

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

APPEAL CASE NO. 108 OF 2011

BETWEEN

**M/S GEOMATICS ENGINEERING
CONSULTANTS LTD APPELLANT**

AND

TABORA MUNICIPAL COUNCILRESPONDENT

DECISION

CORAM:

- | | |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mrs. N.S.N. Inyangete | - Member |
| 3. Mr. F.T. Marmo | - Member |
| 4. Mr. H.S. Madoffe | - Member |
| 5. Mrs. R.A Lulabuka | - Member |
| 6. Ms. B.G. Malambugi | - Secretary |

SECRETARIAT:

- | | |
|-----------------------|---------------------------|
| 1. Ms. E.V.A. Nyagawa | - Principal Legal Officer |
| 2. Ms. F.R. Mapunda | - Legal Officer |

FOR THE APPELLANT:

1. Mr. Goodluck Ngowi – Managing Director
2. Mr. Wariael Samile – Director
3. Mr. Dony Didas – Office Assistant

WITNESSES FOR THE APPELLANT

- 1.** Mr. Tryphon P. Bilauri – Director, Dynamic Survey
Tronics & Right Touch Ltd
- 2.** Mr. Respich A. Malit – Director, Dar es Salaam Earth
Sciences

FOR THE RESPONDENT

1. Mr. Gwandumi G. Mwambage – Municipal Solicitor

This decision was scheduled for delivery today 2nd August, 2011, and we proceed to deliver it.

The appeal at hand was lodged by **M/s GEOMATICS ENGINEERING CONSULTANTS LTD** (hereinafter to be referred to as **“the Appellant”**) against **TABORA MUNICIPAL COUNCIL** (hereinafter to be referred to as **“the Respondent”**).

The said Appeal is in respect of Tender No. TMC/MP/01/2011 for Survey of 1,155 Mixed Land Use Plots at Ipuli Tabora Municipality.

According to the documents submitted to the Authority, as well as oral submissions by parties during the hearing, the facts of the Appeal may be summarized as follows:

The Respondent advertised tender for Survey of 1,155 Mixed Land Use Plots at Ipuli Tabora Municipality vide the Daily News paper of 26th January, 2011.

On 7th February, 2011, the Appellant paid Tshs. 200,000/- to the Respondent being tender purchase fees as it was indicated in the Tender Advertisement. Upon payment of the required fees the Appellant was provided

with Town Planning Drawings showing the layout of the proposed plots in Ipuli area.

The Appellant requested further for the Tender Document apart from the drawings issued, but they were informed by the Respondent that the drawings issued and tender advertisement were sufficient for preparation of their bid document.

On 09th February, 2011, the Appellant wrote an email to Public Procurement Regulatory Authority (hereinafter to be referred to as **PPRA**) asking for guidance on how to proceed with the tendering process without infringing their opportunity of participating in the tender competition.

On 21st February, 2011, PPRA vide their letter referenced PPRA/LGA/124/28 required the Respondent to furnish the tenderers with all the information which were required for purposes of bidding.

The tender opening took place on 25th February, 2011, whereby five tenders were received as listed herein below:

No.	Name of Tenderer	Bid Price (TSHS) VAT inclusive	Contract Period (days)
1.	M/s Dar es Salaam Earth Sciences Ltd	112,209,400/=	70
2.	M/s Interland Surveyors	75,075,000/=	60
3.	M/s Geomatics Engineering Consultants	76,322,400/=	180
4.	M/s Dynamic Survey Tronics & Right Touch Ltd	83,213,600/=	178
5.	M/s Land Survey Consultant	57,750,000/=	56

The said tenders were evaluated and the award was made in favour of M/s Interland Surveyors at a contract sum of Tshs. 75,075,000/=.

On 27th May, 2011, the Appellant received a letter from the Respondent with an incorrect name addressed to '**M/s Geomatics Surveyors**' instead of '**M/s Geomatics Engineering Consultants Ltd**', informing the latter that their tender was rejected.

On 1st June, 2011, the Appellant received another letter from the Respondent referenced TMC/Tender/Part/vi/21/02 dated 11th May 2011, addressed properly to the Appellant informing them that their tender was rejected.

Upon being dissatisfied with the tender results the Appellant on the same date (1st June, 2011) wrote to the Respondent asking to be given the reasons for their disqualification and copied the same letter to PPRA.

On 10th June, 2011, the Appellant received a letter from PPRA referenced PPRA/LGA/124/30 advising them to submit their appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**") as the contract had already entered into force.

On 21st June, 2011, the Appellant lodged their Appeal to this Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant's documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing may be summarized as follows:

That, the Respondent failed to issue Tender Document as required by Regulation 82 (1), (2) and (3) of the Public Procurement (Goods, Works, Non consultant services and disposal of public assets by tender) Government Notice No. 97 of 2005 (hereinafter to be referred to as "**GN No. 97/2005**").

That, the Tender Document fee of Tshs. 200,000/= was too high and contrary to the requirements of Regulation 82 (3) of GN No. 97/2005 which requires the Tender Document price to cover costs related to printing

photocopying and distribution and shall not include any element of profit.

That, the Respondent's act of charging Tshs. 200,000/= for a Tender Document and issuing only two copies of faded Photocopy of A1 Town Planning Drawings (hereinafter to be referred to as "**TP Drawings**") to tenderers indicates that they had intended to make profit of Tshs. 150,000/= as the issued drawings are estimated to cost Tshs. 50,000/=.

That, the Tender Document fee of Tshs. 200,000/- limited other surveying consulting firms from participating in the disputed tender.

That, the Respondent's failure to furnish tenderers with adequate information as required by Regulation 83 (1), (2), (3), (4) and (5) of GN. N. 97/2005 created room for lack of transparency in the evaluation process leading to unfair disqualification of the Appellant.

