

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY**

APPEAL CASE NO. 83 OF 2010

BETWEEN

DIGITAL SCAPE EAST AFRICA LTD APPELLANT

AND

HIGHER EDUCATION

STUDENT'S LOANS BOARDRESPONDENT

CORAM:

- | | |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Hon. V.K. Mwambalasa(MP) | - Member |
| 3. Mrs. R. Mang'anya | - Member |
| 4. Ms. B.G. Malambugi | - Secretary |

SECRETARIAT:

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

FOR THE APPELLANT:

1. Mr. Crispin Mtete- Business Director
2. Mr. Johnson Minja - Accountant

FOR THE RESPONDENT

1. Mr. George Mokaka – Asst. Director Procurement & Supplies

This decision was scheduled for delivery today 23rd November, 2010, and we proceed to deliver it.

The appeal at hand was lodged by **M/s DIGITAL SCAPE EAST AFRICA LTD** (hereinafter to be referred to as "**the Appellant**") against **HIGHER EDUCATION STUDENT'S LOANS BOARD** commonly known by its acronym **HESLB** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. PA/030/2009-2010/NC/07, for Provision of Services for Scanning, Indexing and Converting to Loans Management System of Students' Loans Application Forms for the Year 2010/2011 (hereinafter to be referred to as "**the Tender**").

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

On 7th May, 2010, the Tender Board approved invitations to be made through restricted tendering to the following firms:

- (i) M/s Digital Control Systems Ltd.

- (ii) M/s COSEKE (Tanzania) Ltd.
- (iii) M/s Digital Scape East Africa Ltd.
- (iv) M/s Canocity Ltd.
- (v) M/s Biz Logic Solution Limited.
- (vi) M/s Business Machines Tanzania Limited.

On 13th May, 2010, Tender documents were sent to the above-mentioned firms and the deadline thereof was set for 4th June, 2010.

The tender opening took place on 4th June, 2010, whereby out of the six firms, only two submitted tenders as shown in the Table below:

S/N	Name of a Tenderer	Price Quoted Tshs.
1.	M/s Digital Scape East Africa Ltd	223,079,000/= (VAT Inclusive)
2.	M/s COSEKE (T) Ltd	252,992,000/= (VAT Inclusive)

On 24th June, 2010, the Tender Board directed that

before awarding the tender to the lowest evaluated bidder negotiations should be conducted.

On 30th June, 2010, the Respondent held negotiations with the Appellant whereby six issues were deliberated upon as hereunder:

- Minor alteration to the Statement of Requirements.
- Reduction of quantities due to budget constraints.
- Work Schedule.
- Payment arrangements.
- Methodology.
- Staffing.

An agreement was reached on all the above listed items and the Negotiation Report was tabled before the Tender Board on 23rd July, 2010 whereby it was reported that:

- Among the issues negotiated, included the issue of separation of scanning from indexing as well as the reduction of quantities for items 4 and 5 in the Statement of Requirements. However, the Appellant's offer was still higher by Tshs.

14,330,000/= than the budgeted amount of Tshs. 130,000,000/=.

- It was also submitted by the PMU to the Tender Board that the second lowest evaluated tenderer's offer if subjected to the reduction of quantities for Items 4 and 5 in the Statement of Requirements it could be the lowest offer.

The Tender Board therefore directed the PMU to seek guidance from the Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**") on the way forward as the Public Procurement Act, Cap. 410 does not clearly provide for the same.

Guidance was sought verbally from PPRA and thereafter the Respondent cancelled the tenders and notified the two tenderers on 13th August, 2010. On the same day, the Tender Board approved that restricted tendering method to be used in inviting the tender afresh. The same two tenderers who had participated in the cancelled tender were approved for invitation.

On 20th August, 2010, the Respondent invited the two tenderers for re-tendering. The deadline for submission of tenders was set for 23rd August, 2010.

The tenders were evaluated and the Appellant's tender was disqualified for being substantially non responsive to the requirements of the tender document. The award was recommended and thereafter approved by the Tender Board on 3rd September, 2010, in favour of M/s COSEKE (T) Ltd at a contract price of Tshs. 106,297,490/= VAT Exclusive as the Respondent is excluded from paying taxes.

On 15th September, 2010, the Appellant lodged an appeal with the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**").

