

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

APPEAL CASE NO. 95 OF 2011

BETWEEN

UNIQUE BUILDERS COMPANY LTDAPPELLANT

AND

REGIONAL MANAGER TANROADS-ARUSHA....RESPONDENT

DECISION

CORAM:

- | | |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mr. K.M. Msita | - Member |
| 3. Mrs. N.S.N. Inyangete | - Member |
| 4. Ms. E. Manyesha | - Member |
| 5. 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:

Mr. Averinus Mgomberi – Director

FOR THE RESPONDENT

1. Eng. Albert Kent – Head of Engineering TANROADS- Arusha
2. Mr. Geoffrey Edward – Ag. Head of Procurement Unit TANROADS- Arusha
3. Mr. Justinian Byabato- Legal Counsel
4. Ms. Naomi O. Bugenyi – Procurement Specialist
5. Mr. Gurisha Y. Mwanga – Legal Officer

FOR THE INTERESTED PARTY – M/S NYAMGURUMA ENTERPRISES LIMITED

1. Mr. Allen G. Lutalo – Managing Director
2. Mr. Alfred Ndahondi - Technician

This decision was scheduled for delivery today 5th April, 2011, and we proceed to deliver it.

The appeal at hand was lodged by **M/s UNIQUE BUILDERS COMPANY LTD** (hereinafter to be referred to as "**the Appellant**") against **THE REGIONAL MANAGER TANROADS ARUSHA** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. AE/100/10-11/AR/TEN/W/31 for Bridge Repair and Preventive Works along JCT-Minjingu, Makuyuni, Ngorongoro Gate and Matala Njiapanda Roads.

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

The Respondent advertised the tender for Bridge Repair and Preventive Works along JCT-Minjingu, Makuyuni, Ngorongoro Gate and Matala Njiapanda Roads vide the Daily News of 26th July, 2010.

The deadline for submission of bids was set for 26th August, 2010, whereby seven tenders were received from the following companies:

	Name of Tenderer	Bid Price (TSHS)
1.	M/s Job Engineering Services Limited	260,190,000/=
2.	M/s J.P Traders Ltd	178,881,000/=
3.	M/s Nyamguruma Enterprises Ltd	235,605,000/=
4.	M/s Roms Tech Limited	214,620,000/=
5.	M/s Unique Builders Co. Ltd	225,545,000/=
6.	M/s Builders and Limeworks Ltd	296,855,000/=
7.	M/s Stance Technic & Civil Engineers Ltd	231,740,000/=

The said tenders were evaluated and the award was recommended by the Evaluation Committee in favour of M/s J.P Traders Limited.

The Respondent's Tender Board vide its meeting held on 15th September, 2010, rejected the recommendations of the Evaluation Committee on the reason that, the unit price for major items such as concrete (C25) and

reinforcement steel quoted by M/s J.P Traders Limited were relatively lower than the prevailing market prices as well as the engineer's estimates. Hence, it was ordered that post-qualification be done to the 2nd lowest evaluated tenderer.

The Respondent's Tender Board at its meeting held on 11th October, 2010, refused to award the contract to the tenderer with the second lowest evaluated tender, namely, M/s Roms Tech Limited on the reason that the company lacked experience on works of similar nature and complexity. Accordingly, it was ordered that, the post-qualification be done to the third evaluated tenderer.

The Tender Board at its meeting held on 26th October, 2010, reviewed the third post-qualification analysis and approved the recommendation of award to the Appellant who had the third lowest evaluated tender. The said approval was subject to successful pre-contract negotiations on the availability of the proposed key staff, equipment and timely submission of the Performance Bank Guarantee.

On 27th October, 2010, the Respondent wrote a letter referenced AE/100/2010-11/AR/TEN/W/31/1 to the Appellant, informing them the intention of being awarded the tender and invited them for negotiations. The negotiations took place on 2nd November, 2010.

On 16th November, 2010, the Appellant received a letter from the Respondent referenced AE/100/10-11/AR/CON/W/31/9 which informed them that, their tender had been accepted and required them to submit the Performance Bank Guarantee.

