

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL NO. 27 OF 2020-21**

**BETWEEN**

**M/S NANDHRA ENGINEERING & CONSTRUCTION**

**COMPANY LTD ..... APPELLANT**

**AND**

**MINISTRY OF EDUCATION, SCIENCE**

**AND TECHNOLOGY..... 1<sup>ST</sup> RESPONDENT**

**CRJE (EAST AFRICA) LIMITED..... 2<sup>ND</sup> RESPONDENT**

**DECISION**

**CORAM**

- |                                    |                 |
|------------------------------------|-----------------|
| 1. Hon. Justice (rtd) Suda Mjasiri | - Chairperson   |
| 2. Mr. Rhoben Nkori                | - Member        |
| 3. Adv. Rosan Mbwambo              | - Member        |
| 4. Ms. Florida Mapunda             | - Ag. Secretary |

**SECRETARIAT**

- |                        |                        |
|------------------------|------------------------|
| 1. Ms. Agnes Sayi      | - Senior Legal Officer |
| 2. Ms. Violet Limilabo | - Legal Officer        |



### **FOR THE APPELLANT**

1. Mr. Salim Mushi - Advocate, Dexter Attorneys
2. Ms. Agnes Dominic - Advocate, Dexter Attorneys
3. Mr. Nimesh Barmeda - General Manager

### **FOR THE 1<sup>st</sup> RESPONDENT**

1. Ms. Hirtrudice Jisenge - Director, Procurement and Supplies
2. Mr. Roma Mtawa - Procurement Officer for ESPJ- Project
3. Mr. Oscar Ngenzi - Legal Officer

### **FOR THE 2<sup>nd</sup> RESPONDENT**

1. Mr. Peter Kamyia - Advocate Aymak Attorneys
2. Mr. Rico Adolf - Advocate, Aymak Attorneys
3. Mr. Zhou Zejun - Director, CRJE (East Africa) Ltd
4. Mr. Xu Yubao - Manager, CRJE (East Africa) Ltd
5. Mr. Godlisten Ben - Legal Officer, Aymak Attorneys

The Appeal was lodged by **M/S Nandhra Engineering & Construction Company Ltd** (hereinafter referred to as "**the Appellant**") against the **Ministry of Education, Science and Technology** (hereinafter referred to as "**the 1<sup>st</sup> Respondent**") and **M/S CRJE (East Africa) Limited** (hereinafter referred to as **the 2<sup>nd</sup> Respondent**).

The Appeal is in respect of Tender No. ME-024/2020-2021/HQ/W/02 for the Proposed Construction of Dodoma Technical College Phase I at Nala –



Dodoma City Council in Dodoma Region (hereinafter referred to as "**the Tender**").

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

The Tender was conducted using International Competitive Tendering method specified in the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 446 of 2013 as amended by GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**").

The 1<sup>st</sup> Respondent through the Daily News newspaper dated 18<sup>th</sup> August 2020, invited qualified tenderers to submit their tenders. The deadline for submission was initially set for 15<sup>th</sup> September 2020; however, it was later on extended to 29<sup>th</sup> September 2020. Eighteen (18) tenderers submitted their tenders.

Tenders were then subjected to evaluation which was conducted into two stages namely; preliminary and detailed evaluation. At the preliminary evaluation stage nine (9) tenders were disqualified for being non responsive to the requirements of the Tender Document. The remaining nine (9) tenders were subjected to detailed evaluation. At that particular stage tenders were checked for arithmetic correction of errors. Thereafter tenders were ranked according to their corrected prices. After completion of the evaluation process the Evaluation Committee recommended award of the Tender to M/S CRJE (East Africa) Ltd at the contract price of



Tanzanian Shillings Seventeen Billion Nine Hundred Forty Two Million Eight Hundred Thirty Thousand Seven Hundred and One Cents Twenty Two (17,942,830,701.22) only VAT inclusive.

