, 2012 and the following ten tenders were submitted in respect of Lot No 4.

S/ No	Tenderer's Name	Quoted price
1.	M/s Bajuta International Tanzania Limited	Tshs. 1,880,000,000/-
2.	M/s Southern Agro Services and Supplies Company	Tshs. 2,260,000,000/-
3.	M/s Tanzania Crop Care Limited	Tshs.1,715,000,000/-
4.	M/s Export Trading Company Limited	Tshs.2,544,000,000/-
5.	M/s Sharda Worldwide Export PVT Limited	Tshs. 1,920,000,000/-
6.	M/s Bytrade Tanzania Limited	Tshs.2,960,000,000/-
7.	M/s Mega Generics	Tshs. 2,290,000,000/-

8.	M/s TML Agrovat	Tshs. 2,000,000,000/-
9.	M/s Mocrops Tanzania Limited	Tshs. 1,800,000,000/-
10.	M/s Agripro Tanzania Limited	Tshs. 1,800,000,000/-

The said tenders were subjected to evaluation which was carried out in three stages; namely Preliminary Evaluation, Detailed Evaluation and Post-qualification.

During Preliminary Evaluation tenders were assessed for their commercial and technical responsiveness. At the commercial responsiveness stage tenders were checked for completeness of the Bid and compliance with the eligibility criteria. During that stage all ten tenders submitted were found to be substantially responsive to the requirements of the Tender Document and therefore were subjected to technical examination.

During technical evaluation the tender of M/s TML Agrovat was found to be non responsive for failure to

comply with the Technical Specifications provided for in the Tender Document.

The remaining nine tenders were then checked for correction of arithmetic errors whereby none of them was found to have any errors. The nine tenders were then subjected to price comparison whereby the tender of M/s Tanzania Crop Care Limited was found to be the lowest evaluated while that of the Appellant was found to be the second lowest evaluated.

The tender of M/s Tanzania Crop Care Limited was subjected to Post-qualification analysis whereby it was found to be non responsive for failure to comply with the criterion of two years proven track record of usage of pesticides and acceptance in the cashewnut sector.

Having found the tender of M/s Tanzania Crop Care Limited to be non responsive, the Evaluators proceeded to Post-qualify the tender of the Appellant who was the second lowest evaluated tenderer. During that process, the Appellant's tender was also found to be non responsive for failure to comply with the required

criterion of two years proven track record of usage and acceptance in the cashewnut sector, hence the said tender was also disqualified.

The Evaluators proceeded to Post qualify the tenders of the third and the fourth lowest evaluated tenderers, namely; M/s Bajuta International (Tanzania) Limited and M/s Sharda Worldwide Export Pvt Ltd who were also disqualified for failure to comply with the same criterion pointed out above.

Having disqualified the four tenders above, the Evaluators conducted Post qualification on the tender of the fifth lowest evaluated tenderer namely, M/s Southern Agro Services & Supplies Co. Limited who was found to be substantially responsive and was recommended for award of the tender at a contract sum of Tshs. 2,260,000,000/-.

A joint meeting of Board of Directors of the Respondent and the Cashewnut Board of Tanzania held on 12th December, 2012, disagreed with the recommendations of the Evaluation Committee and directed that the

award be made to M/s Tanzania Crop Care Limited as their price was the lowest of all the tenderers. The Joint Board of Directors observed that, the “criterion of two years proven track record of usage and acceptance in the cashewnut sector” which disqualified most of the tenderers, including the successful tenderer, was misapplied on the ground that all pesticides were experimented for three years by Naliendele Research Institute before they were registered by the Tanzania Pesticides Research Institute (herein after to be referred to as “TPRI”). Thus, all pesticides which have been registered by TPRI do possess the required experience. Therefore, the joint meeting of the Boards of Directors decided to waive the said criterion of two years proven track record of usage and acceptance in the cashewnut sector.

On 14th December, 2012, the Respondent vide a letter referenced CIDTF/TENDER/2012/150 communicated the award of tender to the Successful Tenderer, namely, M/s Tanzania Crop Care Limited.

On 31st January, 2013, the Appellant received an e-mail from the Respondent which informed them of the tender results. The said e-mail contained an attachment of a letter dated 24th January, 2013 referenced CIDTF/TENDER/2013/0030 to the effect that their tender was not successful as they were not among the lowest evaluated tenderers.

Being dissatisfied with the tender results, the Appellant on 5th February, 2013 wrote a letter to the Respondent seeking review of the whole tender process. Before the said letter had been replied to by the Respondent, on 8th February, 2013, the Appellant lodged their Appeal to the Public Procurement Appeal Authority (hereinafter referred to as "the Authority")

On receiving notification of the Appeal, the Respondent raised several points of Preliminary Objection.

As a matter of procedure, the Authority was obliged to resolve the Preliminary Objections raised before addressing the merits of the Appeal.

THE RESPONDENT'S SUBMISSIONS ON THE PRELIMINARY OBJECTIONS

The Respondent's Preliminary Objections were that;

- a) The Notice of Intention to Appeal and the Statement thereof is incompetent and hopelessly filed out of time contrary to Rule 6(1) and 7 of the Public Procurement Appeals Rules GN. 205 of 2005 (hereinafter referred to as "the Appeals Rules");
- b) The Notice of Intention to Appeal is incompetent and materially defective for being signed by a person who was not appointed to sign the Tender Documents as per the Appellant's Power of Attorney and such person is not a legally authorized representative of the tenderer contrary to Rule 6(3) of the Appeals Rules;
- c) The Statement of Appeal is incompetent as it contravenes Rule 6(4) of the Appeals Rules for not being copied to other

tenderers who participated in the same tender;

- d) The Statement of Appeal is incompetent as it contravenes Rule 8(1)(b) of the Appeals Rules for not indicating the relief or remedy sought; and
- e) The Appeal is defective for failure to comply with Sections 79, 80, 81, 82 of the Act, read together with Regulations 109 to 114 of the Public Procurement (Goods, Works, Non-Consultant Services and Disposal of Public Assets by Tender) Government Notice No. 97 of 2005 (hereinafter referred to as "GN. No. 97/2005") and Rule 4 of the Appeals Rules in respect to the procedures of disputes settlement in the tendering process.

