

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
APPEAL CASE NO. 104 OF 2011**

BETWEEN

M/S WAUZAJI WA MAZAO

YA MISITU1ST APPELLANT

M/S CIELMAC LIMITED..... 2ND APPELLANT

M/S PRIME TIMBERS LTD.....3RD APPELLANT

M/S TANZANIA COMMODITIES

TRADING CO. LTD.....4TH APPELLANT

AND

PERMANENT SECRETARY, MINISTRY

OF TOURISM &

NATURAL RESOURCES.....1ST RESPONDENT

M/A OLAM TANZANIA LTD.....2ND RESPONDENT

DECISION

CORAM:

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

SECRETARIAT:

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

FOR THE 1ST APPELLANT:

- | | |
|----------------------|----------------------|
| 1. Mr. Juma Iddi | - Chairman, WAWAMATA |
| 2. Mr. Rashid Hassan | - Member WAWAMATA |
| 3. Mr. Ally Hassan | - Member WAWAMATA |
| 4. Mr. Issack Wannah | - Member WAWAMATA |

FOR THE 2ND APPELLANT

- | | |
|-------------------------|----------------------|
| 1. Mr. Jayesh G. Patel | - Director |
| 2. Mr. Amrish D. Valera | - Project Consultant |
| 3. Mr. Ngassa Dindi | - Legal Advisor |
| 4. Mr. Simon Aliko | - Legal Advisor |

FOR THE 3RD APPELLANT

- | | |
|---|----------------------------|
| 1. Mr. Joseph Sang'udi
& Co. Advocates | - Advocate from Rweyongeza |
| 2. Mr. Ashok B. Shanghavi | - Director |
| 3. Mr. Julius Tesha | - Manager |

FOR THE 4TH APPELLANT

- | | |
|-------------------------|--------------|
| 1. Dr. Masumbuko Lamwai | - Advocate |
| 2. Mr. Muhammad Virji | - Manager |
| 3. Ms. Zakiya Riyaz Ali | - Consultant |

FOR THE 1ST RESPONDENT

- | | |
|----------------------------------|------------------------------|
| 1. Mr. Elias Samuel Mziray | - Principal Supplies Officer |
| 2. Mr. Leonard Lyimo | - Principal Forest Officer |
| 3. Ms. Caroline J. Mutahanamilwa | - Principal Legal Officer |
| 4. Mr. Jacob N. Mokiwa | - Legal Officer |
| 5. Mr. Samuel Mwamasenjele | - Legal Officer |
| 6. Mr. Boaz Ibrahim Ntembanda | - Supplies Officer |

FOR THE 2ND RESPONDENT

- | | |
|---------------------|----------------------------|
| 1. Mr. Jerry Edward | - Head of Legal Department |
| 2. Mr. Nikunj Tyagi | - Manager Operations |

This decision was scheduled for delivery today 10th June, 2011 and we proceed to deliver it.

The Appeal at hand was lodged individually by four tenderers, namely, **M/S WAUZAJI WA MAZAO YA MISITU** commonly known as **WAWAMATA, M/S CIELMAC LIMITED, M/S PRIME TIMBERS LTD** and **M/S TANZANIA COMMODITIES TRADING CO. LTD** (hereinafter to be referred to as “**the 1st, 2nd, 3rd** and **4th Appellants**” respectively) against the **PERMANENT SECRETARY, MINISTRY OF TOURISM AND NATURAL RESOURCES** and **M/S OLAM TANZANIA LTD** (hereinafter to be referred to as “**the 1st and 2nd Respondents**” respectively).

The said Appeal is in respect of two tenders which were processed simultaneously. Firstly, tender No. ME-018/2010-11/HQ/D/01 for Sale of Standing Teak Trees in Compartment No. MT6 (15,905.9117 cubic metres) at Mtibwa Forest Plantation, Morogoro (hereinafter to be referred to as “**the 1st Tender**”). Secondly, tender No. ME-018/2010-11/HQ/D/02 for Sale of Standing Teak Trees and Teak Poles (245.859 Cubic meters and 143 Teak Poles respectively) at Nambinga Teak Trial Plot in Ulanga

District – Morogoro (hereinafter to be referred to as “**the 2nd Tender**”). It should be noted that, all Appellants are contesting the award of the 1st Tender, while the 2nd Appellant in addition thereto disputes the award of the 2nd Tender.

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

On 22nd December, 2010, the 1st Respondent advertised both the 1st and the 2nd Tenders *vide* the Guardian and Mwananchi newspapers. The said advertisement attracted 18 firms for the 1st Tender and 10 for the 2nd Tender who purchased tender documents as indicated in the Table below:

S/ No	1ST TENDER		2ND TENDER
1	M/s Prime Timbers Ltd	1.	M/s Prime Timbers Ltd
2	M/s Sparkleway Ltd	2.	M/s Sparkleway Ltd
3	M/s Tanzania Commodities Trading Co. Ltd.	3.	M/s Tanzania Commodities Trading
4	M/s Cielmac Ltd	4.	M/s Cielmac Ltd
5	M/s Wood World Ltd	5.	M/s Wood World Ltd

6	M/s Mohamed Enterprises (T) Ltd	6.	M/s Mohamed Enterprises (T) Ltd
7	M/s Manito Impex Ltd	7.	M/s Manito Impex Ltd
8	M/s Sengani Wood Ind. Ltd	8.	M/s Kilombero Valley Teak Compan
9	M/s Janki Exports (T) Ltd	9.	M/s Mridhul Exports Ltd
10	M/s Sabaha International Co. Ltd	10.	M/s Paula Inter Business Co. Ltd
11	M/s Olam Tanzania Ltd		
12	M/s WAWAMATA		
13	M/s ABG African Link Traders Ltd		
14	M/s Universal G&G Co. Ltd		
15	M/s Tanga Teak Co. Ltd		
16	M/s Kioma Group Co. Ltd		
17	M/s Sarawany Investment Co. Ltd		
18	M/s KS Impex Ltd		

The deadline for submission of tenders was set for 3rd January, 2011, whereby only 5 out of the 18 firms, submitted their tenders for the 1st Tender. The 1st Appellant was amongst the firms which did not return the tender documents for the 1st Tender. The names of the tenderers who submitted their tenders in the 1st Tender are as shown in the Table below:

Tenderer	Quoted Price Tshs.	Bid Security
M/s Cielmac Ltd	5,210,776,672.92	USD 888,300 (25% - equivalent to Tshs. 1,305,667,755.00 Banker's cheque from Exim Bank)
M/s Prime Timbers Ltd	5,668,340,442.20 VAT Inclusive	Tshs. 1,417,085,423.00 (25% Bank Guarantee from International Commercial Bank (T) Ltd)
M/s Tanzania Commodities Trading Co. Ltd.	4,999,001,388.00	USD 795,300 USD 75,553 26% equivalent to Tshs. 1,280,024,016.98 Banker's cheques from Exim Bank and Standard Chartered Bank)
M/s Sarawany Investment Co. Ltd	5,169,421,302.00 VAT Inclusive	Tshs. 1,268,496,458.07 (24.53% Bank guarantee from National Bank of Commerce Ltd)
M/s Olam Tanzania Ltd	5,411,000,000.00 VAT Inclusive	Tshs. 884,400,000.00 Tshs. 1,175,500,000.00 Tshs. 450,000,000.00 (46.4% Banker's cheques from Exim Bank and Diamond Trust Bank)

With regard to the 2nd Tender, only four out of the 10 firms who purchased tender documents,

submitted their tenders, as shown in the Table below;

Tenderer	Quoted Price	Bid Security
M/s Sparkleway Ltd	Tshs. 55,318,275.00	Tshs. 13,830,000.00 (25% - Diamond Trust Bank Company cheque)
M/s Paula Inter Business Co. Ltd.	Tshs. 42,711,735,00 VAT Exclusive	Tshs. 10,677,933.75 (25% Banker's cheque from Bank M)
M/s Kilombero Valley Teak Co. Ltd	USD 11,516.04	USD 2,914.76 25 % Banker's cheque from CRDB)
M/s Cielmac Ltd	Tshs. 63,243,468.00	USD 11,700.00 (25% Banker's cheques from Exim Bank)

During the tender opening, a concern was raised regarding the status of the tenders whose quoted prices did not indicate whether they were VAT inclusive or exclusive.

On the day of the tender opening, the 1st Appellant wrote to the Public Procurement Regulatory Authority

(hereinafter to be referred to as "**PPRA**") informing them, amongst other things, that:

- They purchased the Tender Document but failed to submit their tender due to a prohibitive provision therein which required them to deposit a Bid Security equivalent to 25% of the tender price, which they found to be too high.
- Clause 17.1 of the Instructions to Bidders (hereinafter to be referred to as "**ITB**") was against Government policy which encourages local entrepreneurs to take part in public tenders.
- Requested PPRA to review the Tender Document and order the 1st Tender to be re-advertised excluding Clause 17.1 of the ITB.

On 5th January, 2011, the 2nd Appellant submitted a letter to the 1st Respondent referenced

CIL/Timber/09/2011 clarifying that their quoted price was VAT exclusive.

On 10th January, 2011, the 1st Respondent wrote to the banks where the tenderers for the 1st and 2nd Tenders had obtained the Banker's cheques and Bank guarantees inquiring on the authenticity of the same. The said assurance was provided by the relevant Banks, except for the National Bank of Commerce Ltd which indicated that they did not issue the said Bank guarantee to M/s Sarawany Investment Ltd.

On the same date, the 1st Respondent wrote to PPRA requesting for advice regarding the how the tenders whose quoted prices did not indicate whether they were VAT inclusive or exclusive should be treated. The 1st Respondent's letter further stated that, the concern was raised during the tender opening and on 5th January, 2011, the 2nd Appellant wrote to the 1st Respondent, informing them that their tender price was VAT exclusive without being requested to do so.

The 1st Respondent also drew PPRA's attention to Item 9 of the Special Conditions of Contract which stated that taxes and duties to be settled by buyer is 18% VAT.

