

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM.**

APPEAL CASE NO. 42 OF 2013-14

BETWEEN

**M/S KIHELYA AUTO TRACTOR
PARTS COMPANY LIMITED.....APPELLANT**

AND

TANZANIA PORTS AUTHORITYRESPONDENT

DECISION

CORAM

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

SECRETARIAT

1. Mrs. Toni S. Mbilinyi -Principal Legal Officer.
2. Mr. Hamisi O. Tika - Legal Officer
3. Ms. Violet S. Limilabo -Legal Officer

FOR THE APPELLANT

1. Mr. Francis Noni -Managing Director.
2. Ms. Margaret Ringo -Advocate.

FOR THE RESPONDENT

1. Plasduce Mbossa - Legal Officer, TPA
2. Alex Seneu - Legal Officer, TPA

This decision was scheduled for delivery today 3rd July, 2014, and we proceed to deliver it.

The appeal at hand was lodged by **M/s KIHELYA AUTO TRACTOR PARTS COMPANY LIMITED** (hereinafter referred to as "**the Appellant**") against the **TANZANIA PORTS AUTHORITY** commonly known by its acronym **TPA** (hereinafter referred to as "**the Respondent**")

The appeal is in respect of Tender No. **AE /016/2013-14 /CTB/G/07 for the Supply and Commissioning of 12 Terminal Tractors for the Port of Dar es Salaam** (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 Appellant was among the six (6) tenderers who had submitted their tenders in response to an invitation made by the Respondent in November, 2013 through the International Competitive Bidding Procedures provided in the Public Procurement (Goods, Works, Non Consultant Services and Disposal of Public Assets by Tender) Regulations, 2005 (hereinafter referred to as "**GN. NO. 97 of 2005**").

The tenders were opened on the 7th January, 2014 and their respective read out prices were as follows;

S/N	Tenderer's Name	Quoted price in Tshs.	Quoted price in Euros
1.	M/s Kihelya Auto Tractor Parts Co. Ltd	1,660,000,000/= (VAT Exclusive)	
2.	M/s Jon Achelis Sohne		1,224,550 (VAT silent)
3.	M/s Mol Transport Solutions		1,100,056 (VAT silent)
4.	M/S Incar (T) Ltd		1,911,600 (VAT Exclusive)
5.	M/S Cargotech Ltd		1,264,680 (VAT Exclusive)
6.	M/S Eristic(T) investment Ltd	1,735,000,000/=	

The tenders were then subjected to evaluation which was conducted in four (4) stages namely; preliminary, detailed, financial eligibility and post qualification.

At the preliminary stage, eligibility of tenderers was verified. As a result, five tenderers including the Appellant's were disqualified for being non responsive to the Tender Document. The Appellant's tender was specifically disqualified on the grounds that;

- They did not submit tax clearance guarantee as required by Clause 12.3(c) of the Bid Data Sheet (hereinafter referred to as "**the BDS**");
- They did not have a track record of previous customers as required by Clause 13.3 (b) (ii) of the BDS
- They did not submit a Power of Attorney as required by Clause 20(2) of the Instructions To Bidders (hereinafter referred to as "**the ITB**").

The remained tender by M/s Jon Achelis Sohne qualified for subsequent stages of the evaluation.

The Evaluation Committee conducted detailed and post qualification evaluation to the tender and recommended the award to them.

Upon submission of the Evaluation Report to Procurement Management Unit (hereinafter referred to as "**the PMU**"), the later differed in opinion with the Evaluation Committee and forwarded the matter to the Tender Board. After its deliberation on the Evaluation Report, the Respondent's Tender Board at its 94th meeting ordered re-evaluation of the tenders.

The Evaluation Committee re-evaluated the tenders and submitted again their report to The PMU with the recommendations of awarding the tender to M/s MOL.

Upon receipt of the report, the PMU differed again with the Evaluation Committee on the reasons that, the Evaluation Report had discrepancies. The PMU observed that, the disqualification of M/s Eristic (T) Investment Limited based on non compliance to the Technical Specifications (Tractive Effort) was relatively insignificant.