During the hearing of this Appeal, the Respondent decided to withdraw their last point of Preliminary Objection.

In expounding on the reason for their first point of Preliminary Objection, the Respondent submitted as follows:

That, the Notice of Intention to Appeal is incompetent for being filed out time contrary to Rule 6(1) of the Appeals Rules which require the Notice of Intention to Appeal to be filed within 7 days from the date of becoming aware of the circumstances giving rise to a dispute. Further to that, the Appellant's Statement of Appeal is incompetent for being filed out of time contrary to Rule 7 of the Appeal Rules which requires a Statement of Appeal to be filed within 14 days of becoming aware of the circumstances giving rise to the Appeal.

The Respondent contended further that, the tender results were communicated to the Appellant on 24th January, 2013 vide an e-mail. Counting from 24th January, 2013, when the letter was sent to the Appellant, the 7 days within which the Appellant was required to file the Notice of Intention to Appeal lapsed on 31st January, 2013. The Appellant's Notice of

Intention to Appeal was filed on 8th February, 2013 that is, 8 days later after the lapse of the 7 days.

The Respondent submitted further that, the Appellant's Statement of Appeal was filed beyond 14 days as they were required to file it by 7th February, 2013. To the contrary the Appellant filed the Statement of Appeal on 8th February, 2013, which is outside the time limit set by the law. In this regard therefore, the Appellant's Appeal was filed out of time and therefore the Authority has no jurisdiction to entertain it.

In relation to the second point of Preliminary Objection, the Respondent submitted that, the Notice of Intention to Appeal which was filed by the Appellant to the Authority contravened Rule 6(3) of the Appeals Rules which requires that a Notice of Intention to Appeal and the Statement of Appeal to be signed by a person who signed the Tender Document or his legally authorized representative. The Appellant's tender was signed by one Patrick F. Kessy while the Notice of Intention to Appeal and the Statement of Appeal thereof, were signed by a different person called Johnson Stanley

without having any legal instrument conferring him with such powers from the person who signed the Tender Document.

The Respondent argued that, the term legally authorized person or representative entails that, there should be an instrument such as a Power of Attorney or a Board Resolution granting such powers to another person. Lack of any of these documents from the Appellant, renders the entire Appeal to be nugatory.

The Respondent contended further that, despite the lack of documents mentioned above, even the status of the purported Company Secretary of the Appellant is not clear, since he has been acting under various titles in the same tender. While in the Statement of Appeal lodged before the Authority the same person appears to be the Company Secretary, in their tender submitted to the Respondent, the same person is referred to as the General Manager and the Secretary was one Geoffrey Mpandikizi. The Respondent wondered as to how many Company Secretaries the Appellant had within a very short period of time.

In substantiating their arguments, the Respondent referred this Authority to its earlier Ruling in Appeal Case No. 91 of 2010 between MADRAS SECURITY PRINTERS AND THE PERMANENT SECRETARY MINISTRY OF HOME AFFAIRS AND THE NATIONAL IDENTIFICATION AUTHORITY.

The Respondent contended further that, there is nothing to be construed as an Appeal fit to be heard by this Authority, since all the documents lodged by the Appellant contravene the required authorization specified under Rule 6(3) of the Appeals Rules.

With regard to the third point of Preliminary Objection, the Respondent submitted that, the Appellant's Statement of Appeal is incompetent because it contravenes Rule 6(4) of the Appeals Rules for failure to produce sufficient copies to be served to the other tenderers who took part in the tender under Appeal.

The Respondent submitted that, in their letter dated 24th January, 2013, they attached a list of other

tenderers who participated in the tender under Appeal, who were not successful and that, the Appellant was duty bound to prepare and serve copies of their Notice of Appeal and the Statement of Appeal thereof to them. To the Respondent's surprise, the Appellant did not adhere to the rule as their Statement of Appeal did not contain sufficient copies to be availed to all the tenderers who took part in the tender under Appeal.

With regard to the fourth point of Preliminary Objection, the Respondent submitted that, the Statement of Appeal does not contain any relief which the Appellant wishes this Authority to grant them. That the law categorically requires that the relief sought had to be specified. Failure by the Appellant to indicate the reliefs sought, pursuant to Rule 8(1) (b) sic entails that, they want nothing to be done by this Authority.

Based on these four points of Preliminary Objections, the Respondent prayed that this Appeal be struck out as it is improperly before this Authority.

THE APPELLANT'S REPLIES ON THE PRELIMINARY OBJECTIONS

The Appellant's replies on the Preliminary Objections may be summarized as follows;

With regard to the first point of the Preliminary Objection, the Appellant submitted that, Rule 6(1) of the Appeals Rules provides for a person dissatisfied with the tender results to file a Notice of Intention to Appeal within seven days. However, to file the Notice of Appeal is not obligatory but optional that's why the law uses the word "may" .

The Appellant submitted further that, whether the Notice was given within 7 days or not in itself cannot render an Appeal defective since it is an optional requirement.