The Tender Board at its meeting held on 6<sup>th</sup> November 2020, approved the award as recommended by the Evaluation Committee, subject to post-qualification and successful negotiations. Post- Qualification was conducted in November 2020 and negotiations took place on 15<sup>th</sup> February 2021. During negotiations the 2<sup>nd</sup> Respondent reduced the contract price from TZS 17,942,830,701.22 to Tanzanians Shillings Seventeen Billion Nine Hundred Million (17,900,000,000/=) only VAT inclusive. On 22<sup>nd</sup> February 2021, the 1<sup>st</sup> Respondent's Tender Board approved the Post qualification report, negotiations report and recommendations of award to M/S CRJE (East Africa) Ltd, the 2<sup>nd</sup> Respondent.

On 10<sup>th</sup> March 2021, the 1<sup>st</sup> Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender. The Notice informed the tenderers that award has been proposed to the 2<sup>nd</sup> Respondent at the contract price of TZS 17,900,000,000/= VAT inclusive. The Notice also informed the Appellant that it was ranked the second with quoted price of Tanzanian Shillings Eighteen Billion Thirty Five Million Seven Hundred Fifty Two Thousand One Hundred and Four Cents Twelve (18,035,752,104.12) only VAT inclusive compared with the price quoted by the proposed bidder of TZS 17,900,000,000/=.

Dissatisfied, on 12<sup>th</sup> March 2021, the Appellant applied for administrative review to the 1<sup>st</sup> Respondent challenging the proposed award of the tender to the 2<sup>nd</sup> Respondent. The basis for challenging the award proposal was



that the 2<sup>nd</sup> Respondent is a sister company of M/S China Railway First Group who has been blacklisted by the World Bank and both are wholly owned by M/S China Railway Group Limited. On 17<sup>th</sup> March 2021, the 1<sup>st</sup> Respondent issued a decision by dismissing the Appellant's application for review. The said letter was received by the Appellant on 23<sup>rd</sup> March 2021 by e-mail. Aggrieved further, on 6<sup>th</sup> April 2021, the Appellant filed this Appeal to the Appeals Authority.

### **GROUND OF APPEAL**

The grounds of appeal as stated in the Appellant's Statement of Appeal may be summarized as follows: -

1. That, the 2<sup>nd</sup> Respondent's company is the sister company of M/S China Railway First Group. This is due to the fact that both are owned by M/S China Railway Group Limited. M/S China Railway First Group was blacklisted by the World Bank from September 2019 to September 2021. Since the 2<sup>nd</sup> Respondent and M/S China Railway First Group both are owned by M/S China Railway Group Limited of China, the blacklisting sanction imposed to M/S China Railway First Group also affects the 2<sup>nd</sup> Respondent.
2. That, the World Bank procedures on the scope of sanctioning of firms prescribe that the period of ineligibility of the sanctioned firm extends to any firm directly or indirectly controlled by the sanctioned firm and affiliates. The 2<sup>nd</sup> Respondent is an affiliate/subsidiary of M/S China Railway First Group since both originates from the same root. Thus, the blacklisting of the latter affects the former too.



3. That, Clause 3.8 (e) of the Instruction To Tenderers (ITT) prohibits blacklisted firms from participating or being awarded the Tender. The 2<sup>nd</sup> Respondent is ineligible to participate and be awarded the Tender as it has been affected by the blacklisting of a sister company.
4. That, According to Section 62 (2) of the Act and Regulation 101 of the Regulations the 1<sup>st</sup> Respondent is prohibited from awarding the Tender to the 2<sup>nd</sup> Respondent as the firm is debarred. To the contrary the 1<sup>st</sup> Respondent proceeded to award the Tender to the 2<sup>nd</sup> Respondent while knowing that its affiliate M/S China Railway First Group has been blacklisted and such a sanction extend to it.
5. That, the 2<sup>nd</sup> Respondent submitted a bid security guarantee from China Commercial Bank (T) Ltd. The said bank on 19<sup>th</sup> November, 2020 was closed for 90 days by the Bank of Tanzania (BOT) due to liquidity problems. The 1<sup>st</sup> Respondent ought to have rejected the bid security of the 2<sup>nd</sup> Respondent and disqualify it for non compliance. Further, as a result of the closure of the China Commercial Bank (T) Ltd, the 2<sup>nd</sup> Respondent failed to extend its bid security after the 1<sup>st</sup> Respondent had requested for extension of the bid validity period. The 1<sup>st</sup> Respondent ought to have disqualified the 2<sup>nd</sup> Respondent for this anomaly too.
6. Finally, the Appellant prayed for the following orders:-
  - i. The 2<sup>nd</sup> Respondent be disqualified from the tender process; and
  - ii. Award this Tender to M/S Nandhra Engineering & Construction Company Ltd.