The PMU therefore, made further scrutiny of the offer made by M/s Eristic (T) Investment Limited and observed that, since the tenderer was compliant to technical specifications in both the Engine and Transmission, the difference between the "Tractive Effort", specified by the Respondent (TPA), to wit; 220KN and that offered by the tenderer (147 KN) was relatively insignificant.

The PMU therefore recommended the award of the tender to M/s M/s Eristic (T) Investment Limited at a contract price of Tshs. 1,735,000,000/-

The Tender Board deliberated on the PMU's Report and observed that, since the technical specifications for dropping M/s Eristic (T) Investment Ltd were established as insignificant; and since the price offered by them was within the Respondent budget, and owing to the serious shortage of terminal tractors, it recommended that M/s Eristic (T) investment Ltd be awarded the tender.

On 11th April, 2014 vide a letter referenced PMU/2013 -14/G07 dated 10th April, 2014 the Appellant received a Notice of Intention to award the tender to M/s Eristic(T) Investment Ltd at a contract price of 1,735,000,000/= exclusive of VAT.

Being dissatisfied with the Respondent's intention to award the tender to the proposed tenderer, the Appellant vide a letter referenced KATPCL/TPA/0013/006/2014, dated 14th April, 2014, sought for an administrative review of the decision to the Respondent's Accounting Officer.

On 22nd April, 2014, the Accounting Officer vide a letter referenced PMU/2013 -14/G07, communicated their decision to the Appellant by dismissing the complaint for lack of merits.

Aggrieved by the Respondent's Accounting Officer's decision, on 21st May, 2014, the Appellant appealed to this Authority.

SUBMISSION OF GROUNDS OF APPEAL BY THE APPELLANT

The Appellant's written and oral submissions in support of the grounds of appeal may be summarized as follows;

- i. That, the quoted price of M/s Eristic Investment Limited was Euro 170,300 and silent on VAT. To the contrary however, they were awarded the tender at a contract price of Tshs. 1,735,000,000/=
- ii. That, the Reason given by the Respondent that, their tender did not contain track records of previous contract as required in Clause 13.3(iii) of the BDS is unfounded, since there is no such clause in the BDS. However, the Appellant submitted the track records of

previous customer served pursuant to Clause 13.3(ii).
of the BDS.

- iii. That, the reason that their tender contained no written specific power of attorney of the Joint Venture is unfounded, since Clause 25 of the BDS required bidders to submit written specific and power of attorney, which they complied with.
- iv. That, the amount awarded to the successful tenderer that is 1,735,000,000/= was not their read out price during the tender opening ceremony. Furthermore, their read out price was silent on VAT element.
- v. That, the tender was invited under the International Competitive Bidding Method and the Appellant submitted the tender in a joint venture. Being so, the Respondent was obliged to observe highest standard of equity and ensuring that procurement is undertaken in accordance with the law.

- vi. That, the integrity and fairness of the evaluation Committee is questionable.

Finally, the Appellant Prayed for the following;

- i. That, the reason for their disqualification be declared null and void
- ii. That, the Notice of Intention to award the tender be declared null and void; and if the award has already been made, then the same be nullified.
- iii. That, the evaluation process of the tender be repeated by an independent Evaluation Committee basing on the criteria provided for in the Tender Document and the same be awarded to the lowest evaluated tenderer.
- iv. That, suspension of award process be made pending the decision of this Appeal or judicial review, if any.
- v. That, the Respondent's Evaluation Committee, PMU and the Tender Board be recommended for punitive actions against their deliberate and intentional wrongdoing during the procurement process of the tender.

- vi. That, compensation of the total cost of twenty five million shillings (Tshs. 25,000,000.00) which includes Appeal application, Appeal fees, Advocate fees, transport charges and Hotel charges(local services) be granted to them.
- vii. That, compensation of Six hundred fifty million shillings only (650,000,000.00) which includes forecasted and expected profit for this tender, Advocated fees, transport charges, and hotel charges (International services and charges) be granted to them.
- viii. Any other relief(s) that this Authority deems fit to grant.

RESPONDENT'S REPLY TO THE GROUNDS OF APPEAL

The Respondent's written and oral submissions in reply to the Appellant's grounds of the appeal may be summarized as follows;

That, the quoted price of M/s Eristic Investment Limited was Tshs. 1,735, 000,000/= and not Euro 170,300 as alleged by the Appellant.