Up to the time of lodging the Appeal, the Appellant had not received any communication from the Respondent on the status of the second tender.

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 negotiations which took place between the Appellant and the Respondent in relation to the first tender was successful as the parties had agreed on all the issues discussed.

That, the Appellant received the minutes pertaining to the said negotiations, signed and returned them to the Respondent for further action.

That, having signed the minutes of the negotiation meeting, the Appellant did not receive any further communication from the Respondent for nearly two months despite repeated enquiries.

That, they learnt later that, the tender was to be re-tendered as there were alterations in the scope of work and reduction in quantities. They also learnt that budgetary constraints were among the reasons for the re-tendering.

That, the re-tendering was thereafter effected whereby the same two tenderers in the previous tender were invited.

That, this move discouraged the Appellant but they went ahead and re-tendered.

That, the Appellant did not receive any notification from the Respondent on the outcome of the second tender.

That, during the negotiations it was agreed that the Appellant would use six staff, and as a result, initial preparations for relocation of staff was undertaken by the Appellant. The said relocation involved IT Engineers from India who were brought to re-enforce the local staff in the implementation of the work.

That, the Appellant's IT Engineer gave a detailed presentation on their compliance to the COVIS software which they had applied in other projects. Moreover, this matter was amongst those agreed upon during the negotiations.

That, due to the turn of events, the Appellant feels that, the re-tendering was a waste of time and resources as they feel that it was done either deliberately by the Respondent for reasons best known to themselves, or due to ignorance for lack of the expertise on the subject matter. However, the Respondent could have engaged a consultant so as to acquire beneficial returns.

That, during the last financial year, the Appellant had also tendered lowest for the same services, but for unknown reasons, the results of that tender were not communicated to them so they are not aware why they were not awarded the tender.

That, much as in any bid process there is a winner and a loser, it is the Appellant's understanding that, fairness and transparency must prevail on all issues. Otherwise, the whole procurement process shall be meaningless, and a waste of time and resources.

That, the Appellant has incurred unnecessary costs and expenditure due to unfair handling of this tender. Hence, they pray for reimbursement of a total of Tshs. 43,973,632/= being costs incurred for this tender as per the following breakdown:

- i) Legal fees charged at 3% of the Bid price of Tshs. 109,994,231/- = Tshs 3,299,826.93
- ii) General damages at 15% of Bid price of Tshs. 109,994,231/- = 16,499,134.65
- iii) Tender Preparation Costs = Tshs. 850,000/-
- iv) Transportation and subsistence costs of Director of ICT, Nairobi-Dar-Nairobi = Tshs. 3,950,000/-
- v) Transportation and subsistence costs for engineers from India = Tshs. 19,254,670/-
- vi) PPAA Appeal fees = Tshs. 120,000/-

TOTAL Tshs. 43,973,631.58

THE RESPONDENT'S SUBMISSION

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

The Respondent first raised a Preliminary Objection, to wit, the Appellant did not observe the dispute resolution procedures provided for under the Act. They contended that, the Appellant erred in submitting the Appeal directly to the Authority instead of first submitting their complaint to the Accounting Officer, then to PPRA and thereafter to this Authority.

Thereafter, the Respondent proceeded to submit on the merits of the Appeal as follows:

That, acting on the advice obtained from PPRA, the Respondent cancelled the tenders in accordance with Section 54(1) and (2) (d) and communicated to the Appellant on 13th August, 2010.

That, the Appellant's tender was found to be substantially non responsive due to the following reasons:

- Their bid offered to use different software (DigiDocs Enterprise) for scanning and indexing other than Covis as Per Section II (Instruction to bidders) of the Tender Document Clause 27.2, 27.5, 28.2 and 28.3
- Their bid offered to use three server computers and two high speed scanners, to be purchased from the USA of which they will take not less than six weeks to be delivered. Hence delay of the assignment which is scheduled to be completed within forty- five days after signing the contract.
- They offered to use a project manager having only two years experience in managing assignments of equivalent nature and volume contrary to the minimum of

three years as per the requirement of Clause 12.5(d) Section II of the Tender Document.

That, it is not true that the tender results as well the reasons for their disqualification were not communicated to the Appellant. The Appellant was duly notified on 16th September, 2010, vide letter referenced AB55/94/01/181.