## REPLY BY THE 1<sup>ST</sup> RESPONDENT

The 1<sup>st</sup> Respondent's reply to the Appellant's grounds of Appeal may be summarized as follows:-

1. That, the 2<sup>nd</sup> Respondent is not among the blacklisted firms as indicated in official World Bank website for the named period from September 2019 to September 2021.
2. That, the 2<sup>nd</sup> Respondent's Bid Security attached to its bid was from CRDB Bank PLC, Bank Guarantee No. CRDB20-IGT1054 dated 24<sup>th</sup> September, 2020. The submitted Bid Security was valid and in compliance with the requirement of the Tender Document. It is not true that the Bid Security submitted by the 2<sup>nd</sup> Respondent was issued by China Commercial Bank (T) Ltd.
3. That, the Appellant's allegation that the 2<sup>nd</sup> Respondent failed to extend the Bid Security at the time the tender validity period was extended is strictly disputed. The 2<sup>nd</sup> Respondent when extending the tender validity period also extended the Bid Security through a Bank Guarantee No. CRDB20-IGT1054 valid from 25<sup>th</sup> January, 2021 to 26<sup>th</sup> April, 2021 issued by CRDB Bank PLC on 8<sup>th</sup> January 2021.
4. Finally, the 1<sup>st</sup> Respondent prayed for the following orders:-
  - i. That, the Appeals Authority determine the eligibility of the 2<sup>nd</sup> Respondent against the Appellant's claims; and
  - ii. The Appeals Authority determine the matter.



## REPLY BY THE 2<sup>ND</sup> RESPONDENT

The 2<sup>nd</sup> Respondent's reply to the Appellant's grounds of Appeal may be summarized as follows:-

1. That, the 2<sup>nd</sup> Respondent has never been debarred by the World Bank in any tendering process and as of to-date, the 2<sup>nd</sup> Respondent is executing several World Bank funded projects in Tanzania.
2. That, neither the 2<sup>nd</sup> Respondent's affiliates nor its subsidiaries have been debarred by the World Bank, thus the Appellant's assertion is unsubstantiated, unfounded and marred with ill will and intent.
3. That, the 2<sup>nd</sup> Respondent is not a sister company of M/S China Railway First Group. It is a subsidiary of M/S China Railway Construction Engineering Group which is totally independent and not related to M/S China Railway First Group. The alleged sanctions on M/S China Railway First Group cannot be extended or applied to M/S China Railway Construction Engineering Group as a shareholder for the 2<sup>nd</sup> Respondent.
4. That, the 2<sup>nd</sup> Respondent is a Private Company limited by shares and registered in Tanzania under the Companies Act No. 12 of 2002. The 2<sup>nd</sup> Respondent has two shareholders; namely, M/S China Railway Construction Engineering Group which owns 950 ordinary shares and M/S Shenzhen Investment Company which owns 50 ordinary shares.
5. That the 2<sup>nd</sup> Respondent's counsel added that, the registered shareholder of the 2<sup>nd</sup> Respondent is not M/S China Railway First Group





as asserted by the Appellant. The registered shareholders of the 2<sup>nd</sup> Respondent are neither affiliates nor subsidiaries of the M/S China Railway First Group.

6. That, the list of the blacklisted firms by the World Bank did not indicate if the 2<sup>nd</sup> Respondent, M/S China Railway Construction Engineering Group Company Limited, M/S Shenzhen Investment Company or any of its affiliate company to have been affected by the sanction. The debarment was specific to M/S China Railway First Group.
7. That, the 2<sup>nd</sup> Respondent disputes the Appellant's assertion that its Bid Security was issued by the China Commercial Bank (T) Ltd. According to the 2<sup>nd</sup> Respondent its Bid Security was issued by CRDB Bank PLC.
8. That, with regard to extension of Bid security, the 2<sup>nd</sup> Respondent stated that its Bid Security validity was accordingly extended to 26<sup>th</sup> April 2021 in compliance with the instructions from the 1<sup>st</sup> Respondent vide a letter with reference No. ME-024/2020-21/HQ/W/27 dated 17<sup>th</sup> December, 2020.
9. That, the 1<sup>st</sup> Respondent is legally obliged to award the Tender to the 2<sup>nd</sup> Respondent since it was the first ranked tenderer during the evaluation process; hence, eligible to be awarded the Tender.
10. Finally, the 2<sup>nd</sup> Respondent prayed for the following orders:-
  - i. Dismissal of the Appeal;
  - ii. The 1<sup>st</sup> Respondent be allowed to award the Tender to the 2<sup>nd</sup> Respondent; and