That, the Respondent's process of examination and comparison of tenders was not conducted in accordance with Regulation 90(4), (18) (a), (b) and (c) of GN No. 97/2005.

That, the Respondent failed to comply with the requirements of Regulation 84(1) of GN. No. 97/2005 which requires notification of award and necessary approvals to be made within 30 days.

That, there is no provision in the Act which allows the Respondent to accept only one tender and reject the others.

That, the Respondent ignored the letter from PPRA referenced PPRA/LGA/124/28 dated 21st June, 2011, which requires the former to furnish the tenderers with all the information required for preparation of their bid documents.

Finally, the Appellant requested the Authority to do the following:

(i) cancel the contract and order re-tendering;

or in the alternative

(ii) order the Respondent to compensate the Appellant a sum of Tshs. 20,729,620/- as per the following breakdown:

S/ No	ITEM	TSHS.
1	Preparation of the combined Technical and Financial Proposal 3 Consultants @ USD 45(Tshs. 67,000/-) per hour for 13 hours	2,613,000/-
2	Photocopying and binding of documents	45,000/-
3	Purchase of Tender Document	200,000/-
	TP Drawings – Ministry of Lands, Housing and Human Settlements	14,000/-
	Collection of the Tender Document: - return ticket Dar-Tabora-Dar - subsistence allowance for 1 staff x 4 days x 50,000/-	80,000/- 200,000/-
4	Tender submission costs: - return ticket Dar-Tabora-Dar - subsistence allowance for 1 staff x 4 days x 50,000/-	80,000/- 200,000/-

5	Costs arising from applying for administrative review to the Accounting Officer: <ul style="list-style-type: none"> - 2 Consultants @ USD 45(Tshs. 67,000/-) per hour, for 14 hours - Legal consultation fee Tshs. 67,000/- per hour for 14 hours - Fees paid to PPRA - Postage by courier 	1,876,000/- 938,000/- 10,000/= 10,620/-
6	Costs arising from lodging this Appeal: <ul style="list-style-type: none"> - 2 Consultants @ USD 45(Tshs. 67,000/-) per hour, for 7 hours - Legal consultation fee Tshs. 67,000/- per hour for 7 hours - Appeal filing fee - PPAA 	938,000/- 469,000/- 120,000/-
7	Consequential loss 20% of the bid (i.e 20% of Tshs. 64,680,000/-)	12,936,000/-
TOTAL TSHS.		20,729,620/-

SUBMISSIONS BY THE APPELLANT'S WITNESSES:

The Appellant brought two witnesses whose firms had also participated in the tender under Appeal. In their oral submissions during the hearing, the said witnesses confirmed that their firms were also charged Tshs. 200,000/- each for the Tender Document which was not

availed to them. Instead, they were given TP Drawings only.

THE RESPONDENT'S REPLIES

The Respondent's documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing may be summarized as follows:

That, the Respondent issued the Tender Document which was in accordance with Section 3(1) of the Public Procurement Act No. 21 of 2004, Cap 410 (hereinafter to referred to as "**the Act**")

That, the required information for this type of tender was provided for in the TP Drawings and tender advertisement and these were sufficient to enable the tenderers to prepare their bids.

That, the law is silent on how much should be charged for the Tender Document; hence, the fee of Tshs. 200,000/ was found to be reasonable by the

Respondent. Thus, the Appellant claim that the Respondent made a profit by selling the Tender Document at Tshs. 200,000/= is not true.

That, the tender under appeal had not limited any firm as it was competitive and as a result several land surveying consultancy firms fully participated without limitation.

That, the Appellant could have sought for clarification if the Tender Document issued was not satisfactory or ambiguous. On the contrary, the Appellant failed to do so as there is no evidence showing that they had sought for clarification. Thus, the claim of unfair disqualification has no limb to stand on. The Respondent conducted its evaluation and subsequent award in a transparent manner.

That the evaluation process adhered strictly to the requirements of Regulation 90 of GN. No. 97/2005, hence, the claim that there were no terms, conditions or criteria for evaluation of tenders are not true at all.

That, the Respondent had erred in law by inviting the tender using regulations under GN 97 /2005 while the Public Procurement (Selection and Employment of Consultants) Regulations (hereinafter to be referred to as GN No. 98/2005) is the appropriate regulation for the tender under Appeal.

That, the Respondent had used the word rejection instead of disqualification as the two words are synonymous and can be used interchangeably.

That, the delay in issuing tender results was attributed to the following reasons:

- On 14th March, 2011 the Tender Board perused the Evaluation Report and noted some defects hence ordered re evaluation of tenders. The noted defects were;
 - (i) There were errors in the contract price quoted by M/s Dynamic Survey Tronic & Right Touch (Ltd) as they had tendered at Tshs **43,388,000/=** but in the Evaluation Report

the figure was recorded as Tshs **45,388,000/=**.

(ii) There was no bank statement showing cash flow on the part of M/s Interland Surveyors and M/s Land Survey Consult. Hence, there was doubt on their financial ability.

- On 15th March, 2011, the Tender Board Chairman was promoted to the Post of District Executive Director of Kibondo District Council; hence Tender Board meetings could not be convened.
- During the months of March and April 2011, several Tender Board members were involved in the preparation of the budget for 2011/2012 Financial Year.
- On 9th May, 2011, Evaluation Report was re-submitted to the Tender Board after correction of errors and thereafter the award was made to M/s Interland Surveyors.

That, the Respondent had not received any letter from PPRA dated 21st February, 2011, as the only letter which was received by the former was the one dated 10th June, 2011 which gave directions to the Appellant to file their complaint to this Authority.