PPRA responded on 19th January, 2011, *vide* letter referenced PPRA/ME/018/"A"/56 advising them as follows:

“Regulation 83(1)h) of GN. No. 97 of 2005 requires solicitation documents to include instructions to tenderers the manner in which tender price is to be formulated. This includes a statement whether the tender price should include Value Added Tax (VAT). In your case, Clause 9 of the Special Conditions of Contract (SCC) stated that taxes and duties to be settled by the tenderer is 18% VAT. In this perspective, a tenderer was required to state clearly that his/her quoted price is VAT inclusive or exclusive and not otherwise.” (Emphasis added)

The five tenders submitted in the 1st Tender were subjected to evaluation whereby four of them, the 2nd, 3rd and 4th Appellants inclusive, were found to be non responsive at the preliminary stage for the following reasons:

(i) **M/s Cielmac Ltd and M/s Tanzania**

Commodities Trading Co. Ltd – did not indicate whether their quoted prices were VAT inclusive or exclusive. However, after the tender opening the former submitted additional information that their price was VAT exclusive. The two tenderers were disqualified for contravening Clause 9 of the Special Conditions of Contract which provided that taxes and duties to be settled by the buyer is 18% VAT.

(ii) **M/s Prime Timbers Ltd** submitted Bid Security in the form of Bank guarantee instead of Banker's cheque, contrary to Clauses 17 of the ITB and Item 13 of the Bid

Data Sheet. They also contravened Clause 16 of the ITB and Item 13 of the Bid Data Sheet as their tender validity was up to 31st March, 2011, instead of 3rd April, 2011.

- (iii) **M/s Sarawany Investment Co. Ltd** – their Bid Security was 24.53% which was less than 25% contrary to Clause 14 of the ITB.

The Evaluators found M/s Olam Tanzania Ltd to be the only tenderer in the 1st Tender whose tender qualified for detailed evaluation and their tender was found to have offered the highest evaluated price hence recommended for award at a contract sum of Tshs. 5,411,000,000.00 (VAT inclusive).

With regard to the four tenders submitted in the 2nd Tender, they were also subjected to evaluation whereby three of them, the 2nd Appellant's tender inclusive, were disqualified at the preliminary stage for the following reasons:

- (i) The prices quoted by all three tenderers did not indicate whether they were VAT inclusive or exclusive.
- (ii) In addition, M/s Sparkleway Ltd did not submit the bid deposit in the prescribed form as they submitted a company cheque whose validity was less than 90 days.
- (iii) With regard to M/s Kilombero Valley Teak Co. Ltd, in addition to item (i) above, they also did not submit a Business License, Certificate of Incorporation as well as VAT and TIN Certificates.

Having disqualified the three tenders in the 2nd Tender, the Evaluators subjected the only substantially responsive tender submitted by M/s Paula Inter Business Co. Ltd. to detailed evaluation. Since the price quoted by the said tenderer was VAT exclusive, the Evaluators added Tshs. 7,688,112.30

as VAT at 18% hence adjusting the price to Tshs. 50,399,847.30. Having found the tender submitted by the said tenderer to have offered the highest evaluated price they recommended them for award of the 2nd Tender.

On 23rd February, 2011, the 1st Respondent's Procurement Management Unit (hereinafter to be referred to as "**PMU**") reviewed the Evaluation Reports pertaining to the two tenders and advised the Tender Board to approve the award of the 1st Tender to M/s Olam Tanzania Ltd as their quoted price of Tshs. 5,411,000,000.00 (VAT inclusive) was above the reserve price of Tshs. 3,620,821,740.00 (VAT inclusive). With regard to the 2nd Tender, the Tender Board was requested to award the same to M/s Paula Inter Business Co. Ltd at a contract price of Tshs. 50,399,847.30 after adding 18% VAT.

On 1st March, 2011, the Tender Board approved the awards of the two tenders as recommended.

The award of the 1st Tender was communicated to the 2nd Respondent on 28th March, 2011, vide letter referenced JA/291/374/02/82.

On 1st April, 2011, the contract for the 1st Tender between the Respondent and M/s Olam Tanzania Ltd was concluded.

On an unknown date, the 1st Appellant wrote to the 1st Respondent's Accounting Officer contesting, among other things, Clause 17.1 of the ITB as it defeated the principle of equality of opportunity to all tenderers. Further that, the said Clause, discriminated against small local entrepreneurs which contravenes the Government policy of developing the capacity of local tenderers.

In early April, 2011 the Accounting Officer convened a meeting which was attended by the 1st, 2nd and 3rd Appellants and the Ministry's Principal Officers whereby various issues pertaining to the said tenders were discussed, including the requirement to deposit the 25% bid security in the form of Banker's cheques

which was said to be prohibited by the Bank of Tanzania (hereinafter to be referred to as "**BOT**") *vide* its Notice dated 20th February, 2009.

On 2nd May, 2011, the 1st Appellant lodged an appeal with this Authority and later the three other Appellants followed suit. Further, the Successful Tenderer in the 1st Tender, namely, M/s Olam Tanzania Ltd opted to join as a 2nd Respondent after being notified of the Appeal by virtue of Section 83(1) & (2) of the Act.

SUBMISSIONS BY THE 1ST APPELLANT

The 1st Appellant's arguments as deduced from 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, they are contesting against the unfair procurement process which also did not adhere to the law.

That, the tenderers were required to deposit a Bid Security equivalent to 25% of their tender prices pursuant to Clause 17.1 of the ITB. The price quoted by the Successful Tenderer was Tshs. 5,411,000,000.00 (VAT inclusive). However, the Banker's cheques submitted by the said tenderer were as follows:

Name of the Bank	Amount in Tshs.
Exim Bank	884,400,000.00
Diamond Trust Bank	1,175,500,000.00
Diamond Trust Bank	450,000,000.00
TOTAL	2,509,900,000.00

That, the 1st Appellant was of the view that, the total amount indicated in the Table above, is not 25% of the amount quoted by the said tenderer. Further that, if the bid deposit of Tshs. 2,509,900,000.00 forms 25% of the quoted price, the said tenderer's

price should have been Tshs. 10,039,600,000.00. Despite this anomaly, the said tenderer was awarded the tender at a contract sum of Tshs. 5,411,000,000.00. This was contrary to Clause 29.1 of the ITB which provides for correction of errors.

That, according to the Notice issued by BOT which became operational in March, 2009, Banks are not allowed to issue Banker's cheques of more than Tshs. 10,000,000.00. Such payments must be routed through the Tanzania Interbank Settlement System (hereinafter to be referred to as "**TISS**"). Since this tender was invited towards the end of the 2010, it was wrong for the 1st Respondent to require the tenderers to submit Banker's cheques. Furthermore, **Bid Bonds** by way of Bank guarantees exceeding Tshs. 10,000,000.00 are acceptable but not Banker's cheques.

That, the fact that the Respondent has awarded the tender to a tenderer who did not offer the highest price denies the Government the opportunity to

maximize revenue collection. Moreover, Clause 32.1 of the ITB required the award to be made to the highest evaluated price amongst the substantially responsive tenders.

That, following complaints from the tenderers, the Respondent convened a meeting under the Chairmanship of Dr. Felician Kilahama where the Members of the Tender Board and the Head of the Legal Unit in the said Ministry, attended. At the said meeting, the 1st Respondent could not show if the said Banker's cheques were genuine or not, instead they subsequently returned them to M/s Olam Tanzania Ltd and requested the said tenderer to make a deposit in cash. The 1st Appellant wonders, if the said cheques were valid, why then were they withdrawn and a different means other than Banker's cheque was used to deposit the **bid security** in the 1st Respondent's bank account in contravention of the Tender Document.

That, they finally requested the Authority to review the entire matter.

SUBMISSIONS BY THE 2ND APPELLANT

The 2nd Appellant's arguments as deduced from 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, according to the Respondent's letters referenced JA.291/374/02/85 and JA.291/374/02/91 dated 5th April, 2011, the tenders submitted by the 2nd Appellant in the 1st and 2nd Tenders were disqualified for failure to indicate whether their quoted prices were VAT inclusive or exclusive. The said letters erroneously concluded that Item 9 of the Special Conditions of Contract required tenderers to state taxes and duties to be settled as 18% VAT. The 2nd Appellant submitted that, the Evaluation Committee erred in applying Item 9 of the Special Conditions of Contract in evaluating the tenders as it

has no relevance in the evaluation process. Consequently, they reached a wrong decision of disqualifying the 2nd Appellant whose tenders had the highest price.

That, Clauses 9 of the Special Conditions of Contract and 13.1 of the General Conditions of Contract states that the taxes and duties settled by buyer to be 18% VAT, which means they were required to quote VAT exclusive prices.

That, the preparation and submission of tenders was governed by the ITB and the Bid Data Sheet. Clause 11.1 of the ITB guides on how the tenders were to be prepared. It is apparent from the said Clause that the Price Schedule was to be completed in accordance with Clauses 13 and 14 of the ITB and no reference is made therein to Item 9 of the Special Conditions of Contract. Further, the said clauses did not require the tenderers to indicate whether their quoted prices were VAT inclusive or exclusive. The

Appellant's tenders had complied to both Clauses 13 and 14 of the ITB.

That, Conditions of Contract both General and Special which were referred in the Respondent's letter dated 5th April, 2011, are mere draft contract conditions conveyed to prospective tenderers as the expected terms of the contract in the event the tenders are awarded to them. The Conditions of Contract have nothing to do with preparation of tenders, it is rather a draft contract which covers not only taxes and duties but other contractual items such as definitions, termination of contract, payment upon termination, force majeure, settlement of disputes, governing language, applicable law and notices. There was nothing in the Conditions of Contract which required tenderers to use Special Conditions of Contract in the preparation of the Price Schedule and the price quotation generally. Item 9 of the Special Conditions of Contract is simply a sample contractual term indicating that the tax to be paid by the successful tenderer is 18% VAT. The 2nd

Appellant does not have a problem in signing a contract with the terms stated in the Conditions of Contract.

That, the General and Special Conditions of Contract were not a document inside the Tender Document which had to be used in preparation of the Price Schedule and the price quotation in general.

That, had VAT at a rate of 18% been included in the 2nd Appellant's quoted price, in the 1st Tender their quoted price would have been Tshs. 6,049,518,119.92 compared to the Successful Tenderer's price of Tshs. 5,411,000,000.00 VAT inclusive. In this case therefore, if the tender is awarded to the said tenderer, the Government will incur a loss of Tshs. 638,518,119.72, which is the difference between the above mentioned prices.