iii. The Appellant to pay the Respondent's costs.

At the hearing of the Appeal, the Appellant's learned counsel prayed to add one additional ground of a Appeal. The said ground is that the *bid validity period for the tender has expired*, hence there is no valid Tender. According to the Counsel for the Appellant, the Appellant became aware of the bid validity issue on 21<sup>st</sup> April 2021 after receiving the 1<sup>st</sup> Respondent's letter requesting for extension of the tender validity period. The Appellant had already filed its appeal on April 6, 2021 and was therefore unable to add a new ground on its Statement of Appeal.

Having considered the Appellant's application, the Appeals Authority allowed it to add the additional ground of Appeal.

Upon being allowed to add a new ground, the Appellant's counsel prayed to withdraw all the other grounds of Appeal as submitted in its Statement of Appeal. Hence the Appellant remained with only the additional ground of appeal.

### **ISSUES**

The following issues were agreed upon by the parties and approved by the Members of the Appeals Authority: -

- 1. Whether Tender No. ME-024/2020-2021/HQ/W/02 for Proposed Construction of Dodoma Technical College is valid; and**
- 2. What reliefs, if any, are the parties entitled to.**



## **SUBMISSIONS BY THE APPELLANT**

The learned counsel for the Appellant started its submissions by indicating that, the deadline for submission of Tenders was on 29<sup>th</sup> September 2020. According to Regulation 191(3) of the Regulations the period for effectiveness of a tender should not exceed one hundred and twenty (120) days from the final date fixed for submission of tenders. The Appellant's counsel further referred Regulation 191 (4) of the Regulations which allows extension of the bid validity period. However, the request for extension should be done prior to the expiry of the initial validity period of the Tender.

The Appellant's counsel submitted that, the initial tender validity period specified in the Tender Document expired on 28<sup>th</sup> December 2020. The 1<sup>st</sup> Respondent requested for an extension of the bid validity period from 29<sup>th</sup> December 2020 to 29<sup>th</sup> March 2021. However, if counting from the Tender opening date 29<sup>th</sup> September 2020 to 29<sup>th</sup> March 2021 the validity period for the Tender has exceeded 120 days stipulated under Regulation 191(3) of the Regulations.

The learned counsel added that, according to Regulation 191(4) of the Regulations, a request for extension of the tender validity period has to be done prior to the expiry of the initial stipulated validity period. After expiry of the tender validity period on 29<sup>th</sup> March 2021, the 1<sup>st</sup> Respondent did not seek for extension as required by the law. The 1<sup>st</sup> Respondent through its letter dated 21<sup>st</sup> April 2021 requested tenderers to extend tender validity period from 29<sup>th</sup> March 2021 to 29<sup>th</sup> May 2021. The 1<sup>st</sup> Respondent's act in

A handwritten signature in black ink, appearing to be 'V. N. S.', is located at the bottom right of the page.

this regard contravened the requirement of the law as the request for extension ought to have been sought prior to 29<sup>th</sup> March 2021. Thus, the request for extension was not valid. Therefore after the expiry of the tender validity period on 29<sup>th</sup> March 2021, there is no valid Tender in place.

In support of his argument, the learned counsel for the Appellant cited this Appeals Authority's decision in ***Appeal Case No. 16 of 2020-21 between M/S Coseke Tanzania Limited versus Tanzania Petroleum Development Corporation, at pg 11*** where it was stated that request for extension of the tender validity period should be done before expiry of the initial validity period. The learned counsel submitted that the purported extension of the bid validity period is not valid. Therefore, the tender is null and void. The Appeals Authority should declare the tender in reference to have expired and order the 1<sup>st</sup> Respondent to re-start the tender process afresh. The learned counsel also prayed for costs of this Appeal.