That, the award of the tender has already been communicated to the Successful Tenderer and once compensation is paid to the residents of the designated areas, the said tenderer would be invited for contract signing.

Accordingly, the Respondent prayed for reliefs as follows:

- (i) The Appellant's claim for loss of Tshs. 20,729,620/-, is left within the mandate of the Authority to decide.
- (ii) The reasons adduced by the Appellant are too weak to compel this Authority to nullify the contract.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral arguments from parties, the Authority is of the view that the Appeal is centred on the following issues:

- **Whether the procurement process was conducted in accordance with the law;**
- **Whether the Appellant was unfairly disqualified;**
- **Whether the award of the tender to the Successful Tenderer was proper at law; and**
- **To what reliefs, if any, are the parties entitled to.**

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

1.0 Whether the procurement process was conducted in accordance with the law

In resolving this issue the Authority formulated two sub-issues, namely,

- (a) Whether the applicable Regulations for this tender were GN. No. 97 or GN. No. 98 of 2005; and**
- (b) Whether the invitation, evaluation and selection procedures were observed;**

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

- (a) Whether the applicable Regulations for this tender were GN. No. 97 of 2005 or GN. No. 98 of 2005**

To start with, the Authority deems it necessary to cite properly the said Government Notices. GN. No. 97 of 2005 refers to the **"Public Procurement (goods, works, non-consultant Services and disposal of**

public assets by Tender)”, while GN. No. 98 of 2005 refers to the **“Public Procurement (Selection and Employment of Consultants)”**. The Authority observes that, the afore-cited Regulations amplify the Public Procurement Act, Cap. 410 and therefore come into play depending on the nature of the procurement intended by a procuring entity.

For one to be able to ascertain which amongst the two Government Notices was appropriate for the procurement of a surveyor of the Respondent’s plots, it is important to ascertain the circumstances under which the said Regulations are applicable. To start with, the Authority reviewed GN. No. 97/2005. As evidenced in the title thereto the said Government Notice, applies to tenders for procurement of goods, works, non-consultancy services and disposal of public assets by tender. The Authority revisited Section 3(1) of the Act to ascertain whether the subject matter of the disputed tender fell within the ambit of the definitions of works, goods, non-consultancy services or disposal of public assets by tender, in which case, GN No. 97/2005 would have been

the proper Regulations. The said definitions are reproduced herein below:

“**disposal**’ means the divestiture of public assets including intellectual and proprietary rights and goodwill, and any other rights of a procuring and disposing entity by any means, including sale, hire-purchase, licences, tenancies, rental, lease, franchise, auction or any combination however classified other than those regulated by the Public Corporations Act, 1992;”

“**goods**’ means raw materials, products, equipment and other physical objects of every kind and description, whether in solid, liquid or gaseous form, electricity, intangible asset and intellectual property, as well as services incidental to the supply of the goods provided that the value of the services does not exceed the value of the goods themselves;”,

“**works**’ means:-All works associated with the construction, reconstruction, demolition, repair or renovation, of a building, structure, road or airfield;

- (i) Any other civil works, such as site preparation, excavation erection, building, installation of equipment or materials, decoration and finishing;
- (ii) Services which are tendered and contracted on the basis of performance of a measureable physical output such as drilling, mapping, satellite photography or seismic investigations;”

However, since the term '**non consultancy services**' is not defined in the main Act, the Authority reproduces its definition as provided for under Regulation 3 of GN. No 97/2005,

“**non-consultancy service**' means a service of a skilled or non skilled nature, **which is not a consultancy service** and includes, but is not limited to cleaning, security, maintenance and repair services;”

The Authority observes that, none of the above quoted definitions relate to survey of plots which is the subject matter of this Appeal. Moreover, the mapping envisaged

under item (iii) of the definition of works, does not imply surveying. The Respondent admitted that they had equated this tender to others which fell under GN. No. 97/2005, but during the hearing, they conceded that the relevant Regulations were those contained under GN. No. 98/2005. The Appellant, on the other hand, submitted that, usually, such tenders are considered consultancy services as they involve professional skills and that they fall under GN. No. 98/2005. The Authority therefore concurs with the Appellant that, it was wrong for the Respondent to treat this tender as one which falls under GN. No. 97/2005.

With regard to the applicability of GN. No. 98/2005 to the tender under Appeal, the Authority observes that, these Regulations apply to selection and employment of consultants. In an endeavor to ascertain whether these regulations were applicable to the procurement of surveyors invited for the Tender in dispute, the Authority revisited the definition of '**consultant**' as provided under Section 3(1) of the Act. The said definition is reproduced herein below:

“consultant’ means a firm, company, corporation, organization, partnership or individual person engaged in or able to be engaged in the business of providing services in architecture, economics, engineering, **surveying** or any field of professional services, and who is, according to the context, a potential party or the party to a contract with the procuring entity;” (Emphasis supplied)

Based on the above definition, the Authority is of the firm view that, surveying of plots falls within the ambit of consultancy services and hence, GN. No. 98/2005 should have been employed in floating this tender. That said, the Authority’s conclusion in the first sub-issue is that, the applicable Regulations for this tender were those contained under GN. No. 98 of 2005.

(b) **Whether the invitation, evaluation and selection procedures were observed**

In analyzing this sub-issue, the Authority started by revisiting the statutory requirements which provide on the modus operandi for processing tenders of this nature. In doing so, the applicable law as well as GN. 98/2005 which has already been established to be proper for consultancy services will be reviewed. In the course of ascertaining if the invitation, evaluation and selection procedures were adhered to, the Authority shall also assess whether the basic principles set out in the Act have been observed as stipulated under Section 58(1) of the Act.

