

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY**

AT DAR ES SALAAM

APPEAL CASE NO. 33 OF 2013-14

BETWEEN

**M/S SAFRAN MORPHO
LIMITED.....APPELLANT**

AND

**NATIONAL ELECTORAL
COMMISSION.....RESPONDENT**

RULING

CORAM

- | | |
|--------------------------------------|-----------------|
| 1. Hon. Augusta G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Ms. Esther J. Manyesha | -Member |
| 3. Eng. Francis T. Marmo | -Member |
| 4. Mr. Haruni S. Madoffe | -Member |
| 5. Mr. Ole-Mbille Kissioki | - Ag. Secretary |

SECRETARIAT

1. Ms. Violet S. Limilabo - Legal Officer
2. Mr. Hamisi O. Tika -Legal Officer

FOR THE APPELLANT.

1. Mr. Abdon Rwegasira -Advocate, Law Care Chambers.
2. Mr. Sebastian Eid -Vice President, Sales.
3. Mr. Florent Canetti -Deputy Chief Executive Officer
4. Mr. Athumani R. Mtele -Clerk, Law Care Chambers.

FOR THE RESPONDENT

1. Mr. Julius B. Malaba -Chief Executive Officer.
2. Dr. Sisti Cariah -Deputy Secretary and Head of IT
3. Mr. Gregory Kaijage -Director of Procurement and Logistics
4. Ms. Venosa A. Mkwizu -Director of Legal Services
5. Mr. Gabriel P. Malata -Principal State Attorney, Attorney General's Chambers.
6. Mr. Sylvester Mwakitalu -State Attorney, Attorney General's Chambers.
7. Ms. Mwanaisha A. Mkumbwa - State Attorney, Attorney General's Chambers.

FOR THE OBSERVER (LithoTech Exports)

1. Mr. Oostewald Immink -Division Managing Director,
2. Mr. Lyle Laxton -Production Manager
3. Mr. Kevin Foulces -Manager
4. Mr. Joseph Nuwamanya -Advocate, Mawalla
Advocates

This Ruling was scheduled for delivery today 5th May, 2014 and we proceed to deliver it.

The appeal at hand was lodged by **M/s MORPHO LIMITED** (hereinafter referred to as "**the Appellant**") against **THE NATIONAL ELECTORAL COMMISSION** commonly known by its acronym (**NEC**) (hereinafter referred to as "**the Respondent**").

The said Appeal is in respect of the re-tendered Tender **No.IE/018/2012-13/HQ/G/19** for **Supply of Biometric Voters Registration Kits** (hereinafter referred to as "**the tender**").

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

The Respondent floated a tender back on 6th February 2013, whereby six tenderers participated in the tender process and the Joint venture of M/s SCI Tanzania/ INVU IT SOLUTIONS, JAZZ MATRIX CORPORATION won the said tender.

Being dissatisfied by the award of the tender made by the Respondent to the Joint Venture, M/s Morpho Limited as well as M/s Iris appealed to the Authority.

After the hearing of the said Appeal, on 29th November, 2013, the Authority delivered its decision by upholding it and ordered

the Respondent amongst other things to re-tender in compliance with the law.

This Appeal emanates from the re-tendering order made by the Authority.

That, being faced with time constraints and the urgent need of updating the Permanent National Voters' Register, the Respondent opted for Emergency Single Source Procurement Method.

That, before they engaged in the above procurement method, the Respondent vide a letter referenced IE/018/2012-13/HQ/G/19/22 dated 16th January, 2014 invited all the six tenderers who had participated in the earlier tender to come and demonstrate the functional operation of their kits in order to identify a capable tenderer to be invited under the Single Source method they had intended to use.

That, the Appellant and other three tenderers responded to request and made their presentations as requested.

That, on 5th February, 2014, the Respondent, vide a letter referenced IE/018/2012-13/HQ/G/19/44 informed the Appellant and the other participating firms the outcome of their demonstration in which the Appellant was ranked the fourth.