That, with regard to the Appellant's claim for mobilization costs of Tshs. 23,204,607/=, the Respondent is not liable as there was no contract between them since the tender was cancelled before it was awarded. Further that, the Respondent had powers to cancel the tender under Clause 37.1 of the Instructions to Bidders (hereinafter to be referred to as "**ITB**"). The Respondent cannot therefore be held liable for mobilization costs incurred by the Appellant as per Regulation 20(1), 20 (2)(e) and 20 (4) of GN. No. 97 of 2005.

That, the Appellant's contention that the re-tendering was a waste of time and resources does not hold water as the cancellation was triggered by the change in scope of work and budget constraints. The said action was not done out of ignorance or deliberately, but was in accordance with the laid down procedures as per Section 54(2) (c) and (d) of the Act.

The Respondent prayed that the Appeal be dismissed for lack of merit due to the following reasons:

- (i) The rejection of tenders was done pursuant to Section 54 of the Act and therefore review shall not apply as per Section 79(2)(c) of the Act.
- (ii) The Appellant did not cite the provisions of the law that have been breached.
- (iii) The Appellant did not explain how the law was breached and did mention neither dates nor names of the responsible officers.

- (iv) The tender process was fair and transparent as all the laid down procedural requirements were followed.

Accordingly, the Respondent prayed for the Appeal to be dismissed and that the Appellant's prayer for compensation be rejected as they are not entitled to any compensation.

ANALYSIS BY THE AUTHORITY

Prior to formulating the issues in dispute the Authority deems it necessary to categorise the two tenders which are involved in this Appeal for avoidance of confusion. The tender that was invited on 13th May, 2010, is hereinafter referred to as "**the 1st tender**", while the tender that was invited on 20th August, 2010, is hereinafter to be referred to as "**the 2nd tender**".

Having gone through the submitted documents and having heard the oral submissions from the parties, the

Authority is of the view that the Appeal is based on the following issues:

- **Whether the Appeal is properly before the Authority**
- **Whether the cancellation of the 1st tender was proper at law.**
- **Whether the disqualification of the Appellant in the 2nd tender was justified.**
- **Whether the award of the 2nd tender to M/s COSEKE (T) Ltd was proper at law.**
- **Whether the reliefs sought by parties are justified?**

The Authority's analysis in respect of each of the five issues is as follows:

1.0 Whether the Appeal is properly before the Authority

During the hearing the Respondent raised a Preliminary Objection which centres on the jurisdiction of this Authority to entertain the Appeal. In their submissions the Respondent contended that the Appellant did not observe the dispute settlement mechanism provided for under the Act as they were supposed to direct their complaints first to the Accounting Officer, then to the PPRA and thereafter to this Authority.

The Authority wishes to enlighten the Respondent that, Section 80(3) which is in *pari materia* with Clause 47.3 of the ITB, read together with Section 82(2)(a) of the Act and Clause 51.1 of the ITB, ousts the jurisdiction of the Accounting Officer and PPRA to handle complaints once a procurement contract enters into force. The said Clauses 47.3 and 51.1 as well as Section 82(2)(a) read as hereunder:

“Clause 47.3 The head of a procuring entity shall not entertain a complaint or dispute or continue to do so after the

procurement contract has entered into force.

Clause 51.1 The Bidder not satisfied with the decision of the Public Procurement Regulatory Authority or **whose complaint cannot be entertained by the Head of the Procuring Entity or the Public Procurement Regulatory Authority shall appeal to the Public Procurement Appeals Authority (PPAA).**

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 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 supplier, contractor or consultant should have become aware of those circumstances.” (Emphasis added)

The above quoted provisions entails that the Authority has sole original jurisdiction on complaints where a procurement contract has already entered into force. For purposes of clarity, the Authority reproduces Section 55(7) of the Act which stipulates as to when a procurement contract enters into force. The said sub-section provides as follows:

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

According to the facts of this Appeal, the Respondent communicated their acceptance to M/s COSEKE (T)

Ltd on 3rd September, 2010, vide letter referenced AB 26/43/01/63. Thus, the procurement contract entered into force on that particular date. Accordingly, when this Appeal was lodged by the Appellant on 15th September, 2010, the procurement contract had already entered into force by virtue of Section 55(7) of the Act.