The Authority revisited Regulation 42(2) of GN. No. 98/2005 which highlights the main stages in the procurement of consultants as hereunder:

“The basic principal stages of the selection process shall be as follows:

- a) Preparation of the Terms of Reference
- b) Preparation of costs estimate and budget
- c) Advertising the acquisition of services
- d) Preparation of shortlist of consultants

- e) Determination of Selection procedures and criteria for selection
- f) Preparation and issuance of the request for proposal
- g) Inviting the consultants to submit proposals
- h) Receipt of proposal
- i) Evaluation of Technical Proposal
- j) Evaluation of financial proposal
- k) Final evaluation of quality and cost;
- l) Negotiations and award of the contract to the selected consultant; and
- m) Signing the contract.”

Item (c) of the above quoted Regulation, dictates that, once the Terms of Reference and cost estimates are in place, the next stage is for a procuring entity to advertise for the acquisition of the required services.

The Authority observes that, Section 61(1) and (2) of the Act compels a procuring entity wishing to commence competitive tendering to prepare and issue a tender notice in accordance with the Regulations. Section 47 of

the Act accords discretion to a procuring entity to pre-qualify tenderers prior to inviting tenders. The said Section 47 states as follows:

“A procuring entity may engage in pre-qualification proceedings with a view to identifying suppliers, contractors or consultants either prior to inviting tenders for the procurement of goods, works, or services, or after taking part in any other procurement proceedings.” (Emphasis added)

The Authority observes that, in the procurement of consultancy services, an invitation for expression of interest (hereinafter to be referred to as “EoI”) is usually advertised pursuant to sub-Regulations (1) and (4) of Regulation 49 of GN. No. 98/2005 which provides as follows:

“49(1) To obtain expression of Interest, the procuring entity shall include a list of expected consulting assignments in the General Procurement Notice which shall be up dated annually for all

outstanding procurement and shall also advertise all contracts in the Authority's journal and website, and national news paper of wide circulation"

- (4) **The advert shall request minimum but adequate information to make a judgment on firm's suitability and may not be so complex as to discourage consultants from expressing their interest."** (Emphasis supplied)

The Authority noted that, in implementation of the powers conferred unto them under the Act, PPRA issued a Standard Invitation for Expression of Interest, Selection and Employment of Consultants, in June 2008. The said Document contains a standard advertisement for Expression of Interest which requires interested consultants to provide information indicating, inter alia, that they are qualified to perform the services by submitting the consultant's profile, description of similar assignments, experience in similar conditions, availability of appropriate skills among staff. In addition, the

selection procedure chosen by the procuring entity is specified therein.

The Authority reviewed the invitation process for the Tender in dispute in order to ascertain if it was conducted in accordance with the law. According to documents availed to this Authority as well as the Respondent's oral submissions during the hearing, the first stage involved advertising for the tender whereby Land Survey Companies registered by the National Council of Professional Surveyors of Tanzania (NCPST) were invited to tender. The Authority observes that, the initial stage contravened the law in the following aspects:

- (i) Instead of inviting for EoI as specified by Regulation 49 of GN. NO. 98/2005, the Respondent invited for tenders for **"Survey of 1,155 Mixed Land-use Plots at Ipuli Tabora Municipality"**. As was conceded by the Respondent during the hearing that, they treated this tender as one falling under GN. No. 97/2005 instead of GN. 98/2005.

- (ii) The interested consultants were invited to collect tender documents at a non refundable fee of Tshs. 200,000/=. The Authority observes that, this process applies to tenders invited under GN. No. 97/2005.
- (iii) It was wrong for the Respondent to invite tenders prior to deciding on the selection procedures as PPRA's standard invitation for EoI requires the said procedure to be specified in the invitation. The selection procedures envisaged are those stated under Regulation 36(2) of GN. No. 98/2005, which provides as follows:

“Four principal types of selection procedures shall be applied according to the characteristics of the services required namely:

- (a) Selection based solely on technical quality;**
- (b) Selection procedure based on technical quality with price consideration;**
- (c) Selection procedure based on the compatibility or technical proposal and least cost consideration; and**

(d) Selection procedure based on quality and fixed budget.” (Emphasis supplied)

Furthermore, the law requires, among other things, that, the selection procedures be approved by the respective tender board pursuant to Regulation 36(1) of GN No.98/2005 which provides as follows;

“The Selection procedure and evaluation criteria to be adopted shall be determined by the procuring entity in consultation with relevant regulatory board prior to the invitation of consultants to submit proposals. Such criteria shall be considered by the appropriate tender board which will verify their suitability and make possible comments concerning them and be included in the request for proposals”

The Authority noted that, the selection procedure was not indicated anywhere. This was a clear breach of the law.

Having reviewed the first stage of the tender process, the Authority revisited Regulation 50(1) and (5) of GN. No. 98/2005 which indicates that, the second stage after EoI involves short listing of consultants and that only the shortlisted ones may be invited to submit proposals. The said provisions read as follows:

“50(1) The short list shall be made up of consultants who in the view of a procuring entity possess the required capabilities and experience to provide the specific services which only consultants appearing on the short list may be invited to submit proposals.

(5) Firms that expressed interest, as well as any other firm that specifically so requests, shall be provided with the final short list of firms. ” (Emphasis supplied)

The Authority noted that, the short-listing stage was not conducted. Additionally, the short listed firms were supposed to be approved by the Tender Board, pursuant

to Regulation 50(7) of GN. No. 98/2005; this was not the case for the tender dispute.

The third stage relates to issuance of tender documents. Section 63 of the Act provides guidance in the following words:

“63(1) The procuring entity shall use the appropriate standard model tender documents specified in the Regulations for the procurement in question.

(2) The tender document shall be worded so as to permit and encourage competition and such documents shall set forth clearly and precisely all the information necessary for a prospective tenderer to prepare tender for the goods and works to be provided.”