That, the above notification aggrieved the Appellant and on 24th February, 2014, vide a letter referenced LCC/MORPHO/GEN/1/2014 requested the Respondent to avail them the reasons for their presentation to be ranked the fourth. The Appellant further requested the Respondent to respond as to whether they followed the law prior to opting for a method they had chosen. They also wanted to know whether there was any material circumstances for the Respondent to opt for emergency procurement. The Respondent vide a letter referenced IE/018/2012-13/HQ/G/19/58 dated 5th March, 2014 responded to the Appellant's letter that the fact that they had been ordered by the Authority to re-start the tender process afresh in observance of the law, did not necessarily mean that, they were to use the same method of procurement.

That, the Appellant vide a letter referenced LCC/MORPHO/GEN/2/2014 dated 3rd March, 2014, wrote to the Public Procurement Regulatory Authority (hereinafter referred to as "**the PPRA**") requesting for their immediate intervention by ordering the Respondent to comply with the law and the decision by the Authority.

That, on 12th March, 2014, PPRA vide a letter referenced PPRA/IE/018/"A"/93 informed the Appellant amongst other

things that, they were no longer involved in determination of complaints. Further that, according to the official information they had from the Respondent, the award of the tender had already been communicated to the successful tenderer hence, the Accounting Officer also could no longer entertain the complaint. Therefore, if the Appellant had any complaint relating to the new procurement process on single source as stated by the Respondent they should lodge their complaint to the Authority.

On 24th March, 2014, the Appellant lodged their Appeal to this Authority.

That, while the Appellant was fighting for redress of various matters of concern to them, on 5th February, 2014, the Respondent had already invited M/s LithoTech Exports to submit their tenders for the tender under Appeal.

According to the documents availed to the Authority, the said tender was conducted through the Emergency Procurement Procedure under Single Source Procurement Method specified in the Public Procurement (Goods, Works, Non Consultant Services and Disposal of Public Assets by Tender, Government Notice 446 of 2013 (hereinafter referred to as **GN.NO.446 of 2013**).

The deadline set for the submission of the tender was 12th February, 2014.

That immediately after the deadline, the tender was opened in the presence of the tenderer and the Respondent's representatives and the read out price for the tender was USD. 117,184,507.05.

The tender was then subjected to three stages of evaluation namely; preliminary, technical compliance and price evaluation.

At the preliminary examination, the Evaluation Committee assessed tenderer's responsiveness to the Tender Document whereby they found them to be substantially responsive to the Tender Document and was therefore subjected to technical evaluation.

During Technical evaluation, the Evaluation Committee checked for compliance of the tenderer's technical specifications and experience. In doing so, the Evaluation Committee found the tenderer to be substantially responsive to the Tender Document and therefore subjected them to price evaluation.

At the price evaluation stage, the Evaluation Committee checked for arithmetic errors in the tender and found it to be error free.

The Evaluation Committee therefore, recommended the award of the tender to M/s LithoTech Exports Limited at a contract price of USD. 117,184,507.05.

The Tender Board at its meeting held on 15th February, 2014, approved the award of the tender as recommended by the Evaluation Committee.

SUBMISSIONS BY THE APPELLANT.

According to the documents submitted to the Authority, the Appellant's arguments may be summarized as follows;

That, the Respondent misdirected themselves in law by inviting the Appellant and other tenderers to demonstrate the performance of their kits at unreasonably short notice which also did not state the qualification criteria.

That, the Respondent erred in law and in fact by ranking them the fourth and the last without justification to support such ranking.

That, the Respondent failed to give them the reasons and justification when such information was requested.

That, the Respondent misdirected themselves in law and in fact by conferring upon themselves the right and freedom of choice of procurement method in the circumstances of the matter.

That, the Respondent misdirected themselves in law and in fact by opting for Emergency Procurement through a Single Source knowing that there existed no material conditions to justify such a method and without respecting the proper procedures.

That, the Respondent erred in law and in fact by ranking M/s LithoTech Exports the first and award them a tender while knowing that the said tenderer did not have good record of the required performance in the Biometric Voters' Registration Kit's Industry.

The Appellant therefore prayed for the following orders:

- i. Annulment of the award of tender through a single source procurement method;
- ii. Re-tendering under International Competitive Tendering in a fair and transparent manner;
- iii. Payment of compensation for reasonable costs incurred by the Appellant in this Appeal;
- iv. Any other relief(s) the Authority may deem just to grant.