With regard to the 2nd Tender had VAT been added to their quoted price, it would have been Tshs. 73,252,291.66 as compared to Tshs. 42,711,735.00 quoted by the successful tenderer, namely, M/s

Paula Inter Business Co. Ltd. Hence, the price difference between the 2nd Appellant and the Successful Tenderer would have been Tshs. 30,541,566.66.

That, 1st Respondent's two letters dated 5th April, 2011, which informed them that their tenders for both the 1st and 2nd Tenders were not successful, were received on 11th April, 2011. Being aggrieved by the said notification, they sought for administrative review to the 1st Respondent's Accounting Officer on 12th April, 2011. However, up to the hearing of the Appeal the matter is yet to be settled.

That, on 6th May, 2011, they learnt through the Mwananchi newspaper that the 1st Tender was awarded but it was suspended pending investigation.

Accordingly, they requested the Authority to review the tender processes pertaining to the two tenders and order:

- the award of the 1st and 2nd Tenders to be made to the 2nd Appellant;
- In the alternative, the tenders be cancelled and re-tendered after reviewing the Tender Document and making the necessary amendments;
- The 1st Respondent compensate them for the following costs:

Description	Amount in USD	Amount in Tshs.
Interest on the deposit of 25% for the 1 st Tender from 3 rd January,2011 to 11 th April, 2011 i.e. 99 days @ 10% per year of USD 888,300.00	24,093.62	37,754,696.96
Interest on the deposit of 25% for the 2 nd Tender from 3 rd January,2011 to 11 th April,2011 i.e. 99 days @ 10% per year of USD 11,700.00	317.34	497,275.64
Legal fees		5,000,000.00
Surveying of plot		3,300,000.00
Transport & accommodation of Surveyor for the two tenders		1,500,000.00
	Total Tshs.	48,051,972.60

SUBMISSIONS BY THE 3RD APPELLANT

The 3rd Appellant's arguments as deduced from 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, they had offered the highest price of Tshs. 5,668,340,444.20 while the lowest price offered was Tshs. 4,999,001,388.00.

That, they had deposited a sum of Tshs. 1,417,085,423.00 in the form of a Bank guarantee as 25% of the tender price as it was required which was valid for 90 days.

That, on 10th January, 2011, the 1st Respondent vide letter referenced AB.315/513/02 requested for assurance from the International Commercial Bank

which had issued the Bank guarantee submitted by the 3rd Appellant, whether it was genuine or not. The said assurance was given on 25th January, 2011, *vide* letter referenced PTL/1/01.

That, having met the requirements of the tender, they were surprised to receive the 1st Respondent's letter dated 5th April, 2011, informing them that their tender was not successful.

That, they were disqualified for failure to submit the tender deposit in the form of Banker's cheque. The other tenderers did not strictly conform with the requirements of the tender in respect of the tender deposit of 25%, especially the Successful Tenderer for the 1st Tender who had deposited three different cheques from two different banks (of more than Tshs. 10,000,000.00) amounting to more than the required 25% contrary to BOT directive that require payment above Tshs. 10,000,000.00 to be paid through banks as per TISS.

That, they were dissatisfied with their disqualification as they did not submit the said deposit in the form of Banker's cheque following the advice given to them by their banker who suggested they should apply for a Bank guarantee as the former was prohibited by BOT.

That said, they prayed for the following reliefs:

- The award of the 1st Tender be set aside and 3rd Appellant be declared the successful tenderer thereof as they were declared the highest tenderers during the tender opening.
- Alternatively, refund and/or compensation for the following costs:
 - (i) Purchase and installation of machinery upon being declared the highest tenderer on 3rd January, 2011, for a sum of Tshs. 73,000,169.00 and Tshs. 5,000,000.00 respectively.

- (ii) Fees charged for Banker's guarantee at a tune of Tshs. 18,894,472.00.
- (iii) Loss of interest for 25% of deposit of the bid amount at 12% per annum amounting to Tshs. 44,259,654.00.
- (iv) Loss of profit based on prorated gross profit of 2010 to the tune of Tshs. 945,496,857.00.
- (v) Loss of goodwill at a tune of Tshs. 1,532,100,000.00.
- (vi) Costs and legal fees of Tshs. 3,000,000.00.

SUBMISSIONS BY THE 4TH APPELLANT

The 4th 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, on 16th May, 2011, they applied for administrative review to PPRA. On 26th May, 2011,

PPRA informed them that they should appeal to this Authority as the procurement contract had already entered into force by virtue of Section 55(7) of the Act.

That, Clause 13.1 of the ITB requires the tenderers to fill the Bid Form without any alterations to its format and no substitute shall be accepted. The said Form indicated they were to fill the '**Total Bid Amount**' which means '**a total net amount**' since there was no direction to include VAT in the total amount. According to them, the question of inclusion of VAT is contrary to the Form of Bid. Further, the format of the Price Schedule contained in the Tender Document required only the unit price to be indicated and does not state whether VAT should be included or excluded.

That, the Bid Data Sheet equally did not provide any direction as regards VAT.

That, the Tender Document did not provide for VAT, save for the Special Conditions of Contract, which means during signing of the formal contract the issue of VAT would then arise and not at the time of submitting a tender, unless it was specifically stated in the Form of Bid or Price Schedule or Bid Data Sheet. Where the price quoted is VAT exclusive, it is very obvious that VAT at 18% is payable at the time of contract signing as per Item 9 of the Special Conditions of Contract.

That, since VAT is related to the Tanzania Revenue Authority (TRA) the 4th Appellant checked with them and they said they had a similar type of tender wherein it was not specified whether the tender price should be VAT inclusive or exclusive and the said tender was awarded to a tenderer whose price was VAT exclusive.

That, the tenderers whose prices were VAT inclusive, on the face of it, their prices appear to be high but ultimately VAT is recovered by the successful

tenderer at the time of exports of sawn teak. Eventually the actual sum payable to the 1st Respondent will be lower than the original prices by 18%.

That, according to GN. No. 97/2005, disposal of public assets by tender is based on the need to achieve the best available net return. Public Officers and members of the Tender Board are obliged to uphold the law by ensuring that they obtain the best value for money and equality of opportunities to all tenderers is accorded.

That, the Tender Document is required to disclose any other factor in addition to price which may be considered in the evaluation of tenders and how such factor may be quantified or evaluated.

Accordingly, they prayed for the following:

- (i) M/s Olam Tanzania Ltd be barred from participating in future tenders for fraudulent practices;

- (ii) Cancellation of the 1st Tender and a re-tendering be ordered.
- (iii) The 1st Respondent be ordered to compensate them for the following costs:

Description	Tshs.
Costs arising from the Bank guarantee	44,691,780.00
Tender preparation	5,000,000.00
Legal fees	5,000,000.00
Total Tshs.	55,691,780.00
Interest on the Bank guarantee charged at the BOT rate	

REPLIES BY THE 1ST RESPONDENT

The 1st 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:

To start with, the 1st Respondent raised a Preliminary Objection on four points, to wit,

- (i) The 1st Appellant has no *locus standi* on this matter pursuant to Section 79 of the Act, read together with Rule 4 of the Appeals Rules, in that, they neither submitted their tender in the 1st Tender nor in the 2nd Tender. They are therefore strangers to the tender process.

- (ii) The 1st Appellant wrongly instituted the Appeal by citing the wrong provision of the law. Moreover, they did not fill the requisite forms as stipulated under Rule 8(1) and (2) of the Appeals Rules.

- (iii) The remedies sought by the Appellants cannot be granted by this Authority as per Section 82(4)(d) and (e) of the Act.

- (iv) The 2nd Appellant is wrongly joined in this complaint contrary to Section 83(2) of the Act, since the review proceedings are confined to the 1st Tender and not the 2nd Tender.

Without prejudice to the above, the 1st Respondent went on to submit on the merits as follows:

That, the 1st Tender attracted 5 tenderers who were subsequently evaluated. Clause 17.1 of the ITB required the tenderers to furnish a bid deposit of 25% of the tender price by way of Bankers cheques.

That, the 3rd Appellant did not comply with this requirement as they submitted the said deposit in the form of a Bank guarantee.

That, M/s Olam Tanzania Ltd submitted their bid deposit in the form of Banker's cheque amounting to Tshs. 2,509,900,000.00 which is equivalent to 46.4 of their tender price. This was over and above the requirements of Clause 17.1 of the ITB.

That, in principle, there is no harm on this as the said tenderer did not tender for Tshs. 10,039,600,000.00 and even if they were to quote

that price, the cubic meters which were offered by the 1st Respondent could not cater for such an amount.

That, during the tender opening the price quoted by the Successful Tenderer as read out was Tshs. 5,411,000,000.00 (VAT inclusive), hence complied with Clause 17.1 of the ITB as the deposit of 46.45% thereof was paid.

That, the 1st Respondent's decision to award the 1st Tender to M/s Olam Tanzania Ltd was not wrong as the said tenderer met all the requirements provided for in the Tender Document.

That, the 1st Respondent took the trouble of communicating with Diamond Trust Bank and Exim Bank to ascertain the authenticity of the Banker's cheques submitted by Successful Tenderer in the 1st Tender. The 1st Respondent was assured by the said Banks that the said documents were genuine. Having received the assurance from the Banks, the

Evaluation Committee recommended award to be made to M/s Olam Tanzania Ltd.

That, according to Regulation 3 of GN. No. 97/2005, solicitation documents are defined as documents prepared by a procuring entity, on the basis of which tenders are solicited from tenders. This entails that tenderers are required to read carefully the entire Tender Document and understand all the terms and conditions contained therein so as to fully comply with each one of them. Moreover, tender documents complement each other; therefore a tenderer is obliged to read the whole document.

That, under Item 6 of the tender advertisement the prospective tenderers were required to obtain further information from the procuring entity in case they did not understand any of the provisions in the Tender Document. The Appellants therefore had an opportunity to seek for clarification from the procuring entity before the tender opening but they did not do so.

That, Clause 14.1 of the ITB provides clearly that, the price quoted by a tenderer in the Bid Form and in the Schedule of Prices shall conform to the requirements specified in Clauses 14.2 and 14.3 of the ITB.