(Emphasis added)

The Authority observes that, in the procurement of consultancy services, documents issued at this stage are called Request for Proposals (hereinafter to be referred to

as **"RFP"**). Regulation 52 lays emphasis to the above quoted Section by specifying what should be contained in the RFP and also compels procuring entities to use standard documents issued by PPRA. The said Regulation states as follows:

"52(1) The request for proposals shall contain:

- (a) A letter of invitation;**
- (b) Information to consultants;**
- (c) Terms of reference;**
- (d) Proposed contract; and**
- (e) Standard form for technical and financial proposals.**

(2) Procuring entities shall use standard request for proposals documents issued by the Authority and shall list all the documents included in the request for proposals." (Emphasis added)

Having pointed out the relevant provisions pertaining to the content and issuance of RFPs, the Authority revisited submissions by parties on this particular stage before

analyzing whether it was done in accordance with the law.

In their submissions the Appellant contended that,

- The Respondent did not issue any Tender Document; they instead, availed a copy of the tender advertisement and TP Drawings only. They further contended that, the Respondent's failure to issue Tender Document contravened Regulation 82(1) of GN. No. 97/2005.
- They were not furnished with adequate information to enable them prepare their tenders pursuant to Regulations 83 of GN. No. 97/2005.
- Non issuance of the Tender Document resulted in lack of evaluation criteria and procedures, contrary to sub-Regulations (4) and (18)(a) of Regulation 90 of GN. No. 97/2005.
- The consultants were subjected to pay too high a fee of Tshs. 200,000/= while no Tender Document was

issued. The amount charged was not proportionate to the cost of reproducing the TP drawings issued and was contrary to Regulation 82(3) of GN. No.97/2005.

In reply thereto, the Respondent stated as follows:

- Confirmed that, the documents stated by the Appellant are the only ones which were issued to the consultants and that they fit within the definition of solicitation documents as provided for under Section 3(1) of the Act. The said definition reads as follows:

“solicitation documents’ means tendering documents or any other documents inviting tenderers to participate in procuring or disposal by tender proceedings and includes documents inviting potential tenderers to pre-qualify, and standard tendering documents.” (Emphasis added)

Based on the above definition, the Tender Document was the TP drawings as the law allows for provision of **'any other document'**.

- The documents issued to tenderers contained adequate information to enable them to prepare their tenders. In addition thereto, they were allowed to survey the designated plots and make inquiries.
- The fee charged was reasonable as it was approved by the Tender Board. Moreover, the law does not provide any particular rate chargeable.

Having summarized submissions by parties, the Authority analyzed their validity. Firstly, the Authority observes that, the provisions relied upon by the Appellant are not relevant as the proper Government Notice applicable to this tender is GN. No. 98/2005 and not GN. No. 97/2005. However, the Authority will consider them in light of GN. No. 98/2005 as some of the requirements pointed out are not only based on the main Act but are also mandatory requirements under GN. No. 98/2005. That said, the

Authority is of the considered view that, the Respondent did not issue solicitation documents and that this particular stage was not conducted and was in contravention of the law, for the following reasons:

- (i) Issuance of tender documents is a mandatory requirement under Section 62(1) of the Act which provides as follows:

“The procuring entity shall provide tender documents immediately after first publication of the tender notice to all suppliers or contractors who respond to the tender notice and pay the requisite fee, if required, for which receipts shall be given.” (Emphasis added)

The TP Drawings issued by the Respondent do not **“set forth clearly and precisely all the information necessary for a prospective tenderer”** to prepare their tender as required under Section 63(2) of the Act.

(ii) Both the tender advertisement and the TP drawings constitute an RFP which was supposed to be issued in this type of procurement pursuant to Regulation 52(1) of GN. No. 98/2005. A proper RFP should contain an invitation letter, information to consultants, terms of reference, proposed contract and standard form for technical and financial proposals. Furthermore, the content of the terms of reference are well specified under Regulation 43(2) of GN. No. 98/2005, and expected to include the following:

- a precise statement of the objectives and goals sought;
- a clear description of the nature and scope of the services required and their content as well as the time interval in which they shall be provided; and
- a description of the duties and responsibilities of the consultant.

The Authority noted that, none of the above aspects were stated. Moreover, the information that was availed to the consultants through the tender

advertisement and the TP drawings could not, by any standard, be deemed to contain the minimum requirements neither under GN. No. 98/2005 nor GN. No. 97/2005.

(iii) The consultants in this tender submitted a combined Technical and Financial proposal instead of submitting separate documents thereof, as no guidance was issued by the Respondent. This contravened the law, which requires the two proposals to be separate as their opening as well as their evaluation must be done separately pursuant to Regulations 54(4)(k), 56(8) and 61(1) and (2) of GN. No. 98/2005, which are reproduced herein below:

“Reg. 54(4)(k) the method in which the proposal shall be submitted, including the requirement that the technical proposals and price proposals be sealed and submitted separately in a manner that shall

ensure that the technical evaluation is not influenced by price;”

Reg. 56(8) The financial proposals shall remain sealed and shall be deposited with the secretary of the appropriate tender board until they are opened publicly.

Reg. 61(1) The opening of financial proposal shall take place in the date, time and place set for opening by the procuring entity in the presence of firms representative who choose to attend.