### **REPLY BY THE 1<sup>ST</sup> RESPONDENT**

The 1<sup>st</sup> Respondent started its submissions by indicating that, on 10<sup>th</sup> March, 2021 it issued the notice of intention to award to all bidders who participated in the Tender. Following the notice of intention to award, the 1<sup>st</sup> Respondent received applications for administrative review from tenderers challenging the proposed award. After making decisions with respect to complaints lodged, the 1<sup>st</sup> Respondent proceeded to issue an award letter on 24<sup>th</sup> March, 2021 to the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent further prepared the contract and submitted it to the Attorney General for vetting.



The 1<sup>st</sup> Respondent submitted further that, according to Section 71 of the Act, the tender validity period should be specified in the Tender Document and it should be sufficient to permit evaluation of tenders, approval and issuing of the award while the tender is still valid. This Tender was opened on 29<sup>th</sup> September 2020. The set tender validity period was 90 days which expired on 29<sup>th</sup> December 2020. On 17<sup>th</sup> December 2020 the 1<sup>st</sup> Respondent requested tenderers to extend their tender validity period to 29<sup>th</sup> March 2021. That means, at the time the 1<sup>st</sup> Respondent issued the notice of intention to award on 10<sup>th</sup> March 2021 and award letter on 24<sup>th</sup> March 2021 the Tender was still valid. The second extension which was requested through a letter dated 21<sup>st</sup> April 2021 was to cover a period from 29<sup>th</sup> March 2021 to 29<sup>th</sup> May 2021. The second extension was necessitated by the existence of this Appeal.

Further, the 1<sup>st</sup> Respondent added that, the 2<sup>nd</sup> Respondent has extended its Bank Guarantee which is valid from 26<sup>th</sup> April 2021 to 26<sup>th</sup> July 2021. The Appellant has also extended its bank guarantee covering the period from 31<sup>st</sup> March 2021 to 27<sup>th</sup> June 2021.

The 1<sup>st</sup> Respondent distinguished Appeal Case No. 16 of 2020-21 (supra) relied upon by the Appellant, on the ground that the circumstances of the cases are not the same. Hence the case relied upon by the Appellant is not applicable under the circumstances.

The 1<sup>st</sup> Respondent concluded that, all the processes relating to the evaluation of tenders, tender board approvals on recommendations and award were made within the bid validity period as required by the law.



Therefore, the 1<sup>st</sup> Respondent prayed for the dismissal of the Appeal in its entirety with costs.

### **REPLY BY THE 2<sup>nd</sup> RESPONDENT**

The 2<sup>nd</sup> Respondent's learned counsel commenced his submissions by distinguishing Appeal Case No. 16 of 2020-21 cited by the Appellant. The learned counsel submitted that in the said case, at the time the tender validity period expired, the procuring entity had not issued the letter of award to the proposed tenderer. The scenario is different in the Appeal at hand, as at the time the tender validity period expired on 29<sup>th</sup> March 2021 the 1<sup>st</sup> Respondent had already issued the letter of award. Thus, the award was made whilst the tender was still valid.

The learned counsel submitted further that, according to Regulation 192 (1) of the Regulations a tenderer who agrees to an extension of the tender validity period should also extend the tender security. The 2<sup>nd</sup> Respondent agreed to an extension of the tender validity period and its tender security was extended up to April 2021. At the time the award was made the tender validity period and tender securities were still valid. The 2<sup>nd</sup> Respondent further extended the tender security up to 26<sup>th</sup> July 2021. The Appellant also extended the tender security up to 27<sup>th</sup> June 2021.

The learned counsel added that, according to Regulation 192 (4) of the Regulations securities are to remain valid for thirty (30) days more after expiry of the tender validity period. Much as the Appellant claims that the tender validity period expired on 29<sup>th</sup> March 2021, the 2<sup>nd</sup> Respondent's tender security was still valid up to 26<sup>th</sup> April 2021. Thus, on 21<sup>st</sup> April 2021



when the 1<sup>st</sup> Respondent requested extension of the tender validity period and tender securities, the 2<sup>nd</sup> Respondent's security was still valid. Thus, the award was made when the tender security was still valid.

