

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 20 OF 2013-14.

BETWEEN

M/S SAFRAN MORPHO.....1ST APPELLANT

M/S IRIS CORPORATION

TECHNOLOGY.....2ND APPELLANT

AND

NATIONAL ELECTORAL

COMMISSION..... RESPONDENT

DECISION

CORAM

1. Hon. Augusta G. Bubeshi, J. (rtd) -Chairperson
2. Mr.Kesogukewe M.Msita -Member
3. Mr. Haruni S. Madoffe - Member
4. Mrs. Nuru S.N. Inyangete -Member

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. Deodacus Mabona -Legal Officer -Law Care Chambers
3. Mr. Sebastien Eid - VP Sales Africa
4. Ms. Catherine Nertzler - Senior Legal Advisor
5. Mr. Lugano Asubira Kibona - Legal Officer- Law Care Chambers
6. Ms. Levina Kagasaf - Legal Officer - Law Care Chambers

FOR THE 2ND APPELLANT

1. Mr. Lee Chee Heong - General Manager- Iris Corporation Technology

FOR THE RESPONDENT

1. Dr. Sisti Cariah - Deputy Secretary NEC
2. Mr. Gregory Kaijage - Director – Procurement
Management Unit- NEC
3. mr. Mtibora M. Seleman - State Attorney
4. Mr. Selemina C. Rubanzibwa – Quantity Surveyor

This decision was scheduled for delivery today 29th November, 2013 and we proceed to deliver it.

The Appeal at hand was lodged by **M/S SAFRAN MORPHO** (hereinafter referred to as "**the 1ST Appellant**") against the **NATIONAL ELECTORAL COMMISSION** commonly known by its acronym **NEC** (hereinafter referred to as "**the Respondent**").

Following notification of the Appeal lodged by the 1stAppellant to the other tenderers, **M/S IRIS CORPORATION TECHNOLOGY** opted to join this Appeal (hereinafter referred to as "the 2nd Appellants")

The said Appeal is in respect of 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**"), as well as oral submissions by parties during the hearing, the facts of the Appeal may be summarized as follows:

The Respondent vide the Guardian newspaper dated 6th February, 2013, and the East African dated 4th -10th February, 2013, invited tenderers to submit tenders.

The deadline for submission of the tenders was initially set for 25th March, 2013, but was later on extended to 16th April, 2013; whereby, six tenders were received from the following firms;

S/NO	TENDERER'S NAME	READ OUT PRICE
1.	M/s Tetes SA	68,171,162.00 Euro
2.	M/s Iris Corporation Technology	94,968,250.50 USD 5,825,120,471.00 Tshs
3.	M/s Lithotec	84,000,941.00 USD
4.	M/s SCI Tanzania/ Invu IT Solutions/ the Jazz matrix Corporation(Joint Venture)	78,987,895.86 USD
5.	M/s Safran Morpho	44,939,912.00 Euro 3,843,736,140 Tshs
6.	M/s Avante International Technology	59,999,900.00 USD

The tenders were subjected to four stages of evaluation, namely; Preliminary evaluation, technical evaluation, detailed evaluation and post qualification.

At the preliminary evaluation stage, five tenders were disqualified for failure to comply with the requirements of the Tender Document.

The remaining tender by M/s SCI Tanzania, M/s SCI Tanzania/ Invu IT Solutions/ the Jazz matrix Corporation (Joint Venture) was then subjected to technical evaluation whereby it was then found to be substantially responsive. Thus subjected to the next stage.

At the detailed evaluation stage, the tender was for checked for arithmetic errors if any and was found with errors which were corrected as follows;

TENDERER'S NAME	READ OUT PRICE	CORRECTED PRICE
M/s SCI Tanzania/ Invu IT Solutions/ the Jazz matrix Corporation(Joint Venture)	78,987,895.86 USD	78,987,636.33 USD

Thereafter, the Evaluation Committee recommended the award of the tender to M/s SCI Tanzania/ Invu IT Solutions/ the Jazz matrix Corporation (Joint Venture) at a contract price of USD 78,987, 636.33.

The Tender Board at its meeting held on 20th June, 2013, resolved that the tenderer should be invited for demonstration.