That, Clause 14.3 of the ITB provides that the price to be quoted in the Bid Form, in accordance with Clause 13.1 of the ITB shall be the total price of the bid. The prices quoted by the 2nd and 4th Appellants did not show whether they included or excluded VAT. After the tender opening, the 2nd Appellant submitted additional information to the Procuring Entity stating that their quoted price did not include 18% VAT, while their tender did not indicate so when the tender opening took place on 3rd January, 2011. It is apparent that, they want to benefit from their own omission.

That, Clause 13 of the General Conditions of Contract stated specifically that the procedures for settling taxes and duties shall be as specified in the Special

Conditions of the Contract. Clause 9 of the Special Conditions of Contract provided for that requirement. That, the above cited clause should be read together with Regulation 83(1)(h) of the Public Procurement (goods, works, non-consultant Services and disposal of public assets by Tender) GN. No. 97 of 2005, (hereinafter to be referred to as **“GN. No. 97/2005”**).

That, Clause 9 of the Special Conditions of Contract stated that, taxes and duties to be settled by the tenderer is 18% VAT. In this case, a tenderer was required to state if their quoted price was VAT inclusive or exclusive and not otherwise. The 2nd Appellant and 4th Appellants chose not to.

That, the above cited provisions, indicate that the tax component was to be incorporated in the total bid price, otherwise the tenderer should have stated that the price was VAT exclusive whereby the Evaluation Committee could have adjusted the price accordingly.

That, there were no errors at all in awarding the 2nd Tender to M/s Paula Inter Business Co. Ltd. Further, no loss has been occasioned to the Government as the 1st Respondent had strictly adhered to the applicable law.

That, when the 2nd Appellant submitted their application for administrative review, the 1st Respondent could not entertain it as the procurement contract had entered into force and so they were barred under Section 80(3) of the Act.

That, the reliefs sought by the 2nd Appellant are untenable as the procurement contract had already entered into force.

That, all the Appellants have not furnished sufficient grounds to warrant this Authority to grant the reliefs sought in their Statements of Appeal. Accordingly, the 1st Respondent therefore prayed for dismissal of the Appeal with costs.

REPLIES BY THE 2ND RESPONDENT

The 2nd 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:

To start with, the 2nd Respondent raised a Preliminary Objection on two points, to wit:

- (i) The 1st Appellant, namely WAWAMATA lacks *locus standi* to appear before the Authority as they are neither suppliers, contractors nor consultants within the meaning of Sections 79 and 81 of the Act. They are therefore strangers to this matter and should not be accorded an opportunity to address the Authority.

It is apparent that, the spirit of the law was intended to limit complaints by allowing only those who participated in the tender process to have recourse to the review mechanisms. That right is confined to suppliers, contractors and consultants who have suffered loss or injury as a result of breach of duty imposed on a procuring entity or approving authority pursuant to Sections 79(1) and 81(1) of the Act.

In view of the above, the 1st Appellant does not qualify as they do not fall within any of the categories mentioned herein above and further that they did not suffer any loss or injury out of the tender process because they did not tender.

- (ii) The Act provides for the time within which 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. Section 82 of the Act requires an appeal to be lodged within 14 days.

Having participated in the 1st Tender, the 2nd Respondent was awarded the said tender on 28th March, 2011, and consequently paid the agreed consideration price to the tune of Tshs. 5,411,000,000.00. They thereafter signed a contract on 30th March, 2011. On the basis of these facts, it is apparent that the Appellants should have lodged their appeals on or before 19th April, 2011, which was the 20th day as required by the Act. This means, any appeal that has been received out of that time is incompetent and cannot be entertained by this Authority.

They are aware that Appeals at hand were lodged out of time that is after 19th April, 2011, they are therefore, incompetent. To be precise, the Appeal by the 1st Appellant was lodged on

2nd May 2011, 3rd Appellant on 31st May, 2011 and the 4th Appellant on 30th May 2011.

Without prejudice to the above, the 2nd Respondent went on to submit on the merits as follows:

That, the Tender Document neither clarified the manner in which VAT would be handled nor did it state how an interested tenderer should quote the bid price in a manner that will take care of the VAT component. Nevertheless, Clause 14.3 of the ITB states very clearly that **“the price to be quoted in the Bid Form shall be total price of the bid”** which according to the interpretation of the 2nd Respondent, it impliedly meant that, the quoted price should be VAT inclusive since it is the total price of the bid.

That, with regard to the bid deposit, it is apparent that Item 13 of the Bid Data Sheet specified that other forms of bid deposit provided for under Clause 17.3 should be in the form of Banker’s Cheque. Since

the Tender Document did not prescribe for an alternative form of bid deposit apart from Banker's cheque, it may be construed to mean, the only accepted form of bid deposit was by way of Banker's cheque and not otherwise.

That, they believe the Tender Board was duty bound to award the contract to a tenderer whose tender has complied with the ITB and had not deviated from the terms and conditions provided in the Bid Data Sheet.

That, the bid deposit is regulated under Clause 17 of the ITB and their perception is that, Clause 17.1 does not prohibit depositing a sum which is over and above 25% of their quoted price. Unfortunately, the Tender Document did not clarify on the issue of depositing a sum above 25% of the tender price, thus, giving room for unnecessary confusion as evidenced from the submissions made by the Appellants.

Accordingly, they prayed for dismissal of the Appeal as they were the rightful winners in the 1st Tender.

ANALYSIS BY THE AUTHORITY

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

- **Whether the Preliminary Objection raised is valid;**
- **Whether it was proper to disqualify the 2nd and 4th Appellants on the basis of Item 9 of the Special Conditions of Contract;**
- **Whether the 3rd Appellant was unfairly disqualified;**
- **Whether it was proper for M/s Olam Tanzania Limited to deposit a sum above**

- 25% of their quoted price, and if so whether it was fatal;**
- **Whether the awards of the two tenders to the Successful Tenderers were proper at law; and**
 - **To what reliefs, if any, are the Appellants entitled to.**

Having identified the issues in dispute, the Authority proceeded to resolve them as follows:

1. Whether the Preliminary Objection raised is valid

In resolving this issue the Authority combined the four points of Preliminary Objection raised by the 1st Respondent and two points by the 2nd Respondent and formulated the following sub-issues:

- **Whether the 1st Appellant has *locus standi* in this Appeal;**

- **Whether the Appeal was lodged out of time; and**
- **Whether the Appeal for the 2nd Tender was wrongly joined to the Appeal on the 1st Tender.**

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

(a) Whether the 1st Appellant has *locus standi* in this Appeal

In their submissions the Respondents contended that the 1st Appellant does not have *locus standi* in the Appeal at hand, as they only purchased the Tender Document for the 1st Tender but they did not participate in the competition by failing to submit a tender. Being strangers to the tender process they have no right to submit complaints as the law accords such a right to suppliers, contractors and

service providers, which the 1st Appellant is not. They further contended that, the 1st Appellant was and is not likely to suffer any loss or injury pursuant to Section 79(1) of the Act and that they did not fit within the description of a tenderer as defined under Regulation 3 of GN. No. 97/2005. Under the said Regulation a tenderer is defined as follows:

“any natural or legal person or group of such persons submitting a tender, with a view to concluding a contract;” (Emphasis added)

In reply thereto, the 1st Appellant submitted that, the Respondents’ arguments on this point are unfounded as the former had purchased the Tender Document with intent to participate in the tender process. However, having gone through the said document they realized that they could not comply with Clause 17.1 of the ITB which required them to submit a bid deposit in a form of a Banker’s cheque equivalent to 25% of the quoted tender price. The 1st Appellant being a prospective tenderer submitted that, they, as

well as most of their members who are small entrepreneurs could not meet that particular requirement. They therefore found the said requirement to be discriminatory as it did not accord equality of participation to all tenderers instead the tender was intended for firms with huge capital.

Having revisited submissions by parties on this point, the Authority reviewed the provisions of the law in order to ascertain whether the 1st Appellant was entitled to seek review under the disputed tender process even though they did not submit their tender. In so doing the Authority revisited Section 79 of the Act which was relied upon by the Respondents as it reads:

“S. 79(1) ... any supplier, contractor or consultant who claimed to have suffered or **that may suffer any loss as a result of a breach of duty imposed on a procuring entity or approving authority by this Act may seek a review in accordance with Sections 81 and 82 of this Act**, provided that, the

application for review is received by the procuring entity or approving authority within twenty-eight days of the supplier, contractor or consultant becoming aware of the circumstances giving rise to the complaint..." (Emphasis supplied)

Based on the above quoted provision the Authority is of the view that, the complaint or application for review may be filed by any supplier, contractor or consultant "**who has suffered or may suffer any loss as a result of a breach of duty imposed on a procuring entity**". The Authority does not agree with the Respondents' contention that, the 1st Appellant did not suffer any loss or injury as they were not tenderers. The Authority opines that, the injury or loss envisaged under the law may be in the form of being deprived an opportunity to compete in a tender process. Due to that, the Authority is of the view that the 1st Appellant is entitled to file an application for review as the same can be done by a tenderer who has been affected by the decision or a prospective tenderer who wants to participate in the

tender process but feels they may suffer any loss as a result of breach of duty. The Authority observes that, by purchasing the Tender Document, the 1st Appellant signified their intent to participate in the procurement process.

The Authority further deemed it prudent to reproduce Rule 5 of GN. No. 205 of 2005 which specifies appealable matters as follows:

“Except for a decision, matter or act or omission arising from the provision of subsection (2) of Section 72 and subject to sections 79, 81 and 85 of the Act, **an appeal shall lie from the following matters:**

(a)...

(b)...

(c) Inclusion of unacceptable provision on the tender documents

(d) Unacceptable tender process; or

(e) ...” (Emphasis supplied)

The Authority is of the view that, the above quoted Rule provides tenderers or prospective tenderers with an opportunity of filing an appeal disputing the inclusion of unacceptable provisions in the tender document and unacceptable tender process. That is to say, the 1st Appellant also has the right to seek redress in accordance with Rule 5(c) and (d) of the Appeals Rules.

