

PUBLIC PROCUREMENT APPEALS AUTHORITY

AT DAR ES SALAAM

APPEAL CASE NO. 109 OF 2011

BETWEEN

BUSINESS MACHINES

TANZANIA LIMITED-----APPELANT

AND

TANZANIA ELECTRIC

SUPPLY COMPANY LIMITED----- RESPONDENT

CHECKNOCRATS (TZ) LTD AND

PERGAMON (TZ) LTD-----INTERESTED PARTY

RULING

CORAM:

- | | |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mr. K.M Msita | - 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. F.R. Mapunda – Legal Officer

FOR THE APPELLANT:

1. Mr. Walter Chipeta- Advocate, Hallmark Attorneys
2. Mr. Justine Ndege - Advocate, Hallmark Attorneys
3. Ms. Annette Kirethi – Advocate, Hallmark Attorneys
4. Mr. Damas Mwangange -Advocate, Hallmark Attorneys
5. Ms. Neema Kileo – Legal Consultant, Hallmark Attorneys
6. Mr. Satish Upadhyay – General Manager - Corporate Affairs

FOR THE RESPONDENT

1. Mr. Steven Urassa – Legal Officer
2. Mr. Roman Uisso – Principal Procurement Officer
3. Mr. Athanas Kalihamwe – Manager (Monitoring & Compliance)

FOR THE INTERESTED PARTY

1. Mr. Balraj Bhatt – Head of Operations
2. Mr. Rajesh Pandya – Managing Director
3. Mr. David Nyaga – Country Manager
4. Mr. D. M. Duncan – Advocate, FK Law Chambers
5. Mr. Wilson Mukebezi- Advocate, FK Law Chambers

This ruling was scheduled for delivery today 24th August, 2011, and we proceed to deliver it.

The Appeal at hand was lodged by **M/s BUSINESS MACHINES TANZANIA LIMITED** (hereinafter to be referred to as "the Appellant") against **TANZANIA ELECTRIC SUPPLY COMPANY LIMITED** commonly known by its acronym **TANESCO** (hereinafter to be referred to as "the Respondent")

The said Appeal is in respect to Tender No. PA/001/10/HQ/G/125 for Supply and Installation of Electronic Fiscal Devices.

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

The disputed tender was floated under restricted tendering procedures in favour of suppliers who had been approved by the Tanzania Revenue Authority.

On 23rd December, 2010, the Respondent vide letter referenced SMP/MP/PMU/18/950 invited six tenderers to

participate in this tender process. The invited companies were;

- M/s Pergamon Tanzania Limited
- M/s Advatech Office Supplies Limited
- M/s Business Machines Tanzania Limited
- M/s Checknocrats Tanzania Limited
- M/s Total Fiscal Solution Limited
- M/s Compulynx Tanzania Limited

On 5th January, 2011, the Respondent held a pre-bid meeting with tenderers where it was clarified and agreed that each supplier would have to quote a unit price for the devices to be supplied; since, by then it was difficult to establish the actual number of devices required. It was further agreed that the total cost was to be obtained by multiplying the unit prices by actual established number of devices.

Pursuant to the invitation letter, the tender opening was scheduled for 7th January, 2011. However, due to clarifications and the amendments which were made

during the pre-bid meeting, the tender opening date was extended three times.

The first extension was done on 7th January, 2011, vide a letter referenced SMP/MP/PMU/26/01 which was addressed to all tenderers informing them that the deadline for submission would be 14th January 2011. On 13th January, 2011, the Respondent made the second extension vide a letter referenced SMP/MP/PMU/26/02 which informed the tenderers that the deadline for submission of tenders had been extended to 28th January, 2011. The third extension was made on 27th January, 2011, whereby the opening date was extended up to 11th February, 2011.