On 1st July, 2013, the successful tenderer demonstrated the technology of biometric kit before the Respondent.

The Tender Board at its meeting held on 4th July, 2013, decided to send delegates to Malawi Electoral Commission to get the details of the equipments to be supplied.

The Tender Board at its meeting held on the 17th July, 2013, received a report of its delegates sent to Malawi and approved the recommendation made by the Evaluation Committee to award the tender to M/s SCI Tanzania/ Invu IT Solutions/ the Jazz matrix Corporation

(Joint Venture) at a contract price of USD 78,987,636.33, subject to negotiations.

On 26th August, 2013, the Respondent vide a letter referenced IE/018/HQ/2012-13/G/19/13 communicated the award of the tender to the successful tenderer.

On the same date, the Respondent wrote notification letters referenced IE/018/HQ/2012-13/G/19/14, informing all unsuccessful tenderers about the tender result. The said letter was however received by the Appellants about a month later.

Being dissatisfied with the award of the tender, the 1st Appellant vide a letter referenced DI/DC/YC/AF/13/17672 dated 21st October, 2013, requested for the reasons of disqualification of their tender.

Before receiving any response from the Respondent, on the 22nd October, 2013, the 1st Appellant lodged their Appeal to this Authority.

On receiving the notification of the Appeal that required them to submit their written replies, the Respondent raised a point of preliminary objection that;

The Appeal before this Authority is time barred for contravening Sections 82(2) of the Public Procurement Act, No. 21 of 2004 (hereinafter referred to as "**the Act**").

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

THE RESPONDENT'S SUBMISSION ON THE PRELIMINARY OBJECTION

The Respondent submissions may be summarized as follows;

That, the 1st Appellant was required to lodge their Appeal to the Respondent's Accounting Officer but they did not do so.

That, if the complaint cannot be entertained under Section 79 of the Act, then, the 1st Appellant ought to have filed their Appeal within 14 days from the date when they became aware of the circumstances leading to their disqualification.

That, the notification of the tender results to the unsuccessful tenderers was written on the 26th August, 2013, and was sent vide e-mails.

That, the 1st Appellant received the said notification letter on 12th September, 2013 while the Appeal was lodged on 22nd October, 2013.

That, counting from 12th September, 2013, to 22nd October, 2013, when this Appeal was lodged, it is clear that the Appeal was lodged outside the 14 days provided for under the law.

The Respondent, therefore, prayed that, this Appeal should be struck out with costs.

1ST APPELLANT'S SUBMISSION ON THE PRELIMINARY OBJECTION.

The 1st Appellant's arguments may be summarised as follows;

That, the Preliminary Objection should be dismissed with costs.

That, the Objection raised by the Respondent does not qualify to be a preliminary objection since it needs production of evidence for it to be determined.

That, once the evidence is produced in the determination of the point of law, then, the said Preliminary Objection ceases to be a point of law.

In support of the afore going assertion the 1st Appellant referred this Authority to the case of **MOHAMED ENTERPRISES (T) LTD VERSUS MASOUD MOHAMED NASSER**, in Civil Application No. 33 of 2012 (CA) to that effect.

That, it was true that, the letter of notification of the tender results was dated 26th August, 2013, as submitted by the Respondent. However, they only became aware of the tender results on 9th October, 2013 when they paid a physical visit to the Respondent to inquire about the tender out come and it was then that they were given copy of the same.

That, the same letter was sent to them by post on 11th October, 2013 and was received on 14th October, 2013.

That, counting the 14 days provided by the law from 9th October, 2013 they are still in conformity with the requirement of the law.

That, the critical question to be determined by this Authority is when the 1st Appellant became aware of the tender outcome. It is from that date that the 14 days within which an Appeal must be lodged starts to run.

Finally the 1st Appellant prayed for the dismissal of the preliminary Objection.

ANALYSIS BY THE AUTHORITY ON THE PRELIMINARY OBJECTION.

