

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

APPEAL CASE NO. 100 OF 2011

BETWEEN

MADRAS SECURITY PRINTERS..... APPELLANT

AND

**THE NATIONAL IDENTIFICATION
AUTHORITY..... 1ST RESPONDENT**

**THE PERMANENT SECRETARY
MINISTRY OF HOME AFFAIRS 2ND RESPONDENT**

**PUBLIC PROCUREMENT
REGULATORY AUTHORITY 3RD RESPONDENT**

RULING

CORAM:

- | | | |
|----|-----------------------------|---------------|
| 1. | Hon. A.G. Bubeshi, J. (rtd) | – Chairperson |
| 2. | Mrs. N.S.N. Inyangete | - Member |
| 3. | Mr. H.S. Madoffe | - Member |
| 4. | Mr. K.M. Msita | - Member |
| 5. | Ms. B.G. Malambugi | - Secretary |

SECRETARIAT:

1. Ms. E. V.A. Nyagawa – Principal Legal Officer

The appeal at hand was lodged by **MADRAS SECURITY PRINTERS** (hereinafter to be referred to as "**the Appellant**") against **THE NATIONAL IDENTIFICATION AUTHORITY** commonly known by its acronym **NIDA**, **THE PERMANENT SECRETARY, MINISTRY OF HOME AFFAIRS** and **THE PUBLIC PROCUREMENT REGULATORY AUTHORITY** commonly known by its acronym **PPRA** (hereinafter to be referred to as "**the 1st, 2nd and 3rd Respondents**" respectively).

The Appellant is disputing the Pre-qualification for the procurement of Goods/Supply and Installation of Equipment and Plants for the Implementation of the National Identification System based on Smart Card Technology (hereinafter to be referred to as "**the Tender**").

According to the documents submitted to the Authority, the facts of the Appeal may be summarized as follows:

The 2nd Respondent had neither a Tender Board nor a Procurement Management Unit (PMU) and therefore the Pre-qualification stage for the procurement of the tender under

Appeal was conducted by the Ministerial Tender Board for the Ministry of Home Affairs.

On 24th May, 2008, the 1st Respondent invited applications for Pre-qualification *vide* The Guardian, Daily News, Mwananchi, Habari Leo and The East African newspapers. In addition the said notice was posted on the Government website and PPRA website.

The deadline for submission of the applications for Pre-qualification was initially set for Monday, 23rd June, 2008, but was later extended to 25th June, 2008. A total of 104 firms purchased pre-qualification documents out of which only 54 returned the documents.

On 27th November, 2009, the 1st Respondent's Tender Board approved five firms to be pre-qualified and proceed to the second stage of the tendering process. They further directed that the said firms be given the Tender Document subject to the said document being reviewed by the Tender Board prior to its issuance.

The 2nd Respondent's Director General was quoted telling News Editors that five firms had been shortlisted for the tender under Appeal.

On 7th February, 2010, the 1st Respondent advertised through various newspapers that, six applicants were shortlisted as listed below:

- M/s Unisys – Republic of South Africa;
- M/s Iris Corporation Berhad – Malaysia;
- M/s Gleseckle & Devrlent fze – United Arab Emirates;
- M/s Madras Security Printers - India;
- M/s Marubeni Corporation (in association with ZETES and NEC) – Japan; and
- M/s Tata Consultancy Services (in association with On Track Innovations Ltd) – India.

On 3rd April, 2010, the Appellant made an inquiry from the Respondents, *vide* letter referenced MSP/OPR/117/2010 on the contradictory information they had learnt through the media, namely,

- (i) That, the Appellants were among the six firms shortlisted for the tender.

- (ii) That, the Government of Tanzania had selected five firms to be given the tender documents.

The Appellant further informed the 1st Respondent that by that date they were yet to receive the tender documents and inquired as to when they would be issued to them. The said letter was copied to the Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**") and the 2nd Respondent.

On 4th November, 2010, the Appellant submitted a complaint to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**") requesting for their intervention in the matter. However the Authority advised them to, inter alia, follow the proper procedure in lodging their appeal.

On 22nd November, 2010, the Authority advised the Appellant to observe the dispute settlement procedures provided for under the Act.

On 1st December, 2010, the Appellant wrote to the 2nd Respondent a letter referenced MSP/OPR/430/2010, which was

copied to the 1st Respondent and PPRA, raising the following issues:

- No replies had been received in respect of inquiries made in their previous letters to the 1st Respondent which was copied to the 2nd Respondent and PPRA.
- The advertisement which appeared in the newspapers included the Appellants among the companies which had qualified for short listing and it was stated therein that the necessary communication would be sent to each firm individually but this was not done.
- They were aware that the other shortlisted companies, save for the Appellant, had been called for the next stage of tendering and no reason had been given for the exclusion of the Appellant.
- In view of the fact that the Respondents' action was not communicated to the Appellant, proceeding to the next stage of tendering would be in violation of the principles of natural justice.
- Furthermore, having short listed the Appellant the 2nd Respondent could not subsequently disqualify them.
- The Appellant therefore prayed that they be allowed to take part in the tender and that the Respondent be ordered to

refrain from proceeding with the Tender process until a decision on the matter has been made.

On 7th December, 2010, the Appellant lodged an Appeal to the Authority (hereinafter to be referred to as "**the previous Appeal**").

In reply to the Appellant's complaints, the 1st and 2nd Respondents raised a Preliminary objection on four points, to wit,

- The Appeal is time barred as no application for extension of time has been applied for and granted contrary to Sub Rule (1) of Rule 6 of the Public Procurement Appeals, Rules of 2005.
- The Authority was not properly moved for an application for an interim order as the Statement of Appeal contained two different prayers, that is, an interim order of stay of tender proceedings and a request that the Appeal be entertained. In the opinion of the Respondents, the two prayers should have been

submitted in two different applications instead of combining them as it was done by the Appellant.