That, the Appellant's tender was disqualified during the preliminary evaluation stage for being non responsive, unreasonable and non competitive.

That, the Appellant's tender document did not contain a Power of Attorney of the Joint Venture as contended by the Appellant.

That, The Appellant's application for administrative review was well responded by the Respondent , however it appears that the Appellant maliciously and out of ill will had planned to reject whatever reason given by the Respondent.

That, the Appellant submitted only one contract record in response to requirements of Clause 13.3(b) (iii) of the BDS. However, during response to their application for administrative review, that clause was erroneously quoted as 13.3(iii). However, by virtue of Section 79(2) of PPA, 2004, reviews should not apply by procuring entity's failure to cite the Act or Regulation.

That, the Respondent had been observing the highest standards of equity, fairness and integrity in their dealings. Therefore, the Appellants allegations are unfounded.

That, the Appellant's application to tender as a joint venture was not a criterion to have an added advantage for them to be selected, rather, all tenderers was subjected to equal treatment.

That, the Respondent's reason to disqualify the Appellant were valid and sound and that the evaluation team abided by the law.

That, the Appellant's reliefs sought are unfounded, since the powers of the Authority to grant reliefs are clearly provided in section 82 of the Act.

That, the Appellant's reliefs sought under paragraph p (vi) and (vii) are repetitive and the maker wants profit from unjustifiable claims. The power of the Authority is only to order payment of reasonable costs incurred for the submission of the appeal. Moreover that the claims of Tshs. 25,000,000/= being appeal application, appeal fees and transport and again Tshs. 650,000,000/= for profit are unfounded.

Finally, the Respondent prayed for the dismissal of the Appeal in its entirety for lack of merit.

ANALYSIS BY THE AUTHORITY

It should be noted from the outset that, on 19th June, 2014 when the case came for hearing and the Respondent was absent despite being duly served, the Authority ordered the appeal to proceed ex parte following the Appellant's prayer to that effect. The Respondent however filed an application to have the order set aside. The Application was heard interparties on 30th June, 2014. The Authority granted the application for the ends of justice to be met and subject to Rule 21 (2) of the Public Procurement Appeals Rules N0.205/2005 which calls for the Authority to conduct its proceedings with as little formality and technicality as well, the Authority allowed the Application though the Applicant's reasons supporting the Application were not enough. The Application was allowed subject to the Applicant to pay the Appellant costs of the Application that has been incurred by the Appellant in hearing of the Application.

In view of the above, the Authority determined the Appeal interpartes.

Having gone through the documents submitted by the parties and having heard their oral submissions, the Authority is of the view that, this Appeal is centred on the following issues;

- 1. Whether the rejection of the Appellant's tender was legally justified.**
- 2. Whether the proposed award of the tender to the successful tenderer was proper at law.**
- 3. To what reliefs, if any, are the parties entitled to.**

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

- 1. Whether the rejection of the Appellant's tender was legally justified.**

In resolving this issue, the Authority revisited the Evaluation Report, the Tender Document vis –a- vis the applicable law. In the course of doing so, the Authority observed that, the Appellant was firstly disqualified because they did not submit a tax clearance guarantee as required by Clause 12.3 (c) of the ITB;

they did not have a track record of previous customers as required by Clause 13.3 (b) (ii) of the BDS and that, they did not submit a Power of Attorney as required by Clause 20(2) of the ITB. However, after re-evaluation of the tender, the Appellant's disqualification was based on the following grounds;

- That, they did not submit evidence of contracts with a minimum volume of Tshs. 500 Million for the past 3 years as per ITB 13.3(iii)
- That they have no track record of previous customers served as per ITB Clause 13.3 (b) (ii)
- That, they did not submit a Power of Attorney as per Clause 20(2) of the ITB.

In ascertaining the Respondent's justification for the rejection of the Appellant's tender in evaluation processes in both, the first and the second based on the above grounds, the Authority revisited the referred ITB and BDS Clauses which read as follows;

Clause 12.3 (c) of the ITB reads;

“12.3. The documentary evidence of conformity of the goods and related services to the Bidding documents may

be in the form of literature, drawings, and data, and shall consist of

a) N/A

c) Any other procurement specific documentation requirement as stated in the Bid Data Sheet.