The Authority is of the settled view that, given the facts of this Appeal, the Appellant could neither submit their complaint to the Accounting Officer nor to PPRA as the only recourse open for them was to appeal directly to this Authority in accordance with Section 82(2)(a) of the Act and Clause 51.1 of the ITB.

In the light of the above findings, the Authority rejects the Preliminary Objection raised and concludes that, this Appeal is properly before it.

Having ruled on the Preliminary Objection raised, the Authority proceeded to resolve the issues in dispute as hereunder:

2.0 Whether the cancellation of the 1st tender was proper at law

In resolving this issue, the Authority revisited submissions by parties on this point and documents availed to the Authority vis-a-vis the Tender Document and the applicable law.

To start with, the Authority revisited the Appellant's submissions which may be summarized as follows:

- The negotiations between the Appellant and the Respondent were successfully conducted whereby they agreed on all six points which were discussed, namely:
 - Minor alteration to the statement of requirements.
 - Reduction of quantities due to budget constraints.
 - Work Schedule.
 - Payment arrangements.
 - Methodology.

- Staffing.
- The minutes of the negotiation meeting were signed by both parties signifying acknowledgement that they presented a true record of what was agreed upon.
- The Respondent's reasons for re-tendering are not justified as they centre on the same matters which were discussed and agreed upon at the negotiation meeting.

The Respondent on the other hand, provided the following replies in respect of the cancellation of the 1st tender:

- The negotiations were intended, among other things, to reduce the quantities and eventually reduce the Appellant's original tender price to be within the budgeted value of Tshs. 130,000,000/= . However, the Appellant's quoted price was only reduced from Tshs. 223,079,000/= to Tshs. 143,530,000/= . This price

was still higher than the budgeted value by Tshs. 14,000,000/=.

- The calculations revealed that, had the second lowest evaluated tenderer been subjected to the reduction of quantities their tender price would have been lower than the Appellant's price and hence their tender could have become the lowest evaluated tender.
- They sought guidance from PPRA on the way forward whereby they were advised to re-tender. Acting on PPRA's advise they cancelled the tender based on Section 54(2)(d) of the Act and invited the same two tenderers who had taken part in the 1st tender to submit new tenders.

The Authority proceeded to examine the validity of the submissions by parties on the issue of cancellation of the 1st tender, by revisiting the Tender Document and the applicable law. Since the cancellation of the 1st tender was made following

guidance obtained from PPRA, the Authority deemed it necessary to firstly examine the way in which guidance from PPRA was obtained. According to the documents submitted to the Authority, the Respondent's Assistant Director for Procurement and Supplies paid a visit to PPRA where he met one of the officers who gave him verbal advice on the matter which was also relayed verbally to the Tender Board. The Authority noted that, the Minutes of the Tender Board did not indicate the specific problem that required PPRA's guidance. Moreover, despite the Respondent's acknowledgement of PPRA's advice, the actual advice given was not documented anywhere. Therefore this Authority could not establish or verify the issues on which advice was sought or given and how it was implemented by the Respondent. The Authority's concern is mainly on the verbal communications made which were not thereafter reduced into writing in order to provide a record as required by Regulation 17(1) and (2) of GN No. 97/2005.

The Authority proceeded to review Section 54(2) (d) of the Act which was relied upon by the Respondent, as reproduced hereunder:

“(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 Authority observes that, this is among the reasons that may justify cancellation of a tender by a procuring entity. According to the facts of this Appeal, it is obvious that, from the beginning the quoted prices were by far, higher than the budgeted amount. The Authority does not understand as to why the Respondent could not see that fact at the time of the tender opening, and instead went ahead to evaluate the tenders and raise the Appellant’s expectations by inviting them to the negotiation table. Moreover, during the hearing the Respondent

could not explain how they had expected to reduce the quantities and subsequently the prices to be within the budgeted amount while Item 34 of the Tender Data Sheet allowed a percentage increase or decrease of 15% only. The Authority is of the view that, the Respondent did not act diligently by inviting the Appellant to the negotiations while knowing that the reduction of quantities allowed was only 15% and the possibility of acting within the confines of the law was slim indeed.