- The Appeal contravened the provisions of Sub-Rule (3) of Rule 6 of GN. No. 205/2005 as it was not signed by the person who signed the Application for Pre-qualification. Since the institution of legal proceedings was related to the tender process, it was pertinent that the person to whom the powers of Attorney were conferred in the Application for Pre-qualification be the one signing Appeal documents.

- The Appeal contravened the provisions of Sections 79, 80, and 81 of the Public Procurement Act, Cap. 410 (hereinafter to be referred to as "**the Act**") which require an application to first be submitted to the accounting officer, then to PPRA pursuant to Section 81 and thereafter to this Authority.

On 11th February, 2011, the Authority delivered its ruling on the four points of Preliminary Objection raised by 1st and 2nd Respondents by rejecting the first, second and third points of Preliminary Objection while upholding the fourth point. The

Authority ruled that it did not have jurisdiction to entertain the Appeal for want of jurisdiction as the Appellant did not refer the matter to PPRA prior to lodging the Appeal to this Authority contrary to Section 81 of the Act.

On 23rd February, 2011, the Appellant applied for administrative review to PPRA whereby a decision thereof was rendered on 2nd March, 2011. In their decision, PPRA stated, inter alia, that they had a conflict of interest in the matter as they had conducted an investigation on the procurement in dispute by virtue of the powers conferred unto them under Section 8 of the Act. Having carried out the investigation, they recommended, among other things, the disqualification of the Appellant as their Joint Venture partner, namely, M/s Bharat Electronics had submitted two bids contrary to the requirements of the Pre-qualification Document. They therefore advised the Appellant to refer the matter to this Authority.

On 8th March, 2011, the Appellant lodged this Appeal to the Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant's arguments as deduced from written submissions availed to this Authority may be summarized as follows:

That, the Respondents have jointly and severally occasioned unacceptable tender process and or entered illegal decisions thereby removing the Appellant from the earlier published pre-qualification list of six firms shortlisted for the next tendering stage.

That, the Appellant was among the six pre-qualified applicants in the tender under Appeal as evidenced in the Respondent's public notice which appeared in the Daily News of 18th February, 2010.

That, in belief of and acting on such representation, the Appellant started to mobilize resources for the next tendering stage together with other five Applicants.

That, the Appellant was not notified of details of the next stage of tendering, including delays on the issuance of the relevant documents, while the other Applicants had such information which prompted the Appellant to seek review on 1st December, 2010. In their application for review, the Appellant had requested

to be availed with necessary documents and tender details so as to participate in the next stage of tendering.

That, the decision not to pre-qualify the Appellant was communicated to them during the hearing of the previous Appeal.

That, with regard to the 1st and 2nd Respondents argument that their notification dated 18th February, 2010 that the Appellant was among the six pre-qualified Applicants did not mean that it was conclusive for them to proceed to the next stage of the tender process, the Appellant submitted that such a statement is untrue and cannot apply to the Appellant alone in exclusion and discrimination of the other five Applicants.

That, the Respondent's conduct in this tender exhibit unfairness in the tender process and has been prejudicial of the Appellant as evidenced in the Respondent's letter to PPRA enticing favor to the detriment of the Appellant.

That, having been aggrieved by the acts of the 1st and 2nd Respondents, the Appellant applied for review to the 3rd Respondent who declined to entertain the Appellant's application

on the ground that their investigation and recommendations on the disputed tender resulted into the disqualification of the Appellant.

That, the ground for the Appellant's disqualification, to wit, the alleged multiple bidding by the Appellant's consortium member, namely, M/s Bharat Electronics was and is untrue and non-existent and in any event does not apply at pre-qualification stage.

That, in removing the Appellant from the pre-qualification list, the 1st and 2nd Respondents acted on a personal directive of the 1st Respondent's Director General in total breach of fairness and corporate governance principles.

That, the Respondents breached the tender process and made illegal decisions, in the following regard;

- (a) Their failure to invite the Appellant to tender as a pre-qualified applicant violated the law.
- (b) By not inviting the Appellant to tender, the Applicants misconceived a personal decision of NIDA's Accounting

Officer and its Chief Executive Officer from that of the required institutional decisions of the evaluating Tender Board which never resolved the applicant's removal from the list of pre-qualified applicants; as such the Appellant believes that NIDA's Accounting Officer usurped the powers of the Tender Board and by implication his decisions were designed to disqualify the Appellant to the next stage because the Appellant remained the only threat to the rest of the Applicants.

- (c) They violated the law which requires them to invite pre-qualified applicants to tender.
- (d) They failed to notify the unsuccessful applicants within seven days as required by the law.
- (e) They failed to respond to the Appellant's application within the prescribed time.
- (f) They did not process the pre-qualification within the minimum time prescribed and made an unjustifiable extension of the said period.
- (g) The Appellant's disqualification made on 8th December, 2010, was *ultra vires* as the matter was statutorily not within their mandate at that particular time.

- (h) They acted illegally in not processing the tender independently; hence submitting to PPRA's investigatory directives which resulted into the unprocedural disqualification of the Appellant .
- (i) They acted on unverified allegation of multiple bidding without hearing and reverting to a disproportionate and extreme decision to remove the Appellant from the pre-qualified list it being not prejudicial to them in lieu of the actual pending tendering process.

That, the Respondents have not refuted or disowned their public Notice made vide the Daily News paper dated 18th February, 2010, titled "SHORTLISTED APPLICANTS" which indicated the Appellants was among the six shortlisted Applicants. Furthermore, the said advertisement stated clearly that **"Necessary guidance to the shortlisted applicants will be communicated to them individually"**.

That, the Appellant vehemently disputes the Respondent's argument that the said publication did not mean that the Appellant qualified for the next stage of tendering, as the said

Notice stipulated clearly that, "... the following applicants have been SHORT LISTED for the next stage tendering ..."

That, the Appellant believed and acted on the represented notice that they were among the six qualified Applicants eligible to get the Tender Document.

That, the allegation that M/s Bharat Electronics Ltd had submitted another application with a third party, namely, M/s Power Computer Telecoms Ltd is also untrue and not applicable at this pre-bidding stage.