(2) Before the opening of the financial proposals, the secretary of the tender board shall read out the results of the technical evaluation to the people attending the opening meeting. ”

(iv) The Authority concurs with the Appellant that, neither the evaluation criteria nor the procedure thereof were provided contrary to sub-Regulations (1) and (4)(c) of Regulation 54 of GN. No. 98/2005 which state as follows:

“Reg. 54(1) The information to consultants shall contain all necessary information that would help consultants prepare responsive proposal and shall bring as much transparency as possible to the selection procedure by providing information on the evaluation process by indicating evaluation and factors and their respective weights and the minimum passing quality score”

(4) The information to consultants shall include adequate information, on the following aspects of the assignment:

(c) details of the selection procedure to be followed, including:

(i) a listing of the technical evaluation criteria and weights given to each criterion;

(ii) the details of the financial evaluation;

- (iii) the relative weights for quality and cost in the case of quality and cost based selection;**
- (iv) the minimum pass score for quality;**
- (v) the details on the public opening of financial proposals; and**
- (vi) available budget in the case of fixed budget selection. (Emphasis added)**

The Authority totally disagrees with the Respondent's submission that, the information contained in the tender advertisement as well as the TP Drawings was sufficient to enable the consultants to prepare their tenders. This is because, the said documents did not meet the requirements of Regulations 52 and 54 of GN. No. 98/2005.

(v) The Respondent erred in not using the standard tendering documents issued by PPRA, pursuant to Regulation 52(2) of GN. No. 98/2005.

(vi) With regard to the fees of Tshs. 200,000/- charged for the Tender Document, the Authority observes that, Section 62(5) of the Act provides that, **“the scale of fees payable for collection of tender documents shall be as set out in the Regulations made under this Act”**. However, GN. No. 98/2005 does not provide for such rates. The Authority is of the view that, had the law intended the said fees to apply to procurement of consultancy services, the same would have been expressly stated in the relevant Regulations. In this case therefore, the fees charged were improper.

(vii) The tender validity period for the disputed tender was not specified contrary to Section 64 of the Act read together with Regulation 54(3) of GN. No. 98/2005. The latter provision states as follows:

“The information to consultants shall specify the proposal validity period which shall not be less than sixty days and may not exceed one hundred and twenty days.” (Emphasis supplied)

The Authority is of the firm view that, the Respondent breached the law again in this respect.

Having resolved the contention whether the Respondent had issued the solicitation documents or not, the Authority reviewed the evaluation process to ascertain if it was conducted in accordance with the law. To start with, the Authority revisited submissions by parties on this particular point.

The Appellant submitted that, firstly, the examination, comparison and evaluation of the tenders should have been consistent with the terms and conditions provided for in the Tender Document pursuant to Regulation 90(18)(a) of GN. No. 97/2005. Secondly, that lack of evaluation criteria and procedure led to an unfair evaluation of tenders which resulted in an equally improper disqualification of the Appellant.

In reply the Respondent submitted that, the Evaluation Committee was appointed and it executed its duties in

observance of the law. Furthermore, the evaluation process was conducted strictly in compliance with the law and therefore the Appellant's contentions are unfounded.

Much as the Authority agrees in principle with the Appellant that, the evaluation process contravened the law, the provisions relied upon by the Appellant are incorrect. As it has already been established under the first sub-issue that, the proper Regulations for this tender were those provided for under GN. No. 98/2005 and not GN. No. 97/2005.

In reviewing the evaluation process, the Authority started by revisiting the Evaluation Report before doing the same for the Re-evaluation Report, as the evaluation was conducted twice. That said, the Authority highlights the shortcomings detected in the evaluation process pertaining to the first evaluation, which are as indicated herein below:

- Evaluation of tenders for consultancy services is guided under Regulation 57 (1) of GN No. 98/2005

which required it to be carried in two stages, to wit, the quality and the costs. Having perused the Evaluation Report, the Authority noted that, it did not comply with the afore-cited Regulation. Moreover, since both technical and financial proposals were contained in the same documents, the evaluation thereof was carried out simultaneously contrary to Regulations 56(8), 57(2), 59(1) 61 and 62 of GN. No. 98/2005.

- The evaluation Report did not show the stages through which the evaluation of tenders was carried out. However, paragraph 2.0 of the Evaluation Report whose literally translated title reads **"TENDER ADVERTISEMENT"**, indicates that the tenders were checked if they contained tender prices as well as the completion period. The said information was thereafter condensed into a Table under paragraph 3.0. Immediately thereafter, a Table was inserted titled **"BASIC REQUIREMENTS FOR TENDER NO. TMC/TENDER/PART VI/21"** which appeared to be misplaced as it was not

preceded by an opening statement linking it to either the previous paragraph or the subsequent ones.

- It has been established under the preceding part of this decision that, the evaluation criteria and procedure thereof were not provided as required under Regulation 54(4)(c) of GN. No. 98/2005. The Authority noted that, the Evaluators picked the requirements as they appeared in the tender advertisement, modified one of them, injected some clarity to some which were ambiguous and used them as evaluation criteria. In the Table below the Authority reproduces the requirements as they appear in the tender advertisement as well as what were regarded as criteria by the Evaluators and used in the evaluation of the tenders:

S/ No.	REQUIREMENTS PER TENDER ADVERTISEMENT	CRITERIA USED BY THE EVALUATORS
1	Receipt of application fee	Stakabadhi ya Malipo
2	Proof of financial capability	Uthibitisho wa uwezo wa kampuni Kifedha
3	A statement of the company not to be involved on corruption matters (sic)	Uthibitisho wa Kampuni dhidi ya vitendo vya rushwa
4	Certified copies of company	Usajili TIN na Leseni ya

	incorporation (sic), TIN and Business Licence	Biashara
5	A summary of time of completion and financial stand (sic) of the work (cost estimate)	Muda wa kazi
		Gharama za kazi
6	Company activities executed in the past, instrumentation (sic) and CV (sic) of employees.	Kazi za miaka 5 ya nyuma na CV's za watumishi
		Vifaa vya Kazi
7	Valid Receipt to (sic) annual fees to NCPS	Ada ya mwaka kwa NCPS kwa mwaka 2010

On the basis of the contents in the Table above, the Authority noted that, Item 2 which required the consultants to submit proof of their financial capability, the Evaluators regarded bank statements or cash flow statements as sufficient proof thereof. The Authority observes that, the requirement as it appeared in the tender advertisement was different from what was actually used to evaluate the tenders. Had the Respondent intended such criterion to be applied the same should have been explicitly stated in the Tender Document. It was therefore, wrong for the Evaluators to use a criterion which was unknown to the consultants prior to the opening of tenders.