The Authority also examined the manner in which the cancellation of the 1st tender was done in order to ascertain whether it adhered to procedural requirements provided under the applicable law. According to documentary evidence as well as oral submissions during the hearing, the Respondent communicated the cancellation of the 1st tender to the two tenderers, the Appellant inclusive, via email on 13th August, 2010. However, during the hearing it was evident and the Respondent conceded that, prior approval of the Tender Board was not sought before the 1st tender was cancelled. The Minutes of

the Tender Board meeting held on 13th August, 2010, did not say anything about the said cancellation and instead indicated the granting of approval to use restricted tendering method of procurement and approving the names of the two tenderers who had participated in the cancelled tender. The Authority is of the firm view that, failure to obtain the Tender Board's approval for the rejection of all tenders contravened Section 54(5) of the Act which states as follows:

"The appropriate **tender board's prior approval shall be sought before rejecting all tenders** or all proposals, soliciting new tenders or proposals or entering into negotiations with the lowest evaluated tenderer." (Emphasis added)

Based on the above quoted provision, the Authority is satisfied that, the Respondent was obliged to seek first the approval of the Tender Board before rejecting the 1st tender. Accordingly, failure to do that invalidates the cancellation of the 1st tender.

That is to say, the cancellation of the 1st tender was a nullity for failure to observe procedural requirements.

In view of the above findings, the Authority concludes that the cancellation of the 1st tender was not proper at law.

3.0 Whether the disqualification of the Appellant in the 2nd tender was justified

Having resolved the second issue and establishing that the cancellation of the 1st tender was a nullity in the eyes of the law, it follows therefore that the invitation of the 2nd tender was equally a nullity as the 1st tender was legally still valid. However, instead of resolving the third issue outright as it has already been affected by the outcome of the second issue, the Authority decided to examine it for the reason that, it formed the basis of the Appellant's grounds of Appeal.

Having said that, the Authority proceeded to review the evaluation process pertaining to the 2nd tender which led to the disqualification of the Appellant. In its endeavour to resolve this issue, the Authority examined each of the three reasons that were used by the Respondent to disqualify the Appellant and submissions by parties on this particular issue. The reasons that disqualified the Appellant as deduced from the Respondent's letter referenced AB 55/94/01/181 dated 16th September, 2010, and the Authority's analysis thereof are as hereunder:

(a) In their tender the Appellant had offered to use different software (DigiDocs Enterprises) for scanning and indexing other than COVIS as per the requirements of the Tender Document:

The Appellant's submissions on this ground is that, this was among the matters that were discussed during the negotiations whereby their IT Engineer's explanation was accepted by the Respondent, hence leading to the successful

conclusion of the negotiations and signing of the Minutes of the Negotiation meeting. Further that, this ground was technically not viable as DigiDocs Enterprise is the latest and more advanced software and that the two types of software do interrelate. The Respondent on the other hand, contended that what was required was COVIS software and therefore the Appellant did not meet the requirements of the Tender Document.

Having revisited the submission by parties, the Authority is of the view that, the specifications given in the **1st Tender** were the same specifications provided in the **2nd Tender** and these same specifications were offered by the Appellant and approved by the Evaluation Team, the PMU and the Tender Board in the **1st Tender**. That is why the Appellant was considered to have met the tender requirements and invited for negotiation. Furthermore if it had not been for the budgetary constraints of the Respondent the Appellant would have executed the same job using the same software. Therefore this argument is not acceptable

since what was required was **the function to be performed by the software that of scanning and indexing and not the brand name of the software to be supplied.**

In order to clarify this point, the Authority revisited Regulation 22 of GN 97 which gives the rules for description of goods, works, services or assets. The Authority reproduces Regulation 22(2) which states as follows:

“22 (2) To the extent possible **any specifications , plans, drawings, designs and requirements or description of goods** or construction **shall be based on the relevant objective, technical and quality characteristics of the goods** or construction to be procured. **There shall be no requirement of or reference to a particular trade mark, name, patent, design, type,** specific origin or producer **unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods ,** works or services to be procured and provided **that**

words of or equivalent are included.” (Emphasis supplied)

In light of the above cited provision of the Law, the Authority is of the settled view that the Respondent erred in giving the specification that the software to be supplied **should be COVIS** and using the same to disqualify the Appellant was contrary to law .