The tender opening took place on 11th February, 2011, whereby tenders were received from five companies as appearing hereunder;

S. NO	NAME OF TENDERER	BID PRICE AT TSHS
1.	M/s Advatech Office Supplies Limited	1,086,426,000/=

2.	M/s Total Fiscal Solution Limited	Not indicated
3.	M/s Business Machines Tanzania Limited	838,800,000/=
4.	M/s Compulynx Tanzania Limited	Item 1.- 2,250,000/= Item 2.- 1,500,000/=
5.	M/s Checknocrats and Pergamon Tanzania Ltd	31,232,240/=

After evaluation of tenders the award was made to the Joint Venture in the name of M/s Checknocrats (TZ) Ltd and Pergamon (TZ) Ltd, at a contract price of Tshs. 3, 130,948,280/= (Three Billion One Hundred Thirty Million Nine Hundred Forty Eight Thousand Two Hundred Eighty only).

On 10th April, 2011, the Appellant wrote to the Respondent asking to be informed about the results of the tender under appeal.

On 8th June, 2011, the Respondent vide a letter referenced SMP/MMCCB/PMU/8/86 informed the Appellant that their tender was unsuccessful.

On 13th June, 2011, the Appellant wrote to the Secretary of the Tender Board a letter referenced BMTL/002/13/TAN/2011 asking to be given the reasons why their tender was unsuccessful.

On 15th June, 2011, the Respondent vide a letter referenced SMP/MMCCB/PMU/13/12 replied to the Appellant's letter of 13th June, 2011, by informing them that if they were dissatisfied with the tender results they were required to lodge their complaint to the Respondent's Managing Director and not to the Secretary of the Tender Board.

On 22nd June, 2011, the Respondent wrote another letter to the Appellant informing them that their tender was found to be non responsive due to the following reasons;

- There was non-compliance to the Tender Validity of 45 days as per Clause 6 of Invitation to Tender.
- The warranty form was not attached as per Clause 3 of the Tender Document.
- Their tender did not specify how the goods would be delivered at the site as specified in the Schedule of Requirements.
- There was no commitment which indicated that the goods would be delivered within two weeks after contract signing as it was stipulated in the Tender Document.
- The tender was not attached with a valid VAT certificate as per Clause 1.3 of the Tender Document.
- The Unit rates of some EFD's were not provided as per agreement in the pre-bid meeting, and;
- The Unit rate of the quoted EFD was relatively higher.

The Appellant was dissatisfied with the reasons given for their disqualification. Thus, on 14th July, 2011, they lodged an Appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**")

PRELIMINARY OBJECTION BY THE INTERESTED PARTY

During the hearing, the Interested Party, namely, M/s Checknocrats (TZ) Ltd and Pergamon (TZ) Ltd, Joint Venture (hereinafter to be referred to as **the successful tenderer**) raised two points of preliminary objections, namely;

- i) **The Appellant has abused the legal procedures enshrined in the law by lodging the appeal directly to this Authority before channeling it to the Accounting Officer and Public Procurement Regulatory Authority.**
- ii) **The Statement of Appeal is incompetent for being lodged to this Authority after the lapse of the required time of 14 days prescribed by the law.**

With respect to the first point of Preliminary Objection the Interested Party stated as follows;

- a) The Appeal is incompetent as it failed to comply with the mandatory provisions of Sections 79(1); 79(2)(d); 80; 81 and 82 of the Public Procurement Act No. 21 of 2004, Cap 410 (hereinafter to be referred to as "**the Act**") read together with Regulations 110, 111, 112, 113 and 114 of the Public Procurement (Goods, Works, Non consultancy Services and Disposal of Public Assets by Tender) Regulations, Government Notice No. 97 of 2005 (hereinafter to be referred to as "**GN No. 97/2005**")
- b) The Appellant contravened the law as they were required to file an application for review to the Accounting Officer as per the requirements of Section 80(1) of the Act before the same could be filed with the Authority. According to the facts of this appeal, there is no evidence that

the Appellant had complied with such a requirement.

- c) The Appellant was required to submit their complaint to the Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**") as required under Section 81(1) after they were dissatisfied with the decision of the Accounting Officer. Since, what was communicated to the Appellant were the results thereof which aggrieved the Appellant and did not indicate that the contract had entered into force. The Appellant therefore failed to comply with this requirement and instead filed their appeal directly to this Authority contrary to the requirements of the law.

- d) Regulation 111(2) of GN No. 97/2005 provides for the documents to be submitted when submitting an application for administrative review but the same was not complied with by the Appellant.

