

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT MWANZA
APPEAL CASE NO. 110 OF 2011
BETWEEN
M/S V.A ENTERPRISES LTD-----APPELLANT
AND
REGIONAL ADMINISTRATIVE
SECRETARY, MWANZA-----RESPONDENT**

DECISION

CORAM:

- | | |
|--------------------------------|-----------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Eng. K.M. Msita | - Member |
| 3. Eng. F.T. Marmo | - Member |
| 4. Mr. H.S. Madoffe | - Member |
| 5. Ms. E.V. A. Nyagawa | - Ag. Secretary |

SECRETARIAT:

Mr. Hassan Bakari – Accountant

FOR THE APPELLANT:

1. Mr. Victor Rwehumbiza – Managing Director
2. Mr. Evarist Kweka – Storekeeper

FOR THE RESPONDENT

1. Mr. Patrick N. Kigere – Head of the Procurement Management Unit
2. Ms. Nuru Mwambuli – Legal Officer

OBSERVERS

1. C.F Chacha – Managing Director, C.F. Builders Ltd
2. Mr. Mbaruku Myovellah – Asst. Quantity Surveyor, C.F. Builders Ltd
3. Justine Kataraiia – Engineer, C.F. Builders Ltd
4. Renatus Magori – Nyamasiriri General Promotion & Supplier Ltd

This decision was scheduled for delivery today 28th September, 2011, and we proceed to deliver it.

The appeal at hand was lodged by **M/S V.A ENTERPRISES LIMITED** (hereinafter to be referred to as **“the Appellant”**) against **REGIONAL ADMINISTRATIVE SECRETARY, MWANZA** (hereinafter to be referred to as **“the Respondent”**).

The said Appeal is in respect to the following two tenders:

- ❖ Tender No.RAS/009/2010/2011/W/01 for Construction of Intensive Care Unit, Kitchen, and Rehabilitation of Theatre at Sekou Toure Regional Hospital in Mwanza City (hereinafter to be referred to as **“the 1st Tender”**); and
- ❖ Tender No. RAS/009/2010/2011/W/03 for the Proposed Construction of Nyamagana District Commissioner’s Office Block – Phase III (hereinafter to be referred to as **“the 2nd Tender”**).

According to the documents availed to the Authority as well as oral submissions during the hearing, the facts of Appeal may be summarized below

Having found that the time left before the end of the Financial Year 2010/2011 was not adequate for advertisement of the tenders in dispute, the Tender Board on 6th May, 2011, resolved to fast-track procurement of contractors of the two tenders by drawing shortlists of building contractors from the Directory of the Contractors Registration Board (hereinafter to be referred to as "**CRB**").

On 9th May, 2011, the Respondent invited tenders from some of the building contractors registered by CRB. According to the Minutes of the Tender Board dated 6th May, 2011, this was done pursuant to Section 67(1)(d) of the Public Procurement Act, Cap. 410 (hereinafter to be referred to as "**the Act**") which provides for selective tendering.

The invitation to the 1st Tender was confined to building contractors registered with CRB in Class five and above, while the 2nd Tender was for Class Six and above.

On 6th May, 2011, the Tender Board approved the following twelve contractors to be invited to tender:

S/No	Name of the Contractor
1	M/s China Railway Jianchang Engineering (CRJE)
2	M/s National Service Construction Department Lake Zone (SUMA JKT)
3	M/s Cyril Investment Co. Ltd - Mwanza
4	M/s German Engineering Co. Ltd - Mwanza
5	M/s C. F. Builders Ltd - Mwanza
6	M/s V.A. Enterprises Ltd - Mwanza
7	M/s Dynamic Developers Ltd - Mwanza
8	M/s Inter Country Road Construction Co. Ltd - Musoma
9	M/s Jassie & Co. Ltd - Mwanza
10	M/s Fortes Construction Co. Ltd - Mwanza
11	M/s Mumangi Trans & Construction Co. Ltd - Bunda
12	M/s Nyamasiriri General Promotion & Supplies Ltd - Mwanza

On 9th May, 2011, the Respondent wrote letters to 11 contractors, including the Appellant, informing them that they have been shortlisted to purchase Tender Documents for the above mentioned tenders at a fee of Tshs. 50,000/= each.

Deadline for submission of tenders was 17th June, 2011, and the tenders were opened on the same day. Only three contractors submitted tenders in respect of each tender as indicated in the Tables herein below:

THE 1ST TENDER		
Name of the Tenderer	Quoted Price Tshs.	Completion Period
M/s Nyamasiriri General Promotion & Supplies Ltd	371,528,800/=	-
M/s C.F. Builders Ltd	404,665,920/=	24 weeks
M/s V.A. Enterprises Ltd	380,554,016/=	24 weeks

THE 2ND TENDER			
Name of the Tenderer	Quoted Price (excluding consultancy costs) Tshs.	Quoted Price (including consultancy costs) Tshs.	Completion Period
M/s National Service Construction Department – Lake Zone (SUMA JKT)	191,240,000/=	208,451,600/=	16 weeks
M/s V.A. Enterprises Ltd	261,557,865/=	285,741,173/=	16 weeks
M/s Nyamasiriri General Promotion & Supplies Ltd	197,851,190/=	225,705,035	48 weeks

During the tender opening it was noted that, M/s Nyamasiriri General Promotion & Supplies Ltd submitted original copies only without copies thereof.

The tenders were subjected to evaluation whereby in the 1st Tender, the Appellant was disqualified at the preliminary stage for failure to submit the tender security. M/s Nyamasiriri General Promotion & Supplier

Ltd was also disqualified at the same stage for submitting an incomplete BOQ and Form of Tender as well as failure to submit the tender security. Only one tenderer, namely, M/s C.F. Builders Ltd qualified for detailed evaluation whereby their quoted price was corrected to read **Tshs. 405,150,259.20** as opposed to the original price of **Tshs. 404,665,920/=** and they were recommended for award of the 1st Tender.