The Authority went further to review the Evaluation Report so as to ascertain how the Evaluators came to the above conclusion on the issue of software. The Authority noted that, two out of the four Evaluators indicated that the Appellant had met this requirement while the other two said NO. Despite the pointed out differences among the Evaluators, their conclusion appearing on Table No. 5 on page 6 of the Evaluation Report was “YES” accompanied by an asterisk. The Authority noted further that, the Evaluators’ comment on this point was that:

“The Bidder used different software for scanning and indexing other than COVIS and

does not say whether they have experience in using COVIS.”

The Authority is of the view that, the Evaluators' final conclusion on this criterion was a 'YES' which meant the Appellant had complied with the said criterion. The Authority wonders as to how the Tender Board derived its conclusion that this was among the reasons for the Appellant's disqualification, as it appears in the letter that communicated the grounds for disqualification to the Appellant. The Authority finds that, the issue of software was not among the reasons given by the evaluators for the Appellant's disqualification.

(b) They offered to use three server computers and two high speed scanners, which will be ordered from USA whose delivery will take not less than six weeks compared to the required delivery time of 45 days as per Clause 12.5(c) of the ITB

The Appellant's submission on this point was that, they had intended to purchase the said scanners from Nairobi, Kenya, once they were awarded the tender. They stated that, the Respondent's understanding was perhaps caused by the fact that the Appellant's current equipment were made in the USA and hence it was assumed that they intended to import the new scanners from the same country.

The Respondent did not provide explanation as to how they came to the conclusion that the said scanners would be purchased from USA. However, according to the Evaluation Report, the Evaluators had indicated that the Appellant had met this requirement as they gave them a **'YES'**. The Evaluators' comment on this criterion appearing on page 6 of the Evaluation Report states that:

"The Bidder appears to have none of the equipment required – scanners, computers and proposes to buy these if awarded the contract. If these are to be ordered from abroad it will take at least 6 weeks to

receive the same. YET, the assignment is to take 45 days.”

The Authority reviewed the Appellant’s bid document and noted that, it has specifically indicated that, the server computers were intended to be purchased from Dell Corporation USA and High Speed Scanners were also to be purchased from Kodak Corporation USA. However, the said Document did not indicate the delivery period for those items. Hence the Authority wonders how the evaluators got the estimation of six weeks for delivery of the items to be ordered from abroad. Based on that, the Authority is of the view that, if the Respondent was not sure of when the equipment will be available, the same could have been resolved by seeking clarification from the Appellant as per Regulation 90 (10) of GN No. 97/2005.

The Authority is of the view that, the Respondent ought to have sought for clarification before disqualifying the Appellant on that criterion.

Therefore the Authority finds the Respondent to have erred in law in using this criterion to disqualify the Appellant.

(c) The Project Manager has two years experience instead of the required three years as per Clause 12.5 of the ITB

In resolving this contention, the Authority revisited submissions by parties, the Evaluation Report and the applicable law. The Appellant disputed this ground, stating that their Project Manager has ten years general experience and five years experience in this field. According to them, the Project Manager has surpassed the required experience required by the Respondent. The Respondent contended that the Project Manager's experience that was considered by the Evaluators was for the duration that he had worked with the Appellant which is two years. Therefore, the Appellant's tender did not meet this criterion as the required experience was three years as per Item 16(d) of the Tender Data Sheet which reads as follows:

“The minimum experience required to be demonstrated by the Manager of the successful Bidder for this Contract shall be three (3) years in service(s) of an equivalent nature and volume.” (Emphasis added)

The Authority noted that, the Respondent’s position is cemented by the comment of the Evaluators’ appearing on page 6 of the Evaluation Report which reads as follows:

“The Project Manager has only 2 yrs of relevant experience in that position. This is critical to the nature of this assignment.

In order to ascertain the validity of the submissions made by parties on this particular point, the Authority revisited the Evaluators’ individual assessment forms which contained different views and conclusion as follows:

Evaluator No.	YES/NO	Evaluator’s Comment
1	NO	Project Manager has less than 3 years experience
2	YES	Manager has 3 years experience with 2 years experience working as Project Manager doing equivalent type of

		project
3	YES	Worked for more than 3 years doesn't explain his experience neither what he was doing
4	YES	The team including the Manager has over 3 years experience. But doesn't show nature of activities done

After reviewing the Appellant's bid document the Authority is of the view that, the Appellant had not complied with Item 16(d) of the Bid Data Sheet as their bid document does not show that their project manager has three years experience in the project of equivalent nature and volume. Furthermore, the Authority did not find any evidence to substantiate that the Appellant had undertaken any work of similar nature and volume apart from a list attached to their bid document mentioning various places that they have been working but with no supporting documents such as reference letters from the respective clients or executed contracts.