The Authority revisited the Bid Data Sheet referred above and observed that, Clauses 12.3 and Clause 13.3(b) of the ITB were modified by Clauses 11 and 13 of the BDS respectively, as hereunder;

BDS Clause 11

“in addition to the information required from the Bidder in ITB Clause 12.3 is provided for as follows;

- i. Copy evidencing fulfillment with tax obligations
- ii. The total monetary value of similar good(s) supplied for each of **3 years** should be indicated.

“**Clause 13.3 (b) (ii)** the qualification criteria required from Bidders in ITB Clauses 13.3(b) is modified as follows;

- i. Bidder must submit Audited Financial Statement for the past 3 years;
- ii. **Bidder must submit a track record of previous customers served**
- iii. Bidder must submit copies of at least 5 contracts with minimum total volume of Tshs. 500 million for the past 3 years;
- iv. The bidder must have one staff with Bachelor of Science in mechanical engineering with at least 3 years' Experience in similar assignment. **N/A**

Clause 20(2) of the ITB

20(2) the original and the copy or copies of the Bid shall be typed or written in indelible ink and shall be signed by the Bidder or a person or **persons dully authorized to sign on behalf of the Bidder...**"

Having revisited the above provisions, the Authority reviewed the Appellant's tender in order to ascertain whether they complied with the above criteria as provided for in the Tender Document and observed as follows;

With regard to a copy evidencing fulfillment with tax obligations, per ITB 12.3(i), the Authority observed that, the Respondent's Tender Document did not specify what sort of evidence, tenderers were to submit to show their compliance to the requirement. However, the Authority observed that, the Appellant's tender contained a Tax Payer's Identification Certificate Number 00064819 with Identification Number 122-779-041 for the Appellant issued on 20th December, 2007 and a VAT Certificate of Registration dated 24th January, 2011, bearing the same Identification Number contained in the Appellant's TIN. In addition to the above certificates, the Authority observed further that, the Appellant's tender contained the Tanzania Revenue Authority's receipts for five consecutive years indicating the Appellant to have paid their respective taxes as shown below;

- a. Payment Notice and deposit slip No. 0190376 deposited to TRA, A/c Number 3221100029 at NMB R/Drive Branch Tshs. 2,250,000/- on 10th December, 2009.
- b. Payment Notice and deposit slip No. 0008758 deposited to TRA, A/c Number 3221100029 at NMB R/Drive Branch Tshs. 1,100,000/- on 16th November, 2010.

- c. Payment Notice and deposit slip No. 0795703 deposited to TRA, A/c Number 01J1043009243 at CRDB Mwanza Branch Tshs. 2,000,000/- on 12th October, 2011.
- d. Payment Notice and deposit slip No. 00878579 deposited to TRA, A/c Number 01J1043009243 at CRDB Mwanza Branch Tshs. 2,029,000/- on 25th July, 2012.
- e. Payment Notice and deposit slip No. 01697926 deposited to TRA, A/c Number 3221100029 at NMB R/Drive Branch Tshs. 6,000,000/- on 23rd January, 2013.

In view of the above findings, the Authority is of the view that, the Appellant complied with this criterion.

With regard to the Power of Attorney, that it did not reflect whether the Appellant tendered as a joint venture. The Authority revisited the Appellant's tender and observed that, it contained a Joint Venture Agreement of three Companies namely; Sinotruck Import & Export Co. Ltd, Qingdao Seize the Future Automobile Sales Co. Ltd and Kihelya Auto Tractor Parts Co. Ltd. The parties to a Joint Venture had agreed to trade in the name of Kihelya Auto Tractor Parts Co. Ltd as provided under Clause 1.1 of the Joint Venture Agreement, which is reproduced herein under;

Clause 1.1 “ The parties hereby associate themselves into and as a Joint Venture in accordance with the provisions of this Agreement under the firm name of KIHELYA AUTO TRACTOR PARTS COMPANY LIMITED (The Supplier’s”)”.

From the above quoted Clause of the Joint Venture the Authority agrees with the Appellant that they had agreed to tender in the Appellants name.