That, the Appellant had an exclusive authorization Consortium Agreement with M/s Bharat Electronics Ltd to the notice of both the Respondents who have successfully evaluated the Appellant herein.

Accordingly, the Appellant requested the Authority to grant the following prayers:

- (a) An order and finding that the removal of the Appellant's name from the pre-qualification list published on 18th February, 2010, was illegal and unfair;

- (b) The Appellant be restored on the list of pre-qualified Applicants and be allowed to bid and participate in the tender under Appeal;
- (c) Nullification of all decisions and any tender processes made subsequent to the Applicant's disqualification;
- (d) Reschedule the timeframes for all the six pre-qualified Applicants, the Appellant inclusive, within which to obtain tender details, instructions and process their tenders;
- (e) The Respondents be ordered to comply with all procurement regulations;
- (g) Any other relief that the Authority shall deem fit and just to grant;
- (h) Temporary injunctive or similar orders be issued against the Respondents restraining to any further process for the disputed tender pending disposal of this Appeal;
and
- (i) Costs at the rate of 200 USD per counsel per hour each for 60 hours and other incidental costs for attendance of the Appellant's principal officers and witnesses.

REPLIES BY THE 1ST AND 2ND RESPONDENTS

The 1st and 2nd Respondents' submissions as deduced from their Written Replies may be summarized as follows:

To start with, the Respondent raised a Preliminary Objection that the Appeal be dismissed on the following legal points:

- (i) The Appeal is time barred as no application for extension of time has been applied for and granted contrary to Sub Rule (1) of Rule 6 of the Appeal Rules.
- (ii) The Appeal contravenes the provisions of Sections 79, 80 and 81 of the Act.
- (iii) The Appeal is *res judicata*.
- (iv) This Authority has no jurisdiction to entertain the Appeal.

Without prejudice to the above, the Respondent went on to submit on the merits as follows:

That, save where expressly admitted, the 1st and 2nd Respondents deny each and every allegation in the Appellant's Statement of Appeal.

That, the removal of the Appellant's name in the list of pre-qualified Applicants was made by the 1st Respondent acting on the 3rd Respondent's directives. The 1st Respondent convened a Ministerial Tender Board Meeting on 27th November, 2009 which worked on the directives of the 3rd Respondent and decided to disqualify the Appellant. On 7th February, 2010, the 1st Respondent's Director General notified the public through media on the five pre-qualified firms and the same was reported in some newspapers on 8th February, 2010.

That, the Notice issued by the 2nd Respondent on 7th February, 2010 was made prematurely while the investigation by the 3rd Respondent was in progress. Having received the 3rd Respondent's recommendations following the investigations conducted, the 1st Respondent convened a Ministerial Tender Board Meeting which revisited its earlier decision in line with the former's recommendations. It is not true that the Appellant's disqualification was maliciously done by the 1st Respondent but

rather they acted in accordance with the instructions of the 3rd Respondent.

That, the Appellant should not have started mobilization as the Request for Proposal was not availed to them indicating that they were qualified and invited for the tendering stage.

That, following the 1st Respondent's statement through the media on the five shortlisted firms, on 19th February, 2010, the Appellant sought for clarification via email and also visited the 1st Respondent's offices physically whereby the reasons for their disqualification were verbally communicated to them in good faith.

That, the Appellant's application for administrative review gave a five day ultimatum to the 1st Respondent to respond contrary to the requirements of the law which requires the accounting officer to respond within 30 days. The reply thereof was written on 8th December, 2010, while the notification of the Appellant's disqualification was sent on 27th November, 2009.

That, the Appellant's claim that he became aware of the notification letter during the hearing of Appeal No. 91/2010 is not true as it was sent to them by post before the previous Appeal was lodged to this Authority. Moreover, the said letter was appended to the Respondent's Written Replies which was submitted to the Authority and served to the Appellant via the Authority before the hearing date, on 7th February, 2011.

That, following the reports vide the media that five firms were shortlisted, the Appellant sent an email on 19th February, 2010 seeking for clarification as to why they had been disqualified. As it has already been stated that the reasons thereof were verbally communicated to the Appellant that is why, they submitted a statement to the 1st Respondent denying that M/s Bharat Electronics Ltd had submitted another application in Joint Venture (hereinafter to be referred to as "**JV**") with M/s Power Computers Telecoms Ltd contrary to Clause 10.3 of the Pre-qualification Documents. This indicates that, by that time the Appellant was not only aware of the fact that they were disqualified but also the reasons thereof.

That, the Appellant had first lodged their complaint to the 1st Respondent on the 1st December, 2010, giving them five days contrary to the statutory period of 30 days pursuant to Section 80(4) of the Act. Before the expiry of the statutory 30 days and without justifiable reasons the Appellant appealed to the Authority instead of referring the matter to PPRA pursuant to Section 82(1) of the Act. This Authority directed the Appellant to go for judicial review in case they were aggrieved by the ruling. The Respondents do not understand why the Appellant having applied for administrative review to the 3rd Respondent which was not entertained, resorted to this Authority instead of going for judicial review.

That, investigations conducted by the 3rd Respondent are merely based on submitted tender documents and not other issues as alleged by the Appellant. Moreover, Section 15 of the Act provides expressly that the 3rd Respondent's investigation proceedings shall not be rendered void or whatever for want of form as alleged by the Appellant. The 3rd Respondent did not entertain the matter as they had already conducted an investigation thereof.

That, the 3rd Respondent had prepared the tender documents after the draft prepared by the 1st Respondent was found to be unsuitable for this kind of procurement. The 3rd Respondent is therefore in a better position to address issues relating to interpretation of the provisions of the Pre-qualification Document.

That, the 3rd Respondent's response to the Appellant's application for administrative review, states categorically that a JV between the Appellant and M/s Bharat Electronics Ltd was wrongly pre-qualified as one of the partners had submitted another application in JV with M/s Power Computers Telecomm Ltd. This was the reason for the Appellant's disqualification.