Item 4 on the first column specifically required consultants to submit a Certificate of Incorporation but the modification made by the Evaluators made reference to '**registration**'. The Authority observes that, had the Certificate of Incorporation been checked, the Evaluators would have discovered that the tender submitted by the partnership of Dynamic Survey Tronics and Right Touch Ltd indicated that the former had submitted a Certificate of Registration issued under the Business Names (Registration) Ordinance, Cap. 213. Furthermore , the successful Tenderer M/s Interland Surveyors had a similar omission but the Evaluation Report indicated that the two consultants had complied with this requirement.

The Authority also noted that, Item 6 was modified by the Evaluators as the information on a firm's past experience was originally not pegged to a number of years, while the criteria used to evaluate the tenders required 5 years experience. The Authority observes that, this was wrong as the Evaluators have no

mandate to change or impose new conditions as the law requires the evaluation to be conducted in accordance with the terms and conditions stated in the tender document.

With regard to Item 6 as it appeared in the tender advertisement, consultants were required to submit information on their '**instrumentation**', the Authority observes that this requirement was vague and ambiguous. However, the same was clarified by the Evaluators to mean '**equipment**'. The Authority is of the view that, this was a new requirement as it was not known to the consultants prior to the deadline for submissions of tenders.

- The Authority observes that, by using criteria which were unknown to the consultants, the Respondent contravened Section 65(1) and (2) of the Act read together with Regulation 58(9) of GN No. 98/2005.

The said provisions are reproduced below:

“S. 65(1) The basis for tender evaluation and selection of the lowest evaluated tender shall be clearly specified in the instructions to tenderers or in the specification to the required goods or works.

(2) The tender document shall specify any factor in addition to price which may be taken into account in evaluating a tender and how such factors may be quantified or otherwise evaluated” (Emphasis supplied)

“Reg.58(9) Evaluation committee shall evaluate each proposal on the basis of the criteria stipulated in the request for proposal. (Emphasis added)

- The Authority noted that, in evaluating the financial capability of the consultants, the Evaluation Report indicated that only one consultant, namely, Dynamic

Survey Tronics & Right Touch Ltd had complied with this requirement as they had attached a Bank Statement. The four other consultants, the Successful consultant inclusive, did not meet this requirement. Despite the said omission, two of the four consultants, namely, Land Survey Consultants and the Successful Tenderer qualified for detailed evaluation.

- Having checked the tenders' compliance to the requirements of the tender advertisement, the Evaluators ranked the consultants as follows:

No.	Name of Tenderer	Ranking
1.	M/s Interland Surveyors	1
2.	M/s Land Survey Consultant	2
3.	M/s Geomatics Engineering Consultants	3
4.	M/s Dynamic Survey Tronics & Right Touch Ltd	4
5.	M/s Dar es Salaam Earth Sciences Ltd	5

The Authority noted that, the Evaluation Report does not show the basis of the said ranking, for instance,

the Appellant and the Successful Tenderer met all the requirements, save for, proof of financial capability but the former was ranked No. 3 while the latter was No. 1. The Authority noted further that, the said Report indicated that the Appellant had submitted a reference letter from their Banker while the Successful Tenderer did not provide any information to that effect but was ranked No. 1. Moreover, Dynamic Survey Tronics & Right Touch Ltd had met all the requirements, including submission of a Bank Statement as proof of their financial capability but they were ranked No. 4.

The Authority is of the considered view that, unequal treatment of the consultants, was unacceptable as it contravened Section 43(a) and (b) of the Act which reiterates the basic tenets of procurement to be equality and fairness. The said provision states as follows:

“43. In the execution of their duties, tender boards and procuring entities shall strive to

achieve the highest standards of equity, taking into account:-

(a) Equality of opportunity to all prospective suppliers, contractors or consultants;

(b) Fairness of treatment to all parties;”
(Emphasis supplied)

- The Authority noted further that, two tenders submitted by M/s Land Survey Consultants and the Successful Tenderer respectively qualified for detailed evaluation. The Evaluation Report does not show the basis of selecting those two. However, it can be inferred that, they were the ones who were ranked No. 1 and No. 2 respectively. The Authority noted that, M/s Land Survey Consult qualified for this stage of evaluation despite their failure to submit an anti-bribery policy, proof of financial capability and information on their past experience. The Successful Tenderer also qualified for detailed

evaluation despite their failure to submit proof of their financial capability. The Evaluators acknowledged the omission on the part of the Successful Tenderer but proceeded to recommend them for award of the contract on the condition that they would submit the said information prior to contract signing.

The Authority observes that, the two consultants should have been disqualified at the preliminary stage as they did not meet the eligibility requirements. The Evaluators therefore, erred in subjecting them to detailed evaluation which led to an equally wrong recommendation for award.

- The Authority also noted that, the Evaluators main reason for disqualifying M/s Land Survey Consult was that they depended on hired equipment as they did not have their own. The Authority is of the firm view that, the requirement for equipment as it appeared in the tender advertisement was not clear and it was

not stated anywhere that, the consultants were required to possess the equipment.

On the basis of the shortfalls pointed out above, the Authority is of the settled view that, the First Evaluation was not conducted in accordance with the law.