Having considered the oral submissions by parties, the Authority is of the view that, the Preliminary Objection is centred on the following issue;

- **Whether the Respondent's objection falls within the meaning of a preliminary objection as defined by the Court of Appeal.**

Having formulated the issue above, the Authority proceeded to resolve it as follows:

In resolving this issue, the Authority considered the Court of Appeal's Ruling cited by the 1st Appellant and observed that at its page 10 and 11, of the said Ruling, the Court of Appeal stated, inter-alia;

"that for a preliminary objection to be successfully argued, it should be capable of disposing a suit (in our case an appeal) without evidential proof. It must be a point in *limine*

***litis* (a preliminary point of law). Therefore, where a preliminary objection raised contains more than a point of law, say law and facts it must fail"... for, factual issues will require proof, be it by affidavit or oral evidence. That defeats the whole purpose of a preliminary objection..."**

From the facts of this case and the submissions made thereof, the Authority is of the considered view that to ascertain the validity of the preliminary objection raised by the Respondent it required the production of evidence from the parties to wit, proof of when the 1st Appellant actually became aware of the circumstances giving rise to this Appeal. Doing so, would defeat the meaning of a preliminary objection as clearly defined by the highest court of this land. The Respondent failed to counter the validity of the 1st Appellant's cited case.

Furthermore, parties disagree on the date when the 1st Appellant became aware of the tender outcome, to resolve this disagreement, calls for evidence is clearly

inevitable. To do so would go against the above cited court of Appeals ruling.

Accordingly, the preliminary objection raised by the Respondent is hereby struck out.

SUBMISSIONS BY THE 1ST APPELLANT ON THE MERITS.

The 1st Appellant'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's action was contrary to Regulation 14 (1) (a) of 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**") and Clause 13.3 (a) of the Instruction To Bidders (hereinafter referred to as "**the ITB**") by ignoring their financial and technical proposals which were far superior from any other tender. That

would have ensured the Respondent about the quality of services to be offered pursuant to Regulation 14 (1) (a) of GN.97 of 2005 cited above.

That, their tender contained technical aspects which were better than those of the successful tenderer yet, they were not considered for the award of the tender. They wondered whether the successful tenderer had technical, financial and production capability to deserve the award of the tender made to them.

That, none of the partners in the joint venture (the successful tenderer) had experience in Biometric Voters Registration and that the joint venture had never delivered any Biometric Kits. The reference provided by one of the partners in the joint venture, namely; Jazz Matrix from Malawi referred Optic Metric Readers and not Bio Metric Voters Registration Kits.

That, the Respondent conduct was in contravention of Regulation 90 (5) and (18) of GN. No 97 of 2005 and Clause 36. 1 of the ITB, for rejecting their tender which was lower than that of the successful tenderer.

That, the lowest bid was a fundamental criterion which was to be looked at and the same ought not to have been ignored but the Respondent did so.

That, they wondered as to why the award of the tender had been made to a joint venture whose turnover is less than 20 Million USD in comparison with the value of this tender.

That, the Respondent's Tender Document contained some of the technical specification which were exactly similar to those contained in the successful tenderer's brochures as per their Web site. For example, section VII-13 of the Tender Document provided for the requirement of the Rugged Steel Construction which is very rare but only the

Kit by Jazz Matrix responded to the criterion. So does section VII-5 of the Tender Document.

That, the name and the sample of the identity appearing in the Respondent's Tender Document is similar to the sample appearing in the successful tenderer's tender.

That, with the presence of the said similarities, the successful tenderer might have had prior knowledge of the requirements of the tender and that it was obvious that only the successful tenderer would have met the criteria provided in the Tender Document.

That, the Respondent contravened the law by awarding the tender to the successful tenderer beyond the 120 days of the bid validity period specified in the law.

That, the extension of the tender from 120 to 150 days was in contravention of Regulation 87(3) of GN.NO 97 of 2005.

That, the Respondent awarded the tender on 17th July, 2013, but the notification to the Appellant was through a letter dated 26th August, 2013. If that was the case, they wondered as to why the letter dated 03rd October, 2013, from the Respondent informed the Appellant that the results of the tender were yet to be made and the same would be communicated when ready.

That, they opine that the award of the tender was made outside the bid validity period contrary to Regulation 96(3) of GN, No.97 of 2005.

That, the Respondent did not communicate the award of the tender pursuant to the law, thus, creating doubt over the transparency of the entire tender process.