The Appellant argued further that, contrary to Rule 6(1) cited above, Rule 7 of the Appeals Rules provides that an appeal must be filed within 14 days from the

date of becoming aware of the circumstances giving rise to the dispute.

The Appellant submitted that, an e-mail from the Respondent to them, in which a letter dated 24th January, 2013, notifying them about the tender results was attached, was received in their e-mail in box on 31st January, 2013. Furthermore, it is only through the said e-mail that they became aware of the tender results. Thus, counting from 31st January, 2013 the 14 days expired on 14th February, 2013 and the Appeal to this Authority was lodged on 8th February, 2013. That means, the Appeal was lodged within the stipulated time pursuant to Rule 7 of the Appeals Rules. The Appellant contended further that, the word "eight (8) days ago" that appeared in their e-mail does not mean that the e-mail was received 8 days back, that is, 24th January, 2013, as claimed by the Respondent.

With regard to the second point of preliminary objection, that Notice of Intention to Appeal is incompetent and materially defective for being signed by a person who was not appointed to sign the Tender

Documents, the Appellant submitted that Rule 6(3) of the Appeals Rules gives two types of persons who can sign the Notice of Intention to Appeal or the Statement of Appeal thereof. The first person who is authorized to sign the Notice of Appeal and the Statement of Appeal thereof is a person who had signed the Tender Document and the second person is his legally authorized representative.

The Appellant submitted further that, a Company can appoint any person to sign any document if it so wishes. Therefore, a person who signed the Appeal Forms, though not the one who signed the Tender Document, he was dully authorized, taking into account the fact that he is their Company Secretary.

It was further contended that, the requirement of a Board Resolution as argued by the Respondent is no longer a valid requirement under the current Company's law and therefore the Appellant had acted within the ambits of the law.

The Appellant argued further that, the intention of the Act is to avoid this Authority to be bogged down by technicalities and formalities so that those who do not have legal representation and indeed the wider public may also have access to justice.

Lastly the Appellant distinguished the Appeal Case No. 91 of 2010 relied upon by the Respondent as the facts of that Appeal and the issues thereof are different from the Appeal at hand.

The Appellant proceeded to address the third point of Preliminary Objection that, the Statement of Appeal is incompetent for contravening Rule 6(4) of the Appeals Rules for not being copied to other tenderers who participated in the tender under Appeal. They submitted that according to Rule 9 of the Appeals Rules, the duty of serving copies of the Appeal to other tenderers who took part in the tender process is vested upon the Secretary of the Authority and not them. Therefore, the Respondent has misconstrued Rule 6(4).

In respect to the fourth ground of Appeal that, the Statement of Appeal contains no relief sought, the Appellant submitted that, there is no provision in the law which dictates that the relief sought must be specified in PPAA Form No.2.

They submitted further that, they have clearly indicated the reliefs sought in their letter attached to Statement of Appeal.

Finally, the Appellant prayed that, this Authority dismisses all the Preliminary Objections raised and hear the Appeal on merits.

ANALYSIS BY THE AUTHORITY ON THE PRELIMINARY OBJECTIONS.

Having gone through the documents submitted and having heard the oral arguments by parties in relation to the Preliminary Objections, the Authority analysed the four objections raised by framing the following issue; whether the Appeal is properly before it. In

resolving this issue, the Authority deemed it necessary to frame the following sub-issues;

- a. Whether the Appeal was filed out of time.
- b. Whether the Notice of Intention to Appeal filed by the Appellant is incompetent and materially defective for being signed by a person who was not appointed to sign the Tender Documents.
- c. Whether the Statement of Appeal is incompetent for not being copied to other tenderers who participated in the tender under Appeal.
- d. Whether the Statement of Appeal indicated relief or remedy sought.

Having identified sub-issues in relation to the main issue, the Authority proceeded to resolve each of them as hereunder;

a. Whether the Appeal was filed out of time.

In resolving this sub issue, the Authority revisited the above arguments by parties' vis-à-vis the applicable Rules cited to this effect so as to ascertain if the Appeal was filed within time. In the course of so doing, the Authority revisited Rule 6 (1) and Rule 7 of the Appeals Rules which were relied upon by the Respondent in substantiating their argument that the Appellant's Notice of Intention to Appeal and the Statement of Appeal was filed out of time. The said Rules states as follows:

Rule 6(1) "A person who is dissatisfied with the matter or decision giving rise to a complaint or dispute may give notice of intention to appeal within seven days from the date when he became aware of the matter or decision" (emphasis supplied)

Rule 7 "Appeal to the Public Procurement Appeals Authority shall be lodged by

filing a Statement of Appeal within fourteen days from the date when the decision, matter, act, omission giving rise to an appeal was made'' (Emphasis added)

Having reproduced the said Rules and after revisiting submissions by parties on this sub issue, the Authority considered it pertinent first to resolve the controversy as to when the tender results was communicated to unsuccessful tenderers including the Appellant. Subsequently, the Authority will examine a date when the Notice of Appeal and Statement of Appeal were lodged before the Authority.

It is settled law that, communication is complete when it is put in course of transmission to the receiver. The question now is when did the Respondent communicate the tender results to the Appellant. Was it on 24th January, 2013 as contended by the Respondent or 31st January, 2013 as submitted by the Appellant?

In resolving this controversy, during the hearing, the Authority asked the Respondent to submit a printed copy of the e-mail they allegedly sent to the Appellant on 24th January, 2013, so as to ascertain the exact date when the tender results were communicated to the Appellant.

Contrary to what they promised, the Respondent vide their letter referenced CIDTF/LEGAL/2013/0052 dated 12th March, 2013 informed the Authority that, they have failed to trace the said e-mail and therefore they were unable to submit it.