With regard to the Re-evaluation, the Authority noted that, most of the defects contained in the First Evaluation also featured in the Re-evaluation Report. However, the Authority detected additional anomalies in the Re-evaluation Report as indicated below:

- The completion period was among the requirements that were evaluated during the re-evaluation process. However, the Re-evaluation Report does not show how this criterion was evaluated or whether it was evaluated at all.
- In checking the consultants' financial capability, this time three out of the five consultants were said to have complied with this requirement. The said three

firms are, M/s Dynamic Survey Tronics & Right Touch Ltd, the Appellant and the Successful Tenderer. During the hearing the Appellant was asked if they had been requested by the Respondent to submit any additional information after the tender opening. In reply they stated that, there was no communication of such nature with the Respondent. The Authority therefore, wonders, if no additional information was submitted by the tenderers, how the information that was found to be missing in the First evaluation, could surface during the re-evaluation. If this requirement was waived, the same should have applied equally to the other two consultants who did not comply.

Based on the above analysis of the Re-evaluation, the Authority is of the considered view that, the re-evaluation process was equally not conducted in accordance with the law. In sum; the answer to the second sub issue is that the invitation, evaluation and the selection procedure were not observed.

Having resolved the two sub-issues, the Authority is satisfied that, the procurement process in its entirety was marred by irregularities and the disqualification as well as the purported award of the tender, was highly erroneous. Accordingly, the Authority's conclusion on the first issue is that, the procurement process was not conducted in accordance with the law.

2.0 Whether the Appellant was unfairly disqualified

In resolving this issue the Authority took cognizance of its finding and conclusion on the first issue and therefore finds that, the Appellant was unfairly disqualified.

The Authority also deemed it necessary to consider the Appellant's contention that, the Respondent's letter which communicated the tender results to the Appellant indicated that their tender was rejected. The Appellant contended further that, it was wrong for the Respondent to use the term '**rejection**' instead of '**disqualification**' as the right to reject tenders can only be exercised on all tenders and not otherwise. In their replies, the

Respondent submitted that, the said words are synonymous. The Authority agrees with the Appellant that, 'disqualification' was the proper term under the circumstances as rejection is usually used in exercise of powers conferred to Tender Boards under Section 54 of the Act.

The Authority's conclusion on this issue is that, the Appellant was unfairly disqualified.

3.0 Whether the award of the tender to the Successful Tenderer was proper at law

As it has already been established under the first issue that, the procurement process in its entirety contravened the law, it goes without saying therefore that, the purported award of the tender to M/s Interland Surveyors equally contravened the law. That said, the Authority's conclusion on the third issue is that, the award of the tender to the Successful Tenderer was not proper at law.

4.0 To what reliefs, if any, are the parties entitled to

Having resolved the contentious issues, the Authority revisited the Appellant's prayers. With regard to the prayer for cancellation of the award and order re-tendering, the Authority observes that, there is nothing before this Authority to be cancelled as entire procurement process is a nullity in the eyes of the law. Moreover, the Authority accepts the Appellant's prayer that the tender be re-tendered and orders the Respondent to start the tender process in observance of the law.

The Authority is of the firm view that, the Appellant is entitled to compensation for some of the expenses incurred. The Authority therefore orders the Respondent to compensate the Appellant a sum of **Tshs. 1,859,620/-** only as per the following breakdown:

S/ No	ITEM	TSHS.
1	Photocopying and binding of documents	45,000/-

2	Purchase of Tender Document	200,000/-
	TP Drawings – Ministry of Lands, Housing and Human Settlements	14,000/-
	Collection of the Tender Document: <ul style="list-style-type: none"> - return ticket Dar-Tabora-Dar - subsistence allowance for 1 staff x 3 days x 50,000/- 	80,000/- 150,000/-
4	Tender submission costs: <ul style="list-style-type: none"> - return ticket Dar-Tabora-Dar - subsistence allowance for 1 staff x 3 days x 50,000/- 	80,000/- 150,000/-
5	<ul style="list-style-type: none"> - Legal consultation fee for the Appeal in general - Fees paid to PPRA - Postage by courier - Appeal filing fee - PPAA 	1,000,000/- 10,000/- 10,620/- 120,000/-
TOTAL TSHS.		1,859,620/-

The Authority also considered the Respondent's first prayer that the compensation claimed by the Appellant be left at the discretion of this Authority. It is observed that, the prayer has already been granted in favour of the Appellant. As for the second prayer that, the reasons adduced by the Appellant are too weak to compel this Authority to nullify the contract, the Authority does not agree with the Respondent as the submissions made by

the Appellant had merit. Accordingly, this prayer is therefore rejected.

Having considered all facts and evidence, the Authority concludes that, entire tender process was marred by irregularities which resulted into the unfair disqualification of the Appellant as well as the erroneous award of the tender to M/s Interland Surveyors.

Lastly, the Authority wishes to advise procuring entities in general and the Respondent in particular to consult or seek clarification from PPRA whenever in doubt or where they are ignorant with regard to any procurement procedure.

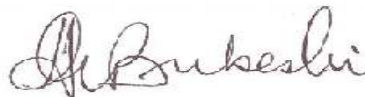
On the basis of the aforesaid findings, the Authority upholds the Appeal and orders the Respondent to:

(a) Restart the tender process in observance of the law; and

(b) Compensate the Appellant a sum of Tshs. 1,739,620/- for some of the costs incurred.




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

Decision delivered in the presence of the Appellant and in the absence of the Respondent this 3rd August, 2011.



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

MEMBERS:

1. MR. F. T. MARMO.....

2. MR. H. S. MADOFFE.....

3. MRS. N.S.N. INYANGETE.....

4. MRS. R.A LULABUKA