REPLIES BY THE RESPONDENT

On receiving notification of the Appeal by the Appellant, the Respondent raised three Preliminary Objections to wit;

- 1. The Appeal is hopelessly time barred.**
- 2. That, the Appellant has no *locus standi* to prefer an appeal against the Respondent**
- 3. That, the subject matter under Appeal, that is, selection of the Procurement Method cannot be reviewed under Section 95 (2) (a) of the Public Procurement Act, No.7 of 2011.**

In view of the objections raised and as a matter of procedure, the Authority is obliged first to resolve the Preliminary Objections before addressing the merits of the Appeal.

RESPONDENT'S SUBMISSIONS

In expounding their preliminary Objections, the Respondent submitted as follows;

- 1. The Appeal is hopelessly time barred.**

That, the Appellant was challenging the decision of the Respondent dated 5th February, 2014, which informed them that their presentation had been ranked the fourth.

That, the Appellant lodged their Appeal to this Authority on 24th March, 2014.

That, counting from 5th February, 2014, when the Respondent informed the Appellant that their presentation had been ranked the fourth to the date when they lodged their Appeal, almost thirty days had lapsed.

That, according to Section 97(1) and (2) of the Act, the Appellant ought to have lodged their Appeal to the Authority within fourteen days from the date of the decision of the Accounting Officer. To the contrary, the Appellant did not adhere to the law. Rather, they lodged their Appeal thirty days from the date of Accounting Officer's decision. This entails that, the Appeal had been lodged out of time and the Appellant slept on their rights.

That, since the Public Procurement Act does not provide for the remedy of an Appeal filed out of time, then, Sections 3(1) and 46 of the Law of Limitation Act, Cap 89 (R.E 2002) which is the general law should be applied as the basis for dismissing this Appeal.

2. That, the Appellant has no *locus standi* to prefer an appeal against the Respondent

That, the Respondent opted for an Emergency Procurement Method under the Single Source Procurement pursuant to Section 65 of the Act.

That, since the Respondent opted for Single Source Procurement Method, it was only one tenderer namely M/s LithoTech who was invited by the Respondent to purchase the Tender Document.

That, due to the above fact, the Respondent did not advertise this tender according to the other methods of procurement embodied in the Act.

That, by using the Single Source Procurement method, the Appellant was not a party to the tender process since they were not invited to tender.

That, since they were not invited to tender, the Appellant lacks *locus standi* to lodge this Appeal before the Authority.

That, the Appellant would have been considered a tenderer, if at all, the Respondent had invited them to tender.

3. That, the subject matter under Appeal, that is, selection of Procurement Method cannot be reviewed under Section 95 (2) (a) of the Public Procurement Act, No.7 of 2011.

That, the Respondent had opted for a Single Source Procurement Method due to the prevailing circumstances of the matter in dispute and the time constraints they are facing.

That, the Appellant is challenging, amongst others, choice of the procurement method used, which is prohibited under Section 95(2) (a) of the Act.

That, since the law under the above cited provision uses the word **shall** (mandatory), the Appellant was bound to follow the law and not challenge the choice of Procurement Method the Respondent had used.

Based on the above points of law, the Respondent prayed for the dismissal of the Appeal with costs.

REPLIES BY THE APPELLANT

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

With regard to the Respondent's first Preliminary Objection, the Appellant submitted that, the Respondent's submissions are intending to mislead the Authority since the letter dated 5th

February, 2014 cited by them did not trigger this Appeal. Rather, the Appeal emanated from their letter dated 15th February, 2014.

That, since the Respondent vide a letter dated 5th February, 2014 informed the Appellant that the presentation they had made was not part of the procurement process, they were waiting for the award of the tender to be made before they could lodge their Appeal to this Authority.

That, their Appeal is not against the decision of the Accounting Officer, rather the circumstances giving rise to their Appeal, which were known to them through a letter from PPRA dated 3rd March, 2014 which was received by them on 13th March, 2014.