That, the 1st Respondent shared the same understanding with the Appellant that they would have been pre-qualified, but after the 3rd Respondent's intervention by way of investigation which came out with various recommendations, the 1st Respondent received a letter from the Treasury referenced C/KA.357/384/01/48 dated 20th November, 2009, which required the 2nd Respondent to observe the directives of the 3rd Respondent. On 24th November, 2009, the 1st Respondent's Accounting Officer requested the

Ministerial Tender Board to revisit their earlier decision in light of the recommendations of the 3rd Respondent.

That, the disqualification of the Appellant was done by the Ministerial Tender Board on 27th November, 2009, acting on the recommendations of the 3rd Respondent and not the 1st Respondent's Accounting Officer as alleged by the Appellant. The Ministerial Tender Board consists of competent persons who cannot be influenced by personal dictates of the 1st Respondent's Accounting Officer.

That, the Appellant's allegation that the 1st Respondent's Accounting Officer is a threat are disputed as the notice for the pre-qualified five firms was intended to get the best tenderers. Furthermore, the pre-qualification stage is not based on technical capabilities and the Appellant's conduct contravened Regulation 99 of GN. No. 97/2005.

That, the 1st Respondent had notified the Appellant in time on the tender process vide media on 7th February, 2008, which made the Appellant aware of the decision.

That, the 1st Respondent's letter to the Appellant referenced CFA 31/273/02/55 dated 8th December, 2010 was a reply to the Appellant's letter dated 1st December, 2010 and not a communication of disqualification but rather a notification of the decision of the Ministerial Tender Board of 27th November, 2009.

That, the 3rd Respondent has statutory mandate to *suo motto* or from any other party to cause or initiate investigation pursuant to Section 8 of the Act. In this case, the investigation was triggered by a public outcry in the media. The recommendations made by the 3rd Respondent were communicated to the 1st Respondent who was legally bound to implement them as the former has supervisory powers and mandate to intervene in any public procurement process for justifiable reasons as was the case in the tender in dispute. Moreover, the directions of the 3rd Respondent are legally binding to the 1st Respondent.

That, the National ID project is classified as a security tender pursuant to Regulation 29 of GN. No. 97/2005. The tender is of great national interest to be implemented unhindered on trivial pretexts as the Appellant is attempting to do. The tendering process is now at a very advanced stage and a lot of resources

have already been deployed for the sole purpose of this project and the Government has dictated that the National IDs should be made available to the eligible persons in six months from January, 2011.

That, the Government has instructed the 1st and 2nd Respondents via Cabinet decision made on 15th October, 2009 that they should follow the guidance of the 3rd Respondent in the implementation of the National ID Project.

That, the tender process is therefore legal and can neither be rescheduled, stayed nor nullified and the Appellant is not entitled to payment of any costs as they have not suffered any loss.

REPLIES BY THE 3RD RESPONDENT

The 3rd Respondents' submissions as deduced from their Written Replies may be summarized as follows:

That, the 3rd Respondent's replies addresses specific statements directed to it.

That, the advice of PPRA to the 2nd Respondent to revisit its decision to pre-qualify the Appellant was made following the investigation conducted by the former on the tender. The investigation revealed that, the Appellant had submitted an application for pre-qualification in JV with M/s Bharat Electronics Ltd. However, the said M/s Bharat Electronics Ltd had also submitted another application in JV with M/s Power Computers Telecom Ltd contrary to the requirement of Clause 10.3 of the Pre-qualification Document.

That, the decision to conduct investigation on this tender was intended to ascertain compliance with the Act and its Regulation in the pre-qualification process following allegations by the general public of the violation of applicable law in the pre-qualification process.

That, having conducted the investigation, the 3rd Respondent informed the Accounting Officer of the 2nd Respondent the findings and recommendations thereof pursuant to Section 13(1) of the Act. The 3rd Respondent refutes the Appellant's allegations that the Respondents entered illegal decisions to disqualify them.

That, the contention that the 3rd Respondent declined to entertain the Appellant's application for review is refuted because after reviewing the same, the 3rd Respondent found that it was not appropriate for them to review it as they were involved in the decision to disqualify the Appellant. Furthermore, the 3rd Respondent communicated the said decision to the Appellant vide letter referenced PPRA/AE/016/19 dated 2nd March, 2011 and having found that the Appellant still had room to refer the matter to the Authority, they duly advised them to do so.

That, Section 10 of the Act gives the 3rd Respondent discretion to adopt whatever procedure it deems appropriate to the circumstances of a particular case, in conducting its investigation. By virtue of the cited provision, the 3rd Respondent was not obliged to conduct a hearing or call for anyone to make representation before it. In conducting investigation on this tender the 3rd Respondent used the procedure which in its opinion was convenient under the circumstances.

That, with regard to the contention that the 3rd Respondent was not properly constituted in declining the Appellant's application for review, in observance of the principles of Good Governance

and natural justice, the former would not have entertained the matter as they had a conflict of interest on the subject matter of the complaint.

That, the Appellant's contention that the alleged multiple bidding by their consortium member M/s Bharat Electronics Ltd was untrue and non-existent is refuted as both the applications for pre-qualifications submitted by the Appellant as well as M/s Power Computers Telecom Ltd provide sufficient proof thereof.

THE PRELIMINARY OBJECTION RAISED BY THE 1ST AND 2ND RESPONDENTS

Having gone through the written submissions by parties, the Authority deemed it necessary to disposed the Preliminary Objection raised by the Respondents by way of written submission. The 1st and 2nd Respondents were therefore requested to expand their submissions on the Preliminary Objection so as to enable the Appellant to respond to them. Only the 1st Respondent submitted an expanded version of the Preliminary Objection which was duly replied by the Appellant. The said submissions are as summarized herein below:

THE 1ST RESPONDENT'S SUBMISSION ON THE PRELIMINARY OBJECTION

The 1st Respondent's written submissions availed to this Authority may be summarized as follows:

- (a) That the Appeal is time barred and no application for extension of time has been applied for and granted contrary to Sub Rule (1) of Rule 6 and Rule 7 of the Public Procurement Appeals, Rules of 2005**

That, this appeal emanates from the 1st Respondent's decision to disqualify the Appellant way back on the 27th November, 2009. The Respondent had informed the Appellant verbally the reason for their disqualification, after they had inquired through a telephone call. They were informed that their disqualification was based on the fact that, a consortium between the Appellant and M/s Bharat Electronics Limited had submitted an application for pre-qualification but when PPRA conducted an investigation they discovered that the Appellant's partner had submitted another

application in JV with M/s Power Computers Telecomms Limited contrary to Clause 10.3 of the Pre-qualification Document.