On 11th December, 2010, the Appellant submitted a Performance Guarantee from the Zanzibar Insurance Corporation.

On 16th December, 2010, the Appellant received a letter from the Respondent referenced AE/100/10-11/AR/CON/W/31/12 dated 15th December, 2010, which informed them that the award had been cancelled due to their failure to submit the required Performance Guarantee, as they had submitted an Insurance Bond instead of a Performance Bank Guarantee.

After cancellation of the award to the Appellant, the Respondent post-qualified the tenderer with the fourth lowest evaluated tender, namely, M/s Stance Technic & Civil Engineers Ltd and who was subsequently awarded the contract.

The Appellant being dissatisfied with the cancellation of the award, on **31st December, 2010**, lodged their appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the 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's bid was accepted by the Respondent vide a letter referenced AE/100/10-11/AR/CON/W/31/12 dated 16th November, 2010, which required the former to submit a Performance Guarantee.

That, the Appellant submitted the Performance Guarantee from the Zanzibar Insurance Corporation which was in accordance with Clause 41.1 and 41.2 of the Instruction to Tenderers (hereinafter to be referred to as ITT).

That, the Respondent's claim that, the Appellant had failed to submit a proper Performance Guarantee is baseless as Clause 41.2 of the ITT had provided for two alternative forms of Performance Security, to wit, one issued by the bank and the other issued by an insurance firm. Thus, the Appellant opted to submit a Performance Guarantee issued by an insurance firm.

That, the Respondent's purported cancellation of the award was unlawful as the Appellant had submitted a Performance Security which complied with the relevant provisions of the Tender Document.

That, the Respondent's act of cancelling the award caused financial loss to the Appellant including costs of seeking redress to the Authority.

The Appellant therefore prayed for the following reliefs;

- a) The Respondent be ordered to rescind its purported cancellation of award and proceed in a lawful manner;
- b) Award of damages at 10% of the contract price;
- c) Costs of the Appeal

THE RESPONDENT'S REPLIES

At the time of hearing the Respondent raised two points of preliminary objections which are as follows:

- a) **The Appellant lodged the Appeal prematurely without exhausting the dispute resolution mechanism provided for under Section 80(1) and (2) of the Act**
- b) **The Appeal was lodged against a wrong party who also lacks legal personality**

In respect of the first point of Preliminary Objection the Respondent stated as follows;

- i) The procedure set for bidders to challenge procurement results is provided under Section 80 (1) and (2) of the Public Procurement Act No. 21 of 2004, Cap 410 (hereinafter to be referred to as "the Act") and Clauses 45, 46, and 47 of the ITT, that the aggrieved tenderer has to apply for settlement of dispute or complaint to the procuring entity, for this matter, that is, the Regional Manager, TANROADS, Arusha within 28 days. Upon being aggrieved by the decision of the procuring entity, the matter could have been referred to PPRA depending on whether the contract with the successful tenderer had been signed or not. And thereafter, it would have reached this Authority as the second stage.
- ii) Further, the Appeal before this Authority had been prematurely filed as the Appellant

had to comply with the legal requirements stipulated under the provision of Section 82 of the Act; on the contrary the Appellant came straight to PPAA.

- iii) The Appellant was informed about the cancellation of the award on 16th December, 2010, and the appeal to challenge the said cancellation was filed to this Authority on 28th December, 2010.
- iv) The procedure opted by the Appellant is against the law and therefore vitiates the entire appeal process.
- v) The anticipated contract between the Respondent and M/S Stance Technic and Civil Engineering Ltd is in the process of being signed, as the tenderer has already submitted the requisite Performance Bank Guarantee.