Therefore, the 2<sup>nd</sup> Respondent prayed for the dismissal of the Appeal in its entirety with costs and the 1<sup>st</sup> Respondent to award the tender to the 2<sup>nd</sup> Respondent.

### **RE-JOINDER BY THE APPELLANT**

The learned counsel for the Appellant stated that the letter of award was not availed to all the bidders who participated in the Tender in question, thus it is doubtful if the award was made when the Tender was still valid. Further, paragraph 2 (f) of the 1<sup>st</sup> Respondent's Statement of Reply indicated NIL in a place where the contract signing date was to be indicated. That means the contract has not been signed, thus the award is yet to be finalized as per Section 71 of the Act.

The learned counsel added that, the tender expired on 29<sup>th</sup> March 2021 and the Appeal was lodged on 6<sup>th</sup> April 2021, therefore the tender had already expired when this Appeal was lodged. Thus, there is no valid Tender in place.

### **ANALYSIS BY THE APPEALS AUTHORITY**

The Appeals Authority took cognizance of the issues framed by the parties at the hearing of this Appeal and proceeds to analyze them as hereunder:-

- 1. Whether Tender No. ME-024/2020-2021/HQ/W/02 for Proposed Construction of Dodoma Technical College is valid.**



According to Clause 12 of the Tender Data Sheet (TDS) and Clause 16.1 of the Instructions to Tenderers (ITT), the bid validity period was Ninety (90) days from the deadline for submission of tenders which was on 29<sup>th</sup> September 2020. Counting from 29<sup>th</sup> September 2020 bid validity period of Ninety (90) days expired on 28<sup>th</sup> December 2020. The record of Appeal indicates that the 1<sup>st</sup> Respondent had requested two extensions of the bid validity period. The first extension was requested by a letter dated 17<sup>th</sup> December 2020 to cover the period from 29<sup>th</sup> December 2020 to 29<sup>th</sup> March 2021. The second extension was sought by a letter dated 21<sup>st</sup> April 2021 to cover the period from 29<sup>th</sup> March 2021 to 29<sup>th</sup> May 2021.

In order to ascertain if the Tender under Appeal is still valid, the Appeals Authority revisited Section 71 of the Act read together with Regulation 232(2) of the Regulations which provide guidance on validity of tenders. The provisions read as follows:-

*Sec.71 "The procuring entity shall require tenderers to make their tenders and tender securities including tender securing declaration valid for periods specified in the tendering documents, 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 approve the contract or contracts to be awarded whilst the tenders are still valid."*





Reg. 232(2) ***"The award shall be made within the period of tender validity to the tenderer whose tender has been determined to be the lowest evaluated or the highest evaluated, as the case may be, and meets the required financial and managerial capability, legal capability, experience and resources to carry out the contract effectively."***

(Emphasis Added)

The above quoted provisions state clearly that the tender validity period has to be specified in the Tender Document and such a period should be sufficient for a procuring entity to complete evaluation of tenders, obtaining approval of award or contracts to be awarded whilst the tenders are still valid. According to the record of Appeal, it is undisputed that the tender validity period specified in the Tender Document was 90 days from 29<sup>th</sup> September 2020 and expired on 28<sup>th</sup> December 2020. Before the tender validity period expired, the 1<sup>st</sup> Respondent requested for extension up to 29<sup>th</sup> March 2021. The said extension was accepted by all the tenderers.

The Appeals Authority observed further that, after the evaluation process was completed the Tender Board approved the award on 22<sup>nd</sup> February 2021 and the award letter was issued on 24<sup>th</sup> March 2021. Relating the facts of this Appeal to the above quoted provisions it is crystal clear that at the time the Tender Board approved the award and when the award letter was issued to the 2<sup>nd</sup> Respondent the Tender was still valid.

A handwritten signature in black ink, appearing to be 'J. N. S.', is written over the page number.