Having received this letter, the Authority is of the settled view that, their failure entails that the date indicated in the Appellant's e-mail, that is, 31st January, 2013, is the date when the Respondent communicated the tender results to them.

Having established that the tender results were communicated to the Appellant on 31st January, 2013 the Authority observed that, counting from that date, the fourteen days stipulated under Rule 7 of the

Appeals Rules lapsed on 14th February, 2013. The Authority reviewed the facts of this Appeal and noted that the Appeal at hand was lodged on 8th February, 2013, that is, before the expiration of the fourteen days.

Furthermore, the Authority noted that the Notice of Intention to Appeal was also filed on 8th February, 2013, that is one day after the expiration of the seven days provided under Rule 6 (1) of the Appeals Rules. In other words, the Notice of Intention to Appeal was not filed within time. However, the Authority observes that, the notification of Appeal is optional as per Rule 6(1) of the Appeal Rules unlike the Statement of Appeal which is mandatory. It is the Authority's view that an optional document and the contents therein should not negate what is otherwise a properly filed Appeal presumably with merits, since the Statement of Appeal alone without any notification is sufficient to support an Appeal as per Rule 7 of the Appeals Rules.

In view of the above, the Authority's conclusion in respect of sub issue one is that, the Appeal at hand was filed within time.

- b. Whether the Notice of Intention to Appeal filed by the Appellant is incompetent and materially defective for being signed by a person who was not appointed to sign the Tender Documents.

In its endeavour to ascertain whether the Notice of Intention to Appeal contravened Rule 6(3) of the Appeals Rules, the Authority, revisited submissions by the parties on this point vis-à-vis the said Rule. To start with the Authority reproduced the said Rule which reads as follows;

"Notice of intention to appeal shall be made in three copies on Form PPAA NO.1 prescribed in the First Schedule to these Rules and shall be signed by the person who signed the tender documents

or his legally authorized representative".
(Emphasis added).

It was not disputed by the parties during their submissions that, the documents lodged by the Appellant were not signed by the person who signed the tender documents. Their main contention in this regard is the manner in which the said authorization had to be made.

While Respondent contended that the authorization was to be made using an instrument, the Appellant argued that, it suffices for a company to assign that task to anyone amongst its officials if they so wish.

Having reviewed these contentions by the parties, the Authority is of the firm view that the words "his legally authorized representative" covers a wide range of authorizations. It may be by word of mouth, through a letter or deed. There is no provision in the Act, Regulations or the Rules which specifically provides for the manner in which the said authorization is to be made. The contention by the Respondent that

authorization has to be made by using an instrument is therefore unacceptable.

The Authority observes that, the authorization referred to in Rule 6(3), is to be made by the person who signed the Tender Document and not the company itself. The word "his" referred to therein, by the said Rule clearly means the said person.

The Authority therefore, rejects the Respondent's contention that a Power of Attorney was to be granted or a board resolution was to be passed to this effect before the Appeal could be filed.

Authority is of the further view that, the Appeal case No.91 of 2010 referred to by the Respondent, states for the need of authorization but does not in any way state the manner in which the authorization is to be made. To the extent that the Respondent relied on the same case to articulate the manner in which the authorization had to be made, the cited case is irrelevant and of no help and does not support his contention canvassed before this Authority.

That said, the Authority's conclusion with regard to this sub issue is that, the Appellant's representative who signed the said Notice of Intention to Appeal and the Statement of Appeal thereof was duly authorized by the Appellant.

- c. Whether the Statement of Appeal is incompetent for not being copied to other tenderers who participated in the tender under Appeal.

In resolving this sub issue, the Authority revisited Rules 6(4) of the Appeals Rules which was relied upon by the Respondent in their submissions. The said rule provides as follows;

"Where more than three persons participated in the procurement or disposal proceedings, copies of the notice of intention to appeal shall be in such number as may be sufficient to distribute to all such persons".

Reading carefully the wording of this Rule, the Authority observed that, the applicability of this Rule is in respect of the Notice of Intention to Appeal and not Statement of Appeal. That means, the Rule cited does not clearly support the Respondent's argument.

It is apparent that, the Respondent in his contention confused the requirement of Rule 6(4) and Rule 9(1) of the Appeal Rules. The cited Rule 6(4) has nothing to do with the Statement of Appeal. It is Rule 9(1) which imposes the duty to distribute multiple copies to other tenderers who participated in the tender process on the Secretary of the Authority. The said Rule 9(1) states as follows;

"On receipt of the appeal, the Secretary shall endorse the date and send a copy to the respondent and all other parties who participated in the procurement or disposal proceedings" (emphasis added)

Therefore, the Authority's conclusion in this sub issue is that, the Appellant did not contravene the law for

failing to copy the Statement of Appeal to other tenderers who participated in the tender under Appeal.

d. Whether the Statement of Appeal indicated any relief or remedy sought.

In determining this sub-issue, the Authority took cognizance of the parties arguments, the documents submitted vis-a- vis the applicable Rule.

To start with, the Authority revisited the Appellant's Statement of Appeal lodged in order to ascertain whether it contained any reliefs.

Having reviewed the said Statement of Appeal, the Authority observed that, the Appellant had indicated their reliefs which they wish this Authority to grant in their letter attached to the Statement of Appeal. Firstly, they requested the Authority to review the entire tender process in respect of Lot No. 4 and secondly to award them the contract as winners of the said Lot.

Having observed that, the Authority considered the contention by the Respondent that the said reliefs were not in the prescribed PPAA's Forms and they should not be considered as they are not part of this Appeal.