In view of the above analysis, the Authority observes that, had the cancellation of the 1st tender been done in accordance with the law the Appellant's 2nd tender would have been disqualified for only one reason,

namely, that their Project Manager did not have the required experience of 3 years in a project of an equivalent nature and volume. However, since it has already been established that the cancellation of the 1st tender contravened the law for want of approval of the Tender Board, it goes without saying therefore that the 2nd tender was legally non-existent in the eyes of the law. That is to say, the whole proceedings pertaining to the 2nd tender were also a nullity.

4.0 Whether the award of the 2nd tender to M/s COSEKE (T) Ltd was proper at law

In resolving this issue, the Authority took cognizance of its findings in the second issues that, prior to inviting new tenders the approval of the Tender Board to cancel the 1st tender should have been sought in accordance with Section 54(5) of the Act. It goes without saying therefore that, since the 1st tender was not legally cancelled the invitation and award of the 2nd tender contravened the law and was therefore not proper at law.

5.0 Whether the reliefs sought by parties are justified?

In resolving this issue the Authority took cognizance of its conclusion in the second issue, to wit, that the cancellation of the 1st tender was not proper hence the invitation and subsequent award of the 2nd tender was equally not proper. As it has been established that the Respondent contravened the law, the Authority is of the considered view that, the Appellant is entitled to compensation for some of the expenses incurred. The Authority therefore orders the Respondent to compensate the Appellant a sum of Tshs.3, 419,826.93 only being costs in respect of the following:

- (i) Legal fees charged -Tshs 3,299,826.93
- (ii) Appeal filing fees - Tshs 120,000.00

With regard to the Respondent's prayer for dismissal of the Appeal, the Authority finds the Appeal to have merit and accordingly rejects the Respondent's prayer in its entirety.

Other matters that caught the attention of the Authority:

In the course of handling this Appeal, the Authority came across some pertinent matters that need to be pointed out as hereunder:

- (a) The Authority noted that **Section 35(d)** of the Act has some deficiencies as it provides for Procurement Management Unit (PMU) to liaise directly with PPRA while **Section 8 (page 69)** in the second schedule of the Act allows the Secretary of the Tender Board to communicate decisions of the Procuring Entity. This is contrary to the principles of Good Governance, as communication between one office and the other has to be made by the Accounting Officer or by someone authorized to act on his behalf.

- (b) The Authority also is of the view that, had the Procurement Management Unit and Tender Board acted diligently enough they would have cancelled the 1st tender immediately after the

bid opening, as it was already evident that tenderers had quoted higher prices than the estimated budget. Hence the act of evaluating them and later on inviting the Appellant for negotiations had raised false hopes to the Appellant. Had the Respondent cancelled the 1st tender right from the beginning given the budgetary constraint, they would have saved the Appellant from incurring unnecessary expenses.

(c) The Respondent invited bidders to re-tender on 20th August, 2010, and gave the deadline for Tender submission to be 23rd August, 2010. This means that the tenderers had only three days to submit their tenders. This is contrary to Regulation 20(6)(b) which requires adequate time to be allowed for submission of tenders

(d) The mode of communication with tenderers was not as per Regulation 17 of GN No. 97/2005. This is because there was verbal communication between the Appellant and the

Respondent which was not documented thereafter.

(e) The Authority noted that, the Evaluators were not consistent when conducting the evaluation as their forms show different observations while they were evaluating the same tender documents.

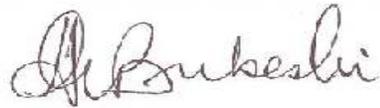
Having considered all facts and evidence, the Authority concludes that, the cancellation of the 1st tender contravened the law and hence the re-tendering and its subsequent award were a nullity in the eyes of the law.

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

- **Compensate the Appellant a sum of Tshs. 3,419,826.93/- only 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 23rd November, 2010.



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

MEMBERS:

1. HON. V.K. MWAMBALASWA



2. MRS. R. MANG'ENYA