With respect to the second point of Preliminary Objection the Interested party stated as follows;

Even if the Appellant had followed the proper procedure, by filing appeal directly to this Authority after entry into force of the Procurement Contract the Statement of Appeal had been lodged out of time since the said documents were filed after expiry of fourteen days. According to the documents in this appeal it indicated that, the tender results were communicated to the Appellant on 8th June, 2011, and the Appeal to this Authority was lodged on 14th July, 2011; that is, more than 34 days after the date when the Appellant became aware of the circumstances giving rise to the Appeal. Thus, the Appeal is time barred.

APPELLANT'S REPLY ON THE PRELIMINARY OBJECTIONS

In reply to the first point of Preliminary Objection the Appellant submitted that, they had received the tender results on 8th June, 2011. The said tender results indicated that the award was made to the Successful

Tenderer at the contract price of Tshs. 3, 130,948,280/=.

The Appellant submitted further that, by virtue of Section 55(7) of the Act the contract enters into force once the award has been communicated to the Successful Tenderer. Hence, the act of the Respondent notifying the Appellant the tender results indicated award had already been communicated to the Successful Tenderer, and that the contract was already in force. Once the contract is in force, the Accounting Officer and PPRA's powers to entertain the complaint are ousted as provided under Section 82(2)(a) of the Act. Hence, this Authority was the only proper forum to entertain their Appeal.

With regard to the second point of Preliminary Objection the Appellant submitted that, they had received the notification of the tender results on 8th June, 2011. Being dissatisfied with the said results the Appellant wrote to the Respondent on 13th June, 2011, asking to be given the reasons for their disqualification. The Respondent communicated the reasons of the Appellant's disqualification vide a letter dated 22nd June, 2011, but the same letter was received by the Appellant on 2nd July, 2011. Upon knowing the reasons which led to their

disqualification and being dissatisfied with the said reasons, they lodged their appeal to this Authority on 14th July, 2011. Thus, the Appeal was lodged within fourteen days as stipulated under the law.

Without prejudice to the points of preliminary objection, the parties' documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing may be summarized as hereunder:

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 Appellant was among the tenderers who were invited to participate in the disputed tender process.

That, the Appellant fulfilled all the conditions given in the Tender Document as well as complied with the requirements of the Act and its Regulations thereon.

That, the Appellant submitted its proposal for the sum of Tanzania Shillings 828,800,000/=.

That, the tenders were to be opened on 22nd December, 2010. However, the opening date was extended up to 11th February, 2011, and no reasons for such delay were given to the tenderers.

That, the tender results were communicated out of time, contrary to the established procurement practice which requires the same to be communicated as soon as possible from the date of the opening and the Respondent failed to provide justification for the said delay.

That, the Tender was awarded under unusual manner hence creating suspicion of corrupt acts on the side of the Tender Board. The said suspicion is based on the following;

- a) That, the initial Bid for the successful tenderer was Tshs. 31,223,246/= the

amount which was read out during the tender opening.

b) That, the announcement of Tender award, revealed another amount of Tshs. 3,130,948,280.00. That the amount was not part of the Bid proposal of the Successful Tenderer.

c) That, the Respondent did not give reasons for the change of the said bid amount by the company.

d) That, the process indicates that there was no transparency.

That, the reasons advanced by the Respondent for disqualification of Appellant's bid were misleading and unjustifiable as they had complied with all the terms and conditions of the Tender Document as pointed out herein below;

i) That, Section B of the Appellant's tender contained a Form of Bid which stipulated

their acceptance to be bound by the Tender under the terms and conditions. Further the said Bid Form incorporated the contents of Clause 6 of the Tender Document.

ii) That, Section G of the Appellant's tender shows all the attached relevant documents with regards to the EFD's supplier information. Also the information provided sufficed the warranty requirements.

iii) That, Section B of the Appellant's tender guaranteed the supply and delivery of the goods as per the schedule of requirements. Also the same guaranteed the delivery of the goods within two weeks as per the Invitation to Tender.

iv) That, the non- inclusion of VAT certificate only in the Appellant's tender was not a valid ground for disqualification under restrictive tendering.

v) That, the Unit rates given by the Appellant were provided based on the research done, that means the rates were given depending on the implementation of the whole project throughout the country which included EFD servers.