In resolving the contentious arguments by parties', the Authority revisited Rule 8(1)(c) relied upon by the Respondent. The said Rule reads as follows;

- 8(1) "Appeal shall be filed on Form PPAA No. 2 specified in the First Schedule to these Rules, and shall contain the following:
- (a).....
 - (b)....
 - (c) reliefs or remedy being sought.

The Authority revisited the PPAA Form No. 2 and observed that in its item number 2 titled (STATEMENT OF FACTS SUPPORTING THE APPEAL), it allows an attachment of additional pages if the space provided for in the Form is not adequate.

It is the Authority's considered view that, there is no restriction imposed by the law for any appellant on the manner in which he is to indicate the remedies sought before the Authority since the Form itself allows for attachment of additional page(s) but does not specify the form in which the additional pages must be. This means that, the additional pages can be in any reasonable format including a letter.

That said, the Authority's conclusion on the fourth sub issue is that, the Appellant's Appeal contained the relief sought.

In view of the above analysis of all four sub issues, the Authority conclusion in respect to the main issue is that, the Appeal is properly before it since the Appellant had adhered to the procedures prescribed under the law.

Having rejected the four points of Preliminary Objection raised, the Authority proceeded to determine the Appeal on merits.

SUBMISSIONS BY THE APPELLANT ON THE MERITS OF THE APPEAL

The Appellant's arguments as deduced from documents availed to this Authority, as well as oral submissions and responses to questions raised by the Members of the Authority during the hearing, may be summarized as follows;

That, they were among the tenderers who participated in the tender under Appeal.

That, the award has been made to a tenderer who had failed to comply with the mandatory criteria provided in the Tender Document.

That, Item 11 (c) of the Bid Data Sheet (hereinafter referred to as "BDS") requires a tenderer to have at least two years proven track record of usage and acceptance of pesticides in the cashewnut sector together with adequate proven after sales technical assistance. To the contrary the award has been made

to M/s Tanzania Crop Care Limited who did not meet these requirements.

That, the Successful Tenderer, namely, M/s Tanzania Crop Care Limited was registered on 22nd June, 2011; hence, by the time the bids for the tender under Appeal were submitted they did not have the two years proven track record of usage as required in the Tender Document.

That, the Respondent's act of awarding the tender to the tenderer who did not possess such a mandatory requirement had contravened Section 20 of the Public Procurement Act, Cap 410 of 2004 (hereinafter referred to as "the Act") which requires an award to be made to a tenderer who had complied with the requirements of the Tender Document.

That, the Respondent's act of awarding a tender to the tenderer who did not have at least two years proven track record of usage as required by the Tender Document had also contravened Section 58 of the Act which requires procuring entities to achieve the highest

standards of equity by taking into account equality of opportunity to all tenderers, fairness and the need to obtain value for money.

That, the Appellant had been unfairly disqualified from the tender process since they had complied with all the specifications provided in the Tender Document

That, they had the two years proven track record of usage and supply of cashewnut pesticides and blowers at the time the bids were submitted as they were registered to supply Triadimenol 250 EC on 26th January, 2010.

That, the Appellant's two years proven track record of usage can also be substantiated by the Respondent themselves since they had supplied the same pesticides to Cashewnut Board of Tanzania in two contracts that were executed in two consecutive years that is 2010 and 2011.

That, the product intended to be supplied by the Appellant is amongst the specialized products in the

Cashewnut industry while that of M/s Tanzania Crop Care Limited is not.

That, the Respondent's letter of 24th January, 2013 which notified the Appellant the tender results indicates that the price was the only factor that was considered during the evaluation process while the Tender Document provided for various criteria that were to be considered during evaluation process. Thus, the Respondent's act of considering the price to be the only criterion of award has contravened their own Tender Document.

That, it was wrong to award the tender to the lowest evaluated tenderer since price was not the only criteria.

That, the Respondent's act of awarding the tender to a tenderer who failed to comply with the requirements of the Tender Document raised a lot of doubts and the Appellant suspects that the same might have been influenced by corrupt practices.

That, the Respondent's purported modification of the criterion to show at least two years proven track record of usage of pesticides in Cashewnut sector ought to have been done in accordance with Clause 9 of the ITB which requires the said changes to be done through circulation of an Addendum to all tenderers. The Respondent's act of amending the said criterion through the joint Board of Directors had contravened their own Tender Document.

That, in any procurement the Government has to get value for money and the illegality should not be entertained on the reasons that the Government will suffer loss since nothing is more expensive than justice. Further to that, if the misconduct would be condoned the tenderers' rights would be jeopardized.

Finally, the Appellant prayed for the following orders;

- a) the award made to the Successful Tenderer be nullified,
- b) the tender process be started afresh

c) costs to follow the event

REPLIES BY THE RESPONDENT ON THE MERITS OF THE APPEAL

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

That, the Respondent is a Trust Fund governed by the Board of Trustees who have the final say on all the transactions which have to be carried out for the benefit of the stakeholders.

That, the Appellants' tender was fairly disqualified as they failed to comply with the two years experience criterion.

That, the Appellant's claims that the tender has been awarded to a tenderer who did not have two years proven track record of usage of pesticides in Cashewnut sector is unfounded and does not have any legal justification as there were no specific documents

attached to the Statement of Appeal to prove the said claim.

That, it is not true that the Successful Tenderer had quoted to supply different pesticides, rather they had quoted for the same products but using the trade names.

That, the Appellant had misconceived the ITB and totally failed to understand it as the criterion of experience was not the only requirement for winning the tender. In the evaluation process, the Respondent was guided by other evaluation criteria as provided for in the Tender Document.