The Authority also considered the Respondents' contention that, the 1st Appellant did not observe procedural requirements as they did not fill the requisite Forms contrary to Rule 8(1) & (2) of the Appeals Rules. The Authority observes that, this contention is unfounded as the 1st Appellant duly filled PPAA Form No. 2 on 2nd May, 2011, when they lodged this Appeal.

With regard to the Respondents' argument that, in instituting this Appeal the 1st Appellant cited a wrong provision, the Authority observes that, that error is

not fatal as it does not form part of the contents of the appeal as per Rule 8(1) which states as follows:

“8(1) **Appeal shall** be filed on Form PPAA No. 2 specified in the First Schedule to these Rules, and **shall contain the following:**

(a) Name and address of the parties;

(b) Statement of facts giving rise to a complaint or a dispute;

(c) Relief or remedy being sought.”

(Emphasis added)

Accordingly, the Authority’s conclusion in respect of the first sub-issue is that, the 1st Appellant has *locus standi* in this Appeal.

(b) Whether the Appeal was lodged out of time

In their submissions the 2nd Appellant questioned the time within which each of the Appellants lodged their complaints to this Authority, in resolving this sub-

issue therefore, each of the complaints lodged by the said Appellants will be considered as a separate appeal. That said, the Authority will first address this sub-issue in the light of the 1st Appellant and thereafter the 2nd, 3rd and 4th Appellants.

It is not disputed that, the 1st Appellant intended to participate in the tender process pertaining to the 1st Tender but could not submit their tender because they could not comply with Clause 17.1 of the ITB which required them to deposit 25% of their tender price. It was evident during the hearing that, having perused the Tender Document, they felt that Clause 17.1 of the ITB was discriminatory and also limited participation of the tenderers. As a result, they submitted their complaint to PPRA on 3rd January, 2011, and they never received any response.

The Authority's observations on the conduct of the 1st Appellant on this particular point are as follows:

- Had the 1st Appellant been diligent and committed in ensuring that the hurdle that was threatening their right to participate in the tender is reviewed, they would have dealt with the matter prior to the deadline for submission of tenders. That is, they were supposed to act before 3rd January, 2011, when the tenders were opened. No proof was availed to indicate that the 1st Appellant had drawn the attention of the procuring entity on the said Clause prior to the tender opening date.
- Having felt aggrieved by the alleged discriminatory provision contained in the Tender Document, the 1st Appellant should have submitted a complaint, in writing, to the Accounting Officer with a copy to PPRA, disputing the said Clause in accordance with Clauses 40, 41 and 42 of the ITB. This is because inclusion of unacceptable provisions in the tender document is amongst appellable matters pursuant to Rule 5 of the Appeals Rules.

- They erred in referring the matter directly to PPRA which was unfortunately not copied to the Procuring Entity.

In view of the above observations, the Authority finds that, as far as the 1st Appellant is concerned, the cause of action arose when they purchased the Tender Document prior to the deadline for submission of tenders, that is, before 3rd January, 2011. That is to say, they became aware or should have become aware of the circumstances giving rise to the complaint around that period. They were therefore required to submit their complaint to the Accounting Officer within 28 days pursuant to Section 80(2) of the Act which is in *pari materia* with Clause 41.1 of the ITB. The latter provision reads as follows:

“The bidder shall submit an application for review within twenty eight (28) days of him becoming or should have become aware of the

circumstances giving rise to the complaint or dispute.” (Emphasis added)

By failing to put the dispute settlement machinery into motion when they detected the alleged discriminatory provision in the Tender Document, the 1st Appellant chose to sit on their rights. It is therefore improper for them to submit a complaint almost five months after the cause of action arose. That said, the Authority is satisfied that, the Appeal lodged by the 1st Appellant is not properly before this Authority for two reasons. Firstly, they did not follow the review levels provided for under the Act and secondly, their Appeal is time barred. It is fair to conclude that, the 1st Appellant’s complaint on the alleged discriminatory condition was an afterthought.

With regard to the Appeals lodged by the 2nd, 3rd and 4th Appellants, the Authority observes that, during the hearing it was evident that, on 5th April, 2011, the 1st Respondent notified the unsuccessful tenderers of their disqualification and the reasons

thereof. However, some of the tenderers received the said letters on 8th, 11th and 19th April, 2011, respectively. The 2nd Respondent contended that, aggrieved tenderers should have lodged complaints to this Authority on or before 25th April, 2011, and that any Appeal filed after that date is time barred. According to them, the time started to run on 5th April, 2011, when the 1st Respondent posted the said letters in accordance with the Postal Rule, that is, the communication was completed when the notification letters were posted. They further stated that, the appeals should have been lodged on or before 19th April, 2011, which was the 20th day as required by the Act.

In reply the 2nd, 3rd and 4th Appellants submitted that, the communication of the tender results was purposely delayed by the 1st Respondent so as to prevent the unsuccessful tenderers from contesting against the awards of the tenders before the contracts were signed. They further argued that, some of their complaints were first submitted to the

Accounting Officer, then to PPRA and later to this Authority after they were informed that the other two review levels were not competent to entertain them.

The Authority observes that, the 2nd Respondent's contention that, the time started to run from 5th April, 2011, is not corroborated as the 1st Respondent did not say how the said letters were delivered to the Appellants and if they were posted, when did that take place. The Authority observes further that, according to Sections 80, 81 and 82 of the Act, time start to run from the time when the tenderer becomes or ought to have become aware of the circumstances giving rise to the complaint. The Authority therefore deemed it necessary to examine when did the 2nd, 3rd and 4th Appellants become or ought to have become aware that their tenders were unsuccessful.

The Authority noted that, the 2nd Appellant received the notification of the tender results on 11th April,

2011, and the next day they put the dispute resolution process into motion by submitting their complaints to the Accounting Officer *vide* letters referenced LX/APRC/21104-1 and LX/APRC/21104-2. The said letters were disputing the grounds for their disqualification in both the 1st and 2nd Tenders. Having learnt that, the procurement contract had already entered into force, they lodged two Appeals, one for the 1st Tender and the other for the 2nd Tender.

The Authority observes that, having submitted their complaints to the Accounting Officer, the 2nd Appellant should have waited for 30 days within which the said Officer was supposed to make a decision or in the event of failure to make a decision; the 2nd Appellant should have referred the matter to PPRA within 14 days. The Authority is of the view that, the limitation period started to run on 11th April, 2011, when the 2nd Appellant received the notification letter from the 1st Respondent. The 30 days statutory period accorded to the Accounting

Officer expired on 10th of May, 2011. The Authority observes therefore that, the 2nd Appellant had the right to seek for administrative review to PPRA within 14 working days. However, having been informed by the 1st Respondent that, they did not have mandate to entertain the matter, they appealed to this Authority pursuant to Section 82(2)(a) of the Act. For purposes of clarity the Authority reproduces the said provision read together with Clause 46.1 of the ITB which provide as follows:

“S. 82(2) A supplier, contractor or consultant entitled under section 79 to seek review may submit a complaint or dispute to the Public Procurement Appeals Authority:-

(a) if the complaint or dispute cannot be submitted or entertained under section 80 or 81 because of entry into force of the procurement contract and provided that the complaint or dispute is submitted within fourteen days from the date when the supplier,

contractor or consultant submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when that supplier, contractor or consultant should have become aware of those circumstances;

Clause 46.1 The Bidder who is not satisfied with the decision of the PPRA or whose complaint cannot be entertained by the Head of the Procuring Entity or the PPRA shall appeal to the Public Procurement Appeals Authority (PPAA)” (Emphasis added)

The above quoted provisions entail that this Authority has sole original jurisdiction in complaints where a procurement contract has already entered into force. For purposes of clarity, the Authority reproduces Section 55(7) of the Act which stipulates

as to when a procurement contract enters into force. The said sub-section provides as follows:

S. 55(7) “The procurement contract shall enter into force **when a written acceptance of a tender has been communicated to the successful supplier,** contractor or consultant” (Emphasis added)

Linking the above quoted provision to the Appeal at hand, the Authority found that the 1st Respondent communicated their acceptance to the Successful Tenderers on 28th March, 2011. In this case therefore, the procurement contract pertaining to the tenders under Appeal entered into force on that particular date. It goes without saying therefore that, when the 2nd Appellant lodged their Appeal, the procurement contract had already entered into force by virtue of Section 55(7) of the Act. The Authority is therefore satisfied that, the Appeal by the 2nd Appellant was rightly filed under Section 82(2)(a) of the Act. That is to say, it was lodged within time.

The Authority also considered the Appeals lodged by the 3rd and 4th Appellants and observes that, it is not necessary to venture on whether they were lodged within time or not as sub-Sections (1) and (2) of Section 83 of the Act, compels the responsible review level to inform other tenderers who took part in the procurement proceedings and also allows any interested party who is likely to be affected by the review proceedings to participate in the review process. The said provisions state as follows:

“S.83(1) After the submission of a complaint or dispute under sections 80, 81 or 82, the head of the procuring entity or of the approving authority or the Public Procurement Appeals Authority, as the case may be, shall notify all suppliers, contractors or consultants participating in the procurement proceedings to which the complaint or dispute relates, of the

submission of the complaint or dispute and of its substance.

(2) Any supplier, contractor or consultant or any Government authority whose interests are or could be affected by the review proceedings, shall have a right to participate in the review proceedings and a supplier, contractor or consultant who fails to participate in the review proceedings and shall be barred from subsequently making the same claim."

Based on the above quoted provision, assuming the 3rd and 4th Appellant did not lodge the appeals in the first place, this Authority was duty bound to notify them on the existence of the Appeal after receiving the Appeal lodged by the 2nd Appellant. It means, the tenderers are statutorily accorded an opportunity to join in the appeal proceedings once one of them submits a complaint about the procurement process. So the issue of the Appeals filed by the 3rd and 4th Appellants being lodged out of time is not relevant as

the notification envisaged under the above quoted Section is usually done when summons for the hearing are issued. That is why, the 2nd Respondent opted to join in the Appeal by submitting their statement a day before the hearing, that is, on 6th June, 2011. The Authority observes therefore that, the Appellant's contentions during the hearing that, the 2nd Respondent was not a party to the proceedings as they did not lodge an appeal to the Authority are equally erroneous.