That, having learnt the said reason, the Appellant's partner M/s Bharat Electronics Limited submitted to the Respondent a letter dated 25th February, 2010, disputing that they had submitted another pre-qualification application with M/s Power Computers Telecomms Limited. This shows clearly that at that time the Appellant was aware of their disqualification, hence they should have lodged their complaints to the Accounting Officer within 14 days pursuant to Clause 11 of the General Instructions to Bidders (hereinafter to be referred to as "**GITA**").

That, the Appellant had on 1st December, 2010, lodged their complaint to the 1st Respondent's Accounting Officer giving a five days notice contrary to Section 80(4) of the Act. Further, before the expiry of the statutory period of 30 days, (which ended on the 31st December, 2010) within which the Accounting Officer was to give his decision, the Appellant lodged an appeal to this Authority, that is, Appeal Case No. 91 of 2010, without referring the matter to PPRA as required by law.

That, in its Ruling on Appeal No. 91 of 2010, this Authority ruled that that Appeal was lodged before it prematurely and rejected it for want of jurisdiction. Had the Appellant been aggrieved by the Ruling of this Authority, the only recourse open to them was to seek for Judicial Review by invoking the provisions of Section 85 of the Act.

That, surprisingly, instead of applying for Judicial Review to the High Court, on the 21st February, 2011, the Appellant applied for administrative review to PPRA. PPRA refrained from entertaining the said application and informed the Appellant that they should lodge an appeal to this Authority. However, the current Appeal is improper on the ground that, when the Appellant lodged their complaint to the 1st Respondent's Accounting Officer, they were supposed to wait for the decision to be delivered until 31st December, 2010, before going to PPRA as provided for under Section 80 of the Act. Since the Appellant did not exhaust the review levels the Appeal should be dismissed.

That, the Appeal is time barred as the decision upon which they are complaining about was made on 27th November, 2009, and by virtue of the Appellant's letter to the 1st Respondent dated 1st

December, 2010, the time within which they should have appealed to this Authority was 14 days which elapsed on the 14th January, 2011, pursuant to Section 81(1) of the Act.

That, in view of the foregoing, the Appellant did not seek for leave appeal out of time and ought to be dismissed with costs.

(b) That the Appeal contravenes the provisions of Section 79, 80, and 81 of the Public Procurement Act No. 21 of 2004.

That, in the Ruling for Appeal No. 91 of 2010, this Authority considered the cause of action against the 1st Respondent to have arisen on the 1st December, 2010; when the Appellant wrote a letter to the 1st Respondent's Accounting Officer. This was a review according to Section 80 of the Act. The Appellant should have waited for 30 days within which the Accounting Officer was to make a decision pursuant to Section 80(6) of the Act read together with Regulation 113(1) of GN No. 97 of 2005. The Appellant did not wait for 30 days.

That, the Appellant disregarded the Ruling issued by this Authority in the previous Appeal as they were directed to go for

Judicial Review under Section 85 of the Act in case they were aggrieved by the said Ruling. Instead of going for Judicial Review the the Appellant sought administrative review to the 3rd Respondent, namely, PPRA who did not entertain the matter. This shows that the Appeal lacks merit and should be struck out.

(c) That the Appeal is res judicata.

That, the Appeal is *res judicata* in the sense that it involves the same parties (save for the 3rd Respondent) and the same matter that was brought to this Authority vide Appeal No. 91 of 2010 whose Ruling was delivered on the 11th February, 2011. The principle of *Res Judicata* applies where the following pre-conditions exist:

“not only must it be shown that the matter directly and substantially in issue in the contemplated suit is the same as that involved in a former suit between the same parties but also it must be shown that the matter was finally heard and determined by a competent court;
(Emphasis supplied)

That, the 1st and 2nd Respondents in Appeal No. 91 of 2010 are also the 1st and 2nd Respondents in the Appeal at hand and the reliefs sought in the previous Appeal are the same as in this Appeal.

That, although the previous Appeal was rejected for want of jurisdiction, but during the hearing the Authority allowed the parties to go to the merits thereof as the Preliminary Objections raised touched on the merits of the said Appeal. This was intended to ensure that a fair decision is made.

That, the Appeal is *res judicata* and ought to be struck out and or dismissed for want of prosecution.

(d) That this Authority has no jurisdiction to entertain this Appeal

That, following the investigations conducted by the 3rd Respondent whereby its findings were communicated to the 1st Respondent, the Government instructed the 1st and 2nd Respondents vide Cabinet decision made on the 15th October, 2009, that they should follow the guidance given by the 3rd Respondent in the procurement of the tender under Appeal.

According to Article 54(5) of the Constitution of the United Republic of Tanzania, 1977 as amended (hereinafter to be referred to as "**the Constitution**"), Cabinet decisions cannot be questioned in any court of law; the status which this Authority also enjoys.

That, the decision to disqualify the Appellant was made in implementation of the directive of the 3rd Respondent which was also in conformity with the Cabinet directive which cannot be questioned in any court. This Authority therefore cannot entertain this Appeal as it will be tantamount to contravening the Constitution.

Accordingly, the Appeal be dismissed with costs.