That, the Appellant had misconstrued the letter of 24th January, 2013 which notified them of the tender results as price was not the only criterion that was considered during evaluation as claimed by them. The other criteria as provided in the Tender Document were also considered.

That, the Appellant had failed to comply with the requirement to show at least two years proven track record of usage of pesticides in Cashewnut sector as his tender indicated that they had only one year experience. Further to that, the Appellant had not submitted any evidence regarding goods off shelf stock or commitment of credit to supply from the manufacturer of cashewnuts pesticides. Therefore, they did not qualify for the award of tender on the basis of technical evaluation.

That, the Appellant had failed to submit any proof of the alleged misconduct or element of corruption as claimed in the Appellant's letter dated 8th February, 2013 to this Authority.

That, during this tender process the Respondent had adhered to all tender procedures as provided in the Act and disqualification of the Appellant has merit.

That, the members of the joint Board of Directors at their meeting held on 12th December, 2012 waived the criterion of "to show at least two years proven track

record of usage and acceptance of pesticides in Cashewnut sector” after they were satisfied that the said criterion was not essential since all the pesticides had been tested for three years in various farms before the Certificates of registration to them were issued by TPRI.

That, the Appellant had not disclosed any loss or injury suffered or that may be suffered as a result of the alleged misconduct as per Section 79(1) of the Act and Regulation 109 GN.No.97/2005. The said provisions require the complaint to be actionable.

That, the Respondent disputes the said Appeal as filed by the Appellant as it intends to unreasonably frustrate the awarded tender and the signed contracts which at the end of the day will cause gross loss to the poor cashew nuts farmers in the country who are the beneficiaries of the inputs to be supplied through the awarded contracts by the successful tenderers.

That, the awarded contract has already been executed by 80% and part of the payment has already been effected.

Finally, the Respondent prayed for dismissal of the Appeal in its entirety and that they be awarded costs.

THE AUTHORITY'S ANALYSIS ON THE MERITS OF THE APPEAL

Having gone through the documents and having heard the oral arguments from parties, the Authority is of the view that the Appeal is centered on the following issues:

- Whether the Appellant was unfairly disqualified
- whether the award of the tender to M/s Tanzania Crop Care Limited was proper at law;
- To what reliefs, if any, are the parties entitled to.

Having identified the issues in dispute, the Authority proceeded to resolve them as follows:

1.0 Whether the Appellant was unfairly disqualified

In resolving this issue the Authority deems it proper to revisit parties' main contentions in this Appeal. To start with, the Authority considered the Appellant's main contentions that, they have been unfairly disqualified from the tender process while they had complied with all the requirements of the Tender Document and that the award had been made to a tenderer who did not possess the required experience. In reply thereof, the Respondent submitted that the Appellant was disqualified for failure to show at least two years proven track record of usage of pesticides in Cashewnut sector as required in the Tender Document. The Respondent contended further that, the award has been made to M/s Tanzania Crop Care Limited after it was established that they had complied with all the criteria as provided in the Tender Document.

In order to substantiate the validity of the arguments' by parties on this particular issue, the Authority deems it necessary to review the Evaluation Report vis-à-vis the Tender Document and the applicable law so as to ascertain if the disqualification of the Appellant was justifiable.

In the course of so doing, the Authority noted that, the evaluation of tenders was carried out in three stages as provided under Clauses 28 to 35 of the ITB.

In reviewing each stage of evaluation, the Authority noted that, after completion of the preliminary, technical and detailed evaluations, the tender submitted by M/s Tanzania Crop Care Limited was found to have complied with all the criteria provided in the Tender Document. They also had the lowest price amongst all the tenderers. Thus, they were subjected to Post Qualification. During the Post-qualification stage the tender of M/s Tanzania Crop Care Limited was disqualified for failure to comply with the criterion to show two years proven track record of usage of

pesticides in Cashewnut sector as provided in the Tender Document.

The Authority noted further that, the evaluators having disqualified M/s Tanzania Crop Care Limited opted to conduct Post-qualification to the tender of the Appellant as it was the second lowest evaluated tender. In that post qualification process the Appellant's tender was disqualified due to the following reasons;

- failure to show two years proven track record of usage of pesticides in Cashewnut sector; and
- no evidence of goods off shelf stock was submitted.

Furthermore, the Authority noted that the Post-qualification was carried out to the third and the fourth lowest evaluated tenderers whereby they were equally disqualified for failure to comply with the same criterion as pointed out above and the award was recommended to the fifth lowest evaluated tenderer namely, M/s Southern Agro Services & Supplies Co.

Limited who was found to have complied with all the criteria.

Having noted that the tenders of the Appellant and that of M/s Tanzania Crop Care Limited, the successful tenderer were amongst the disqualified tenders for failure to show two years proven track record of usage of pesticides in Cashewnut sector and having observed that the Appellant disputes the said disqualification, the Authority deems it proper to revisit Clause 11(c) of the BDS so as to verify what was the required experience. The said Clause 11 (c) provides as follows;

11.(c) "The bidders shall furnish documentary evidence to demonstrate that it meets the following experience requirements:

- Must submit sample of the Cashew nut Pesticides and Catalogue of Blowers to be supplied.
- The Bidder or his authorized local agent shall have at least 2 years of experience in the supply of Cashew nut Pesticides and Blowers together

with adequate and proven after sales technical assistance for the use of Cashew nut Pesticides and Blowers.

- Pesticides to be supplied shall have at least 2 years proven track record of usage and acceptance in the Cashew nut Sector
- All Pesticides should be newly manufactured and must have at least two (2) years of remaining shelf-life.”
(Emphasis added)

The above quoted provision indicates clearly that the tenderers were required to submit evidence which proved their two years proven track record of usage and acceptance of the pesticides in Cashewnut sector.