The Authority further observed that the Appellant’s tender contained a Power of Attorney, given by the Appellant to Mr. Lazaro Ng’wheleja of P.O.BOX 2074 Mwanza and Mr. Francis Noni of P.O.BOX 11273 Dar es salaam for the purpose of executing this tender as donees; and the same was signed by Mr. Pius Samwel Mabuga, a Company Secretary together with Ms. Juliana Lazaro who is the Director of the Appellant. The said Power of Attorney was authenticated by one Beatus E. Mpotwa as a witness attorney.

The Authority is of the view that, the Power of Attorney did not contain the signatures of the donees which renders it to be defective and has no legal force.

In view of the above findings, the Authority considers the Appellant to have not complied with the requirement and the Respondent was proper to disqualify them on that ground.

With regards to the requirement of at least five contracts with a minimum volume of Tshs. 500 Million for the past 3 years and track record of previous customer as per Clauses 13.3(iii) of the ITB and 13 (ii) (iii) of the BDS, the Authority observed that, the Appellant's tender contained evidence of five contracts with the total monetary value provided by the Respondent in their Tender Document as follows;

- Sapphire Miners Cyangugu Co. Ltd worth USD. 235,700.00. in 2012
- Tanzania Road Haulage (1980) Ltd, worth USD. 276, 196.00. in 2012
- Ministry of Agriculture, food security and cooperatives for the supply of 285 tractors from 2009 to 2011 worth Tshs. 3.5 billion.
- Tanzania Road Haulage (1980) Ltd, worth USD. 276,900.00 in 2013.

- Tanzania Road Haulage (1980) Ltd, worth USD.278, 990.00 in 2014.

Regarding to the track records, the Authority is of the considered view that, since the Tender Document did not specify the number of contracts the tenderer had to submit, and much as the Appellant's tender contained letters from the Ministry of Agriculture indicating the Appellant to have effectively delivered 285 tractors for the period commencing 2009 to 2011 worth Tshs. 3.5 billion, it sufficed the purpose.

In view of the above findings, the Authority is of the settled view that, disqualifying the Appellant's tender basing on these criteria was not proper while indeed they had complied with the requirements of the Tender Document.

Accordingly, the Authority's conclusion with regard to the first issue is that, the rejection of the Appellant's tender was legally justified due to defective power of attorney though complied with other requirement as already observed above.

2. Whether the proposed award of the tender to the successful tenderer was proper at law.

In resolving this issue, the Authority revisited the Evaluation Report, the Tender Document as well as the Appellant's contention regarding the successful tenderer vis-a vis the Applicable law. In the course of doing so, the Authority observed that, the Successful Tenderer's tender was firstly, disqualified at the preliminary evaluation stage for failure to comply with a tax clearance obligation criterion. However, during the re-valuation, the Successful Tenderer passed the preliminary and the detailed evaluation stages before they were subjected to post qualification together with other tenderers who were considered to be substantially responsive to the Tender Document. These included; M/s Joh Achelis & Sonhe GmbH, M/s Eristic (T) Investments Limited and M/s MOL Transport Solutions.

The Authority revisited the Evaluation Report and observed that, the Evaluation Committee neither followed the law nor the stages provided for under Clauses 29, 34 and 35 of the Tender Document. Rather, they rushed to conduct post qualification for the three tenderers and went back to conduct the technical specifications evaluation of the tenders contrary to Regulation 94 (5) of GN.NO. 97 of 2005.

For purposes of clarity, the Authority reproduces the above cited Clauses and provisions which read as follows;

Clause 29(1) the Procuring Entity shall examine the bid to confirm that **all terms and conditions specified in the General Conditions of Contract and the Special conditions of Contract have been accepted** by the bidder without any material deviation or reservation.

(2) The Procuring Entity shall evaluate the technical aspects of the Bid submitted in accordance with ITB Clause 12, **to confirm that all requirements specified in Section VI –Schedule of Requirements of the Bidding Document and Section VII –Technical Specifications to have been met** without material deviation or reservation.

(3) If after the examination of the terms and conditions and the technical evaluation, the Procuring Entity determines **that the Bid is**

not substantially responsive in accordance with ITB Clause 28, it shall reject the Bid.

