

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

APPEAL CASE NO. 81 OF 2010

BETWEEN

M/S SINGILIMO ENTERPRISES APPELLANT

AND

TANZANIA PORTS AUTHORITYRESPONDENT

DECISION

CORAM:

- | | |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mrs. R. Mang'anya | - Member |
| 3. Mr. K.M. Msita | - Member |
| 4. Mrs. N.S.N. Inyangete | - Member |
| 5. Ms. B.G. Malambuigi | - Secretary |

SECRETARIAT:

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

FOR THE APPELLANT:

1. Mr. Fredy Kandonga - Advocate, Kandonga and Company Advocates
2. Mr. Subira Mwalile – Assistant Managing Director
3. Mr. Yassin A. Makasso - Accountant
4. Mr. Michael A. Masubo - Supervisor

FOR THE RESPONDENT

1. Mr. Bahebe S. Machibya - Port Procurement and Supplies Manager
2. Ms. Magreth Sirikwa - Senior Legal Counsel
3. Ms. Anna Kessy - Legal Officer

This decision was scheduled for delivery today 25th October, 2010, and we proceed to deliver it.

The appeal at hand was lodged by **M/S SINGILIMO ENTERPRISES** (hereinafter to be referred to as "**the Appellant**") against **TANZANIA PORTS AUTHORITY** commonly known by its acronym **TPA** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. AE/016/2009-10/DSM/NC/02 for Disposal by Sale of Sludge/Slops (hereinafter to be referred to as "**the Tender**")

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

The Respondent advertised the tender for Disposal by Sale of Sludge/Slops *vide* the Daily News of 10th February, 2010.

The tender opening took place on 11th March, 2010, whereby six tenders were submitted as listed herein below:

NAME OF TENDERER	TENDER PRICE FOR LOT 1 TSHS.	TENDER PRICE FOR LOT 2 TSHS.
M/s Hamex General Trading Co. Ltd	4,012,000/= VAT Inclusive	4,012,000/= VAT Inclusive
M/s Singilimo Enterprises	4,400,000/= VAT Exclusive	880,000/= VAT Exclusive
M/s Baga Investment	4,200,000/= VAT Exclusive	600,000/= VAT Exclusive
M/s Safina Marine & General Traders	1,350,000/= VAT Exclusive	1,350,000/= VAT Exclusive
M/s Nushipper Enterprises	3,400,000/= VAT Exclusive	3,400,000/= VAT Exclusive
M/s Mkanzala Enterprises Company	5,000,000/= VAT Exclusive	2,300,000/= VAT Exclusive

The said tenders were evaluated and the award for both Lot 1 and 2 was recommended in favour of the Appellant at Tshs. 4,400,000/= and Tshs. 800,000/= respectively. The said award was subject to physical verification of the availability of equipment/facilities owned by the Appellant for collection of sludge.

On 16th April, 2010, the Respondent communicated the intent to award the tender to the Appellant *vide* letter referenced DPS/2/1/01.

The Tender Board appointed a team to carry out a physical verification of the Appellant's equipment/facilities on 23rd April, 2010. A report was prepared indicating that the team was satisfied that the Appellant had the capacity to perform the contract. The results were submitted to the Chairman of the Tender Board on 27th April, 2010, *vide* letter referenced DPS/2/3/07.

While waiting for the award letter, the Appellant saw an advertisement of the same tender by the Respondent in the Daily News of 4th June, 2010. On making a verbal inquiry on the matter, the said advertisement was withdrawn through another advertisement on 14th June, 2010.

Having withdrawn the advertisement the Respondent did not award the tender to the Appellant; instead on 21st June, 2010, extended the Appellant's earlier contract

which was supposed to end on 30th June, 2010, to 31st August, 2010.