With regard to the 2nd Tender, during preliminary evaluation two tenderers were disqualified for the following reasons:

- ❖ M/s Nyamasiriri General Promotion & Supplier Ltd did not fill both the Form of Tender and the Power of Attorney and in addition there were shortcomings with regard to the qualifications of the Project Manager.
- ❖ M/s National Service Construction Department (SUMA JKT) did not submit proof of registration with CRB, Power of Attorney was also not submitted and

did not indicate the qualifications of the Project Manager.

The Appellant qualified for detailed evaluation whereby their quoted price was corrected to read **Tshs. 289,766,165/45** instead of **Tshs. 261,557,865/=** and **Tshs. 285,741,173/=** respectively. The Evaluators thereafter compared the tenderer's corrected price to the Engineer's Estimates and found the former to be +34.25% of the latter, which according to the Evaluators, was above the 15% deviation percentage which is allowed by the law. They therefore, recommended the tender to be re-tendered.

On 20th June, 2011, the Appellant vide a letter without reference, requested the Respondent not to employ Item 5 of the Invitation to Tender regarding submissions of a Bid Security in the evaluation of the tenders under Appeal. The Appellant further stated, amongst other, that prior to the tender opening the Respondent had amended the said Item and issued

in its place Tender Securing Declaration forms. Moreover, the Appellant stated that, the time given to them to prepare and submit tenders was not adequate to obtain a tender security which takes time to process.

On 21st June, 2011, the Tender Board deliberated on, among others, the Evaluation Reports for the two tenders and made the following decisions:

- (i) Approved award in respect of the 1st Tender as recommended by the Evaluation Committee.
- (ii) Approved the recommendation of the Evaluators that the 2nd Tender be re-tendered.

On 23rd June, 2011, the Appellant *vide* unreferenced letter, requested the Respondent's Accounting Officer to review the award of the 1st Tender made in favour of M/s C.F. Builders Ltd. The Appellant contended,

among other things, that one of the Evaluators was not in good terms with them in connection with a contract they were executing in Kwimba District Council in which at a certain point they sought the intervention of Respondent's Accounting Officer. The Appellant therefore **viewed** the participation of the Engineer of Kwimba District Council in the evaluation process could jeopardize their chance of winning the tenders.

The next day, the Appellant wrote another unreferenced letter to the Respondent complaining on an unfair treatment of their tender in the evaluation of the 1st Tender and provided evidence to substantiate on the bad relationship between themselves and the Engineer of Kwimba District Council. They further stated that, they did not have confidence in him. However, in their oral submissions they chose to withdraw these allegations.

On 28th June, 2011, the Respondent wrote two letters to the Appellant all containing the same reference number CFA.193/323/01/274, in respect of the outcome of the two tenders, as follows:

- ❖ Their offer for the 1st Tender was unsuccessful for failure to submit a tender security;
- ❖ Their offer for the 2nd Tender was above the estimated costs and therefore the tender would be re-tendered at a date to be communicated later.

According to the Respondent, the notification of the tender results were availed to all unsuccessful tenderers.

On the same day, the Respondent wrote to 16 building contractors, including the Appellant, informing them that they were chosen to purchase Tender Documents for the two tenders at a fee of Tshs. 100,000/=.

The communication of acceptance for the 1st Tender was sent to M/s C.F. Builders Ltd (hereinafter to be referred to as "**the Successful Tenderer**") vide letter referenced CFA.193/308/01 dated 29th June, 2011. According to the said letter, the contract price was Tshs. 283,167,526.40 (VAT inclusive) for a completion period of 20 weeks excluding two weeks of mobilization as corrected and modified in accordance with the Instructions to Tenderers (hereinafter to be referred to as "**ITT**").

The Appellant wrote again to the Respondent on 12th July, 2011, a letter which was not availed to this Authority. The Respondent replied on this particular letter, vide letter referenced FA.32/308/01/78 dated 14th July, 2011, whereby they reminded the Appellant that notification of the outcome of the 2nd Tender was sent to the latter through the address they had provided. They further cautioned the Appellant that the law prohibits any act or conduct which is likely to interfere with the tender process,

especially raising complaints on the outcome of the tender while the tender process was yet to be finalized.

On 15th July, 2011, the Public Procurement Regulatory Authority (hereinafter to be referred to as **"PPRA"**) responded to the Appellant's letters dated 22nd June, 2011 and 6th July, 2011 (which were not availed to this Authority) vide letter referenced PPRA/LGA/089/17. They informed the Appellant that, they had pursued their complaint on the 1st Tender and learnt that the procurement contract had already entered into force and so they advised the Appellant to refer their complaints to the Public Procurement Appeals Authority (hereinafter to be referred to as **"the Authority"**).

On the same day, the Appellant lodged an Appeal to this Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant's arguments as deduced from the documents availed to this Authority as well as their responses from the questions asked by the Members of the Authority during the hearing, may be summarized as follows:

That, they participated in the two tenders, from which, this Appeal originates and that, the tender processes contravened the law in the following regard:

- ❖ The time allocated for preparation and submission of tenders was hardly one week which was contrary to the law. Moreover, the said time was not adequate for the tenderers to obtain the required tender securities. In realization of the difficulty faced by tenderers, the Respondent's Procurement Officer issued a Bid Securing Declaration (Form No. 'X') to the tenderers to be filled in place of the said securities.

- ❖ The Appellant had filled the Bid Securing Declaration Form but, it seems, it was not considered during the evaluation process. This is evidenced in the notification of tender results to the Appellant dated 28th June, 2011, which informed them that the reason for their disqualification was failure to submit a bid security.

- ❖ Despite cautioning the Respondent on 20th June, 2011, not to use bid security as an evaluation criterion, this was also not considered.

That, the above reasons indicate that, the evaluation process was not conducted in accordance with the law, as the change on the evaluation criteria was not observed. Moreover, the Respondent did not inform the tenderers that the changes made would not be used in the evaluation of tenders.