Clause 34 "the bid with the lowest evaluated price, from among those which are eligible, compliant and substantially responsive shall be the lowest evaluated bid.

Clause 35 (1) **if specified in the Bid Data Sheet Post Qualification shall be undertaken** (Emphasis Added).

Regulation 94(5) reads as follows;

94(5) Post-qualification shall be undertaken for the lowest evaluated tenderer only.

From the above provision, the Authority is of the considered view that, it was improper for the Respondent to conduct post qualification for all the tenders prior to conducting the detailed evaluation. Assuming that, the said post qualification was conducted after the detailed evaluation, the Authority is of the further view that, the same ought to have been made to only one tenderer who was established to be responsive and the lowest evaluated pursuant to Regulation 94(5) cited above.

Therefore, it was not proper for the Respondent to conduct post qualification and return to determine tenderer's responsiveness.

Additionally, the Authority observed that, the successful tenderer was disqualified during the evaluation of the technical specifications, for failure to comply with a "tractive effort" criterion provided for under item two of the Technical Specifications for the terminal tractors, which was set at a minimum of 220KN. The successful tenderer's tractive effort was 147 KN. However, the Procurement Management Unit retrieved their tender and recommended them for the award of the tender on the reasons that their price was lower compared to other tenderers and that, their deviation was insignificant.

The Authority revisited the above requirement and observed that, the Tender Document was couched in a mandatory term and that all tenderers were to comply with the requirement. For purposes of clarity, the Authority reproduces the said requirement as hereunder;

2. OPERATING CHARACTERISTICS

The tractor **shall** be designed to operate with a minimum **tractive effort of 220KN** and for handling trailers with a load of up to 40 tons and 24% Grade ability.

From the above findings, the Authority is of the considered view that, the Successful Tenderer's departure from the above criterion was not insignificant as purported by the Respondent's PMU.

The Authority observed with utter dismay, the acts of the Respondent's PMU to substitute the recommended tenderer by the Evaluation Committee with their choice for no good reasons. The Authority wonders as to why the PMU opted for a tenderer who was disqualified instead of those recommended by the Evaluation Committee. The Authority observes that, the PMU usurped the powers of the Evaluation Committee with a deliberate move to favour their choice since; it is the Evaluation Committee which has been empowered by the law to evaluate tenders and not the PMU. The Authority finds the Respondent to have contravened Clauses 28(2) and 29 of the ITB and Regulation 90 (16) of GN.NO 97 of 2005 which read as follows;

Clause 29(1) the Procuring Entity shall examine the bid to confirm that **all terms and conditions specified in the General Conditions of Contract and the Special conditions of Contract have been accepted** by the

bidder without any material deviation or reservation.

- (2) The Procuring Entity shall evaluate the technical aspects of the Bid submitted in accordance with ITB Clause 12, **to confirm that all requirements specified in Section VI –Schedule of Requirements of the Bidding Document and Section VII –Technical Specifications to have been met** without material deviation or reservation.
- (3) If after the examination of the terms and conditions and the technical evaluation, the Procuring Entity determines **that the Bid is not substantially responsive in accordance with ITB Clause 28, it shall reject the Bid.**

(Emphasis Added).

Clause 28(2) A substantially responsive bid is one which conforms to **all terms, conditions, and specifications of the bidding**

documents, without material deviation or reservation. A material deviation or reservation is one that:-

a. affects in any substantial **way the scope, quality, or performance of the services.**

b. limits in any substantial way , inconsistent with the bidding documents, the Procuring Entity's right or the Bidders obligations under the Contract; or

c. **if rectified, would affect unfairly the competitive position of other Bidders presenting substantial responsive bids".**

"Reg. 90(16) if a tenderer is not responsive to the tender document, **it shall be rejected by the procuring entity, and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation".** (Emphasis added)

Notwithstanding the above anomalies, the Authority revisited the Appellant's written and oral submission during the hearing with regard to the successful tenderer's experience and observed the following;