In respect of the second point of Preliminary Objection the Respondent stated as follows;

- i) The Invitation For Bids (IFB) states under paragraph 3 that the TANROADS Regional Manager-Arusha Region on behalf of the Chief Executive, TANROADS, invited eligible bidders to tender.
- ii) The Bid Data Sheet (BDS) Item 1 provides that the Procuring Entity is Tanzania National Roads Agency (TANROADS) – Arusha Region for and on behalf of the Chief Executive of TANROADS.
- iii) The Appeal at hand has been preferred against the Regional Manager, TANROADS, Arusha who is not the rightful person to be sued under the Executive Agencies Act Cap. 245. Section 3(6)(b) of Cap. 245 as amended by the Finance Act No. 18 of 2002.

iv) The Regional Manager, TANROADS, Arusha under the Executive Law Regime and in particular section 11 of the Executive Agencies Act Cap. 245, is immune from all liability. The best way at the disposal of the Appellant was to appeal against the Tanzania National Roads Agency, instead of the Regional Manager, TANROADS, Arusha.

Without prejudice to the points of preliminary objections, the Respondent's documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing may be summarized as follows:

That, the requirement for submission of the Performance Bank Guarantee by the Appellant was imperative as clearly set out in the Letter of Acceptance coupled with the prescribed form of security that was attached to the Bidding Documents.

That, Section 10 of the Tender Document provides for various sample forms, one of them being a Performance

Bank Guarantee Form. From the spirit and wording of that form one could see clearly that what was intended to be submitted, was an irrevocable Performance Bank Guarantee and not an Insurance Bond. Therefore the form of the security submitted by the Appellant was incompatible with the Letter of Acceptance and the requisite Sample Form.

That, during pre-contract negotiations the Appellant was informed that the performance guarantee which was required was the one issued by the bank, and the Appellant promised to submit a Performance Bank Guarantee from CRDB Bank within fourteen days.

That, after fourteen days had elapsed from the date the Appellant promised to submit a performance bank guarantee, the Respondent sent to them a reminder on the importance of submitting the said Bank Guarantee. However, on 11th December, 2010, the Appellant submitted a performance guarantee in the form of an insurance bond, contrary to what was required. As a result the Respondent cancelled the award.

That, the Respondent's cancellation of award was lawful and the Appellant was supposed to read the Letter of Acceptance and the Sample Form of the Bank Guarantee appended to the Bidding Document under Section 10.

That, if the issue of performance security was not clear in the Tender Document, the Appellant had an option of seeking for clarification as per Regulation 95 (1) of GN No. 97/2005 and Clause 8 of the ITT.

That, the tender validity period expired on 27th November, 2010, and there was no extension of the bid validity period which was made by the Respondent before awarding the said contract to the fourth lowest evaluated tenderer.

That, the award to the successful tenderer has been made after the expiry of the tender validity period because extension could not be done before finalization of the process.

Therefore, the Respondent prayed for the dismissal of the Appeal and compensation of Tshs. 6, 900,000/- being costs for transport and accommodation for two witnesses from Arusha as well as allowances for other officials who handled the Appeal.

ANALYSIS BY THE AUTHORITY

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

- **Whether the Appeal is properly before the Authority**
- **Whether the cancellation of the award made to the Appellant was proper at law**
- **Whether the award of the tender to the Successful Tenderer, namely, M/s Stance**

Technic & Civil Engineers Ltd 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

In their written replies to the Statement of Appeal, the Respondent raised Preliminary Objection on two points, which centred on the jurisdiction of this Authority to entertain the Appeal. The Authority's analysis on the said two points is as follows:

1.1 The Appellant lodged the Appeal prematurely without exhausting the dispute resolution mechanism provided for under Section 80(1) and (2) of the Act

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 Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**") and thereafter to this Authority. This first objection was subsequently withdrawn by the Respondent following the Authority's citing the relevant provisions of the law. However, in order to educate both parties on the legal position regarding that objection the Authority deems it prudent to re-state that legal position in this decision.

The Respondent's arguments on the first point of preliminary objection are based on Sub-Sections (1) and (2) of Section 80 of the Act, the Authority deems it necessary to reproduce them herein below:

"80(1) Complaints or disputes between procuring entities and suppliers, contractors or consultants which arise in respect of procurement

proceedings and awards of contracts and which cannot be resolved by mutual agreement shall be reviewed and decided upon a written decision by the Accounting Officer, Chief Executive of a Procuring Entity, unless the procurement has been reviewed and approved by an approving authority, in which case that approving authority shall review and decide on the dispute and give reasons for its decision in writing.