That, the results pertaining to the 2nd Tender were not disclosed, in that, they did not receive the Respondent's

letter which communicated the results of the 2nd Tender to the Appellant. They only received notification of the results on the 1st Tender.

That, they received the Respondent's letter dated 28th June, 2011, informing them that they were selected to purchase Tender Documents for the 2nd Tender at a non refundable fee of Tshs. 100,000/= while they are awaiting results of the same tender.

That, on 12th July, 2011, they submitted a complaint to the Respondent disputing the re-tendering of the 2nd Tender on the ground that, they did not receive notification of the results thereof, so they were not aware of the reasons for such a decision.

That, their interest is not to request for annulment of the tenders or compensation but rather to see that justice is done. Most tenderers choose not to pursue their rights

for fear of victimization by procuring entities in future tenders. The Appellant is aware that the same is going to happen to them but they still decided to exercise their right because bodies such as PPRA and PPAA were purposely established to set the processes right and ensure compliance with the law. This Appeal would serve as a lesson to both tenderers and public officers, in that, the former would learn to be bold and stand for their rights while the latter would be reminded of conducting procurement processes in observance with the law.

Finally, they requested the Authority to review the matter in its entirety and declare whether the tender processes were conducted in accordance with the law or not.

REPLIES BY THE RESPONDENT

The Respondent's arguments as deduced from the documents availed to this Authority as well as their

responses from the questions asked by the Members of the Authority during the hearing, may be summarized as follows:

That, they dispute the Appellant's contention that the time given to the tenderers to submit tenders was not adequate as the names of the contractors were recommended and approved by the Tender Board on 6th May, 2011. The invitation letters were sent on 9th May, 2011, while the tender opening took place on 17th June, 2011, that is, 37 days after the issuance of the said invitations. The time allocated was therefore, sufficient to enable the tenderers prepare and submit their tenders.

That, the evaluation process took a short time as only three tenderers had submitted tenders and the approval of the award was granted on 21st June, 2011. Since the Financial Year 2010/2011 was coming to an end, it was necessary to expedite the process to avoid the funds being returned to the Treasury.

That, the Appellant's claim that they did not receive the tender results in respect of the 2nd Tender are not true, as the notification was sent through their postal address indicated in their tender.

That, the Appellant wrote a number of letters while the tender process was yet to be finalized, including the one dated 23rd June, 2011, requesting the award of the 1st Tender to be reviewed while the results thereof were not yet communicated to the tenderers. They also wrote another letter, on 24th June, 2011, disputing the inclusion of Engineer of Kwimba District Council in the Evaluation Committee.

That, with regard to the issue of tender security, the Appellant being an experienced contractor registered in Class Five, ought to have known that, had they been dissatisfied by the said requirement they had room to clarify the matter with the Respondent in writing prior to the tender opening date. They instead contended to have been given verbal instructions by the Respondent's Procurement Officer, which is improper.

That, the decision to re-advertise the 2nd Tender was caused by failure to award the tender for budgetary constraints pursuant to Sections 54(2) and 79(2)(c) of the Act.

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 issues;

- ❖ **Whether the tender process in respect of the 1st Tender was conducted in accordance with the law;**
- ❖ **Whether the disqualification of the Appellant in the 1st Tender was justified;**
- ❖ **Whether the award of the 1st Tender to the Successful Tenderer, namely, M/s C.F. Builders Ltd was proper at law;**

- ❖ **Whether the re-tendering of the 2nd Tender was proper at law;**
- ❖ **Whether the Appellant was notified on the outcome of the 2nd Tender, and if not, whether such omission prejudiced them; and**
- ❖ **To what reliefs, if any, is the Appellant entitled to.**

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

1. Whether the tender process in respect of the 1st Tender was conducted in accordance with the law

In order to resolve this issue, the Authority revisited the contentious issues in dispute on this particular tender and formulated three sub-issues as follows:

- **Whether the time availed to the tenderers to prepare and submit tenders was proper at law;**
- **Whether the Drawings were availed to the Appellant ; and**
- **Whether the Respondent amended Clause 32.2 of the ITT to allow submission of a Bid Securing Declaration instead of a bid security.**

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

- (a) **Whether the time given to the tenderers to prepare and submit tenders was proper at law**

To start with, the Authority revisited submissions by parties on this particular point. The Appellant contended that the time was not adequate mainly for the following reasons:

- ❖ The invitation letters requesting the tenderers to purchase tender documents were issued sometime in May 2011, but the tender documents were not yet ready at that time.

- ❖ Having pursued the matter closely, they purchased the Tender Document for the 2nd Tender on 10th June, 2011. It was not until 13th June, 2011, when the Tender Document for the 1st Tender became available and they purchased them. They produced two receipts to substantiate the actual dates when they purchased Tender Documents for the two tenders.

- ❖ The time started to run from the date when the Tender Documents became available to the tenderers and not the date when the invitation letters were dispatched to the shortlisted contractors. In this case, the tenderers were given

less than a week to prepare and submit their tenders which is against the law.

In their oral replies the Respondent stated that:

- ❖ The Appellant's contentions are not true, in that, the Tender Documents were ready prior to the issuance of the invitation letters as they were approved by the Tender Board on 6th May, 2011. The Respondent produced a Register for Issuance of Tender Documents to support their arguments.

- ❖ The invitation letters were dispatched to the selected contractors on 9th May, 2011, while the deadline for submission of tenders was scheduled for 17th June, 2011, which makes a total of 37 days. The time was therefore adequate compared to the minimum statutory time of thirty days in competitive tendering.