That, PPRA's letter notified them that, apart from PPRA being ousted from hearing appeals, they had information that the tender they were disputing had already been awarded and that the Accounting Officer can no longer entertain it. Therefore, the fourteen days provided under the law ought to have been counted from that date, that is 13th March, 2014 and that fourteen days lapsed on 27th March, 2014.

Further that, Section 97(3) of the Act allows a tenderer to Appeal to the Authority upon becoming aware of the circumstances giving rise to a complaint. So the Appellant could

not have appealed to the Authority prior to knowing the circumstances.

Despite PPRA's letter mentioned above, other circumstances which gave them the right to Appeal to the Authority emanated from the Respondent's letter dated 5th March, 2014 which was received by them on 12th March, 2014. In the said letter the Respondent informed them that they had discretion in the choice of a procurement method and that they were justified in the choice of the Procurement Method they had opted for.

That, the Respondent misled the Appellant that the presentation they had made was not part of the procurement process while knowing that their statement was not correct.

With regard to the second Preliminary Objection, the Appellant referred this Authority to the High Court of Tanzania's decision in the case of **Lujuna Shubi Balonzi, Senior versus Registered Trustees of Chama Cha Mapinduzi** at page 208 in which the Court held, amongst others that, *locus standi* is governed by the common law and that in order to maintain proceedings successfully, a plaintiff or an applicant must show not only that the court has power to determine the issue but also that he is entitled to bring the matter before the court.

That, by virtue of the above holding by the court, the Appellant has *locus standi* which entitle them to lodge their Appeal to the Authority.

That, the Appellant together with other previous tenderers were invited to demonstrate the functioning of their kits. According to the invitation letter dated 16th January, 2014, the Respondent referred to them as "tenderers".

That, the history of this tender indicates that, the Appellant was a tenderer in the previous tender No.IE/018/2012-2013/HQ/G/19 floated back in 2013 and which tender was nullified by the Authority on 29th November, 2013. However, the tender now awarded has the same number as the one floated in 2013.

That, had the Respondent intended this tender to be different they would have given it a different tender number and the Appellant would have no justification to Appeal to the Authority. Since, the tender is the same; they are still tenderers, hence entitled to Appeal.

With regard to the third Preliminary objection, the Appellant responded that, Section 95(2) of the Act relied upon by the Respondent is confusing in itself. While the said provision prohibits appealing against choice of procurement method,

Section 95(3) of the same Act allows tenderers to complain on the same.

That, since the above provisions are conflicting, the Appellant should be given the benefit of doubt. In the alternative, the Authority should determine the Appeal irrespective of the third Preliminary Objection.

That, their Appeal is not based solely on the selection of a Procurement Method used as purported by the Respondent. It is rather based on various irregularities made by the Respondent in the tender.

Based on the above submissions, the Appellant prayed for the dismissal of the Preliminary Objections raised and for the Appeal to be heard on its merits.

ANALYSIS BY THE AUTHORITY.

Having gone through the documents submitted and having heard the oral submission by parties, the Authority is of the view that, the Preliminary Objections raised gravitate around one main issue, namely, **whether the Appeal is properly before it.**

Having identified the main issue, the Authority proceeded to resolve it by framing three sub issues, namely;

- i. **Whether the Appellant has locus *standi* to file this Appeal.**
- ii. **Whether the Appeal was filed within time.**
- iii. **Whether choice of the procurement method is an appealable matter.**

Having identified the sub-issues, the Authority analyzed them as follows:

- i. **Whether the Appellant has locus *standi* to file this Appeal.**

In resolving this sub-issue, the Authority revisited the availed documents as well as submissions by the parties and the definition of the word “tenderer” provided for under Section 3 of the Act relied upon by both the Appellant and the Respondent. For purposes of clarity, the Authority deemed it necessary to reproduce the said definition as hereunder;

“A tenderer means any natural or legal person or group of such persons **participating** or **intending to participate** in procurement proceeding with a view to submitting a tender in order to conclude a contract and includes a supplier, contractor, service provider or asset buyer”

In order to ascertain the validity of the Appellant's contention that they were tenderers by virtue of the above definition and in terms of the invitation letter from the Respondent, the Authority revisited the said invitation letter and observed that, the Respondent did not invite the Appellant to tender. Rather, they invited them for presentation and demonstration of their Biometric Voters Registration Kit in order to evaluate the operation and performance of their kits with the intention of getting one tenderer to be invited to tender under the Single Source Procurement Method.