With regard to the 2nd Respondent's contention that, the Appeals should have been lodged by 19th April, 2011, which according to them was the 20th day, the Authority observes that, such a duration is not provided anywhere in the Act. This depicts ignorance of the law on the part of the 2nd Respondent. For the benefit of parties, the dispute settlement mechanisms under the Act are also reproduced in the Tender Document and it is therefore surprising that such misleading statements can be made.

Based on the above analysis, the Authority observes that, in the Appeals in dispute all the Appellants, save for the 1st Appellant whose appeal is time barred, lodged their Appeals prior to the issuance of the notification required under Section 83(1) of the Act.

In view of the foregoing, the Authority partly accepts the objection on this point with regard to the 1st Appellant and rejects the contention on the 2nd, 3rd and 4th Appellants as their Appeals were lodged within time.

(c) Whether the Appeal for the 2nd Tender was wrongly joined to the Appeal on the 1st Tender

With regard to this issue, the 1st Respondent contended that, the 2nd Appellant was wrongly joined in this complaint in contravention of Section 83(2) of the Act as the complaints lodged involve the 1st Tender while the said Appellant contests the awards

in respect of both the 1st and 2nd Tenders. In their replies the 2nd Appellant stated that, they lodged two different Appeals one for each tender.

In analyzing the validity of the submissions by parties, the Authority concurs with the 2nd Appellant that they lodged two Appeals contesting against the grounds for their disqualification in the two tenders. The Authority wonders as to why the 1st Respondent seems to be surprised by the institution of the Appeal against the 2nd Tender while the records indicate that, when the said tenderer sought for administrative review to the Accounting Officer, they submitted two applications as it has been pointed out under the second sub-issue. Furthermore, the 2nd Appellant lodged two appeals to this Authority and duly paid the requisite fees thereof. It should be noted that, Authority deemed it fit, under the circumstances, to join the two Appeals as the tender processes thereof, from the invitation to tenders, tender opening, evaluation and award were done simultaneously.

That said, the Authority therefore concludes that, the Appeal for 2nd Tender was properly joined to the Appeal on the 1st Tender.

In view of the findings and conclusions on the three sub-issues, two of which have been rejected and one partly upheld, the Authority's conclusion on the first issue is that, the Preliminary Objection raised by the Respondents is partly valid.

Having disposed the Preliminary Objection, the Authority proceeded to ascertain the merits of the Appeals.

2. Whether it was proper to disqualify the 2nd and 4th Appellants on the basis of Item 9 of the Special Conditions of Contract

In resolving this issue, the Authority revisited the main arguments by parties wherein their detailed submissions have already been covered in the

preceding part herein. According to the facts of this Appeal, the 2nd and 4th Appellants are the ones whose tenders in the 1st Tender were disqualified for failure to indicate whether their quoted prices were VAT inclusive or exclusive. Moreover, the 2nd Appellant is also disputing their disqualification in the 2nd Tender on the same ground. Since the issue in dispute relates to VAT, the Authority's decision on this particular point will address both tenders.

According to the 2nd and 4th Appellants, their main arguments are as summarized hereunder:

- Clauses 13 and 14 of the ITB did not specify that the price to be quoted should indicate whether they are VAT inclusive or exclusive. In addition, the said requirement was neither stated in the Bid Form nor in the Schedule of Prices.
- Had the tenderers included VAT in filling the Bid Form and the Schedule of Prices, that would have amounted to altering the format of the Bid

Form which was strictly prohibited under Clause 13 of the ITB.

- The preparation and submission of tenders are governed by the ITB as well as the Bid Data Sheet while the Special Conditions of Contract is a mere draft contract which is intended to appraise a tenderer on the terms of the contract in the event they are awarded the tender.
- It was wrong to apply Item 9 of the Special Conditions of Contract in the evaluation process and subsequently disqualify the 2nd and 4th Appellants.
- Payment of VAT is a statutory requirement known to all tenderers, and it is payable regardless of whether it has been stated or not as the computation thereof is also common knowledge.
- Item 9 of the Special Conditions of Contract made reference to taxes and duties, but the

Evaluation Committee zeroed in on VAT ignoring other payable taxes such as VETA Levy, Cess levy which is 5%, royalty and others.

- Following complaints made by the Appellants on the issue of VAT in the tenders under Appeal, the 1st Respondent has advertised another tender for Sale of Standing Teak Trees (1250.039 cubic metres) at Amani Nature Reserve in Muheza District, Tanga Region whereby the Tender Document issued requires the prices to include VAT. The said requirement is contained under Clause 14.3 of the ITB, in the Bid Form as well as the Schedule of Prices which have been duly amended to that effect. This is a clear indication that, there was a deficiency in the Tender Document and therefore it is not right to penalize the Appellants for the 1st Respondent's omission.

Having summarized submissions by the 2nd and 4th Appellants on this issue, the Authority revisited

replies thereof by the Respondents, which are as summarized hereunder:

- In order to understand the requirements of the tender, the tenderers were obliged to read the Tender Document in its entirety. Had the said tenderers not understood the Tender Document they ought to have sought for clarification as the same was clearly stated under Item 6 of the tender advertisement.
- Clause 14.1 of the ITB indicates that the prices quoted by the tenderers in the Bid Form and in the Schedule of Prices shall conform to the requirements of sub-Clauses 2 and 3 of Clause 14 of the ITB.
- Clause 13 of the Bid Data Sheet requires that the price to be quoted should be the total price of the bid.
- Clause 13 of the General Conditions of Contract clearly stated that, the procedures for settling

taxes and duties shall be as specified in the Special Conditions of Contract. This provision is in line with Regulation 83(1)(h) of GN. No. 97 of 2005.

- The 1st Respondent sought for clarification from PPRA on the status of the tenders whose prices did not indicate whether they were VAT inclusive or exclusive. PPRA advised them that, the Tender Document had complied with Regulation 83(1)(h) of GN. No. 97/2005 and that the tenderers were obliged to indicate that their quoted prices were VAT inclusive or exclusive and not otherwise.
- The amendments made to the Tender Document in the subsequent tender are not conclusive that the Tender Documents for the Appeals at hand were defective, rather, it was a way of accommodating concerns of the tenderers who are their main stakeholders in the disposition of natural resources.

Having summarized arguments by parties, the Authority embarked on ascertaining their validity in light of the Tender Document and the applicable law. To start with, the Authority revisited Regulation 83(1)(h) of GN. No. 97/2005 which states as follows:

“The solicitation documents shall include instructions to tenderers with at a minimum, the following information:

(h) the manner in which the tender price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the goods, works or services themselves, such as any applicable transportation and insurance charges, customs duties and taxes;”
(Emphasis supplied)

The Authority observes that, the above quoted provision requires the tender document to specify

the mode of formulating the price taking cognizance of other elements such as taxes and duties. The Authority concurs with the Appellants, in that, they do not dispute that Item 9 of the Special Conditions of Contract makes reference to taxes and duties payable by the buyer, but rather they are arguing that the application of that particular document comes into play once a tenderer has been awarded the contract and not before that. In addition the Appellants are saying that, the Sections within the Tender Document which apply to bid preparation and submission did not address the issue of taxes and duties.

The Authority noted that, two out of the three tenders in the 1st Tender did not state whether their quoted prices were VAT inclusive or exclusive while in the 2nd tender, three out of the four tenders did not indicate the same. This is a clear indication that the content of the Tender Document lacked clarity as it was perceived differently by the tenders contrary to Section 63(2) of the Act which requires the

information contained in the solicitation documents to be clear and precise. This is evident in the tender submitted by M/s Sarawany Ltd which indicated various taxes such as VAT (18%) and Cess (5%) as forming part of the total price quoted.

The 2nd Respondent on the other hand, was of the view that, they met the requirements of the above quoted Regulation as the issue of taxes and duties was stated under Item 9 of the Special Conditions of Contract. To them, the placement of the said requirement does not matter as long as it is within the Tender Document.

Having expounded the positions of the parties, the Authority analysed the validity of their submissions and concurs with the 2nd and 4th Appellants in the following regards:

- Experience has shown that, where tenderers are required to indicate whether their quoted prices are VAT inclusive or exclusive, usually such a

requirement is clearly specified in the ITB and it is also reflected in the Bid Form as well as the Schedule of Prices. Additionally, the Schedule of Prices contains a specific column or row where a tenderer is required to indicate the total price excluding VAT, the amount of VAT payable and the total price including VAT. Such key information was missing in the Tender Documents issued by the Respondent for the two tenders.

- The Appellants rightly submitted that, the Tender Document contains several sections, each one of them is for a specific reason. Usually, the invitation to tender, Instructions to Bidders, Bid Data Sheet, the Schedule of Requirements and Standard Forms are the parts within the Tender Document which are referred to in the preparation, submission, opening, evaluation and award of tenders. This fact is evident by merely looking at the content of the above stated documents. For instance,

the ITB provides guidance to tenderers on the tender requirements from how one can purchase a tender document, which documents form a tender, how the tender should be filled, pricing, signing and mode of submission. It also shows the evaluation criteria and how the tenders would be evaluated, determination of the winner, award of contract and how to resolve procurement disputes.

One would have expected that, the formulation of price should have been covered under Clause 14 of the ITB. It is the view of this Authority that, the General and Special Conditions of Contract provide the manner in which the execution of the contract will be undertaken and hence are applicable once an award has been made and not prior to that.

- PPRA misdirected the 1st Respondent by advising them that, having Clause 9 of the Special Conditions of Contract in the Tender Document

entailed compliance with Regulation 83(1)(h) of GN. No. 97/2005. The Authority observes that, the said clause simply provides that, **“State the taxes and duties to be settled by the Buyer: 18% VAT”**. The Authority opines that, the said phrase neither specifies the manner in which the tender price is to be formulated nor does it include a statement as to whether the price is to cover elements such as taxes as it is required under Regulation 83(1)(h) of GN. No. 97/2005. Moreover, there is no provision in the Tender Document which complies with the said Regulation. The Authority is of the firm view that, the Tender Document for both the 1st Tender as well as the 2nd Tender did not comply with Regulation 83(1)(h) of GN. No. 97/2005, which is a serious omission.