Having summarized submissions by parties on this point, the Authority analyzed the evidence adduced in light of the applicable law. For purposes of clarity, the Authority reproduces the records deduced from the receipts submitted by the Appellant and the content of the Respondent's Register in the Table below:

Name of the Tenderer	Date of purchasing Tender Document for the 1st Tender as per Receipts issued by the Respondent	Date of purchasing Tender Document for the 2nd Tender as per receipts issued by the Respondent	Date of purchasing Tender Documents as per the Respondent's Register
M/s V.A. Enterprises Ltd	13/6/2011	10/6/2011	13/06/2011 for the 1st Tender (the 2nd Tender was not recorded in the Register)
M/s Nyamasiriri General Promotion & Supplies Ltd	13/6/2011	13/6/2011	13/6/2011 for the two tenders
M/s C.F. Builders Ltd	13/6/2011	N/A	13/6/2011
M/s National Service Construction	N/A	10/6/2011	They were not recorded in the

Department (SUMA JKT)			Respondent's Register.
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In view of the self explanatory evidence contained in the Table above, the Authority concurs with the Appellant that when the invitation letters were issued, the Tender Documents were not yet ready, for the following reasons:

- ❖ According to the Register, the Appellant was the first tenderer to purchase Tender Documents for the tenders under Appeal as the last entry therein was made on 1st November, 2010.
- ❖ The dates on the receipts issued by the Respondent acknowledging receipt of the tender fees, indicate the earliest payments thereof were made on 10th June, 2011 and the last was on 13th June, 2011, which corroborates the Appellant's testimony.
- ❖ Minutes of the Tender Board dated 6th May, 2011, indicate that, one of the agenda was approval of the Tender Documents for two tenders, namely, tender

for Construction of the Regional Commissioner's Office – Phase III as well as the tender for Construction of Nyamagana District Commissioner's Office. – Phase III. However, the approval was not granted owing to the defects detected therein whereby the Tender Board directed the Head of the PMU and the Quantity Surveyor of Kwimba District Council to identify the defects therein and return the said documents to the Regional Administrative Secretary who was to liaise with the Tanzania Building Agency (TBA) before they were re-submitted to the Tender Board for approval. The Authority deems it necessary to reproduce herein below the actual reasons as they appear on page 4 and 5 of the said Minutes which in Kiswahili read as follows:

“Baada ya Wajumbe kupendekeza majina ya kampuni zitakazopelekewa **vitabu vya zabuni, walipitia vitabu vya zabuni na kubaini kuwa kuna baadhi ya kazi zilizokuwa katika**

awamu ya pili ya mkataba zimerudiwa katika vitabu vya zabuni awamu ya tatu hivyo kikao kilimuagiza Katibu kwa kushirikiana na QS kutoka Halmashauri ya Wilaya ya Kwimba wapitie vitabu hivyo ili kubaini mapungufu na kuvirudisha kwa Katibu Tawala Mkoa ili naye aweze kuwasiliana na TBA kwa ajili ya marekebisho ndiyo viweze kupitishwa na wajumbe kabla ya kupelekwa kwa wazabuni.” (Emphasis supplied)

- ❖ No evidence was tendered to substantiate that, the Tender Board’s directive (issued on 6th May, 2011) was implemented within two days and the amended Tender Documents were duly approved and ready for collection by tenderers on 9th May, 2011, when the invitation letters were issued. This indicates that, the Respondent’s submission that the Tender Documents were ready on 9th May, 2011, is not corroborated.
- ❖ The Respondent did not submit minutes of the Tender Board to confirm that the amendments

initiated by the Tender Board were again tabled before it for approval pursuant to Regulation 83(5) of GN. No. 97/2005 which provides as follows:

“The procurement management unit shall table in good time before the planned issue of the tender documents, the draft text of the tender documents to the tender board for comment and approval, and **shall incorporate into the final text of the tender documents, any amendments agreed with the appropriate tender board. Tender documents that have not been approved by an appropriate tender board shall not be considered as sufficient and adequate to satisfy these Regulations.**” (Emphasis supplied)

- ❖ The Respondent’s assertion that the tenderers were given 37 days within which to prepare and submit their tenders is untrue as time started to run after the issuance of the Tender Documents and not

otherwise. This is due to the fact that, tenderers cannot be expected to commence preparing their tenders before they obtain tender documents which set out the requirements, terms and conditions of the tender.

Having satisfied itself that the Tender Documents for the two tenders were issued on 10th and 13th June, 2011, respectively, the Authority observes that, for the 1st Tender the tenderers had only three days within which to prepare and submit their tenders. With regard to the 2nd Tender, the tenderers had six days to do so. In order to ascertain whether the time given was adequate or not, the Authority revisited the Third Schedule to GN. No. 97 of 2005 which sets out the minimum tender preparation period to be 14 days. The Authority is of the view that, the spirit of the Act to ensure adequate notification of the requirements is accorded to enable tenderers to prepare their tenders and that the tender documents should be ready at the time the advertisement (in this case when the invitations were sent) is re-emphasized under Sections 60 and 62(1) of the Act.

Moreover, the Authority observes that, Regulation 67(5) of GN. No. 97/2005 provides that **“in all aspects other than advertising and issuance of tenders, the procedures for competitive tendering as set out in the Regulations shall apply to restricted tendering”**. Hence, the Respondent was duty bound to ensure the time accorded to the tenderers was adequate to prepare and submit their tenders. No explanation was given why it took a whole month, from the date the invitation for tenders were sent out to the time when the Tender Documents were issued to the tenderers. Furthermore, instead of breaching the law, the Respondent had powers to extend the deadline for submission of tenders pursuant to Clause 17.2 of the ITT.

In view of the above findings, the Authority’s conclusion in respect of the first sub-issue is that, the time availed for preparation and submission of tenders was not adequate and thus contrary to the law.

(b) Whether the Drawings were availed to the Appellant

In their submissions, the Appellant contended that, the Tender Documents issued were incomplete as they did not contain drawings for the two projects. They further contended that, in the absence of the Drawings, the law was breached and they had difficulty in preparing their tenderers as such omission was likely to result into conflict during contract execution. The Respondent on their part stated that, the Drawings were in place but were bound separately because they were bulky.