On 30th June, 2010, the Appellant sent a reminder to the Respondent *vide* letter referenced SING/AE/016/2010-11/DSM/NC/03 inquiring on the finalization of the award process. Another reminders was sent on 20th July, 2010, *vide* letter referenced SING/EA/017/2010-11/DSM/NC

The Respondent replied *vide* letter referenced DPS/3/1/18 dated 19th July, 2010, which the Appellant received on the 23rd July, 2010 informing them that owing to recent events of fuel adulteration in the country, there was a possibility that sludge/slops could be one of the sources. He was thus notified that the current contract in respect of the said services would be stopped by 31st August, 2010.

On 5th August, 2010, the Appellant wrote another letter referenced SING/MBT/018/010 expressing their dissatisfaction with the Respondent's decision to extend the subsisting contract instead of awarding them the tender.

The Respondent replied *vide* letter referenced DPS/3/1/18 dated 18th August, 2010, informing the Appellant that, the former had cancelled the tender in accordance with Regulation 20(2)(d) of GN. No. 97 of 2005. The Appellant was also informed that, even if the contract were concluded the Respondent had the option to rescind it pursuant to Section 69(1) of the Public Procurement Act, Cap. 410 (hereinafter to be referred to as "**the Act**").

Being aggrieved by the Respondent's failure to award the tender, on 20th August, 2010, the Appellant submitted their complaint to the Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**"). PPRA responded *vide* letter referenced PPRA/AE/016/"A"/41 dated 30th August, 2010, advising the Appellant to appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**") as the contract had already entered into force.

On 6th September, 2010, the Respondent advertised a similar tender *vide* The Guardian newspaper.

On 9th September, 2010, the Appellant lodged an appeal with 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 Appellant was one of the six firms that participated in the tender which was opened on 11th March, 2010.

That on 16th April, 2010, the Appellant received a letter of intent to award the tender from the Respondent which stated categorically that they would be awarded the tender subject to inspection of their equipment/facilities. However, after the physical verification of the equipment

and facilities there was no further communication from the Respondent on the said award.

That, on 4th June, 2010, the Appellant saw an advertisement in the Daily News which was for the same tender. After making inquiries on the matter with the Procurement Manager, the Appellant was requested to give him time to investigate the matter.

That, on 14th June, 2010, the Respondent advertised in the Daily News the withdrawal of the previous tender invitation made on 4th June, 2010. Following the said withdrawal, on 21st June, 2010, the Respondent extended the Appellant's previous contract for two months up to 31st August, 2010.

That, on 30th June, 2010, and 20th July, 2010, the Appellant wrote reminder letters following up the tender award letter but no response was forthcoming.

That on 23rd July, 2010, the Appellant received a letter referenced DSP/3/1/18 from the Respondent dated 19th July, 2010, notifying them that the subsisting contract

would be terminated on 31st August, 2010, due to fuel adulteration concerns.

That, from the technical point of view, it was not possible for sludge or slops to be used in fuel adulteration since the adulteration process involves mixing of kerosene with diesel or petrol. Thus, the explanation provided by the Respondent cannot be accepted as it is used to deny the Appellant's rights. Furthermore, the Respondent's actions depict lack of transparency.

That, it is surprising that on 30th August, 2010, the Appellant received a letter from the Respondent extending the previous contract for a further period of two months while a new tender was advertised through The Guardian newspaper dated 6th September, 2010.

That, the Respondent's act of extending the Appellant's running contract for 4 months contravened the law.

That, the Respondent has failed to award the said tender to the Appellant to-date.

The Appellant therefore requested the Authority to order the Respondent to:

- Terminate the proceedings of the tender advertised on 6th September, 2010;
- Award the tender to the Appellant;
- Compensate the Appellant a sum of Tshs. 33,000,000/= as per the following breakdown:

			TSHS
1.	Legal fees	<ul style="list-style-type: none"> • Advocate's fee – Tshs. 2,880,000/= • PPAA fees – Tshs.120,000/= 	3,000,000/=
2.	General damages	<ul style="list-style-type: none"> • Purchase of tender document – Tshs. 50,000/= • Preparation of the tender – Tshs. 3,000,000/= • Disturbance arising from failure to award on time – Tshs. 26,950,000/= 	30,000,000/=
TOTAL			33,000,000/=

REPLIES 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 hereunder:

That, the Appellant is the current service provider with respect to the disposal of sludge/slops.