- (2) The head of the procuring entity or of the approving authority shall not entertain a complaint or dispute unless it is submitted within twenty eight days from the date the supplier, contractor or consultant should have become aware of those circumstances, whichever is earlier.”

The Authority observes that, in accordance with subsection (3) of Section 80 of the Act, which is in *pari materia* with Clause 47.3 of the ITT, the Accounting Officer’s mandate to entertain a complaint ends once the

procurement contract enters into force. Furthermore, Section 82(2)(a) of the Act and Clause 51.1 of the ITT, oust 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 who is not satisfied with the decision of the PPRA or **whose complaint cannot be entertained by the Head of the Procuring Entity or the PPRA 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 complaint or dispute to the Public Procurement Appeals Authority;

- a) **if the complaint or dispute cannot be entertained under section 80 or 81 because of entry into force of the procurement contract** and provided that the complaint or dispute is submitted within fourteen days from the date when supplier, contractor or consultant submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when supplier, contractor or consultant should have become aware of those circumstances.” (Emphasis added)

The above quoted provisions entail that 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 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)

According to the facts of this Appeal, the Respondent communicated their acceptance to the Appellant on 16th November, 2010. Thus, the procurement contract entered into force on that particular date. Accordingly, when this Appeal was lodged by the Appellant, 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 52.1 of the ITT. The Authority thus, rejects the Respondent’s first point of Preliminary Objection.

1.2 The Appeal was lodged against a wrong party who also lacks legal personality

In order to ascertain the validity of the Respondent's second point of Preliminary Objection, the Authority revisited the Respondent's submissions on this point. The Respondent argued that, the tender was floated by the TANROADS Regional Manager – Arusha on behalf of the Chief Executive of TANROADS. Item 1(1.1) of the BDS mentions the procuring entity as **“Tanzania National Roads Agency (TANROADS) – Arusha Region for and on behalf of Chief Executive”**. The Respondent further argued that, the right party to be sued should have been Tanzania National Roads Agency as the Regional Manager, TANROADS Arusha is immune from all liability under Section 11 of the Executive Agencies Act, Cap. 245.

The Authority observes that, the law allows an aggrieved tenderer to lodge a complaint against a procuring entity which floated the tender. The law does not require such a

complaint to be lodged against a body corporate but rather against any procuring entity or a non Government entity where public finances are involved pursuant to Section 2(1) of the Act. Furthermore, the law equally recognizes delegated tender boards, such as TANROADS Regional Manager, Arusha Region in the Appeal at hand. The Authority is of the considered view that, any procuring entity which exercises procurement functions may be brought before this Authority in the event complaints arise in the procurement proceedings.

Moreover, according to the documents availed to this Authority, the TANROADS Regional Manager, Arusha was the one who handled the procurement process pertaining to the tender under Appeal. This included the advertisement, tender opening, evaluation of tenders, post-qualification, notification of award, negotiations as well as cancellation of the award made to the Appellant. All communications between the procuring entity and the tenderers were done by TANROADS Regional Manager, Arusha. Hence, logically, they are the right party to answer questions arising from the disputed procurement

process. This was evidenced by the Respondent's submission during the hearing that, two officials from TANROADS Regional Manager, Arusha travelled to Dar es salaam to assist in the preparation of their defence and attended the hearing as witnesses.

The Authority also considered the Respondent's argument that, TANROADS Regional Manager, Arusha is immune from all liabilities as per Section 11 of The Executive Agencies Act, (Cap. 245 R.E, 2002). The Authority is of the firm view that, firstly, the said piece of legislation does not override the Public Procurement Act, 2004. Secondly, the cited section exonerates employees from liability in their personal capacity while the Appeal at hand is not against the Regional Manager in his personal capacity but rather as a public office. The said Section 11 is hereby reproduced:

"An employee of an Executive Agency **shall not, in his personal capacity**, be liable in civil or criminal proceedings in respect of any act or omission done

or made in good faith in the performance of his functions.” (Emphasis supplied)

In view of the foregoing, the Authority equally rejects the Respondent’s second point of Preliminary Objection.