That, the Respondent had contravened the law and its Regulations by backdating the notification letters sent to them by one month.

Finally the Appellant prayed for the following orders;

1. Annulment of the Award of the tender.
2. Re-evaluation of the tender in a fair and transparent manner.
3. Payment of reasonable compensation for costs incurred by the 1st Appellant as per the following breakdown;
 - i. Advocate's fee- USD 10,000 only
 - ii. Transport and accommodation costs- USD 10,000 only
4. Any other order the Authority deems fit to grant.

SUBMISSIONS BY THE 2ND APPELLANT ON THE MERITS.

The 2nd Appellants' 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 records of tender opening were not distributed to the tenderers contrary to Clause 25.8 of the ITB.

That, the notification of award of the tender was issued to tenderers beyond the bid validity period which ended on 14th August, 2013 contrary to Clauses 17 and 40.1 of the ITB.

That, the extended bid validity period from 90 days to 120 days was for another tender which they did not tender for. Thus, the second extension made by the Respondent, if at all it existed, was not proper.

That, there was an inconsistency in the extension of the bid submission date which was contrary to Clause 22.3 of the ITB. They received a letter prohibiting extension, but later they received another letter dated 15th March, 2013 allowing an extension of time to submit the bid.

Finally the 2nd Appellant prayed for a re-tendering order.

REPLIES BY THE RESPONDENT

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 Appellant's tender was disqualified at the preliminary evaluation stage for failure to comply with the requirement of the Tender Document contrary to Regulation 90 (6) and (7) of GN. No 97 of 2005 and Clause 28 of Section II of the Tender Document.

That, the tender price was not the only criterion for the award of the tender.

That, the bid validity period was extended from 120 days up to 150 days pursuant to Regulation 87(4) of GN.NO.97 of 2005 and all tenderers were informed of that extension which ran from 16th April, 2013 to 16th September, 2013. The decision to award the tender to the successful tenderer was made on 17th July, 2013. Thus, the award of the tender was made within the Bid Validity period.

That, all tenderers were requested to provide samples of their products before preparation of the Tender Document. Thus, some of the product specifications were included in the Tender Document. The said inclusion however, did not intend to favour any tenderer as contended to by the 1st Appellant.

That, the brochure shown by the 1st Appellant might have been printed from the successful tenderer's Website after they had already prepared their Tender Document.

That, all tenderers were to be notified about the tender results on 26th August, 2013; i.e. within the Bid Validity period. However there was a Government directives which partly delayed the communication of the award, thus the letter was subsequently sent by e-mail on 12th September, 2013. The e-mail to the 1st Appellant bounced back.

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

ANALYSIS BY THE AUTHORITY

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 Appellants were unfairly disqualified.**
- **Whether the award of the tender to the successful tenderer was proper at law.**

- **Whether the award of the tender was made within the bid validity period provided in the Tender Document.**
- **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 Appellants were unfairly disqualified

In resolving this issue, the Authority revisited the Tender Document, the Appellants' tenders and the Evaluation Report vis -a vis the applicable law. In the course of doing so, the Authority noted that, both Appellants were disqualified at the preliminary evaluation stage for failure to comply with the requirements of the Tender Document on the following;

- i. That, their offered price was partly Delivery Duty Paid (hereinafter referred to "**as DDP**") contrary to Clause 16 of the Bid Data Sheet (hereinafter referred to "**as BDS**") and Clause 15.6 (a) (b) of the Instruction To Bidder (hereinafter referred to "**as ITB**").
- ii. That, they did not state that their tender price was fixed contrary to Clause 18 of the BDS.
- iii. That, they did not state the payment schedule contrary to Clause 36 of the BDS.

In addition to the above the 1st Appellant was disqualified for submitting a defective Power of Attorney.

In order to establish whether the Appellants disqualification based on these grounds was justified, the Authority revisited the grounds used to disqualify the Appellants and observed that the Appellants' offered prices which were in compliance with the Delivery Duty Paid criterion provided for in the BDS Clause 17 and the price schedule for Goods and Related Services offered

from abroad contained under section VIII-2 of the Tender Document. In deed the Respondent, notwithstanding that was abundantly represented as indicated in the Coram herein before could not explain why they faulted the Appellants' on this ground.