That, prior to the award of the tender, the Respondent learnt that there was rampant fuel adulteration in the country and they felt that there was a possibility that sludge/slops could be one of the sources. Further that, the Respondent received directions from higher authorities that they should look for ways and means to curb the said problem and ensure environmental protection measures are put into place. In view of the said directives they were compelled to rescind the award in order to re-examine the existing terms so as to identify any changes required in order to closely monitor the end usage of the products.

That, the Tender Document was reviewed by a team that co-opted officials from the National Environment Management Council (hereinafter to be referred to as **“NEMC”**).

That, the Respondent's decision to cancel this tender was triggered by national interest and not otherwise and that is why the Appellant was given an extension of contract to continue providing the same services. The decision to cancel the tender was made under Section 54(2)(c) of the Act and Regulation 20(2)(d) of GN. No. 97 of 2005.

Accordingly, the Respondent prayed that the Appeal be dismissed in its entirety.

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 Appeal is properly before the Authority**

- **Whether the cancellation of the tender was proper at law**
- **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

During the hearing the Respondent raised a Preliminary Objection which centers on the jurisdiction of this Authority to entertain the Appeal relying on Part IX of the Act that provides for review of procurement decisions and disputes. The Respondent cited Regulation 111 of GN. No. 97 of 2005 which requires an application for administrative review to be submitted to the Accounting Officer arguing that the Appellant did not do so.

Having reviewed the documents availed; the Authority observes that, the Appellant lodged an Appeal with this

Authority following the advice given to them by PPRA, the regulator in so far as procurement matters are concerned. However, the mechanism stated by the Respondent is among the two avenues through which an aggrieved tenderer may submit procurement complaints. For the benefit of the parties, the Authority wishes to analyze the two avenues. The first avenue requires an aggrieved tenderer to submit an appeal or complaint to this Authority directly, that is, without passing through the Accounting Officer or PPRA under Section 82(2) (a) of the Act which states as hereunder:

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

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

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

The above quoted provision entails that this Authority has sole original jurisdiction in complaints where a procurement contract has already entered into force. For purposes of clarity, the Authority reproduces Section 55(7) of the Act which stipulates as to when a procurement contract enters into force. The said subsection 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)

Moreover, once a procurement contract enters into force, the accounting officer ceases to have jurisdiction to entertain such a complaint as per Section 80(3) of the Act read together with Clause 47.3 of the ITB which state as hereunder:

“S. 80(3) The Accounting Officer shall not entertain a complaint or dispute or continue to do so after the procurement or disposal contract has entered into force.

Under the second avenue, aggrieved tenderers are required to first submit their complaints to the Accounting Officer under Section 80, then to PPRA under Section 81 and finally to PPAA under Section 82. According to the documents availed to this Authority, the Appellant had inquired several times (i.e. on 30th June, 2010; 20th July, 2010; and 5th August, 2010) from the Respondent as to why they were not completing the award process having fulfilled the condition attached to the award. The Respondent did not reply to the said complaint, until they were directed by PPRA to address the Appellant’s complaints on 16th August, 2010, that is

when they responded to the Appellant's letters on 18th August, 2010.

It is not disputed that, after receiving the Respondent's reply of 18th August, 2010, which informed them that the tender was cancelled, the Appellant was aggrieved and submitted their complaint to PPRA in accordance with Section 81(2)(b) of the Act which states as follows:

"Where:-

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

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

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

The Authority observes that, the Respondent's reply to the Appellant was made on 18th August, 2010, and the latter's complaint to PPRA was made 20th August, 2010,

which was within the 14 working days stipulated under Section 81(2)(b) of the Act. The Authority is therefore satisfied that, the Appellant had observed the dispute settlement mechanism provided for under the Act and therefore rejects the Respondent's Preliminary Objection. Accordingly, the Appeal is properly before this Authority.