That, the Appellant was dissatisfied with the criteria used to disqualify its Bid as well as the award of tender to the successful tenderer.

That, the Appellant is a recognized supplier duly registered with Tanzania Revenue Authority and was selected for the restrictive tender for the supply of EFD's to the Respondent. Also the Appellant has more capability and capacity to service the Tender far more than the awarded company.

That, the award of Tender was communicated on 8th June, 2011, and the contract was to come into force within two weeks of contract signing as per Clause 2 of the Tender Document, and that the same had already

come into force and therefore this Appeal is within the jurisdiction of this Authority.

Therefore, the Appellant prayed for the following reliefs;

- a) A declaration that the tender award was unlawful
- b) An order for compensation of USD 600,000 being for loss of business and opportunity cost
- c) An order for costs which arose from the following;
 - i) Appeal filing fees - Tshs. 120,000/=
 - ii) Legal costs – 3% of the bid Amount- USD 18,000.00
- e) Any other order that the Authority deems fit.

SUBMISSIONS BY THE RESPONDENT

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

That, there were extensions of the deadline for submission of tenders because of the clarifications and amendments made to the Tender Document and the said information was duly communicated to the tenderers.

That, it was agreed during the pre bid meeting that the total cost was to be determined by multiplying the unit prices by the actual established number of devices.

That, after tender opening, the tenders were subjected to evaluation pursuant to requirements of the Tender Document, the Act and its Regulations therein.

That, during evaluation of the tender, the Appellant was found to be non-responsive due to the reasons pointed out in the letter communicated to them on 22nd June, 2011.

That, the modality of price submission was not the ground on which bids were rejected so long as the unit rates were provided. As at the final stage, unit rates of the lowest evaluated tenderer had to be multiplied by the

established requirements in order to arrive at the initial contract amount for initial supply. In this case the comparison of the award amount and the one noted at the tender opening was not correct.

That, after the evaluation process was completed, the contract for the said Tender was awarded to M/s Checknocrats (TZ) Ltd and Pergamon (TZ) Ltd, Joint Venture.

That, the Appellant's tender was found to be non responsive and was rejected pursuant to Regulation 90(16) of GN No. 97/2005.

That, the scope of work was not established prior to submission of bids, instead, the same was identified during the negotiation meeting which was held between the successful tenderer and the Respondent.

Therefore, the Respondent prayed that the appeal be dismissed with costs.

SUBMISSIONS BY THE INTERESTED PARTY

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

That, the Appellant's tender was rejected for failure to comply with the mandatory provisions of the Tender Document and the reasons why their tender was not successful was duly communicated to them; thus, the disqualification was fair.

That, the Successful Tenderer has complied with all the terms and conditions set forth in the Tender Document; hence, they were the right tenderer to be awarded the tender.

That, the reasons for extending the opening date was duly communicated to all the tenderers.

That, amount of Tshs 3,130,948,280/= for which the Successful Tenderer was awarded the tender, was a total

cost after multiplying the unit price by number of devices required.

That, award of the tender followed all the legal procedures set forth under the law.

That, if the appeal is not dismissed, the successful tenderer would suffer irreparable loss since the contract was signed on 4th May, 2011, and they have already executed the contract and subsequently the Respondent has paid.

That, in case the Appeal is upheld it will render the contract inoperative and this will cause the successful tenderer to suffer loss resulting from breach of contract.

Therefore, they prayed that the Appeal be dismissed with costs.

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 Appeal is properly before the Authority;**
- **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 Appeal is properly before the Authority

The successful tenderer raised a preliminary objection on two points of law, which centred on the jurisdiction of this Authority to entertain the Appeal. The Authority's analysis on the said two points of Preliminary Objection is as follows;

- i) The Appellant has abused the legal procedures enshrined in the law by lodging the appeal directly to this Authority before channeling it to the Accounting Officer and Public Procurement Regulatory Authority.**

In their oral submissions the Successful Tenderer contended that, the Appellant did not follow the set out review mechanism in that they were was required to lodge their complaint first to the Accounting Officer as per requirements of Section 80(1) of the Act, read together with Regulation 111(1) of GN. No. 97/2005. In the event they were dissatisfied with the decision of the Accounting Officer then they should have submitted the matter to PPRA as per the requirements of Section 81 of the Act for review. It is only after review by PPRA that they would be entitled to submit an appeal to this

Authority. The above cited provisions mandate the Accounting Officer to entertain procurement disputes which arise before the contract enters into force.