THE APPELLANT'S REPLIES TO THE PRELIMINARY OBJECTIONS

The Appellant's written replies to the Preliminary Objections raised by the 1st Respondent, may be summarized as follows:

- (a) This Appeal is time barred and no application for extension of time has been applied for and**

granted contrary to sub Rule(1) of Rule 6 and Rule 7 of the Public Procurement Appeals Rules, 2005

That, the 1st Respondent's submissions on this preliminary objection has no merit and it is raised as a delaying tactic so that the Respondents may continue with the tendering process so as to avoid involvement of the Appellant whom they regard as a major threat in the whole tendering process having regard of the price the Appellant has quoted. This is because the same ground of objection was raised and argued in the previous proceedings and it was rejected when this Authority ruled as follows:

“With regard to the controversy as to when the Applicant became aware of the matter giving rise to the Appeal, the Authority accepts the Appellant's reply that, their letter dated 3rd April, 2010 does have any indication that by that time they were aware of their disqualification. Moreover, the Respondent conceded that their letter was neither replied to nor did they communicate the outcome of the Pre-qualification proceedings to the Appellant before the appeal was lodged. In view of the above analysis, the Authority

finds that the Appeal is not time barred as the cause of action arose on 1st December, 2010 while the appeal was filed on 6th December, 2010.” (Emphasis added)

That, it was a further observation of the Authority that as the cause of action arose on 1st December, 2010 and the Appellant lodged its complaint on 6th December, 2010 to the Accounting Officer, the latter was supposed to determine the complaint within a period of 30 days. This Authority observed further that, since the 30 days period expired on 31st December, 2010 and the Accounting Officer did not give decision within that statutory period, then the Accounting Officer ceased to have jurisdiction to determine the Appellant’s application.

That, with regard to the 1st Respondent’s submissions that the Appellant was supposed to refer the matter for Judicial Review, the Appellant is of the view that this contention is erroneous, in that, there was no need for the Appellant to seek Judicial Review by invoking the provision of Section 85 of the Act. The Appellant followed the dictum of this Authority in due compliance of its earlier Ruling in Appeal No. 91 of 2010. If the Respondent was aggrieved by the order of this Authority, they ought to have

preferred Judicial Review, but cannot be allowed to take a defence that the Appellant had not followed the procedure under the Act. The Appellant was satisfied with the decision of this Authority delivered on 11th February, 2011, that is why they followed its directive by instituting these proceedings to the proper review level.

That, even after the Authority had delivered its Ruling on 11th February, 2011, the Accounting Officer never issued any decision to determine the Appellant's complaint. They therefore request the Authority to reject this ground for lack of merit.

(b) The Appeal contravenes the provisions of Sections 79, 80 and 81 of the Act

That, the Appellant failed to understand if the 1st Respondent was serious in raising and making arguments on this preliminary objection because in their submissions they conceded that the Appellant's letter dated 1st October, 2010 was more than a request for clarification. They further conceded that, the Accounting Officer has never issued a decision to that effect and that:

“...it is clear that the Appellant would refer his application for Administrative Review to the 3rd Respondent immediately after 31st December, 2010 and not before that ...”

That, as rightly conceded by the 1st Respondent, the Appellant has never referred the matter to the 3rd Respondent before 31st December, 2010. After this Authority ruled and directed the Appellant to refer the matter to PPRA, it dutifully referred the matter to PPRA on 21st February, 2011, whereby PPRA confirmed that they were substantially involved in the tendering process by way of investigation and therefore they refrained from entertaining the Appellant’s complaint. Immediately thereafter the Appellant referred this matter to this Authority as required by law.

That, in the submissions, the 1st Respondent further concedes in that:

“assuming that the 3rd Respondent refrained from entertaining the Appellant’s application for review on reason that he was involved in the investigations that led to the Appellant’s disqualification the

Appellant's only recourse was to refer his appeal to this authority as provided for under Section 82(1) of Act No. 21 of 2004." (Emphasis supplied)

That, one would wonder if the Appellant has done contrary to what the 1st Respondent suggests above. It is very clear that after the 3rd Respondent had disqualified themselves the Appellant referred the matter to this Authority. This is in line with the 1st Respondent's suggestion above.

(c) That this Appeal is *res judicata*

That, first of all, the 1st Respondent has raised the above preliminary objection without notice and has argued the same without leave of this Authority. They request the Authority to disregard this preliminary objection. In the alternative, they submitted that, the doctrine of *res judicata* cannot apply or suit in the material facts of this matter. The submissions by the 1st Respondent defeats their Preliminary Objection as they suggest that this matter is not *res judicata* as per their own submissions on page 9 which reads as follows:

“not only must be shown that the matter directly and substantially in issue in the contemplated suit is the same as that involved in a former suit between the same parties but also it must be shown that the matter was finally heard and determined by a competent court.”

That, based on the above quotation the pleader of *res judicata* must establish the following elements:

- (i) The issue must be directly and substantially the same
- (ii) The issue must be between the same parties
- (iii) The matter must have been finally heard
- (iv) The matter must have been determined by a competent court.

That, all of the above elements must be established by the pleader. However, on this matter only two elements exist, that is, (i) and (ii) while (iii) and (iv) cannot be established here. Element (iii) above requires that the matter must be finally and conclusively heard on merits and a conclusive decision thereon entered. However, in this matter the previous Appeal was not conclusively heard but was rejected on technicality. Therefore, the doctrine cannot apply here.

That, with regard to element (iv), the pleader must establish that the matter was determined by a competent court. In this case, this Authority is not a Court and nowhere it is defined as such. Even assuming it was a court it has already decided that it did not have jurisdiction to entertain the previous Appeal. Therefore, even if it determined the matter on merit, it had by then no jurisdiction to entertain the earlier Appeal before it.

That, the cases cited by the 1st Respondent are irrelevant in the circumstance of this matter and they should not be considered. This objection has no merit and should be dismissed with costs.

(d) This Authority has no jurisdiction to entertain this Appeal.