- Clause 14.3 of the ITB provides in unambiguous terms that the **‘total price of the bid’** shall be the one quoted in the Bid Form in accordance with Clause 13.1 of the ITB. However, the said

Clause 13.1 of the ITB as quoted above, strictly prohibits tenderers from making any alterations to the Bid Form which does not make any reference to VAT. Further, the Authority agrees with the Appellants that, the modifications made by the Respondent to the document issued in the subsequent tender are clear and precise as they state categorically that the price quoted should include VAT. Had a similar provision been included in the solicitation documents of the tenders under Appeal, the misunderstanding on the VAT component could have been avoided.

- In the absence of a specific provision in the ITB or Bid Data Sheet with respect to VAT, common sense would have dictated that the VAT element is irrelevant in deciding the best price or any price for that matter because the VAT rate is fixed and known and mandatory except for those who are tax exempt. In other words, tenders compete on the price and not VAT.

- Had the inclusion of taxes in the quoted price been a mandatory requirement, all relevant taxes should have been equally scrutinized during the evaluation process.

In view of the above reasons, the Authority finds that, the Evaluators erred in disqualifying the 2nd and 4th Appellants in the 1st Tender on the ground that, their quoted prices did not indicate whether they were VAT inclusive or exclusive. Further, the disqualification of the 2nd Appellant in the 2nd Tender for the same reason was equally faulty.

Accordingly, the Authority's conclusion on the second issue is that, it was not proper to disqualify the 2nd and 4th Appellants in the 1st Tender, and the 2nd Appellant in the 2nd Tender on the basis of Item 9 of the Special Conditions of Contract.

3. Whether the 3rd Appellant was unfairly disqualified

It is not disputed that, the 3rd Appellant was disqualified for submitting a Bank guarantee instead of Banker's cheque as it was required under Clause 17.1 of the ITB read together with Item 13 of the Bid Data Sheet. In its endeavour to dispose this issue, the Authority revisited the conflicting submissions by parties vis-à-vis the Tender Document and the applicable law. It should be noted that, although this issue concerns the 3rd Appellant but the 4th Appellant also made submissions on this particular issue. To start with, the Authority revisited submissions by the 3rd Appellant which are as summarized herein below:

- They complied with Clause 17.1 of the ITB by depositing 25% of their quoted price in the form of a Bank guarantee in accordance with BOT directive. This was in implementation of the advice given by their Banker that, Banker's cheques worth more than 10 million shillings were prohibited by BOT.

- It was wrong for the 1st Respondent to require the said deposits to be made by way of Banker's cheques as it was a clear contravention of the BOT directive.
- If Bank guarantees were not acceptable, why did the 1st Respondent inquire from the 3rd Appellant's Banker on the authenticity of the same. Further, the 1st Respondent received assurance from the said Banker.
- Their disqualification was ill motivated as the 1st Respondent has previously awarded a tender to a tenderer who had submitted a Bank guarantee instead of a Banker's cheque.

As for the 4th Appellant, they argued that, the 2nd Respondent submitted Banker's cheques which were illegal that is why they were later not accepted by the 1st Respondent's Banker. In their replies, the 1st Respondent argued that, they were not aware that Banker's cheques exceeding 10 million shillings were not allowed, but following concerns raised by the

tenderers they sought clarification from BOT and they are yet to receive a reply. Further that, the tenderers were required to submit Banker's cheques and not Bank guarantees as the former are more reliable compared to the latter.

Having summarized submissions by parties on this issue, the Authority revisited the Notice issued by BOT on 20th February, 2009, which reads:

“This is a follow up to the Circular No.2 of 2008. With effect from March 1 2009, cheques with value of above TZS 10 Million shall not be accepted for processing in the Dar es salaam Electronic Clearing House (DECH) and in all other clearing houses in the country. Payments exceeding the limit shall be processed through the Tanzania Inter bank Settlement System. (TISS).

Government cheques above the limit shall continue to be processed in the clearing houses until further notice. I would therefore urge all

commercial banks to honour these cheques and that they should continue to raise awareness to their customers to avoid undue inconveniences” (Emphasis added)

The Authority noted that, the notice issued by BOT is very clear and it does not give any option to the banks. During the hearing it was evident and the 1st Respondent conceded that, when they went to deposit the Banker’s cheques submitted by the 2nd Respondent, to the Ministry’s bank account, their banker refused to accept them. Thus, they were returned to the 2nd Respondent who had to deposit the required sum into the 1st Respondent’s account using other means. The Authority failed to comprehend the 1st Respondent’s submission that, they were waiting for clarification from BOT on the matter, as the experience they got with Banker’s cheques submitted by the 2nd Respondent should have clarified the position beyond doubt. The Authority is concerned that, the 1st Respondent does not appear to take the matter seriously, in that; in

the subsequent tender the same requirement has been retained.

The Authority observes that, it was evident during the hearing that, the tenderers started to complain on the validity of Banker's cheques required under Clause 17 of the ITB read together with Item 13 of the Bid Data Sheet before the deadline for submission. This should have been a wakeup call for the 1st Respondent to consult the relevant authorities on this subject.

According to Clause 17.3 of the ITB the tenderers were given option to submit the bid deposit in either Tanzanian shillings or any convertible currency. However, according to the BOT directive bid deposits in convertible currencies of any amount are acceptable while those in Tanzanian shillings beyond 10 million are not. This means that, bid deposits in Tanzania shillings were literally not acceptable since they would never clear through the banking system. In other words, tenderers who offered bid deposits in

Tanzanian shillings were subtly discriminated against as per the BOT directive.

The Authority also noted that, the purported successful tenderers in the two tenders, namely, M/s Olam Tanzania Ltd, submitted three Banker's cheques the lowest being worth Tshs. 450,000,000.00 while M/s Paula Inter Business Co. Ltd submitted a Banker's cheque worth Tshs. 10,677,933.75. Hence, the two tenderers contravened the BOT directive. It is the view of the Authority that, since it is common knowledge that, such cheques cannot be cashed as it happened in the tenders under Appeal, legally speaking, both M/s Olam Tanzania Ltd and M/s Paula Inter Business Co. Ltd did not submit any bid deposit. This is because if the intent of bid deposit as per Clause 17.2 of the ITB is to protect the 1st Respondent against the risk of the tenderer's conduct, how would have the procuring entity been protected with Banker's cheques which could not be cashed?

The Authority is of the firm view that, the Respondent erred in requiring tenderers to submit bid deposits in excess of Tshs. 10,000,000.00, save for those designated in convertible currencies in the form of Banker's cheques contrary to the BOT directive. This means, all tenderers who submitted Banker's cheques in Tanzanian shillings equally contravened the said directive and therefore their purported bid deposits were not valid. The Authority is concerned that, such reputable Banks could be involved in issuing Banker's cheques which they well knew that were not acceptable and could not be cashed. Such malpractices should not be tolerated. No wonder the 3rd Appellant opted for a Bank guarantee in their endeavour to do what seemed right under the circumstances. Had the Evaluators been diligent they would have treated the submission of a Bank guarantee instead of a Bankers Cheque as a minor deviation since it would have served the purpose envisaged under Clause 17.2 of the ITB, that is, accord the intended protection to the 1st Respondent.

During the hearing the 1st Respondent argued that, Banker's cheques were more reliable than Bank guarantees. The Authority is of a different opinion that, it is easier to forge Banker's cheque than it is for a Bank guarantee, as this fact was also experienced by the 1st Respondent when the National Bank of Commerce Ltd informed them that Banker's cheque submitted by M/s Sarawany Ltd was not authentic, in that, it was not issued by that particular Bank.

Accordingly, the Authority's conclusion on the third issue is that, the 3rd Appellant was unfairly disqualified.

4. Whether it was proper for M/s Olam Tanzania Limited to deposit a sum above 25% of their quoted price, and if so whether it was fatal

It should be noted that, this issue is confined to the 1st Tender. In their submissions the Appellants' arguments on this issue, may be summarized as follows:

- Clause 17.1 of the ITB required the bid deposit to be 25% of the tenderer's quoted price. By depositing 46.4% of their quoted price, the 2nd Respondent, namely, M/s Olam Tanzania Ltd contravened the law.
- The 2nd Respondent conceded during the hearing that they tied up their money (bid deposit) due to fierce competition and also for secrecy purposes. The Appellants contended that, the conduct of the 2nd Respondent in this regard is suspicious as it is not business-like to tie such a huge amount of money unnecessarily. The Appellants believe that, it was intended to impress the 1st Respondent and influence a decision which they managed to achieve as they were awarded the 1st Tender.

In reply thereof, the 1st Respondent submitted that, although the requirement was 25% of the quoted tender price, by depositing a larger sum than required, the 2nd Respondent did not breach any provision. On the contrary, this was advantageous to the 1st Respondent. They further submitted that, the only limitation attached to the bid deposit was that tenderers were barred from depositing an amount lesser than 25% of their quoted prices.

During the hearing, the Members of the Authority were curious to know why did the 2nd Respondent tie such a huge sum of money in this tender by depositing 46.5% of their quoted price instead of the required 25%. In reply thereof, the 2nd Respondent submitted that, they did so due to fierce competition and for secrecy purposes, in that, the competitors would not be able to tell their tender price. They further concurred with the submissions made by the 1st Respondent on this point.

Having summarized submissions by parties, the Authority revisited Clause 17.1 of the ITB which is the bone of contention. The said clause states as follows:

“Pursuant to ITB Clause 11, unless otherwise specified in the Bid Data Sheet, the Bidder shall furnish as part of its bid, a bid deposit in the amount and currency specified in the Bid Data Sheet.” (Emphasis added)

The Authority noted that, Clause 11 which has been referred in the above quoted provision, states that, a bid deposit forms part of the bid. The Authority noted further that, Item 12 of the Bid Data Sheet specified the amount of the bid in the following words:

“The amount of Bid Deposit is 25% of bid amount” (Emphasis added)

The Authority is of the view that, according to Clause 17.1 of the ITB, the amount to be deposited is that specified in the Bid Data Sheet, which is 25% of the price quoted by a tenderer. Much as tenderers are obliged to strictly abide by the provisions contained in the tender document, the Authority agrees with the 1st Respondent that, depositing more than the required sum is more advantageous to them pursuant to Clause 17.2 of the ITB which explains the intent of a bid deposit in the following words:

“The Bid Deposit is required to protect the Procuring Entity against the risk of Bidder’s conduct which would warrant the deposit forfeiture, pursuant to sub-Clause 17.7.”