In order to ascertain the validity of the arguments by parties, the Authority revisited Regulation 83(1)(c) of GN. No. 97/2005 which requires tender documents to contain, among others, drawings where applicable as it was the case in the tenders under Appeal. The said provision states as follows:

83(1) The solicitation documents shall include instructions to tenderers with at the minimum, the following information:

- (c) the nature and required technical and quality characteristics, in conformity with Regulation 22 of the goods, works or services to be procured, including, but not limited to, technical specifications, plans, **drawings** and designs as appropriate; ..." (Emphasis added)

The Authority noted that, the Table of Contents for both tenders indicated that SECTION VII of the Tender Documents were supposed to contain drawings, which were bound separately. However, the Tender Documents availed by the Respondent to this Authority do not have that particular SECTION, but in the tenders submitted by the Appellant and the Successful Tenderer, it was there and it reads as follows:

**"SECTION VII
DRAWINGS
(Drawings Bounded (sic) Separately)"**

From the evidence adduced before the Authority, we are inclined to believe that the Appellant's complaints that they were not availed with the Drawings has merit for the following reasons:

- ❖ According to the SECTION VII of the Tender Documents, Drawings were bound separately. However, at the time of collection of the Tender Documents the said Drawings were not given to the Appellant as was conceded by the Respondent during the hearing.
- ❖ During the hearing the Respondent contended that the said Drawings were bulky and were available at their offices for inspection by the tenderers. However, the Tender Documents did not guide the tenderers where they would find the said Drawings. Furthermore, immediately after the hearing the Respondent produced the said Drawings before the Authority which contrary to his assertion were not bulky. Accordingly, there was no justification that

such Drawings could not be availed to the Appellant together with the other tender documents.

- ❖ The Respondent could not demonstrate that the contentious Drawings were available at the time when the other tender documents were issued to the Appellant.

In view of the above, the Authority's conclusion in respect of the second sub-issue is that, the drawings were not availed to the Appellant.

(c) Whether the Respondent amended Clause 32.2 of the ITT to allow submission of a Bid Securing Declaration instead of a bid security

In order to resolve this sub-issue, the Authority started by revisiting the Appellant's submissions on this particular point and thereafter the Respondent's replies thereof. The Appellant's contentions are as summarized herein below:

- ❖ Owing to the late issuance of the Tender Documents, they realized that the time left before the expiry of the deadline for submission of tenders was not adequate for them to process the required tender security.

- ❖ They therefore contacted the Head of the PMU through telephone and explained their predicament, thereafter the said official delivered physically a Bid Securing Declaration Form No. X to their offices and told them that they should fill it as a replacement of tender security, which they complied.

- ❖ SECTION X of the Tender Document for the 2nd Tender which was issued to them on 10th June, 2011, did not contain the Tender Securing Declaration Form. This particular Form was given to them by the Head of the PMU and was also contained in the substituted Tender Document which they had

requested from the said Officer having spoilt the previous one.

- ❖ According to their experience, the originally envisaged tender securities in the Tender Documents cannot be processed within a short time, as most of the banks situated in Mwanza are mere branches which procedurally are obliged to forward such applications to their headquarters in Dar es Salaam for approval.

- ❖ On 20th June, 2011, they cautioned the Respondent in writing not to use tender security as an evaluation criterion as that particular requirement was amended by the Respondent's officer by issuing a Tender Securing Declaration. The Respondent ignored this caution without justification.

- ❖ Having been informed that, the only reason for their disqualification in the 1st Tender was failure to submit a tender security, they were aggrieved and felt deceived by the said Officer and concluded that the move was intended to deny them an opportunity to win that tender.

- ❖ Conceded that the communication between them and the said Officer was verbal and the assurance given thereof was also verbal.

In reply thereof the Respondent submitted as follows:

- ❖ The alleged communication between the Appellant and the Respondent's Official never took place and they neither issued any additional form to the Appellant nor an amended version of the Tender Document for the 1st Tender as claimed by the Appellant.

- ❖ Had the Appellant felt that time was inadequate, they should have sought for clarification in writing from the Respondent pursuant to Clause 8 of the ITT. Being registered contractors in Class Five, they are experienced and therefore ought to have known that, verbal communication only is not the proper means as per the Act.

Having summarized submissions by parties, the Authority is of the considered view that, both parties are in agreement that the requirement contained in the original as well as the substituted Tender Document that was issued to the Appellant stated categorically that, tenderers were required to submit tender securities. The form of the said security was specified under Clause 32.2 of the ITT as follows:

“The Bid Security shall, at the Bidder’s option, be in the form of **a certified check** (sic), **bank draft, letter of**

credit, or a bank guarantee from a reputable bank located in the United Republic of Tanzania. The format of the Bid Security should be in accordance with the form of bid security included in Section 4 or another form acceptable to the employer...” (Emphasis supplied)

The issue in dispute therefore is whether the alleged amendment of the said requirement took place or not. The Authority observes that, as a general rule, the law provides for ways and means through which tender documents can be amended. Regulation 85(4) of GN. No. 97/2005 provides guidance in the following words:

“Reg. 85(4) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier, service provider, contractor or asset buyer, modify the

solicitation documents by issuing an addendum.” (Emphasis added)

Unfortunately, the Authority noted that, the Tender Documents issued by the Respondent did not have provisions for amendments thereof. The Authority observes that, this is dangerous especially where an omission is spotted after the issuance of solicitation documents, how can it be cured. Had the Respondent used the ITT contained in the Standard Tendering Documents issued by PPRA without modifications, such an omission could not have happened. The Authority observes therefore that, it was wrong for the Respondent to customize the Instructions to Tenderers in the Standard Tendering Documents issued by PPRA, as the law allows for modification of the bid data sheet only, pursuant to sub-Regulations (3) and (4) of Regulation 83 of GN. No. 97/2005 which provide as follows:

“Reg. 83(3) A procuring entity shall use the appropriate standard tender documents issued by the Authority with minimum changes, acceptable to the Authority, as necessary to address project specific issues.