2.0 Whether the cancellation of the tender was proper at law

In its endeavour to ascertain whether the cancellation of the tender was properly done, the Authority, reviewed the documents submitted and the contesting oral submissions by parties *vis-a-vis* the applicable law and the Tender Document. In the course of resolving this contentious issue, the Authority deems it prudent to analyse the circumstances leading to the said cancellation as there is no *consensus ad idem* between parties as to whether the tender was cancelled or not.

The Appellant claims that they were entitled to be awarded the tender as they had met all the requirements while the Respondent argues that the award process was

not complete and therefore they had the right not to award the tender. The Appellant relied on Section 55(1) of the Act and Regulations 96(3) and 97(1) of GN. No. 97 of 2005, which state as follows:

“S. 55(1) Subject to the provisions of section 54, the tender or proposal that has been ascertained to be the successful tender or proposal pursuant to Sections 68(a) and 71(1) of this Act **shall be accepted.**

Reg. 96(3) The award shall be made, within the period of tender validity to the tenderer whose tender has been determined to be the lowest evaluated and meets the appropriate standards of capability and financial resources.

Reg. 97(1) The tender that has been ascertained to be the successful tender shall be accepted and the notice of acceptance of the tender shall be given promptly to the supplier, service provider, contractor, or asset buyer submitting the tender after all necessary in-country and outside the country approvals, required, have been obtained.”

In order to determine the validity of the arguments made by parties on this point, the Authority revisited the documents availed and the applicable law. According to the Tender Board Minutes of 16th April, 2010, which deliberated on the recommendations of the Evaluation Committee, it was resolved that:

“... tender for disposal by Sale of Sludge/Slops at DSM Port for both Lots 1 & 2 at KOJ and Container & General Cargo Terminal be awarded to M/s Singilimo Enterprises subject to physical confirmation of availability of equipment/facilities said to be owned by the buyer for collection of the sludge.” (Emphasis supplied)

Furthermore, the Respondent’s letter referenced DPS/2/1/01 dated 16th April, 2010, titled **“LETTER OF INTENT TO AWARD”** partly reads:

“Please be notified that, Tanzania Ports Authority **intends to award you tender** for disposal by sale

of sludge/slops obtainable from KOJ, Container Terminal and General Cargo sections **subject to** clarification/confirmation of the following items :-

- Equipment/facilities owned...

The purpose of this letter is to request you to present legal documents supporting ownership of the subject equipment and facilities which will be physically verified by the Port Tender Board. Please, kindly submit the documents before closing hours i.e. 4.30 pm on 20th April, 2010 so as to enable the Board Members inspect the equipment/facilities on 23rd April, 2010." (Emphasis added)

In view of the above quoted documents, the Authority is of the view that the only condition attached to the award of the tender in favour of the Appellant was "**physical confirmation of availability of equipment/facilities said to be owned by the buyer for collection of the sludge.**" In this case therefore, the Appellant met the said condition as evidenced in the Inspection Report submitted to the Chairman of the Port Tender Board *vide* letter referenced DPS/2/3/07 dated 27th April, 2010, which partly reads as follows:

“The team was satisfied with the items inspected and reports that M/S Singilimo Enterprises has all the required items listed in its tender to execute the contract.” (Emphasis added)

The Authority is of the settled view that, the Appellant complied with the conditions set by the Respondent as indicated by the Inspection Team in their letter of 27th April, 2010. Since the Letter of Intent stated categorically that the award was subject to confirmation that the Appellant possessed the required equipment/facilities, it goes without saying therefore that when they fulfilled that condition they became the successful tenderer and were supposed to be notified promptly in accordance with Regulation 97(1) of GN. No. 97 of 2005.

The Authority is concerned that, despite passing the inspection test there was no communication on the matter from the Respondent for the whole month of May, 2010 until 4th June, 2010, when the Appellant saw the Respondent’s advertisement of the same tender in the

Daily News paper which was later withdrawn through another advertisement in the same paper on 14th June, 2010, following the Appellant's verbal complaint. The Authority shares the Appellant's concern on the lack of transparency depicted by the Respondent on this matter.