However, the Appellant failed to comply with the two review stages provided under the law, instead, they submitted their Appeal directly to this Authority. The Appellant's failure to exhaust the two review stages prior to filing of the Appeal to this Authority contravened the requirements of Sections 80 and 81 of the Act.

In reply, thereof, the Appellant stated that, they had written a letter to the Respondent on 10th May, 2011, seeking to be given the tender results. The Respondent's reply on the said letter was made on 8th June, 2011, whereby they were informed that the award has been made to the successful tenderer. The Appellant submitted further that, by virtue of Section 55(7) of the Act the contract enters into force once the award has been communicated to the successful tenderer. Hence, the act of the Respondent notifying the Appellant the tender results indicates that the award had already been communicated to the successful tenderer; thus, the

contract was already in force. Once the contract is in force, the Accounting Officer and the PPRA's powers to entertain complaints cease in accordance with Section 82(2)(a) of the Act. Thus, this Authority is the proper organ to entertain the complaint. Therefore the Appeal is properly before this Authority.

Having summarized arguments by parties on this point, the Authority revisited Sections 80 (1) and 81(1) of the Act which were relied upon by the Respondent as reproduced hereunder;

“80(1) Complaints or disputes between procuring entities and suppliers, contractors or consultants which arise in respect of procurement proceedings and awards of contracts and which cannot be resolved by mutual agreement shall be reviewed and decided upon a written decision by the Accounting Officer, Chief Executive of a Procuring Entity, unless the procurement has been reviewed and approved by an approving authority, in which case that approving authority shall review and decide on the

dispute and give reasons for its decision in writing”.

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

After reviewing the documents submitted the Authority observes that, the Appellant filed an appeal to this Authority after being dissatisfied with the tender results. According to the facts of this Appeal the award was communicated to the successful tenderer on 15th April, 2011, and the contract was signed on 4th May, 2011. The Authority noted further that, the information that the Appellant’s tender was not successful was communicated on 8th June, 2011.

The Authority revisited 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)

From the above quoted provision and the facts of this appeal, the Authority is of the firm view that, by the time the Appellant was informed of the tender results the contract was already in force.

The Authority further revisited Section 82(2)(a) of the Act and noted that, it ousts the jurisdiction of the Accounting Officer and PPRA to handle complaints once a procurement contract enters into force. The said Section 82(2)(a) reads as hereunder:

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

a) if the complaint or dispute cannot be 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 supplier, contractor or consultant submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when supplier, contractor or consultant should have become aware of those circumstances.” (Emphasis added)

The above quoted provisions entail that, this Authority has sole original jurisdiction on complaints where a procurement contract has already entered into force.

Furthermore, the Authority wishes to enlighten the Respondent that the powers of the Accounting Officer and PPRA to handle complaints are ousted once a procurement contract enters into force as per Section 55(7) of the Act.

The Authority therefore, accepts the Appellant’s argument in this regard that, by the time they were

informed about the tender results, the procurement contract was already in force. Thus, they could neither submit their complaints to the Accounting Officer nor to PPRA as the only recourse open for them was to appeal directly to this Authority in accordance with Section 82(2)(a) of the Act.

In the light of the above findings, the Authority rejects the first point of Preliminary Objection and concludes that the Appellant has not abused the legal procedures enshrined under the law for filing their appeal directly to this Authority.

ii) The Statement of Appeal is incompetent for being lodged to this Authority after the lapse of the required time of 14 days prescribed by the law.

The Authority revisited the submissions of the Successful Tenderer who contended that, the Appellant became aware of the circumstances giving rise to their complaint on 8th June, 2011, when they were notified of the tender results. The fourteen days therefore lapsed on 23rd June,

2011, but the Appeal to this Authority was lodged on 14th July, 2011; that is, twenty days after the notification of the tender results. Thus, the Appellant's act of filing the appeal after expiry of the statutory time prescribed contravened the requirements of Section 82(2) (a) of the Act.