On the second ground for disqualification, the Authority observed that, Clause 18 of the BDS gave emphasis to Clause 15.8 of the ITB which required tenderers to submit fixed prices and not otherwise as follows;

“Clause 15.8 Prices quoted by the Bidder **shall be fixed** during the Bidder’s performance of the contract and **not subject to variation** on any account, **unless otherwise specified in the Bid data sheet**. A bid submitted with an adjustable price quotation will be treated as non responsive and shall be rejected.....”

“Clause 18 **The price shall be fixed**”
(Emphasis Added)

Furthermore, there was no requirement in the Tender Document which compelled tenderers to restate that their tender prices were fixed. Accordingly the Appellants' disqualification on the basis of this ground are equally not justifiable.

Regarding the third ground for disqualification, that, the Appellants did not state the payment schedule contrary to Clause 36 of the BDS, the Authority observed that Clause 36 of the BDS provided that, "Deviation in payment schedule: is not applicable". The said payment schedule which was not to be deviated from had already been provided for under Clause 18 of the Special Conditions of Contract. As observed under the second ground above, the Tender Document did not compel tenderers to restate that they have not deviated from the provided payment schedule. Thus, the disqualification of the Appellants' on this ground was not proper.

With regard to the fourth ground which affected the 1st Appellant only, the Authority revisited the 1st Appellant's tender and observed that their Power of Attorney did not

meet the requisites of a Power of Attorney acceptable by Tanzanian law. The said power of attorney had names of donees but lacked their signatures. The same was not verified by an attorney. In a nutshell, the 1st Appellant submitted a defective power of attorney. Since a power of attorney is a mandatory requirement this ground could disqualify them for contravention of Clause 11.1 (f)

Which read as follows;

“Clause 11. 1 the Bid prepared by the Bidder shall constitute the following components:

(f) Written power of attorney authorising the signatory of the bid to commit the Bidder, in accordance with ITB Clause 20.2”.

Therefore, the 1st Appellant’s disqualification on the basis of this ground was proper.

In view of the above findings, the Authority is of the view that, the Respondent had contravened Regulation 90 (4) of GN. No. 97 of 2005;

“Reg 90 (4) the tender evaluation shall be consistent with the terms and conditions set forth in the tender documents and such evaluation shall be carried out using the criteria explicitly stated in the tender document”.

Accordingly, the Authority’s conclusion regarding the first issue is that, the 1st Appellant’s disqualification based on the power of attorney was fair. As for the 2nd Appellant, their disqualification was unfair.

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

In resolving this issue, the Authority considered the Appellants contentions that their financial and technical capabilities were superior than those of the successful tenderer and that the Tender Document contained criteria, specifications and names of the persons similar to those contained in the successful tenderer’s tender, yet, the Respondent did not consider them for the award of the tender.

In order to dispose this issue, the Authority deemed it necessary to frame the following sub-issues.

- i. Whether the successful tenderer had the requisite experience, financial, technical and production capability to execute the tender.**

- ii. Whether some of the specifications provided for in the Tender Document were discriminatory.**

Having framed the sub-issues the Authority proceeded to resolve them as follows;

- i. Whether the successful tenderer had the requisite experience, financial, technical and production capability to execute the tender.**

In resolving this sub-issue, the Authority examined the Tender Document, and the applicable law. In particular Clause 35.2 and 3 of the ITB and Section 48 (1) (2) of

the Act and Regulation 14 (1) (a) of G.N. No.97 of 2005 which provides as follows:

“Clause 35.2 “The Procuring Entity will determine to its satisfaction whether the Bidder that is selected as having submitted the lowest evaluated responsive Bid is qualified to perform the contract satisfactorily, in accordance with the criteria listed in sub Clause 13.3

Clause 35.3 **“the determination will take into account the Bidders financial, technical, and production capabilities. It will be based upon an examination of the documentary evidence of the Bidders qualifications submitted by the Bidder, pursuant to Sub Clause 13.3...”**.
(Emphasis added)

“S. 48 (1) if tenderers have not pre-qualified, the procuring entity and the tender board **shall** determine whether the tenderer whose tender or proposal has been determined to offer the lowest evaluated tender, in the case of procurement or

the highest evaluated tender in case of disposal of public asset by tender, **has the capability and resources to carry out effectively the contract as offered in the tender**". (Emphasis added)

(2) the criteria to be met shall be set out in the tendering document and if the tenderer does not meet any of these criteria, the tender shall be rejected..."