The Authority reproduces in part the said letter as hereunder;

M/s Safran Morpho
11 Boulevard Gallieni
BOX 92130
FRANCE.

**REF: INVITATION FOR PRESENTATION
AND DEMONSTRATION OF THEIR
BIOMETRIC VOTERS REGISTRATION KIT.**

"The above heading refers,

...the National Electoral Commission now invites all bidders who participated in the said tender up to the submission, opening and evaluation stages **to participate in the demonstration of the functional operation of their**

respective kits which will be done at 10:00 am Local time, on 20th to 22nd January, 2014...

The said demonstration will be done in the presence of the National Electoral Commission members, Biometric Stakeholders, and Biometric and IT Experties (**sic**).

The aim is to allow experties to evaluate operation and performance of each Biometric Kit and to come up with recommendation of the firm to be invited in the tender for supply of Biometric Kits under Emergency Procurement through Single Source Procurement Method..."

(Emphasis Added).

The Authority revisited Clauses 3 and 6 of the Invitation letter communicated to the invited tenderer, which was in *pari materia* with the Tender Document and observed that, the same was exclusively communicated to M/s LithoTech alone. The Authority reproduces the Clauses 3 and 6 of the Tender Document as hereunder;

Clause 3 "the National Electoral Commission now invites you for the supplier (sic**) of Biometric Voters Registration Kits."**

Clause 6 "A complete set of Bidding Document(s) in English and additional sets may be purchased by interested Bidders on the submission of a written application to the address given under paragraph 5 above and **upon payment of a non- refundable fee of Tshs. 200,000/- or any freely convertible currency.** Payment should either be by Cash or Banker's Cheque, payable to the Director of Elections, National Electoral Commission". **(Emphasis Added).**

From the above Clauses, the Authority is of the settled views that, the tender process kick starts by an invitation to tender, followed by a purchase of a Tender Document upon payment of the prescribed fees and not (an "invitation for demonstration or presentation of kits)". This is followed by issuance of the pertinent Tender Document which contains the terms and condition of the tender in question and amongst others the evaluation criteria.

It is the Authority's considered view that, the words "**participating or intending to participate**" contained in the definition of the word tenderer under Section 3 presupposes that, the respective complainant whether a supplier, contractor or an asset buyer has firstly been invited to tender and has purchased the tender Document from the respective procuring entity and not otherwise.

The Authority noted that, the letter to the Appellant stated in no uncertain terms that, the purpose of the demonstration was to identify one tenderer followed by an invitation of that tenderer only to submit their tender under the Single Source method of procurement. The Appellant was not invited to tender. Without an invitation one remains an alien to the tender process. In view of the above findings, the Authority's concurs with the Respondent that the Appellant was not a tenderer in the eyes of the law. Accordingly, the Authority's conclusion with regard to the first sub issue is that the Appellant has no *locus standi* to file the Appeal to this Authority with respect to this tender.

The above preliminary Objection would suffice to dismiss this Appeal in its entirety but for the sake of enlightening the parties, the Authority deems it prudent to consider the other Preliminary Objections raised by the Respondent as hereunder.

ii. Whether the Appeal was filed within time.

In order to resolve this sub issue, the Authority revisited the availed documents and the applicable law. In the course of doing so, the Authority observed that, at the time when the Appellant lodged their complaint to the Accounting Officer on 24th February, 2014, the Procurement Contract between the Respondent and the Successful Tenderer had already come into

force in terms of Section 60(11) of the Act and Regulation 233(3) of GN. NO. 446 of 2013. This is evidenced by the Respondent's letter of award to the Successful Tenderer Referenced IE/018/HQ/2012-13/G/19/51 dated 15th February, 2014. However, the Appellant was not informed of the tender result by the Respondent since they were not involved in the tender process.