The Appeals Authority considered the Appellant's argument that the tender validity period had exceeded 120 days contrary to the requirement of Regulation 191(3) of the Regulations. Regulation 191(3) provides as follows:-

*Reg. 191(3) "The period fixed by a procuring entity shall be sufficient to permit evaluation and comparison of tenders, for obtaining all necessary clearances and approvals, and for the notification of the award of contracts and finalise a contract **but the period shall not exceed one hundred and twenty days from the final date fixed for submission of tenders.**"*

*(Emphasis supplied)*

Having reviewed the above quoted provision, the Appeals Authority is of the view that a procuring entity is allowed to specify in the Tender Document the validity period which does not exceed 120 days.

However, in exceptional circumstances as provided under Regulation 191(4) of the Regulations such a period may be extended. Regulation 191(4) of the Regulations reads as follows:-

*Reg. 191(4) "In exceptional circumstances, **prior to the expiry of the original period of effectiveness of tenders, a procuring entity may request tenderers to extend the period for an additional specified period of time**".*

*(Emphasis added)*

18  


Therefore, the 1<sup>st</sup> Respondent cannot be faulted for extending the tender validity period from 29<sup>th</sup> December 2020 to 29<sup>th</sup> March 2021 as the law allows it to be done.

The Appeals Authority further considered the Appellant's argument that the second extension of the tender validity period was done contrary to the requirement of Regulation 191(4) of the Regulations which requires request for extension to be sought before expiry of the initial stipulated tender validity period.

The Appeals Authority revisited the record of Appeal and observed that, the first extension was sought prior to the expiry of the initial tender validity period. It was further observed that on 21<sup>st</sup> April 2021, the 1<sup>st</sup> Respondent requested tenderers to extend their tender validity period from 29<sup>th</sup> March 2021 to 29<sup>th</sup> May 2021. The Appeals Authority is of the view that the purpose of the tender validity period is to ensure that a tenderer does not vary its tender during the evaluation stage. It is a prerequisite for the validity of the evaluation of tenders and the award procedure that tenders be valid throughout the entire evaluation process. It is not a condition *sine quo non* for signature of contract at the end of the award procedure. In this tender the Tender Board approved the award on 22<sup>nd</sup> February 2021 whilst the tender validity period was still valid as per Section 71 of the Act. Therefore, the 1<sup>st</sup> Respondent's act of requesting the second extension of tender validity period was not in line with the requirements of Section 71 of the Act.

A handwritten signature in black ink, appearing to be 'C. V. S.', is written over the page number.

The Appeals Authority noted in passing that Regulation 191(3) of the Regulations requires tender validity period to be valid until notification of award is made and finalization of a contract. The Appeals Authority observes that the wording of Regulation 191 (3) conflicts with Section 71 of the Act. The Regulation requires tenders to be valid until finalization of the contract while the Act requires tenders to be valid until approval of award by the Tender Board. Section 36 (1) of the Interpretation of Laws Act, CAP 1 provides as follows:-

Section 36 (1) "*subsidiary legislation shall not be inconsistent with the provisions of the written law under which it is made, or of any Act, and subsidiary legislation shall be void to the extent of any such inconsistency*".

The Appeals Authority further distinguished Appeal Case No. 16 of 2020-21 cited by the Appellant from the circumstances of this Appeal. In the cited case the bid validity period expired before the Tender Board approved the award. Therefore, the cited case is inapplicable under the circumstances.

Having considered all the arguments by the parties vis-à-vis the requirement of the law, the Appeals Authority is of the settled view that award of the Tender to the 2<sup>nd</sup> Respondent was made whilst the tender was still valid. Therefore, the Appeals Authority concludes the first issue in the affirmative.

A handwritten signature in black ink, appearing to be 'J.P. 8', is written over the page number.

**2. What reliefs, if any, are the parties entitled to.**

Given the findings hereinabove, the Appeals Authority hereby dismiss the Appeal. The 1<sup>st</sup> Respondent is allowed to proceed with the Tender process. Each party is to bear its own costs.

It is so ordered.

This Decision is binding on the Parties and may be executed in terms of Section 97 (8) of the Act.

The Right of Judicial Review as per Section 101 of the Act is explained to the Parties.

The Decision is delivered in the presence of the parties this 11<sup>th</sup> day of May 2021.

**HON. JUSTICE (rtd) SAUDA MJASIRI**

  
.....  
**CHAIRPERSON**

**MEMBERS:**

- 1. MR. RHOBEN NKORI** .....
- 2. ADV. ROSAN MBWAMBO**.....