"Reg. 14 (1) To qualify to participate in procurement or disposal proceedings, suppliers, contractors, service providers or asset buyers shall meet the following criteria:

(a) **that they possess the necessary professional and technical competence, financial resources, equipment and other physical facilities, managerial capabilities, reliability, experience and reputation, and the person to perform the procurement or disposal contract**".

(Emphasis Added)

The Authority observed that, this project was very big by any standard involving about sum of Tshs 126 Billion based on the (successful tenderer tender price). The Authority further observed that there was no prequalification done, consequently, according to the law post-qualification was mandatory to determine the experience, financial, technical, production and managerial capability of the tenderer with the lowest evaluated price. However, curiously and strangely this fundamental requirement was not conducted, what was done was a demonstration by the successful tenderer of the product before the Respondents staff followed by a physical visit to Malawi Electoral Commission. The Authority hastens to say that, this is not post qualification by any stretch of imagination and is a mockery to the requirement of the law. In deed, one wonders how the Respondent satisfied themselves about the technical, financial, requisite experience, managerial and production capability in the absence of a proper post-qualification.

Furthermore, the Authority observed that, the BDS under Clauses 15 and 44 provided that;

“Clause 15 the qualification criteria required from Bidders in ITB Clause 13.3 (b) at least one year similar project in the past five years in supplying of digital voters registration kits with solar power backup.”

“Clause 44 Post Qualification;

The lowest bidder will be called to demonstrate the technical functionality of his kits to the purchaser’s technical team at purchaser premises-Dar es Salaam. And the Purchaser will have no any responsibility on any given time when required during and after demonstration”.

Both the above requirements are completely inadequate in meeting the requirement of the law already cited above. It should be noted that, a qualification criteria of at least one similar project in supply of digital voter registration kits is not relevant to the need for the supply of biometric voters registration kits and as it is apparently from their tender document, the successful

tenderer had no experience with biometric voters registration kits as required. It is rather like the Respondent asked for apples but they were ready to pay for oranges.

Furthermore, and at the expence of repeating ourselves a post qualification through a demonstration exercise is both totally inadequate in meeting the requirement of the law and in seriously determining the successful tenderer' capability .

From the above findings the Authority's conclusion with regard to this sub- issue is that the successful tenderer had no requisite experience, financial, technical and production capabilities to execute the tender.

ii. Whether some of the specifications provided for in the Tender Document were discriminatory.

In order to ascertain the Appellant's contentions regarding this sub-issue, the Authority revisited the

Tender Document and noted that at page VII-13 of the Technical Specifications; there is a sample of the voters registration card bearing the picture and the name of one **Roger Moiane.**

The Authority revisited the successful tenderer's brochures availed by the 1st Appellant and noted that, at its page 2 of 4 contained the photograph and the names of Mr. Roger Moiane as one of the successful tenderer's key staff working as a Senior Electronics Technician.

The Authority further revisited the successful tenderer's tender and observed that at its profile chapter, (Appendix F) contains the same information contained in the brochure, regarding **Mr. Roger Moiane.**

The Authority noted further with utter dismay, that even the specifications of the camera provided for in the Tender Document at its Section VII-6 were similar to those provided in the successful tenderer's brochures attached to their tender.

The Tender Document further required Solid steel Structure cameras with 100% dust and water proof casing. The Authority observed that, the successful tenderer's brochure provided for the same specification. (That is, solid steel, dust and water proof casing).

When asked by the Members of the Authority of such a similarity, the Respondent casually, responded that they had prior requested samples of specifications from all tenderers and some of them which suited Tanzania's environment were picked without intention to favour any tenderer.

The Authority finds the Respondent's act to have contravened Section 62 (3) of the Act, which prohibits the Procuring Entity from setting the discriminatory requirements. The said Section reads as follows;

"S. 62(3) Tender document shall not include requirements and terminologies which

discriminate unfairly against participation by suppliers, contractors or consultants”.