(4) Any such changes shall be introduced only through tender or contract data sheet, or through special conditions of contract and not by introducing changes in the standard wording of the Standard Tender Documents. Where no relevant standard tender documents have been issued, the procuring entity shall use other internationally recognised standard conditions of contract and contract forms acceptable to the Authority. (Emphasis added)

In their submissions the Respondent stated, among other things, that the Appellant should have sought for

clarification in writing prior to the tender opening date. The Authority wonders where would the Appellant have derived the right to do so when the Tender Documents are silent with regard to requests for clarification prior to the expiry of the deadline for submission of tenders. The only reference to clarification in the Tender Documents is contained under Clause 22 of the ITT which restricts that right to be employed at the option of the Respondent only. The said Clause provides as follows:

“To assist in the examination, evaluation and comparison of tenders, the Employer may, at the Employer’s discretion, ask any tenderers for clarification of the tenderer’s tender. The request for clarification and the response shall be in writing or by cable, telex, or facsimile, but no change in the price or substance of the tender shall be sought, offered, or permitted except as required to confirm the correction of arithmetic errors discovered by the Employer in

the evaluation of the tenders in accordance with Clause 24.” (Emphasis supplied)

In the absence of written evidence to prove that, the amendments claimed by the Appellant were actually made by the Respondent, the Authority is inclined to accept the Respondent’s submission that such thing did not take place. The Authority’s position emanates from Regulation 17(1) and (2) of GN. No. 97/2005 which guide on the acceptable mode of communication in the following words:

“Reg. 17(1) Subject to the provisions of these Regulations communication between suppliers, contractors, service providers or buyers and the procuring entity **shall be in a form that provides a record of the content of the communication.**

(2) Communication between suppliers, contractors, service providers or buyers and the

procuring entity may be made by means of communication that does not provide a record of the content of the communication **provided that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form which provides a record of the confirmation.**" (Emphasis supplied)

Having observed that the requirement to submit tender securities in the two tenders was not changed after the issuance of the Tender Documents, the Authority noted that the reason for the disqualification of the Appellant in the 1st Tender, was due to failure to comply with that particular requirement. They instead, submitted a Tender Securing Declaration. Surprisingly, the same requirement was ignored or waived by the Evaluators in the evaluation of the 2nd Tender where the Appellant's tender was found to have complied with all the requirements and qualified for detailed evaluation. The Authority does not comprehend the inconsistent, conflicting and what

appears to be arbitrary decisions of the Evaluators in the two tenders.

Having said that, the Authority concludes that, the Respondent did not amend Clause 32.2 of the ITT to allow submission of a Tender Securing Declaration instead of a bid security.

2. Whether the disqualification of the Appellant in the 1st Tender was justified

Having disposed the first issue and sub-issued thereof, the Authority proceeded to address the second issue in order to ascertain if the disqualification of the Appellant in the 1st Tender was justified. In resolving this issue, the Authority took cognizance of its findings in the first issue that, the time within which the tenderers were given to

prepare their tenders, including obtaining tender securities, was not adequate. In their attempt to overcome the time hurdle, the Appellant resorted to a Bid Securing Declaration as it does not involve any outside processing. Had the time allocated been adequate, the Appellant would not have submitted a document that was contrary to the requirements.

In view of the foregoing, it is the considered view of the Authority that, the tender processes for both tenders started on a wrong footing for failure to accord the tenderers sufficient time within which to prepare and submit their tenders as required by law. Accordingly, the Authority concludes that, the disqualification of the Appellant in the 1st Tender was not justified.

3. Whether the award of the 1st Tender to the Successful Tenderer, namely, M/s C.F. Builders Ltd was proper at law

In resolving this issue, the Authority, in addition to its findings and conclusions pointed out under the first and second issues, reviewed the evaluation process for the 1st Tender whereby the following deficiencies were detected:

- ❖ The Evaluation Report did not show which items were actually checked during preliminary evaluation.

- ❖ Table 6 titled Corrections and Unconditional Discounts indicate that the corrections made to the Successful Tenderer's tender were as follows:

Tenderer	Amount(s)	Computational errors	Provisional sums	Corrected tender price(s)	Corrected/ discounted tender price(s)
M/s C.F Builders Ltd	404,665,920.54	(+484,338.66)	10,000,000	395,150,259.20	395,150,259.20

This Table contradicts the contents under Table 13 of the Evaluation Report which indicates that **Tshs.**

484,338.66 was added to the Successful Tenderer's read out price of **Tshs. 404,665,920.54** which increased their price to **Tshs. 405,150,259.20**. It is the corrected price which was recommended as the basis for award of the tender. The Authority observes that, the sum of **Tshs. 395,150,259.20** contained in the above Table does not feature anywhere else in the documents availed to the Authority.

- ❖ The tenderers were not pre-qualified and the Successful Tenderer was also not post-qualified contrary to Section 48 of the Act which requires post-qualification to be carried out where tenderers were not pre-qualified like in the tenders under Appeal. The Authority reminds the Respondent that, post-qualification is a mandatory requirement as it enables a procuring entity to determine if the tenderer has the capability and resources to execute effectively the contract.

❖ Table 1 of the Evaluation Report for the 1st Tender, the cost estimate for the project was **Tshs. 390,020,858.00**. The Authority requested for the Engineer's Estimates for the project, only to be informed that they were not prepared instead the budgeted sum was used as the basis for award. The latter information is corroborated by the Minutes of the Negotiations Meeting dated 29th June, 2011, that the budgeted sum for the project was **Tshs. 304,960,674.53** only compared to the awarded price of **Tshs. 405,150,259.20**. It is not clear where the Evaluators obtained the estimated costs of the project which they used to compare with the Successful Tenderer's corrected price and concluded that the variation thereof was only 3.88%.