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 other issues in dispute as hereunder:

2.0 Whether the cancellation of the award made to the Appellant was proper at law

In its endeavour to resolve this issue, the Authority reviewed submissions by parties vis-à-vis the applicable law and the Tender Document. To start with, the Authority revisited the arguments by parties’ on this point.

The Authority revisited the Appellant's main contention that, the Respondent's cancellation of award was contrary to the law as the Appellant had submitted the required performance guarantee which is in accordance with Clause 41.1 and 41.2 of the ITT which provided options to tenderers to submit the Performance Security in the form of either an Insurance Bond or Bank Guarantee.

The Respondent in reply submitted that, the Appellant was required to submit a performance security in the form of a Bank Guarantee and not an Insurance Bond. The Respondent contended further that, it is true that the BDS and Special Conditions of the Contract were not very explicit in which form the performance guarantees were to be submitted. However, the Respondent notified the Appellant through various means that the required performance security was a Performance Bank Guarantee as pointed out hereunder;

- The Respondent's letter of acceptance clearly stated that a Performance Bank Guarantee was required to be submitted as a performance security.
- The negotiations held on 2nd November, 2010, discussed among other things, the Appellant's requirement of submitting the performance guarantee in the form of a Bank Guarantee.
- Section 10 of the Tender Document provided for the sample form which had to be used by tenderers at the time of submitting the Performance Guarantee.

Thus, the Respondent contended that, the Appellant's failure to submit the performance security in the required form had no justification as they were fully aware that, the required performance security was to be in the form of a Bank Guarantee and not an Insurance Bond.

Having considered the contentions by parties on this particular point, the Authority revisited Clause 41.1 and 41.2 of the ITT which was relied upon by the Appellant that, it gave the successful tenderer options of submitting the performance security in the form of a Bank Guarantee or an Insurance Bond. The said Clause 41.1 and 41.2 provides as follows;

“Clause 41.1 Within twenty eight (28) days after receipt of Letters of Acceptance, the successful bidder shall deliver to the Procuring Entity a Performance security in the amount and in the form stipulated in the **Bid Data Sheet** and the **Special Conditions of Contract**, denominated in the type and proportions of currencies in the Letter of Acceptance with Conditions of the Contract.” (Emphasis added)

“Clause 41.2 **If the Performance Security is issued by the successful bidder in the**

form of Bank Guarantee or Insurance Bond, it shall be issued either;

- (a) At the bidders options, by a bank or Insurance firm located in the United Republic of Tanzania or a foreign bank or insurance firm through a correspondent bank or insurance firm located at the United Republic of Tanzania, or**
- (b) With the consent of the Procuring Entity, directly by a foreign bank acceptable to the Procuring Entity.”(Emphasis supplied)

Based on the above provisions the Authority is of the view that, Clause 41.1 of the ITT has indicated that the amount and the form of the required performance security would be provided in the BDS and the Special Conditions of Contract. The Authority reviewed the BDS and noted that it did not provide for the required form of the performance security instead it indicated the amount of performance security to be “**10% of the contract price**”.

Furthermore, the Authority revisited the Special Conditions of Contract and noted that, they did not provide the form in which the performance security had to be submitted. Instead, it had specified the amount of the performance security which was in line with the one specified in the BDS. The said omission on the BDS and Special Conditions of Contract was conceded by the Respondent during the hearing that the form of the required performance security was not specified as it was provided for under Clause 41.1 of the ITT.