The Authority’s conclusion regarding the second sub-issue is that some of the specifications provided for in the Tender Document were discriminatory and unfair to other tenderers.

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

3.0. Whether the award of the tender to the successful tenderer was made within the Bid validity period as specified in the Tender Document.

In resolving this sub-issue the Authority considered the Appellants’ arguments that the tender was awarded beyond the bid validity period provided in the Tender Document contrary to Regulation 87 (3) of GN. No. 97 of 2005 and Clause 17 of the ITB and Clause 21 of the BDS.

In ascertaining the Appellants' arguments, the Authority observed that, the initial bid validity period for the tender was 90 days and later on extended to 120 and later to 150 days. The Authority further observed that, the tenders were opened on 16th April, 2013; and that its validity period was to end on 15th July, 2013. However, the Respondent vide letters referenced AB.74/77/01 dated 17th June, 2013 and AB.34/75/01 dated 24th July, 2013 respectively, extended the Bid Validity period up to 16th September 2013.

During the hearing the Respondent submitted that the letter of award to the successful tenderer was communicated on 12th September, 2013, and the contract was signed on 20th November, 2013.

The Authority is of the firm view that, having extended the Bid Validity period of the tenders for the second time to 16th September, 2013, they were duty bound to finalise all processes of the tender including the signing of the contract by or before the 16th September, 2013.

The Authority finds the Respondent's act to be in contravention of the law provided for under Section 64 of

the Act and Regulation 87(2) of GN. No. 97 of 2005 which read as follows;

“S.64 the procuring entity shall require tenderers to make their tenders and tender securities valid for periods specified in the tendering documents, and **such periods shall be sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders and for the appropriate tender board to review the recommendations and give its approval for the contract or contracts to be awarded whilst the tenders are still valid**”

“Reg. 87 (2) **The period fixed by the procuring entity shall be sufficient to permit evaluation and comparison of tenders, for obtaining all necessary clearance and approvals, and for the notification of the award of contracts and finalise a contract**”.

(Emphasis Added).

In view of the above findings, the Authority's observes that, the signing of the contract between the successful tenderer and the Respondent on 20th November 2013 was beyond the bid validity period. However, the Authority's conclusion with regard to this issue is that the award of the tender to the successful tenderer was made within the Bid Validity Period.

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

Having analyzed the contentious issues in dispute, the Authority considered prayers by the parties as hereunder;

To start with the Authority considered the Appellants prayers for nullification of the award of the tender and the Respondent be ordered to re-evaluate them in a fair and transparent manner.

The Authority is of the settled view that, as it has been established in the first issue that the tender process did not comply with the procedures provided for in the Tender

Document. Further it has been established that 2nd Appellant was unfairly disqualified; and the award of the tender to the successful tenderer was not properly done, the Authority hereby nullifies the award of the tender to the purported successful tenderer and orders the same to be re-started afresh in observance of the law.

With regard to prayer for compensation as raised by the 1st Appellant; after due considerations of the said prayers, the Authority in exercise of its discretionary powers, orders the Respondent to pay the 1st Appellant a reasonable sum of USD 9,000 as per the following breakdown;

- i. Advocate fee USD 5,000 only
- ii. Transport and accommodation costs USD 4000 only.

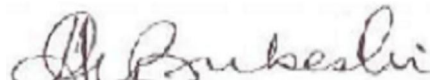
The Authority also considered the Respondent's prayer that, the Appeal be dismissed with costs. The Authority does not agree with the Respondent as the Appeal has some merits.

Accordingly, the Authority partly upholds the Appeal and Orders the Respondent to;

- re-start the tender process afresh in observance of the law; and
- to compensate the 1st Appellant the sum of USD 9,000 only.

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

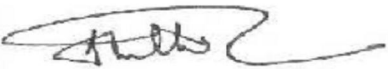

Decision delivered in the presence of the 1st Appellant and the Respondent this 29th November, 2013.



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

CHAIRPERSON

MEMBERS:

1. MR. K. M. MSITA.....
2. MR. H.S. MADOFFE.....
3. MRS. N.S.N. INYANGETE.....