That, this preliminary objection is misconceived and has no relevance on this matter. The Respondent supports this objection by referring to Article 54(5) of the Constitution of United Republic of Tanzania which bars proceedings against advice given to the President by the Cabinet to be questioned in any court. With due respect to the Respondent, firstly, the quoted provision does not apply in this Appeal as the said provision applies to advice given

to the President by the Cabinet and where such presidency is a party to proceedings. In this case, there is no advice referred by the Respondent that was given to the President by the Cabinet. Secondly, the appellant is not challenging the decision of the Cabinet, if any, the Cabinet has never made any decision to disqualify the Applicant which would entitle them to challenge such decision.

That, the alleged undisclosed Cabinet decision is intended to cover the Respondents' procurement irregularities in this tender and compromise the intended independence of this honorable Authority to dispense justice without fear. It was pleaded by the 1st Respondent that the decision to disqualify the Appellant was made by 2nd Respondent. The Appellant further submits that the 1st Respondents for the first time have come forward to contend that the Government of Tanzania *vide* a Cabinet decision made on 15th October, 2009, accepted the findings of the investigation conducted by the 3rd Respondent. This argument was never raised by the 1st Respondent in the previous Appeal and it is raised now as an afterthought.

That, the Appellant respectfully submits that the entire procedure followed by Respondents with respect to the alleged investigation, findings and the disqualification of the Appellant was orchestrated to suit the convenience of the 1st Respondent for reasons best known to them.

That, the contention that the said irregular process has been approved by the Cabinet is yet another sword used by the 1st Respondent to compromise the independence of this Authority. In the previous Appeal, the 1st Respondent wrote to this Authority a letter dated 8th January, 2011, intimidating this Authority to ignore the previous Appeal because the Government had issued a note that the project was behind schedule. The Respondent should be warned from repetition of such utterances which are likely to compromise the independence of this Authority.

That, the Respondents are afraid that gross irregularities they have committed in the tender process might be exposed. Therefore, they urge this Authority as a watchdog of the public funds to dismiss these objections with costs and schedule a nearest date to dispose the merits of the Appeal in order to preserve the rights of the Appellant and rescue billions of public

funds which are exposed to irregular and unfair tendering processes.

Accordingly, the Preliminary Objection be dismissed with costs as pleaded in the Memorandum of Appeal.

ANALYSIS BY THE AUTHORITY

Having revisited submissions by parties on the Preliminary Objections, the Authority deems it proper to address the key issue, to wit, whether this Authority has jurisdiction to entertain this Appeal. In resolving this issue the Authority formulated sub-issues, which dwell on each of the four points of the Preliminary Objection. However, since the first two points are interconnected as evidenced by the Respondent's submissions thereof, they will be addressed jointly. The said sub-issues are as follows:

- **Whether the Appeal is time barred;**
- **Whether the Appeal is *res judicata*; and**

- **Whether by entertaining this Appeal the Authority will be questioning the Cabinet's decision.**

Having formulated the sub-issues, the Authority proceeded to resolve them as follows:

1. Whether the Appeal is time barred

To start with, the Authority deems it necessary to point out at the outset that, most of the submissions by the 1st Respondent on this point were irrelevant, erroneous, confusing and imprecise which made it difficult to comprehend the underlying message. The Authority also cautions that, although this Appeal is a separate and independent Appeal from Appeal No. 91 of 2010, it is not possible to render the ruling on the current Appeal without referring to the previous Appeal as the two are substantially interrelated as evidenced in the submissions by parties.

In order to resolve this issue, the Authority started by revisiting Rule 6(1) of the Appeals Rules relied upon by the 1st Respondent which provides as follows:

“A person who is dissatisfied with the matter or decision giving rise to a complaint or dispute may give notice of intention to appeal within seven days from the date when he became aware of the matter or decision.” (Emphasis supplied)

In their submissions the 1st Respondent made two conflicting arguments. On the one hand, they submitted that, the Ruling delivered by this Authority on 11th February, 2011, directed the Appellant to apply for Judicial Review. They further contended that, the Appellant ignored the Authority’s Ruling that, if they were dissatisfied by that Ruling they should go for Judicial Review instead the Appellant referred the matter to PPRA. Secondly, they contended that, the Appellant should have lodged the Appeal to this Authority within 14 days from 31st December, 2010, when the 30 days period accorded to the accounting officer to decide the matter

lapsed and that the said 14 days expired on 14th January, 2011.

In reply thereof the Appellant stated that, the Respondent's contention is unfounded as the same ground of preliminary objection was rejected in the previous Appeal. Further that, they were satisfied with the Ruling rendered by this Authority that is why they did not go for Judicial Review. In addition, they sought for administrative review from PPRA as it was directed by this Authority in its Ruling.

Having revisited submissions by parties on this point, the Authority analyses them in order to ascertain their validity starting with Rule 6(1) which was cited by the 1st and 2nd Respondents. The Authority observes that, sub-Rule (1) of Rule 6 of the Appeal Rules relied upon by the Respondent is not mandatory but optional. The use of the word '**may**' entails an aggrieved person is at liberty whether to file a 'notice of intention to appeal' or not. Had it been mandatory, the words '**shall**' or '**must**' or others with similar connotation should have been used.

The Authority is of the firm view that, under the circumstances, the cited sub-Rule is not relevant.

The Authority considered the Respondent's argument that, in the previous Appeal the Authority directed the Appellant to go for Judicial Review but they instead sought administrative review to PPRA in disregard of Authority's directive. The Authority concurs wholly with the Appellant's submissions on this particular point and partly with the Respondent's submissions thereof. The Authority's position is based on the fact that, in its Ruling delivered on 11th February, 2011, the Authority gave the Appellant an option either to follow the review levels by seeking administrative review to PPRA by virtue of Section 81 of the Act or apply for Judicial Review in case they were aggrieved by the said Ruling pursuant to Section 85 of the Act. In this case, therefore, the Appellant's interpretation is totally correct as the Authority gave that leeway. With regard to the Respondent's interpretation thereof, they are partly right in that, going for Judicial Review was one of the two options, but that did not mean the Appellant was barred

from referring the matter to PPRA as a second review level which was skipped in the previous Appeal.