Furthermore, the Authority deems it necessary to address the sequence of events that transpired after the inspection of the Appellant's equipment/facilities as there are some contradictory or questionable transactions whose rationale could not be explained by the Respondent. The Authority wishes to itemise the following in that regard:

- The Respondent advertised the same tender on 4th June, 2010, and withdrew it on 14th June, 2010, after the Appellant's verbal complaint.
- On 14th June, 2010, (the same day when the tender advertisement was withdrawn) the Respondent purported to have sent to the Appellant a letter referenced DPS/3/1/18 informing them that:

“We regret to inform you that the said tender has been suspended due to change of technical data to the ITT, thus the same has been withdrawn in accordance to PPA, 2004 Clause 54(c).” (Emphasis added)

The Authority noted that, this letter raises two questions. Firstly, the Respondent had advertised the tender on 4th June, 2010 before it was cancelled. Secondly, the provision cited as the basis of the ‘suspension’ of the tender was wrongly quoted as Clause 54(c) does not exist in the Act. Moreover, the Appellant denied receiving this particular letter and the Respondent could not show evidence that the letter was dispatched to substantiate the same.

- The Appellant’s reminders to the Respondent on the award were made on 30th June, 2010, and 20th July, 2010, *vide* letters referenced SING/AE/016/2010-11/DSM/NC/03 and SING/EA/017/2010-11/DSM/NC respectively. The Authority is appalled by the Respondent’s conduct on this matter, in that, their response to the Appellant’s two letters was

purported to have been written on **19th July, 2010**, while the same makes reference to the Appellant's letter dated **20th July, 2010**. The Authority wonders as to how the Respondent could have responded to a letter which was non-existent at the time when they were writing their reply.

Furthermore, the Appellant's letters were inquiring about the award of the tender by making reference to the Letter of Intent, thus, the Respondent's reply thereof should have made reference to their letter of 14th June, 2010, which cancelled the tender. This raises doubt as to whether the said cancellation letter was in place at the time and if so, whether it was actually dispatched to the Appellant. Instead of addressing the issue of the cancellation of tender, the said response introduced the issue of fuel adulteration and the indefinite suspension of the tender after expiry of the Appellant's running contract. It is surprising that this same contract was further extended for two more months to 31st October, 2010.

The Authority further considered the reasons for cancellation of the tender. The Authority revisited submissions by parties on this particular point, starting with the Respondent as they are the ones who contended that the tender was cancelled. The Respondent's submissions are as follows:

- They were obliged to cancel the tender following directives from higher authorities which required them to take preventive and control measures to curb fuel adulteration.
- There is a possibility that sludge/slops could be used in fuel adulteration and environmental pollution, hence the need arose for reviewing the terms and conditions of the tender under Appeal.
- The said cancellation was done under Section 54(2)(c) of the Act and Regulation 20(2)(d) of GN. No. 97 of 2005.

For purposes of clarity, the Authority reproduces Sub-section (2) of Section 54 and Sub-regulation (2) of Regulation 20 of GN. No. 97 of 2005 which read follows:

- "S. 54(2)** The rejection of all tenders or all proposals under this section shall only be justified where:-
- (a) there is lack of effective competition;
 - (b) tenders or proposals are not substantially responsive to the tender dossier or to the request for proposals and terms of reference;
 - (c) **the economic or technical data of the project have been altered;** or
 - (d) tenders or proposals involve costs substantially higher than the original budget or estimates." (Emphasis added)

- Reg. 20(2)** The annulment of a tender proceeding may take place in the following cases:
- (a) if no tender is responsive to the tender documents;
 - (b) if no tender satisfies the criteria for the award of the contract as set out in the tender documents;
 - (c) if the economic or technical data of the project have been altered;

(d) if exceptional circumstances render normal performance of the contract impossible;

(e) if every tender received exceeds the budgetary resources available;

(f) if the tenders received contain serious irregularities resulting in the interference with the normal play of market forces;

(g) if funds voted or earmarked for the procurement have been withheld, suspended or have otherwise not been made available; or

(h) if there has been no competition.