Upon further review the Authority noted that, Section 10 of the Tender Document contained various sample forms, which included, among others, a Performance Bank Guarantee form. The Authority having reviewed the said form noted that, it provided for mandatory submission of a Performance Bank Guarantee by the successful tenderer if the employer required so. For purposes of clarity the Authority reproduces the first paragraph of the said form which reads as follows;

“[The bank/successful bidder providing the Guarantee shall fill in this form in accordance with the instructions indicated in brackets, if the employer requires this type of security”]
(Emphasis supplied)

Based on the above quoted paragraph, the Authority is of the view that, the Appellant was required to submit a performance security in the form of a Bank Guarantee.

Furthermore, the Authority noted that the Respondent’s letter of intent to award informed the Appellant that their tender would be accepted subject to successful negotiations which were to be carried out based on the following points;

- Confirmation of availability of the proposed key staff,
- Confirmation on availability of equipment including those for bituminous surfacing layer;
- **Confirm capability of timely submission of Performance Guarantee.**

Moreover, the Letter of Acceptance of the Appellant's bid from the Respondent dated 16th November, 2010, indicated that they were required to submit a performance security in the form of a Bank Guarantee.

The Authority was of the further view that, despite the omissions noted in the BDS and the Special Conditions of Contract, the Appellant had sufficient knowledge on the mandatory requirement of submitting the performance security in form of a Bank Guarantee. Hence, the Appellant's erred in submitting the performance security in the form of an Insurance Bond.

In view of the above findings, the Authority's conclusion in respect of the 2nd issue is that the cancellation of award made to the Appellant was proper at law.

3.0 Whether the award of tender to the Successful Tenderer, namely, M/s Stance Technic & Civil Engineers Ltd was proper at law

During the hearing, the Respondent conceded that the tender validity period expired on 27th November, 2010. They further stated that, they could not extend the tender validity period because they were waiting for the finalization of the tender process. The Authority observes that, the Respondent's failure to extend the bid validity period prior to the expiry of the original period contravened Regulation 87(4) of GN. No. 97/2005 which provides as follows:

“In exceptional circumstances, prior to the expiry of the original period of effectiveness of tenders, the procuring entity may request suppliers, contractors, service providers or asset buyers to extend the period for an additional specified period of time.” (Emphasis supplied)

The Authority further observes that, the Respondent's failure to extend the tender validity period rendered all the subsequent transactions relating to the tender process to be a nullity pursuant to Section 64 of the Act read together with Regulations 87(2) and 97(7) of GN. No. 97/2005 which provide as follows:

"S. 64. The procuring entity shall require tenderers to make their tenders and tender securities valid for periods specified in the tendering documents, and such periods **shall be sufficient to enable the procuring entity to complete the comparison and evaluation of the recommendations and give its approval for the contract or contracts or works.**"
(Emphasis added)

"Reg. 87(2) **The period fixed by the procuring entity shall be sufficient to permit evaluation and comparison of tenders, for obtaining all necessary clearances and approvals, and for notification of the**

award of contracts and finalize a contract”.
(Emphasis added)

“Reg.97(7) Except as provided in sub-regulations (3),(4) and (5) a procurement or disposal contract made in accordance with the terms and conditions of the accepted tender shall enter into force when the notice referred to in sub regulation (1) has been dispatched to the suppliers, service providers, contractor or asset buyers that submitted the tender provided that the same is dispatched while the tender is in force.

The Authority observes that, the transactions which were conducted after the expiry of the tender validity period, namely, 27th November, 2010, include the following:

- The submission of Performance Security by the Appellant on 16th December, 2010.

- The award of the tender to the fourth lowest evaluated tenderer, namely, M/s Stance Technic & Civil Engineers Ltd, made on 4th January, 2011.
- The Performance Security submitted to the Respondent by M/s Stance Technic & Civil Engineers Ltd dated 20th January, 2011.

The Authority is concerned that, during the hearing it was evident that the Respondent seemed to be unaware of the effects of the expiry of the tender validity period. This fact is evidenced *vide* their defence that, they intended to extend the tender validity period after finalizing the tender process. The Authority is appalled by such a defence in view of the fact, the Respondent is amongst the procuring entities whose core functions involve large sums of public funds. Hence the issue of tender validity period cannot be under estimated.