The Authority also detected some irregularities/inconsistencies in the transactions as indicated herein below:

❖ The Authority noted that, the Tender Document for the 1st Tender submitted by the Appellant is quite different from that filled by the Successful Tenderer. While the one filled by the Appellant is similar to the one availed to this Authority by the Respondent, the document filled by the Successful Tenderer has a different version on the form of tender security required by the Respondent. The latter version is provided under Clause 18.3 of the ITT which partly reads as follows:

“18.3 The Tender security shall be denominated in the currency of the Tender or in another freely convertible currency, and shall be in one of the following forms:

(a) a bank guarantee, an irrevocable letter of credit issued by a reputable bank, or **an insurance bond** issued by a reputable insurance firm located in the United Republic of Tanzania, in the form of provided in the Tendering documents, or another form acceptable to the Procuring Entity ...

- (b) a cashier's or certified check
- (c) another security if indicated in the Tender Data Sheet." (Emphasis added)

The Authority noted further that, the Appellant used a Tender Document issued by the Respondent which was purported to be customized, while the Successful Tenderer used the Standard Tendering Document issued by PPRA without modifications. In this case therefore, there are glaring differences, some of which are shown in the Table below:

S/No	Appellant's Tender Document	Successful Tenderer's Tender Document
1	It has a Table of Contents	It doesn't have one
2	The ITT contain 32 Clauses	The ITT contain 53 Clauses
3	The page numbering of the ITT starts from 2/2 to 2/11	The page numbering of the ITT starts from 4 to 37
4	The ITT is silent on the issue of drawings	Clause 7.1 of the ITT specifies the Tendering Documents as including drawings

❖ The Evaluation Committee had recommended the award of the 1st Tender to be made to M/s C.F. Builders Ltd at a corrected contract price of Tshs. 405,150,259.20 (the read out price was Tshs. 404,665,920/=) for a completion period of 24 weeks. The Tender Board approved the award as recommended. The Authority noted that, two different award letters were issued to the Successful Tenderer. The first one referenced CFA.193/323/01/272 dated **28th June, 2011**, indicated the awarded tender price was **Tshs. 405,150,259.20** and the completion period was 24 weeks. In addition, the said tenderer was invited for negotiation and was informed that the scope of works had been reduced. The second letter, which did not cancel the previous one, was dated **29th June, 2011**, referenced CFA.193/308/01 indicated the tender price to be **Tshs. 283,167,526.40** and

the completion period was 20 weeks excluding two weeks of mobilization.

- ❖ According to the Minutes of the Negotiations Meeting dated 29th June, 2011, the matters to be discussed were reduction of scope of work and completion period. During contract negotiations, it was disclosed that the award was made for a contract price of **Tshs. 405,150,259.20** while the client had **Tshs. 304,960,674.53** only, for the project. The difference between the awarded sum vis-à-vis the funds available was **Tshs. 100,189,584.67**. The reduction of scope of works and price agreed between parties was stated as:

“After long conversation the teams have come to the agreement that the reducing (sic) of scope of work (sic) should be the best alternative. They agreed that the Bill no.3 construction of intensive care unit, Bill no5 Rehabilitation of Theatre, item 5/1/3H Demolishing existing gully trap, item 5/1/3J Demolishing manholes and item

5/11/2G Opal single level surgical purpose basin mixer should be omitted because it is an item if omitted, will save to cover the budget of the client on that project and the contract sum will be Tanzanian Shillings 283,167,526.40...” (Emphasis supplied)

The completion period was reduced from 24 weeks to 20 weeks excluding 2 weeks for mobilization.

- ❖ The Authority noted that, no proof was availed to it to show that the agreements arising from the negotiations were subsequently approved by the Tender Board prior to issuance of the second award letter and signing of the contract on 29th June, 2011.

- ❖ The Evaluators had indicated that the Successful Tenderer's corrected price was +3.88% of the Engineer's Estimates which was within the allowed deviation of 15%. The Authority noted that, while in this tender reduction of scope of works is deemed as the best option considering the budgeted sum, in the

2nd Tender, such an alternative was not even mentioned and it was recommended for re-tendering. The Authority does not understand the rationale behind conflicting decisions on similar situations.

In view of the findings and conclusions in the first and second issues, the Authority observes that, a proper award of tender cannot emanate from an improper process. In this case therefore, the purported award of the 1st Tender to the Successful Tenderer was a nullity in the eyes of the law.

In view of the above, the Authority's conclusion in respect of the third issue is that, the award of the 1st Tender to the Successful Tenderer, namely, M/s C.F. Builders Ltd was not proper at law.

4. Whether the re-tendering of the 2nd Tender was in accordance with the law

During the hearing the Appellant submitted that, they learnt on the Respondent's decision to re-tender when they received a letter from the Respondent dated 28th June, 2011, informing them that they were chosen to purchase Tender Documents for the 2nd Tender. They were surprised as they were still waiting for the outcome of that same tender. They further stated that, they became aware of the Respondent's reasons for re-tendering, for the first time, during the hearing as the tender results were yet to be communicated to them. With regard to the correction of their read out price, the Appellant contended that, the Respondent was obliged to inform them in writing of the said changes as required by law so that they could satisfy themselves if the changes were correct, before accepting them. Further that, re-tendering is not the best option as they could have awarded the tender after reducing the scope of the works. They also submitted that, if re-tendering is done

without reducing the scope of works, the costs are likely to increase. According to them, the Engineer's Estimates are not conclusive as they are made by human beings who can commit errors and may not be in conformity with the rates obtaining in the market.

In reply the Respondent stated that, the reason for re-tendering was based on budgetary constraints pursuant to Section 54(2)(d) of the Act. The said provision states as follows:

"54(2) The rejection of all tenders or all proposals under this section shall only be justified where:-

(d) tenders or proposals involve costs substantially higher than the original budget or estimates." (Emphasis supplied)

The Respondent further stated that, the Tender Document issued in July, 2011, was different from the one issued previously as they had used the current Standard Tendering Documents issued by PPRA.