- That, they have a business license Number **B. 01226165** issued by Ilala Municipal Council on 8th March, 2010, as **Spare Parts dealers and not tractor suppliers**, as the tender required.
- That, all track record documents attached to their tender was for the supply of Spare Parts and not tractors as the tender required. The Successful tenderer's tender contained the following contracts indicating their track records;
 - i. A contract with TPA for supply of Spare for Cranes-PSM/12/07 referenced DPS/3/1/18 dated 23rd October, 2007.
 - ii. A contract No. AE/016/2009-10/DSM/G/26 for the Supply of Maintenance Spare Parts for Marine Crafts referenced DPS/3/1/18 dated 6th October, 2009.
 - iii. A contract No. AE/016/2009-10/DSM/G/11 for the Supply Spare Parts for Maintenance of equipment Lot 4: ZV 45T & FZ 16T referenced DPS/3/1/18 dated 18th January, 2010. To mention few.

Their tender did not contain evidence regarding tax obligation as provided for in the Tender Document Clause 12.3(i) of the BDS. Rather, it contained VAT and TIN certificates only.

From the above findings, the Authority is of the settled view that, the Respondent deliberately decided to favour the Successful Tenderer contrary to Sections 72(1) of the Act, since they ought to have disqualified them from the preliminary stages of the two evaluations of the tenders made.

For purposes of clarity, the Authority reproduces the said Section as hereunder;

“S.72(1) Procuring entities as well as tenderers , suppliers, contractors and consultants under public financed contracts shall proceed in a transparent and accountable manner during the procurement and execution of such contracts”.

(Emphasis Added).

Accordingly, the Authority’s conclusion with regard to the second issue is that, the proposed award of the tender to the Successful tenderer was not proper at law.

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

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

To start with, the Authority considered the prayers by the Appellant that, the reason for their disqualification be declared null and void. The Authority cannot make such order as it had been observed under the first issue that the Appellants disqualification was justified for attaching a defective Power for Attorney.

With regard to the prayer that the **Notice of Intention to award** the tender be declared null and void, the Authority cannot grant such a prayer, since the law as it then was, had no a requirement for the Accounting Officer to issue such a notice.

With regard to the prayer that, the evaluation process of the tender be repeated by an independent Evaluation Committee basing on the criteria provided for in the Tender Document and the same be awarded to the lowest evaluated tenderer, the Authority partly agrees with the Appellant that, the tender be re-evaluated afresh in observance of the law. However, it cannot order the Respondent to use an independent evaluation committee as prayed, since it is beyond its powers.

With regard to the prayer for the suspension of award process pending the decision of this Appeal, or judicial review, if any, the Authority is of the view that, the prayer to suspend procurement process pending its determination has been overtaken by event. However, it cannot suspend the procurement or contract execution pending Judicial Review since it is beyond its jurisdiction. The said order can only be made by the High Court.

With regard to the prayer that, the Respondent's Evaluation Committee, PMU and the Tender Board be recommended for punitive actions against their deliberate and intentional wrongdoing during the procurement process of the tender, the Authority is of the view that, the prayer is beyond its powers. Therefore it cannot grant the same.

With regard to the prayers for costs to a tune of Tshs. 675,000,000.00 being Appeal fees, Advocate fees, transport charges, Hotel charges (International services and charges), forecasted and expected profit for this tender, the Authority is of the view that, the Appellant deserves a compensation to a tune of Tshs. 2,000,000.00 only, being the reasonable costs incurred in pursuit of this Appeal and incidental thereto, since the Appeal has some merit.

With regard to the prayers by the Respondent that the Appeal be dismissed for lack of merits, the Authority does not agree with them as the Appeal clearly has some merits.

On the basis of the aforesaid findings, the Authority upholds the Appeal and orders the Respondent to re-evaluate the tenders afresh in observance of the law and pay the Appellant a sum of Tshs. 2,000,000.00 only.

Right of Judicial Review as per Section 101 of the PPA/2011 explained to parties.

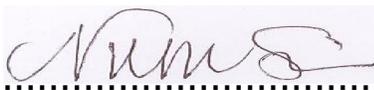
Decision delivered in the presence of the Appellant and the Respondent this 3rd July, 2014.



.....
JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MS. E. J.MANYESHA.....

2. MRS. N.A.INYANGETE.....

3. ENG. F.T.MARMO