Assuming that the Appellant was a tenderer in terms of the definition of the word tenderer cited above and therefore entitled to be informed of the tender outcome by the Respondent, the Authority observed that, the Appellant was not aware of the entry into force of the procurement contract between the Respondent and the Successful Tenderer at the time when they lodged their complaint to the Accounting Officer. Therefore, the proper avenue for them was to lodge their complaint to the Accounting Officer, within twenty eight days from the date of becoming aware of the circumstances giving rise to their complaint pursuant to Section 96 (1) and (4) of the Act which reads as follows;

"S.96 (1) Any complaint or dispute between procuring entities and tenderers which arise in respect of procurement proceedings, disposal of public assets by tender and awards of contracts shall be reviewed and decided upon a written

decision of the accounting officer of a procuring entity and give reasons for his decision.

(4) The accounting officer shall not entertain a complaint or dispute unless it is submitted within twenty eight days from the date the tenderer submitting it became aware of the circumstances giving rise to the complaint or dispute or when that tenderer should have become aware of those circumstances, whichever is earlier.”

(Emphasis Added)

The law further requires the Accounting Officer to deliver his decision within fourteen days from the date when the complaint was submitted to him pursuant to Section 96(6); and that, if a tenderer is dissatisfied with the decision of the Accounting Officer or the Accounting Officer does not deliver his decision as the law requires, he is supposed to lodge his complaint to this Authority within fourteen days from the date when the Accounting Officer delivered his decision or ought to have delivered his decision pursuant to Sections 96 (7) and 97 (1) and (2) (a) and (b) of the Act. For purposes of clarity the Authority reproduce the said Sections as hereunder;

S.96 (6) The accounting officer shall, within fourteen days after the submission of the complaint or dispute deliver a written decision which shall

a) State the reasons for the decision; and

b) If the complaint is upheld in whole or in part indicate the corrective measure to be taken.

(7) Where the accounting officer does not issue a decision within the time specified in sub section (6), the tenderer submitting the complaint or dispute to the procuring entity shall be entitled immediately thereafter to institute proceedings under section 97 and upon institution of such proceedings, the competence of the accounting officer to entertain the complaint or dispute shall cease.

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

(2) Where –

a) The accounting officer does not make a decision within the period specified under this Act; or

b) The tenderer is not satisfied with the decision of the accounting officer.” (Emphasis Added)

According to the facts of this Appeal, the Appellant received Respondent's letter informing them that their presentation had been ranked the fourth on 5th February, 2014 vide a letter referenced IE/018/2012-13/HQ/G/19/44.

Being dissatisfied with the said results and choice of the method of procurement the Respondent had used, the Appellant vide a letter referenced LCC/MORPHO/GEN/1/2014 dated 24th February, 2014, requested the Respondent's Accounting Officer to avail them, amongst others, the reasons for their tender to be ranked fourth and the justification for the Respondent to use the Single Source Procurement Method.

The Respondent however, did not respond to the request. The Authority is of the view that, counting from 5th February, 2014, the date when the Appellant received the Respondent's ranking results to 24th February, 2014 when the Appellant lodged their

complaint to the Respondent's Accounting Officer; the Appellant's complaint was without doubt lodged within twenty eight days provided for under the law.

It is the Authority's further considered view that, the Appellant complied with the requirement of Section 96(1) and (4) of the Act but the Accounting Officer did not deliver its decision as the law requires him to do. That being the case, upon lapse of fourteen days prescribed under the law, the Appellant ought to have come straight to this Authority pursuant to Section 96(6) cited earlier and 97(1) and (2) (a) and (b) of the Act. To the contrary, the Appellant preferred their complaint to PPRA. It was PPRA who advised them to lodge their complaint to this Authority for want of jurisdiction.

Despite the Appellant misdirecting themselves by lodging their Appeal to PPRA, it is the Authority's considered view that, counting from the date when the Accounting Officer ought to have delivered his decision, that is, on 10th March, 2014, the fourteen days provided for under the law in which the Appellant was supposed to lodge their complaint to this Authority ended on 24th March, 2014. Therefore, the Appellant complied with the time specified by the law by lodging their Appeal to this

Authority on 24th March, 2014, which indeed was the last day for them.

It is the Authority's view that, under this avenue, the Appellant lodged their Appeal within time.