In order to ascertain if the disqualification of the Appellant on the basis of the said criterion was proper or not, the Authority revisited the tender submitted by the Appellant and noted that they had shown their experience in the table contained under Qualification Information Form. In the said table, under column

three titled "types of works performed and year of completion" the Appellant had indicated to have supplied Jute Bags for the Year 2011/2012. No other types of work were stated to have been performed in the years 2009, 2010 and 2011 though the said years were listed in the said column. For purposes of clarity the Authority reproduces the said table as hereunder:

Services performed as a prime supplier on the provision of similar nature or volume over the last three years. Also list of work underway or committed including expected completion date"

Project name and Country	Name of procuring Entity and contact person	Types of work performed and year of completion	Value of Contract
2011/12 Farming season(Tanzania)	TANECU – Tender Board	Supply of Jute Bags 2011/12	2,400,000,000/-
Bodi ya Korosho	Bodi ya Korosho- Mr. Mhagama	2010/11	1,000,000,000/
Bodi ya Pamba- sale of Pesticides	Bodi ya Pamba	2009/11	300,000,000/-

Kings Medics	Kings Medics	2010/11	700,000,000/-
Rafiki Kilimo – Moshi, Tanzania	Rafiki Kilimo	2009/11	400,000,000/-
Kalinga – Mbeya Tanzania	Kalinga	2009/11	350,000,000/-

From the above table the Authority observes that, the Appellant's two years proven track record of usage of the pesticides and acceptance in Cashewnut sector was not clearly shown as types of works performed were not specified as required by the Tender Document. During the hearing the Members of the Authority showed the said table to the Appellant and they conceded that it was ambiguous as it did not show their two years proven track record of usage. However, the Appellant insisted that they had the two years proven track record of usage since they were registered in January, 2010 and they had executed two different contracts with the Cashewnut Board of Tanzania in the years 2010 and 2011.

In verifying the experience claimed by the Appellant the Authority revisited further the tender submitted by them and observed that, it is true that they were

registered in January 2010, but there were no copies of contracts which were attached in their tender to prove their two years proven track record of usage and acceptance of the said pesticides in the cashewnut sector. The said copies of the contracts were submitted to this Authority in course of hearing this Appeal. Therefore, the Authority is of the view that, the registration Certificate per se was not sufficient evidence to establish their experience.

Based on the above fact, the Authority finds the Respondent's act of disqualifying the Appellant for failure to show two years proven track record of usage and acceptance of the pesticides in the cashewnut sector to be proper as the said record was not shown.

Furthermore, the Authority revisited the tender submitted by M/s Tanzania Crop Care Limited and observed that their Certificate of Registration for the supply of Triadimenol was issued on 22nd June 2011. Hence, at the time bids were being submitted they did not have the two years proven track record of usage and acceptance of the said pesticide. In addition, the

Authority noted that, in the Qualification Information Form M/s Tanzania Crop Care Limited had indicated to have performed the contract of offering technical assistance to procuring entities including agronomy advice on the usage of pesticides. The Authority finds such type of contracts to be not of a similar nature to the tender under Appeal as they were required to show two years proven track record of usage and acceptance of the said pesticide in the cashewnut sector.

Based on the above facts the Authority is of the view that, equally M/s Tanzania Crop Care Limited did not have the two years proven track record of usage and acceptance in the cashewnut sector as required by the Tender Document, hence, it was proper for Evaluators to disqualify them at the Post-Qualification stage.

Having observed that both the Appellant and M/s Tanzania Crop Care Limited were fairly disqualified at the Post-qualification stage for failure to meet the required experience, the Authority proceeded to consider the Appellant's argument that, the

Respondent had erred in law for awarding the tender to a tenderer who did not have the required proven track record of usage of the pesticides. In ascertaining the validity of the Appellant's argument the Authority examined the documents submitted and the oral submissions by parties in order to substantiate why the award of Lot No. 4 was made to M/s Tanzania Crop Care Limited while they were already disqualified.

In the course of reviewing the documents submitted the Authority noted that, after completion of the evaluation process the Report was submitted to the Tender Board with recommendation that the award be made to M/s Southern Agro Services & Supplies Co. Limited. The Tender Board at its meeting allegedly held on 9th December, 2012, approved the recommendations of the Evaluation Committee.

The Authority noted further that, the recommendations of the Evaluation Committee and the decisions of the Tender Board were then submitted to the Joint Meeting of the Board of Directors held on 12th December, 2012. In that meeting, the Joint Board of Directors waived

the criterion of two years proven track record of usage and acceptance in the cashewnut sector as stipulated under Clause 11.1 (c) of the BDS to all tenderers.

The reason for this waiver was that, pesticides were already tested in various farms for three years before they were registered by TPRI. Hence, there was no need for suppliers to prove their experience as Certificate of Registration from TPRI proves that the Pesticides have been tested and accepted for use. Thus, the Joint Board of Directors directed that, the award of Lot No. 4 be made to M/s Tanzania Crop Care Limited as they were the lowest evaluated tenderer amongst all since the recommended tenderer, M/s Southern Agro Services & Supplies Co. Limited had quoted a higher price. It was noted further that, having received that decision, the Respondent implemented it by signing the contract with M/s Tanzania Crop Care Limited on 3rd January, 2013.

Having noted that the Joint Board of Directors had approved the award of the tender under Appeal instead

of Respondent's Tender Board, the Authority wondered as to where the Joint Board of Directors got the powers of awarding tenders.