That said, the Authority's conclusion on the third issue is that, the award of the tender to M/s Stance Technic &

Civil Engineers Ltd was not proper at law and hence a nullity.

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

Having resolved the issues in dispute, the Authority considered prayers by parties as hereunder:

4.1 The Appellant's prayers:

- i) The Respondent be ordered to rescind its purported cancellation of award and proceed in a lawful manner**

With regard to this prayer the Authority of the view that, the Respondent cannot be ordered to rescind the cancellation of the award as it has already been established under the second issue that the said cancellation was in accordance with the law. However, based on the findings made by the Authority on the third issue that the award to the successful tenderer was made

after the expiry of the tender validity period and thus a nullity in eyes law, the Authority hereby orders the Respondent to restart the tender process afresh in observance of the law.

ii) Award of damages at 10% of the contract price

In their submissions, the Appellant had requested for damages of a sum equivalent to 10% of the contract price for financial loss. The Authority rejects this prayer as it does not fall within the ambit of Section 82(4) of the Act.

iii) Appeal Costs

With regard to this prayer, the Authority finds it prudent to grant the Appellant a compensation of **Tshs. 120,000/-** only being appeal filing fees since the Appeal has some merit. The Authority is unable to grant any other relief by way of costs as the Appellant did not itemize and substantiate the same.

4.2 The Respondent's prayers:

The Authority revisited the Respondent's prayer that the Appeal be dismissed for lack of merit, and rejects it as the appeal has some merit. The Authority also considered the Respondent's prayer for compensation of Tshs. 6,900,000/= for transport and accommodation for two witnesses from Arusha as well as allowances for other officials who handled the Appeal. The Authority rejects the prayer as procuring entities are not covered under Section 82(4) of the Act when it comes to issues of compensation.

Other matters which caught the attention of the Authority

In the course of handling this Appeal, the Authority came across the following pertinent issues which need to be pointed out:

- (i) The Authority reviewed, the Respondent's letter dated 31st March, 2011, seeking to re-instate

the withdrawn first point of preliminary objection and noted the following shortfalls;

- a) Firstly, it had been submitted to the Authority after the hearing of the Appeal.
- b) Secondly, it was not copied to the Appellant while it had intended to reinstate the first preliminary objection which was withdrawn during the hearing.
- c) Thirdly, the letter was signed by a person not competent to do so as all letters have to be signed by the Accounting Officer of that entity or any officer authorized on his behalf.

Such conduct is, to say the least, highly irregular and unethical.

- ii) The Authority noted that, the Respondent's Tender Board meeting held on 15th September, 2010, which reviewed the post-qualification of M/s J.P Traders, rejected the recommendations of the Evaluation Committee to award the tender to said M/s J.P Traders on the reason that, the unit price for major items such as concrete (C25) and reinforcement steel quoted were relatively lower than the prevailing market prices as well as the engineer's estimates. By so doing the Tender Board had usurped powers of the Evaluation Committee. Having noted some anomalies in the Evaluation Report the Tender Board were required to proceed in accordance with Section 68(b) of the Act which requires them to order for re-evaluation in case they differ with recommendation of the Evaluation Committee. In this instance the Tender Board did the evaluation its self which is contrary to the law.

Having considered all facts and evidence, the Authority concludes that, while the cancellation of award in favour of the Appellant was proper at law, the subsequent award to M/s Stance Technic & Civil Engineers Ltd was invalid and therefore a nullity in the eyes of the law.

On the basis of the aforesaid findings, the Authority partially upholds the Appeal and orders the following:

- **The Respondent to restart the tender process in observance of the law; and**
- **Compensate the Appellant the sum of Tshs. 120,000/- only.**

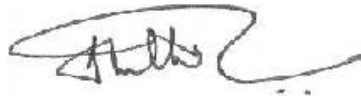
Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

Decision delivered in the presence of the Appellant and the Respondent this 5th April, 2011.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:



1. MR. K.M. MSITA



2. MRS. N.S.N. INYANGETE.....



3. MS. E. MANYESHA