With regard to the Respondent's argument that the Appellant's right to appeal to this Authority expired on 14th January, 2011, the Authority observes that the 1st Respondent misconceived the Ruling delivered by this Authority. In its previous decision, the Authority made a thorough analysis of the dispute resolution mechanism under the Act, and had the 1st Respondent carefully considered the said Ruling they would have realized that, where the accounting officer makes a decision or fails to do so within 30 days of receiving a complaint, the matter is to be referred to PPRA pursuant to Section 81(2) of the Act. In this case therefore, the Authority agrees with the Appellant that, in its Ruling in the previous Appeal, this Authority held, *inter alia*, that it could not entertain the matter because the Appellant did not exhaust the dispute settlement levels provided for under the Act. That is to say, having applied for administrative review to the Accounting Officer they had to wait for 30 days before referring the matter to PPRA and later to this Authority.

The 1st Respondent's submission that the Appellant should have referred the matter to this Authority within 14 days from the date when the jurisdiction of the Accounting Officer ended, that is, 31st December, 2010, is wrong. The Authority observes that, the first review level is the accounting officer, of which the Appellant had complied with on 1st December, 2010. The second review level is PPRA and finally this Authority. The Authority observes further that, the said review levels are also provided for under Clause 11 of the Pre-qualification Document which was issued by the Respondent.

The Authority is of the firm view that, the 1st Respondent's submissions on this issue were in themselves not satisfactory as they failed to substantiate in which way was the Appeal time-barred. However, the Authority being a quasi judicial body is bound to interpret the law and ensure that justice is served. That said, the Authority is of the settled view that, this Appeal is time-barred because after the expiry of the 30 days accorded to the accounting officer, the Appellant was supposed to

seek for administrative review to PPRA within **“14 working days”** pursuant to **Section 81(2)** of the Act which reads as follows:

“81(1) A supplier, contractor or consultant who is aggrieved by the decision of a procuring entity or an approving authority may refer the matter to the Authority for review and administrative decision.

(2) Where:-

(a) the Accounting Officer does not make a decision within the period specified in section 80(6); or

(b) the tenderer is not satisfied with the decision of the Accounting Officer,

The tenderer may make a complaint to the Authority within fourteen working days from the date of communication of the decision by the Accounting Officer.”

Based on the above provision, the time within which the Appealable was supposed to refer the matter to PPRA

started to run from 1st January, 2011, hence the statutory period of 14 working days expired on 21st January, 2011. That is to say, the Appellant's right to refer the matter to PPRA ended on that particular date. By virtue of Section 81(2)(a) of the Act as quoted above, when the Appellant submitted their application for review to PPRA on 21st February, 2011; then, they were already time-barred. It goes without saying therefore that, this Authority cannot entertain the Appeal as it is not properly before it.

Accordingly, the Authority's conclusion on the first issue is that, this Appeal is time barred.

2. Whether the Appeal is *res judicata*

With regard to this issue, the Authority considered the submissions by parties and concurs with the Appellant that, the Appeal is not *res judicata* as in the previous Appeal the Appellant lost due to a technicality that they did not exhaust the proper review channels hence, the merits of the Appeal were not determined and no

decision was rendered. Moreover, the Ruling in the previous Appeal did not prevent the Appellant from instituting the current Appeal after following the procedures provided for under the Act. That said, this point is rejected.

The Authority's conclusion on this issue is that, the Appeal is not *res judicata*.

3. Whether by entertaining this Appeal the Authority will be questioning the Cabinet decision

In resolving this issue, the Authority revisited submissions by parties as well as Article 54(4) of the Constitution which was relied upon by the 1st Respondent. The said provision states as follows:

“The question whether any advice, and if so, what advice was given by the Cabinet to the President, shall not be inquired into in any court.”

Having reviewed the documents submitted, it is not disputed that, the Cabinet had directed the 1st Respondent to implement the directives issued by PPRA in the procurement of the Tender under Appeal. However, it was clearly cautioned that they should ensure the said procurement is made with due observance of the law. The law in this case is the Public Procurement Act, Cap. 410, in particular and other relevant laws. Furthermore, PPRA being a regulatory body is duty bound to observe the law, meaning that, whatever advice or directive they issue should be in compliance with the law. It is the opinion of this Authority that, assuming this Appeal was not time-barred; this Authority would have reviewed the tender process without any hindrance as it is mandated to do so by virtue of Section 82 of the Act.

The Authority emphasizes that, it also has jurisdiction to entertain complaints against PPRA by virtue of Section 82(1) of the Act which provides as follows:

“Complaints or disputes not amicably settled by the Authority shall be referred to the Public Procurement Appeals Authority:-” (Emphasis added)

It should be noted that, the word '**Authority**' under the Act is defined under Section 5(1) of the Act to mean PPRA.

The mandate of this Authority is to handle disputes arising from the procurement processes in order to ensure the law is adhered to. In this case, the Cabinet directed the 1st Respondent to conduct the procurement in accordance with the law, which is equally the duty of this Authority.

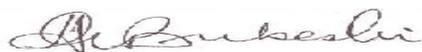
Accordingly, the Authority concludes that, by entertaining this Appeal the Authority will not be questioning the decision of the Cabinet, on the contrary it would be a way of ascertaining whether the Cabinet directive was actually implemented in as much as that decision underlined the need to follow the law.

Having resolved the points of Preliminary Objection, two of which have been rejected and one upheld, the conclusion is that the Appeal is not properly before this Authority. Accordingly, the Authority cannot address the issues pertaining to the merits of the Appeal for want of jurisdiction.

In view of the above analysis, the Authority upholds the Respondents' first point of Preliminary Objection and concludes that, the Appeal is not properly before this Authority.

On the basis of the aforesaid findings, the Authority rejects the Appeal and orders each party to bear its own costs.

Parties have right of Judicial Review as per Section 85 of the Act.



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JUDGE (rtd) A. BUBESHI

CHAIRPERSON

MEMBERS:

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