(Emphasis supplied)

Having summarised the Respondent's reasons for cancellation of the tender and the legal provisions relied upon; the Authority revisited the Appellant's replies on this point, which in summary are as follows;

- There was no cancellation of the tender as the cancellation letter purported to have been sent to

them by the Respondent never reached them and they learnt about it for the first time during the hearing.

- The provisions relied upon by the Respondent as warranting their decision to cancel the tender was not relevant to the circumstances of the tender under Appeal. For instance, Regulation 20(2) (d) of GN. No. 97 of 2005 is not applicable as there were no exceptional circumstances rendering the performance of the contract impossible since the tender can be executed. This is evidenced by the fact that the Appellant received two extensions of the previous contract to 31st August, 2010 and 31st October, 2010, to continue performing the same function.
- Sludge/slops cannot be used in fuel adulteration and therefore the Respondent's contention is not correct.

Having summarized the submissions by parties the Authority proceeded to analyse them. The Authority started by reviewing the provisions relied upon by the

Respondent in order to ascertain whether the said cancellation was done in accordance with the applicable law and the Tender Document.

The first provision is Section 54(2)(c) of the Act which allows tenders to be rejected where economic or **technical data** have been altered. During the hearing, the Respondent could not substantiate the **technical data** which were altered instead they referred to all amendments made to the Tender Document as **technical data**.

The Authority does not accept the Respondent's interpretation of the term **technical data** since **not all provisions within the said document may be referred as technical data**.

Moreover, the Authority noted that most of the Clauses introduced, except for Clause 3.3, dealt with environmental issues which were already covered under Clause 1.2(b) and Clause 3.2 (e) of the Instructions to Tenderers (hereinafter to be referred to as "**ITT**") in the previous Tender Document. Furthermore, the licenses

issued by NEMC which were submitted by the tenderers including the Appellant under the previous tender specifically bind license holders with conditions such as:

- "You will collect waste oil from the specified area only in the manner prescribed in your letter.
- **The waste oil so collected shall only be used for the purpose prescribed.**
- You are required to take all necessary precautions to ensure that no spillage occur during loading, transportation, offloading and storage.
- That you will provide necessary protective gears to all your staff engaged in oil handling to safeguard their health.

- **That you will furnish this office with the report on a quarterly basis indicating the amount of waste oil collected and to whom disposed off and for what purpose.**

- **That you will adhere to the conditions stipulated for purposes of protecting the environment from environmental pollution.**

- **NEMC staff may visit you at any time to countercheck if the above laid conditions are adhered to.**
- This permit can be withdrawn any time if it is proven that you are not following the above mentioned conditions.” (Emphasis supplied)

With regard to Clause 3.3 of the ITT the Authority observes that the content is discriminatory in nature in that it restricts the disposal to **end users** contrary to what is prescribed by the License issued by NEMC to the Appellant and other tenderers contravened Section 46(4) of the Act read together with Regulation 83(2) of GN 97 of 2005 quoted herein below:

“S. 46(4) Any qualification criteria shall be made known to , and shall apply equally to all suppliers, contractors or consultants and a procuring entity shall impose no discriminatory criteria , requirement or

procedure with respect to qualifications of any supplier contractor, consultant “.

“Reg. 83(2) The solicitation documents shall be worded so as to **permit and encourage competition** and such documents shall set forth clearly and precisely all information necessary for a prospective tenderer to prepare a tender for the goods, works or services to be provided or executed or assets to be disposed of.”
(Emphasis added)

The Respondent submitted that the decision to cancel the tender on the basis of Regulation 20(2)(d) of GN. No. 97 of 2005 was due to recent events of fuel adulteration that had aroused public outcry. This was interpreted by the Respondent to be an exceptional circumstance which rendered the performance of the contract impossible. The Respondent therefore deemed it necessary to revise the terms and conditions in the solicitation document to accommodate the changed situation.