(Emphasis Supplied)

However, the advantage referred to by the 1st Respondent is what raised the eyebrows of the Appellants, to wit, the 2nd Respondent had intended to impress the 1st Respondent and influence decision. The Authority is of the considered view that,

although on the face of it, both the Tender Document and the applicable law provide for what is termed as minimum requirements, tenderers are at liberty to make some additions provided they are not expressly barred in the said documents. These are sometimes considered as minor deviations especially when they do not jeopardize, in anyway, the interests of the procuring entity. That is why, it is the discretion of the procuring entity to determine whether a deviation is a material or minor as per Clause 27.3 of the ITB which provides as follows:

“The Procuring Entity may waive any minor informality, non conformity, or irregularity in a Bid which does not constitute a material deviation, provided such waiver does not prejudice or affect the relative ranking of any Bidder.” (Emphasis added)

However, the Authority observes that, in such a situation, had the Evaluators considered the deposit of 46.4% to be a minor deviation they should have

pointed out in the Evaluation Report. The Authority noted that, the 1st Respondent's submission that, the deposit of 46.4% was to their advantage is also reflected in the Evaluation Report as no comment was made on that particular fact.

The Authority further observes that, it could have been safer for the 1st Respondent to state categorically in the Tender Document that the bid deposit would be either "**not less than 25% of the quoted price**" or "**25% or more**". Such a formulation could have transmitted a different message to the tenderers, that is, the limitation imposed relates to the minimum deposit while the maximum is unlimited. Hence, avoid unnecessary complaints.

The Authority also considered the Appellants submissions, and observes that they have raised a very serious, valid and timely concern on how such conducts are likely to influence decisions, in the absence of the above formulation suggested by this

Authority. This concern is by implication evident in the 1st Respondent's submissions. The Authority is of the firm view that, this matter needs to be thoroughly addressed by the regulator, namely, PPRA who is mandated with the preparation and issuance of, amongst others, standard tendering documents and guidelines.

In view of the above analysis, the Authority's conclusion on the forth issue is that, it was proper, although un-business-like, for M/s Olam Tanzania Limited to deposit a sum above 25% of their quoted price.

5. Whether the awards of the two tenders to the Successful Tenderers were proper at law

According to the Evaluation Reports for the 1st and 2nd Tenders, the disqualification of the 2nd and 4th Appellants was based on only one ground, namely, failure to indicate whether their quoted prices were

VAT inclusive or exclusive. Had the evaluation been properly conducted they should have qualified for detailed evaluation. This means, by being wrongly disqualified, the three tenderers were denied the opportunity to be subjected to detailed evaluation and therefore compete on the basis of price with the Successful Tenderers in the two tenders. As it has been observed under the fourth issue, the successful tenderer for the 1st Tender, M/s Olam Tanzania Ltd and M/s Paula Inter Business Co. Ltd for the 2nd Tender should not have qualified for awards of the two tenders for failure to submit valid bid deposits.

The Authority is of the settled view that, by disqualifying the 2nd, 3rd and 4th Appellants, the Respondent breached the law and as a result enabled the Successful Tenderers in the two tenders to lack competition in the comparison of prices as all their competitors, including the 2nd, 3rd and 4th Appellants, had already been erroneously disqualified. The wrong disqualification of the 2nd, 3rd

and 4th Appellant resulted into another error of awarding the tenders to unqualified tenderers.

The Authority commends the Appellants for being courageous to exercise their statutory rights in pursuit of justice. The Authority concurs with the Appellants that, had they declined to submit their Appeals, the 1st Respondent, in particular, and the Government generally would have suffered colossal loss in terms of price differences.

In view of the above findings, the Authority concludes that, the awards of the two tenders to the Successful Tenderers, to wit, **M/s Olam Tanzania Ltd** and **M/s Paula Inter Business Co. Ltd** were not proper at law.

6.To what reliefs, if any, are the Appellants entitled to

Having resolved the contentious issues, the Authority is satisfied that the tender process contravened the

law and the subsequent awards thereof were a nullity in the eyes of the law. The Authority therefore considered prayers by parties and is of the settled view that, the order of cancellation of the awards of the tenders which was requested by the 2nd, 3rd and 4th Appellants cannot be granted as, legally speaking, there is nothing before this Authority to be cancelled. That said, the Respondent is ordered to start the tender process afresh in observance of the law.

With regard to the prayer for compensation, the Authority observes that, by ordering re-tendering the Appellants will have an opportunity to participate in the said process, the 2nd, 3rd and 4th Appellants are therefore entitled to some compensation totaling **Tshs. 9,840,000.00** as per the following breakdown:

	Description	Tshs.
2nd Appellant	Legal fees	3,000,000.00
	Appeal fees for two tenders	240,000.00
	Purchase of the Tender Documents for the two tenders	200,000.00
	Sub Total Tshs.	3,440,000.00
3rd Appellant	Legal fees	3,000,000.00
	Appeal fees	100,000.00
	Purchase of the Tender Document	100,000.00
	Sub Total Tshs.	3,200,000.00
4th Appellant	Legal fees	3,000,000.00
	Appeal fees	100,000.00
	Purchase of the Tender Document	100,000.00
	Sub Total Tshs.	3,200,000.00
Grand Total Tshs.		9,840,000.00

The Authority also considered prayers by the 1st and 2nd Respondents that the Appeal be dismissed with costs, and reject them in their entirety as the Appeal has merit.

Other matters that caught the attention of the Authority:

In the course of handling these Appeals, the Authority detected the following matters which are worth mentioning:

- (a) The tenders were advertised only once contrary to Regulation 80(5) of GN. No. 97/2005 which provides as follows:

“The approved tender notice shall be advertised by the procuring entity **at least twice** in one or more newspapers of national circulation and in case of international tendering, a similar notice may be published in appropriate foreign or international publications or professional or trade journals which are likely to be seen by the greatest number of potential suppliers, contractors, service providers or asset buyers.” (Emphasis supplied)

- (b) It was wrong for the 2nd Appellant to write to the 1st Respondent after the tender opening clarifying that their quoted price was VAT exclusive. The Authority observes that, after the tender opening clarification as to the content of a tender is sought by a procuring entity and not the other way round. That is to say, at that stage, a tenderer cannot not submit additional information or clarification unless it has been requested in writing by the procuring entity.
- (c) The Minutes of the Tender Board dated 1st March, 2011, indicate that the Evaluation Committee was composed of three members while the Evaluation Report was signed by five members. Upon being requested to explain the said inconsistency, the 1st Respondent replied that, the information contained in the said minutes was erroneous. The Authority does not accept this explanation since the said

minutes were duly read and confirmed and any purported typing error would have been detected and corrected during confirmation of the said minutes.

(d) The Authority is concerned that, the 1st Appellant had written to PPRA on 3rd January, 2011, but up to the date of the hearing, namely 7th June, 2011, they were yet to receive any response.

(e) The Authority is shocked at the magnitude of price difference between the 1st Respondent's reserve price for the 1st Tender of **Tshs.3,620,821,740.00(VAT inclusive)** when compared to the prices quoted by the tenderers, for instance, had VAT been added to the 2nd Appellant's quoted price (as later clarified that it was VAT exclusive) it would have risen to **Tshs. 6,049,518,119.92**. The price difference between the reserve price and the prices quoted by the tenderers casts doubt as to the quality of or whether any market

research was conducted by the 1st Respondent prior to inviting tenders.

- (f) According to the facts of this Appeal, the 1st Appellant, the rejection of their Appeal notwithstanding, failed to submit their tender due to their inability to comply with Clause 17 of the ITB which required them to deposit a sum equivalent to 25% of their quoted price. As a representative of small local entrepreneurs who could not raise such huge deposit as it was done by the other tenderers. The Authority is of the view that, the fact that out of the **18** firms which purchased the Tender Document in the 1st Tender only **5** returned them, was an indication that there was a hurdle that most of them failed to cross. The Authority is of the view that, had the said tender been split into smaller lots, the bid deposit thereof could have been manageable by the small entrepreneurs hence benefit a wider group of persons.

During the hearing, the Members of the Authority questioned the 1st Respondent on the reasons as to why the 1st Tender was advertised as a single lot if there was a possibility of splitting it into lots in order to accommodate local entrepreneurs and enhance wider participation. The 1st Respondent replied that, it was possible to do so provided the splitting is done prior to the advertisement. The Authority is of the opinion that, the 1st Respondent should look into that possibility in accordance with Regulations 48(5) and 49(3) of GN 97/2005.

Last but not least, the Authority commends the 1st Respondent's Accounting Officer for suspending the execution of the contracts pending determination of these Appeals.

Having considered all facts and evidence, the Authority concludes that, the tender process

pertaining to the 1st and 2nd Tenders was not properly conducted and the subsequent awards to **M/s Olam Tanzania Ltd** and **M/s Paula Inter Business Co. Ltd** were equally a nullity.

On the basis of the aforesaid findings, the Authority rejects the Appeal by the 1st Appellant and upholds Appeals by the 2nd, 3rd and 4th Appellants respectively and orders the Respondent to do the following:

- **Restart the tender process afresh in observance of the law; and**
- **Compensate the 2nd, 3rd and 4th Appellants a total of Tshs. 9,840,000.00 as per the following breakdown:**

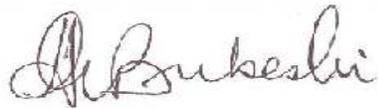
(i) The 2nd Appellant – Tshs. 3,440,000.00

(ii) The 3rd Appellant – Tshs. 3,200,000.00

(iii) The 4th Appellant – Tshs. 3,200,000.00.

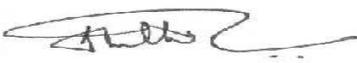
Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

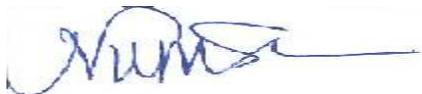
Decision delivered in the presence of the 1st, 2nd, 3rd and 4th Appellants as well as the 1st and 2nd Respondents this 10th June, 2011.



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

MEMBERS:

1. ENG. K.M. MSITA.....


2. MRS. N.S.N. INYANGETE.....


3. MR. H. S. MADOFFE.....