The Authority finds the Respondent's act of submitting the Evaluation Report and decision made by their Tender Board to the Joint Board of Directors meeting for final approval to be contrary to the requirements of the law. This is because, under the prevailing Act the powers to approve award of tenders are vested in the respective Tender Boards. Thus, the Respondent ought to have acted on the approval made by their own Tender Board on 9th December, 2012, to award the tender under Appeal.

That said, the Authority finds the Respondent's award process to have been marred by a number of irregularities as pointed out hereunder;

- a) The Joint Board of Directors is not a recognized entity under the Act and its Regulation, hence, its act of approving the award of tender to M/s Tanzania Crop Care

Limited has contravened Section 31(b) of the Act which provides clearly that the powers to approve award of tenders are solely vested in the Tender Boards. The said Section provides as follows;

“Notwithstanding any other enactment, no public body shall;-

b) award any contract unless such an award has been approved by the appropriate tender board” (Emphasis added)

- b) The act of the Joint Board of Directors of waiving the criterion to show two years proven track record of usage and acceptance in the cashewnut sector to all tenderers has contravened Section 30 of the Act which vests the powers of preparing, amending, waiving or varying the criteria in the Tender Document to the Tender Boards.

c) The act of waiving the criterion to show two years proven track record of usage and acceptance in the cashewnut sector done by the Joint Board of Directors had contravened Regulation 90 (16) of GN No.97/2005 which prohibits the act of making non responsive bids to be responsive. The said Regulations states as follows;

“If a tender is not responsive to the Tender Document, it shall be rejected by the procuring entity and may not subsequently be made responsive by corrections or withdrawal of the deviation of reservation”. (Emphasis supplied)

The Joint Board of Directors’ act of waiving the criterion to show two years proven track record of usage and acceptance of the pesticides in the cashewnut sector had made the tender of M/s Tanzania Crop Care Limited to be responsive while it was already found to be non-responsive.

From the above pointed anomalies, the Authority is of the settled view that;

- i) that, the award of tender to M/s Tanzania Crop Care Limited was improperly made since their tender was rightly disqualified for failure to show two years proven track record of usage and acceptance of the pesticide in the cashewnut sector.
- ii) that, the Joint Board of Directors had usurped powers of the Tender Board in the disputed tender process. In other words, the Joint Board of Directors had acted ultra vires.

Apart from the above shortfalls in the award process, the Authority noted further that, the Respondent's Accounting Officer and chairperson of the Tender Board is one and the same person.

From the above findings the Authority is of the firm view that, the Respondent's act in this tender process had contravened Section 38 of the Act which provides as follows;

“Subject to the provisions of this Act, the Accounting Officer or the Chief Executive, the Tender Board, the Procurement Management Unit, the User Department and the Evaluation Committee shall act independently in relation to their respective functions and powers”.
(Emphasis added)

From the above findings the Authority is of the settled view that, despite the anomalies noted in the disputed tender process, the Appellant's tender had been fairly disqualified.

Accordingly, the Authority's conclusion on the first issue is that the Appellant was fairly disqualified in this tender process.

2.0 whether the award of the tender to M/s Tanzania Crop Care Limited was proper at law;

In resolving this issue the Authority relied on its findings in issue number one that, the award of tender to M/s Tanzania Crop Care Limited was not proper in the eyes of the law due to the following reasons;

- i) Their tender was non responsive as it was established by the evaluators that they failed to show two years proven track record of usage and acceptance of the pesticides in the cashewnut sector.
- ii) The award was made by an entity that has no powers to do so under the Act.

Accordingly, the Authority's conclusion in relation to the second issue is that the award made to the M/s Tanzania Crop Care Limited was not proper at law.

3.0 To what reliefs, if any, are the parties entitled to.

Having resolved the contentious issues in dispute, the Authority revisited the prayers by parties and resolved them as hereunder:

(a) Prayers by the Appellant

The Appellant requested the Authority to annul the award made to M/s Tanzania Crop Care Limited and order the Respondent to re-start the tender process afresh in observance of the law with respect to Lot No.4.

In determining this prayer, the Authority took cognizance of its findings in issue one that the Appellant was fairly disqualified and considered the Respondent's submission that the awarded contract has been executed by 80% and that part of the payment had already been made to the Successful Tenderer. Furthermore, the season to use the said pesticides is just around the corner, that is April, 2013. Hence, if the order of re-tendering is to be issued the

same would cause incredible economic loss to a large group of innocent peasants who depend on the pesticides for caring their Cashewnut trees. It is also conceivable that considering the stage of execution of the contract and the money paid so far, an order as prayed by the Appellant would be unimplementable. The Authority therefore, deems it wise to reject the prayer by the Appellant in the public interest despite being established that the award of tender to the Successful tenderer was not properly made.

(b) Prayers by the Respondent:

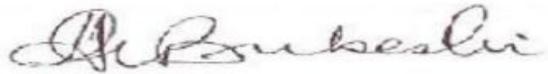
With regard to the Respondent prayer that the Appeal be dismissed in its entirety the Authority rejects this prayer as the Appeal partly has merits.

On the basis of the aforesaid findings, the Authority partly upholds the Appeal and orders;

- Each party to bear their own costs

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

Decision delivered in the presence of the Appellant and the Respondent this 15th March, 2013.



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JUDGE (rtd) A. G. BUBESHI
CHAIRPERSON

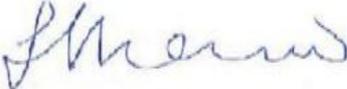
MEMBERS:

1. MR.H.S MADOFFE



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2. ENG.F.TMARMO



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