The Authority observes that according to Regulation 20(2)(d) of GN. No. 97 of 2005 there should have been exceptional circumstances which would render the performance of the contract impossible. However, the Authority does not consider the issue of fuel adulteration to be an exceptional circumstance which would prevent the parties from fulfilling their obligations under the contract.

The Authority further observes that, having received the directives from higher authorities, to curb fuel adulteration, the Respondent was duty bound to investigate the matter in liaison with relevant authorities and experts in order to ascertain the possibility that sludge/slops could be used in fuel adulteration which would have enabled them to come up with the appropriate remedial measures.

Furthermore, if the paramount intent was to curb fuel adulteration and environmental pollution by establishing controls in the disposal of sludge/slop, why did they continue to extend the Appellant's running contract on the same terms? In other words, there were no additional

preventive/control measures taken by the Respondent on the matter since the terms which prevailed in 2009 are still in existence to-date.

The Authority therefore agrees with the Appellant that, the provisions relied upon by the Respondent to cancel the tender are not applicable to the circumstances of this Appeal.

During the hearing the Respondent had indicated that the cancellation of the tender made on 14th June, 2010, was approved by the Tender Board and so they were given an opportunity to submit the said minutes. Contrary to the expectations of the Authority, the Respondent submitted documents which were not Minutes as requested. They instead submitted a notice of invitation sent to members on 2nd September, 2010, to attend a Special Port Tender Board Meeting to deliberate, among others, **“approval for re-advertisement of tender for disposal by sale of Sludge/ Slops at KOJ (Lot 1 and container Terminal and General Cargo (Lot 2)”**. Furthermore, a Special Report of the Tender Board was written on 3rd September, 2010, addressed to the Port Manager from

the Secretary of the Tender Board seeking approval to re-advertise the tender.

The Authority is of the view that, since the tender cancellation was done on 14th June, 2010, there would have been available documentary evidence of transactions concluded prior to 14th June, 2010, such as Minutes of the Tender Board Meeting which deliberated on the cancellation. Given that the documents which were submitted relate to transactions carried out in September, 2010, they are not relevant to the matter in dispute.

In view of the foregoing, the Authority is of the settled view that, the cancellation of tender made on 14th June, 2010, contravened the law as it did not have prior approval of the Tender Board in accordance with Section 54(5) of the Act which states:

“The appropriate **tender board’s approval shall be sought before rejecting all tenders** or proposals, soliciting new tenders or proposals or entering into

negotiations with the lowest evaluated tenderer.”
(Emphasis added)

In the absence of documentary evidence to show that there was Tender Board’s approval for the cancellation and amendments to the technical data, the Authority is satisfied that there was no cancellation of the tender in the eyes of the law.

Accordingly, the award decision is still in existence considering the requirements of Section 55(1) of the Act. Therefore the advertisement of the same tender made on 6th September, 2010, is not valid.

With regard to the issue of whether the cancellation letter was communicated to the Appellant, the Respondent was given time to submit documentary proof to substantiate their claim that the Appellant had signed the Respondent’s Dispatch Book to acknowledge receipt of the same. However, they did not submit the requested documentary proof. The Authority is therefore inclined to accept the Appellant’s position that the said letter was not dispatched to them. The Authority’s position is

further cemented by the fact that, in their replies to the Appellant's reminders on the Letter of Intent (dated **30th June, 2010** and **20th July, 2010**), the Respondent's responses did not make any reference to the cancellation of the tender which was supposedly communicated to the tenderers on **14th June, 2010**. In the absence of evidence to the contrary, the Authority finds that the notification was not communicated to the tenderers contrary to Regulation 20(3) of GN. No. 97 of 2005.

In view of the foregoing, the Authority concludes that, the cancellation of the tender was not proper at law.