With regard to the second avenue, that is upon entry into force of a procurement contract in terms of Section 97(3) of the Act, the Authority is of the considered view that, had the Appellant been a tenderer as explained above, they ought to have lodged their complaint straight to this Authority upon entry into force of the procurement contract between the Respondent and successful tenderer. There is no doubt that, the Appellant became aware that the procurement contract between the Respondent and the Successful tenderer upon receipt of PPRA's letter on 13th March, 2014. Counting from 13th March, 2014, fourteen days provided under the law was to lapse on 27th March, 2014. Since, the Appellant lodged their Appeal on 24th March, 2014, thus, they were within the time provided by the law.

Accordingly, the Authority's conclusion with regard to this sub-issue is that, the Appeal was filed within time.

iii. Whether choice of the procurement method is an appealable matter.

In order to resolve this sub-issue, the Authority revisited Section 95(2) and (3) of the Act, relied upon by the parties and reproduces it as follows;

95 (1) Any tenderer who claims to have suffered or that may suffer any loss or injury as a result of a breach of a duty imposed on a procuring entity by this Act may seek a review in accordance with sections 96 and 97.

(2) The review referred to in sub section (1) shall not apply to –

a) the selection of a method of procurement or in case of services the choice of selecting procedure;

b) The limitation of procurement proceedings on the basis of nationality in accordance with section 54 of this Act or in accordance with the prescribed Regulations;

c) N/A

(3) Any tenderer who is aggrieved by the decision of the accounting officer under sub section (2) shall have the right to lodge a complaint to the Appeals Authority”

From the above provisions of the law, the Authority is of the considered view that, the restriction for a tenderer to lodge his complaint on a selection of a procurement method by a procuring entity laid under Section 95(2) has been watered down by Section 95(3) of the same, as correctly submitted by the Appellant. However, the Authority is of the considered view that, for a tenderer to successfully lodge their complaint based on the choice of procurement method they need to establish that, the respective procuring entity did not comply with the conditions provided for under Regulation 149 (2) and (4) of **GN.NO. 446**, on arriving at their decision. For purposes of clarity the Authority reproduces the said provisions which read as follows;

Reg.149 (2) subject to the prior approval, in writing of the tender board, other methods of procurement may be used where it is established that such methods may have due regard for transparency, economy and efficiency in the implementation of the project.

(3) Where a procuring entity uses a method of procurement pursuant to sub-regulation (2), the procuring entity shall include, in the record under regulation 15, a statement of the grounds and relied circumstances with a view to justify the use of the method.

(4) A procuring entity may select an appropriate alternative method of procurement if-

a)The competitive tendering is not considered to be the most economic and efficient method of procurement ; and

b)The nature and estimated value of the goods, works or services permit". (Emphasis Added)

From the above findings, the Authority concurs with the Appellant that the selection of a procurement method is an appealable matter under the law. However, it is incumbent upon the Appellant to establish the non compliance of the law by the Procuring entity in this respect. In such a case, it behoves upon the aggrieved tenderer to inquire from the procuring entity the justification(s) for the procurement method

used other than the competitive selection process. It is only after knowing the justification of the method used, that one can proceed with an appeal. In this case the Appellant sought for the justification of the method used after participating and failing in the demonstration exercise.

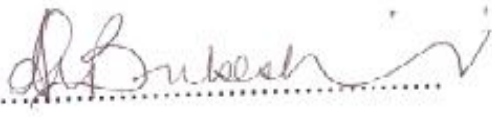
Accordingly, the Authority's conclusion with regard to the third sub-issue is that, the subject matter of the Appeal is an appealable matter subject to conditions contained in the law.

In view of the above analysis, and in further view of the Authority's findings in the first sub-issue, the Authority's conclusion with regard to the main issue is that, this Appeal is not properly before it since the Appellant has no *locus standi*.

Accordingly, the Authority dismisses the Appeal and orders each party to bear their own costs.

Right of Judicial review as per section 101 of PPA/ 2011 explained to parties.

Ruling is delivered in the presence of the Appellant and the Respondent this 5th day of May, 2014.



JUDGE (rtd) A. BUBESHI

CHAIRPERSON

MEMBERS:

1. Ms. E. J. Manyesha 
2. Mr. H.S. Madoffe 
3. Eng. F.T. Marmo 