According to the Evaluation Report as well as the Respondent's communication of the tender results to the Appellant, the Appellant's corrected price exceeded the budgeted sum by 34.25%, hence the decision to re-tender. It is evident that, in accordance with Section 54(2)(d) of the Act cited above, budgetary constraints is one of the justifiable reasons for rejection of all tenders, and therefore agrees with the Respondent's cause of action.

With regard to the Appellant's argument on the reduction of scope of works, the Authority wishes to revisit Section 54(3)(a) and Regulation 20(6) of GN. No. 97/2005 which guide on rejection of tenders and re-tendering. The said provisions state as follows:

"S. 54(3) Lack of competition shall not be determined solely on the basis of the number of tenderers or persons who made proposals, and where all tenders or proposals are rejected, the procuring entity shall review the causes justifying the rejection and shall consider:-

- (a) making revision to the conditions of contract, design and specifications, scope of the contract, or a combination of these before inviting new tenders;

Reg. 20(6) Where all tenders are rejected pursuant to any of the foregoing sub-regulations:

- (a) the procuring entity shall review the causes justifying the rejection and consider whether revision of the specifications or modification in the project or both are required before inviting new tenders;

- (b) new tenders shall be requested from at least all who were invited to submit tenders in the first instance plus new tenders and a reasonable amount of time shall be allowed for the submission of the new tenders;
- (c) where the approving entity considers it advisable it may require that the whole tender proceeding be repeated.

Having perused the Respondent's Tender Document for re-tendering, the Authority observes that, the following improvements or modifications were, amongst others, made:

- ❖ They used the Standard Tendering Documents issued by PPRA.

- ❖ It was exclusively reserved for National contractors.

- ❖ Tender Securing Declaration and insurance bond were among the options available to tenderers.

- ❖ Post-qualification was to be undertaken.

- ❖ Tenderers were allowed to seek clarifications on the tendering documents.

Furthermore, the number of contractors invited was increased from 12 to 19; which included some of the previous invitees as well as new ones.

The Authority observes that, the improvements or modifications effected by the Respondent made the tender document more comprehensive and enhanced competition. However, no reduction of scope of works was made as envisaged by Section 54(3)(a) read together with Regulation 20(6)(a) of GN. No. 97/2005 and as expected by the Appellant. The Authority observes

that reduction of scope of works is just one of the options which must be considered by a procuring entity before re-tendering. Much as such reduction of scope was not made, still the cause of action taken by the Respondent were in conformity with the law.

Further to the above findings, the Authority is concerned that, in the 1st Tender the Respondent negotiated on the reduction of scope of works as well as completion period which resulted into a 35% reduction of the contract sum from **Tshs. 405,150,259.20** to **Tshs. 283,167,526.40**. This was done in order to conform with budgetary limits. However, this was done in contravention of Regulation 95(2)(c) and (e) of GN. No. 97/2005 which prohibit negotiations purely for the purpose of reducing prices and which substantially alter anything which formed a crucial or deciding factor in the evaluation of tenders.

Accordingly, the Authority is satisfied that the re-tendering of the 2nd Tender was in accordance with the law.

5. Whether the Appellant was notified on the outcome of the 2nd Tender, and if not whether that omission prejudiced them

In their submissions, the Appellant argued that, up to the time of the hearing, the tender results for the 2nd Tender were not availed to them. They did not receive the Respondent's letter alleged to have been sent to them through the postal system as the previous communications were delivered physically. In reply thereof, the Respondent stated that, they posted the letter using the Appellant's postal address and so they were sure that it had reached them. Upon being asked by the Members of the Authority the reasons for not using physical delivery as the Appellant is based in Mwanza, and the postal system normally takes rather long, they agreed that they could do better in future.

The Authority observes that, using the postal system is not only safe but also reliable when done via registered mail or courier services which accords documentary proof of the transactions including delivery and receipt. In the absence of proof from the Respondent that the said letter was actually posted and that it was received by the Appellant, the Authority is inclined to accept the Appellant's contention that, the said results were not communicated to them.

The Authority reminds the Respondent that, writing a notification letter is one thing but ensuring it has reached the recipient is another. The Respondent was bound to notify the Appellant pursuant to Regulation 20(3) of GN. No. 97/2005 which provides as follows:

“In the event of annulment of any tender proceedings, all tenderers who submitted tenders shall be notified thereof by the procuring entity.” (Emphasis added)

The Authority is of the settled view that, failure to communicate the tender results is a breach of law and that omission prejudiced the Appellant in participating in the re-tendering process.

6.To what reliefs, if any, is the Appellant entitled to

Having resolved the issues in dispute, the Authority considered the Appellant's prayer that the tender process be reviewed and a declaration made if the process was fair or not. Considering the findings and conclusions made in the issues above, the Authority therefore grants the Appellant's prayer by declaring that, to a large extent, the tender processes for both tenders contravened the law.

Having considered all facts and evidence, the Authority concludes that, the tender processes in respect of the 1st

and 2nd Tenders were not conducted in accordance with the law. That said, the disqualification of the Appellant was unfair and the award of the 1st Tender to M/s C.F. Builders Ltd was not proper at law.

In view of the findings above, the Authority would have been inclined to order the 1st Tender to be re-tendered. However, given the Appellant's specific prayer which is confined to a mere declaration of the legality or otherwise of the tender process, the Authority confines itself to the said declaration.

On the basis of the aforesaid findings, the Authority upholds the Appeal as it has merits. However, since the Appellant only prayed for a declaration whether the tender processes were conducted in accordance with the law or not, the Authority so declares that the two tenders were not conducted in accordance with the law.

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

Decision delivered in the presence of the Appellant and the Respondent this 28th September, 2011.



JUDGE (rtd) A. BUBESHI

CHAIRPERSON

MEMBERS:

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

2. ENG. F. T. MARMO.....

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