3.0 To what reliefs, if any, are the parties entitled to.

Having analysed the issues in dispute, the Authority is of the considered view that, the Appellant is the Successful tenderer and the purported cancellation of the tender was not proper hence a nullity in the eyes of the law. In view of those findings, the Authority considered the prayers by parties as hereunder:

(a) The Appellant's Prayers:

The Authority revisited the Appellant's prayers as follows:

- **Order the procurement proceedings in respect of the tender advertised on 6th September, 2010, be terminated:**

As it has already been stated under issue number two, the Authority is of the firm view that, the said tender advertisement is not valid as it was not preceded by cancellation of the tender under Appeal.

- **Order the Respondent to award the tender to the Appellant:**

The Authority observes that, the tender was awarded to the Appellant when they fulfilled the condition stated in the Respondent's Letter of Intent to award. The Respondent is therefore ordered to execute the contract.

- **Order the Respondent to compensate the Appellant a sum of Tshs. 33,000,000/=**

Having ordered specific performance of the contract, the Authority observes that the Appellant is entitled to compensation for costs incurred in pursuit of this Appeal only. The Respondent is therefore ordered to pay the Appellant a total of **Tshs. 3,000,000/=** as per the following breakdown:

- (i) Legal fees – **Tshs. 2,880,000/=**
- (ii) Appeal fees (PPAA) **Tshs. 120,000/=**

(b) The Respondent's Prayer:

With regard to the Respondent's prayer that the Appeal be dismissed in its entirety, the Authority rejects it as the Appeal has merit.

Other matters that caught the Authority's attention

In the course of handling this Appeal the Authority discovered the following flaws:

- (a) Clause 3.2(b) of the ITT required tenderers to submit a **Certificate of Registration**. During the hearing the Respondent submitted that they had expected the tenderers to submit **Certificates of Incorporation**. The Authority does not accept the Respondent's reply, in that, most of the tenderers who took part in the tender under Appeal are not incorporated companies and the Evaluation Report does not indicate that the said document was checked.

The Authority reminds the Respondent that, the two documents are distinct as a Certificate of Registration is merely a registration of a business name issued under the Business Names (Registration) Act, Cap. 213 which does not have capacity to enter into contract. A Certificate of Incorporation, on the other hand, is issued under the Companies Act, Cap. 212, showing that a particular company is a legal entity.

- (b) Item 2.1 of the Evaluation Report indicates that the tender was advertised on **10th February,**

2010, and the said tenders were opened the next day, that is, **11th February, 2010** while the actual opening was on 11th March, 2010.

- (c)** During the hearing it was evident that, there was verbal communication between the Appellant and the Respondent which was not thereafter reduced into writing in accordance with Clause 21.2 of the ITT read together with Regulation 17(2) of GN. No. 97 of 2005, which state as follows:

“Clause 21.2 – From the time of tender opening to the time of contract award if any tenderer wishes to contact the Seller on any matter related to the tender it should do so in writing”.

“Reg. 17(2) Communications between suppliers, contractors, service providers or buyers and a 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)

- (d) The Respondent’s Letter of Intent to award the Appellant dated 16th April, 2010, as well as the Inspection Report indicated that the said inspection was done by the Members of the Tender Board. The Authority is of the view that, this was highly irregular as duties of the Tender Boards are explicitly stated under Section 30 of the Act.

- (e) During the hearing the Respondent claimed that, they were not served with the Appellant’s Statement of Appeal. The Authority, apart from giving them proof to substantiate delivery of the said document and the written Replies from the Respondent’s Director General, noted that there is a serious problem of mail handling within TPA.

Having considered all facts and evidence, the Authority concludes that, the award of the tender was made when the Appellant fulfilled the condition precedent attached thereto and the cancellation of the tender contravened the law hence a nullity in the eyes of the law.

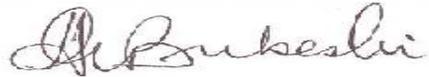
On the basis of the aforesaid findings, the Authority upholds the Appeal and orders the Respondent to;

- **Execute the contract.**

- **Pay the Appellant a total of Tshs. 3,000,000/= being costs incurred in pursuit of this Appeal.**

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 25th October, 2010.



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

CHAIRPERSON

MEMBERS:

1. MRS. R. MANG'ENYA.....


2. MR. K. M. MSITA


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