In reply thereof, the Appellant submitted that, after they had received the tender results on 8th June, 2011, they wrote a letter to the Respondent on 13th June, 2011, inquiring on the reasons which led to their disqualification. The Respondent's reply was received on 15th June, 2011 whereby they were advised to submit their complaint to the Accounting Officer if they were dissatisfied with the tender results. Before the Appellant reacted to that letter they received another letter on 2nd July, 2011 dated 22nd June, 2011. The said letter gave them the reasons for their disqualification. Being dissatisfied with the said reasons they decided to lodge their Appeal to this Authority on 14th July, 2011; that is within the fourteen days as required by Section 82(2)(a) of the Act.

It was further clarified by the Respondent that, even if the letter providing the Appellant with the reasons for their disqualification was written on 22nd June, 2011, the same was sent to the Appellant vide Fax number 2761640 on 27th June, 2011. Furthermore, the original letter was collected by one of the Appellant's employees named David Kisenka on the same day. The said employee was the one who also received the Appellant's letter of 8th June, 2011 and indicated acknowledgement by signing and stamping the letter. Hence, it is not true that, the Appellant had received the letter on 2nd July, 2011.

Having considered the contentions by parties, the Authority reviewed the documents submitted to it and noted that, the Appellant received the tender results on 8th June, 2011. However, their intention of filing an appeal resulted from the letter of 22nd June, 2011, which notified them the reasons for their disqualification.

It was further noted that, the Respondent's letter of 22nd June, 2011, was sent through fax to the Appellant on 27th June, 2011. The fax report attached to the copy of that

letter shows that, the letter was actually received at the fax number to which it was directed. It was also noted that, the fax number was used by the Respondent to send the letter was the same as the one appearing on the Appellant's letterhead; indicating that the letter was the one actually sent and received at the Appellant's office on 27th June, 2011.

The Authority counted the days from 27th June, 2011, to 14th July, 2011, when the Appeal was lodged to this Authority and noted that the Appeal was lodged eighteen days after the Appellant received the reasons for their disqualification.

The Authority revisited Section 82(2)(a) of the Act and noted that, it clearly stipulates that appeals to this Authority have to be lodged within fourteen days from the date the tenderer becomes aware of the circumstances giving rise to an appeal. For purposes of clarity the Authority reproduces the said section as follows;

"S.82(2)(a) if the complaint or dispute cannot be 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 supplier, contractor or consultant submitting it became aware of the circumstances giving rise to the complaint or dispute** or the time when supplier, contractor or consultant should have become aware of those circumstances.” (Emphasis added)

Furthermore the Authority revisited Rule 7 of the Public Procurement Appeal Rules GN. No 205 of 2005 which provides as follows;

“Appeal to the Public Procurement Appeals Authority shall be lodged by filing a statement of the Appeal within fourteen days from the date when the decision matter, act or omission giving rise to an appeal was made”. (Emphasis added)

According to the facts of this Appeal the Authority observes that, the Appellant became aware of the circumstances giving rise to the Appeal on 27th June, 2011. Hence, the Appeal was to be filed within fourteen days from that date. To the contrary, the Appellant filed their Appeal to this Authority after eighteen days which is outside of the time specified by the law.

On the basis of the above analysis, the Authority concurs with the Successful Tenderer that, the Appeal is incompetent for being filed out of time as specified under the law and is therefore time barred.

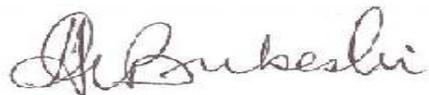
The Authority, therefore, upholds the Successful Tenderer second objection and concludes that the Appeal is not properly before it.

Having ruled on the preliminary objections and having established that the Appeal is not properly before it, the Authority finds that it is unable to proceed with other issues as framed for want of jurisdiction.

Accordingly, the Authority rejects the Appeal and orders each party to bear their own costs.

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

Ruling delivered in the presence of the Appellant, the Respondent and Interested Party this 24th August, 2011.



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JUDGE (rtd) A. BUBESHI

CHAIRPERSON

MEMBERS:

1. MR. K.M. MSITA


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2. MRS. R.A. LULABUKA


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3. MR. H.S. MADOFFE


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4. MR. F.T. MARMO


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