

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

**APPEAL CASE NO. 68 OF 2010**

**BETWEEN**

**PHOENIX OF TANZANIA  
ASSURANCE COMPANY LTD.....APPELLANT**

**AND**

**ILALA MUNICIPAL COUNCIL .....RESPONDENT**

**DECISION**

**CORAM:**

- |                                |               |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mr. M. R. Naburi            | - Member      |
| 3. Mr. K.M. Msita              | - Member      |
| 4. Mrs. R. Mang'anya           | - 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:**

## **FOR THE RESPONDENT**

This decision was scheduled for delivery today 2<sup>nd</sup> June, 2010, and we proceed to deliver it.

The appeal at hand was lodged by **M/s PHOENIX OF TANZANIA ASSURANCE COMPANY LTD** (hereinafter to be referred to as "**the Appellant**") against **ILALA MUNICIPAL COUNCIL** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. IMC/TA/4/42005 for the Proposed Development on Plot No. 12 (former Kisutu Bus Terminal) at the APPWEA Junction of Morogoro Road and Libya Street, Dar es Salaam (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:

On 3<sup>rd</sup> June 2005, the Respondent, advertised a Request for Expression of Interest for the proposed Development on Plot No. 12 (former Kisutu Bus Terminal) at the Junction of Morogoro Road and Libya Street Dar es Salaam, Tanzania.

On 15<sup>th</sup> July, 2005, the Appellant submitted Expression of Interest for the project to which a reply was received on 23<sup>rd</sup> August 2005 indicating that the Appellant had qualified for short listing and was therefore invited to collect the Request For Proposal (hereinafter to be referred to as "**RFP**")

On 7<sup>th</sup> December 2005, the Appellant submitted their Technical and Financial Proposal as required by the RFP.

On 5<sup>th</sup> January 2007, the Appellant received a letter from the Respondent referenced IMC/TBLA/VOL.1/688 which informed the Appellant that their proposal had been accepted for a Joint Venture with the Respondent on ownership terms of 30% for the Respondent and 70% for the Appellant. Thereafter, the Appellant was invited for contract negotiation and finalization.

Negotiations between the Appellant and the Respondent were finalized in late February 2007.

On 7<sup>th</sup> May 2007, the Appellant wrote a letter to the Respondent inquiring about the execution of the finalized agreement. A reply to the same was received on 30<sup>th</sup> July 2007, vide a letter referenced IMC/MP/U.11/VOL/III/19 informing the Appellant that the proposed agreement was in the process of being sent to the Standing Committee of the Council for final approval.

The Appellant wrote several additional reminders to the Respondent inquiring about the status of the finalized agreement.

On several occasions during 2009, the Appellant attended various meetings convened by the Respondent to deliberate on the proposed changes to the Terms of Reference which the Respondent

claimed were necessary due to the new Investment Policy.

On 18<sup>th</sup> March 2010, the Respondent advertised another Expression of Interest for a Feasibility Study for Investment on Plot No. 6 Block 12 Kisutu (Tender No. LGA/015/2009-2010/C/03) for a 30 storey commercial building.

On 19<sup>th</sup> March, 2010, the Appellant received a letter from the Respondent with reference No. IMC/MP/T.8/VOL.1/11 indicating various changes to the Terms of Reference which introduced a number of changes to the draft agreement.

The Appellant being dissatisfied with the changes proposed to the finalized agreement, filed an application for review to the Respondent and copied the same letter to Public Procurement Regulatory Authority (hereinafter referred to as **PPRA**)

Upon receipt of a copy of the complaint letter from the Appellant , PPRA wrote a letter referenced PPRA/LGA/015/57 dated 20<sup>th</sup> April 2010, informing the Respondent to advise the Appellant to lodge an appeal with the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**"), since the contract had already entered into force.

On 30<sup>th</sup> April 2010, the Appellant lodged an appeal with 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 were as follows:

That, the objective of the Public Procurement Act Cap. 410 (hereinafter to be referred to as "**the Act**") include to ensure the application of fair, competitive, transparent, non discriminatory and value for money procurement standards and practices and to monitor compliance of procuring entities.

That, the Appellant participated in the tender and was awarded the same in early 2007 based on the Respondent's requirements set forth in the Terms of Reference.

That, following the successful negotiations between the Appellant and the Respondent, the draft agreement was finalized in February, 2007. However, to date, more than five years since the Respondent advertised its search for a joint venture partner in respect of the project and over three years after selecting the Appellant's proposal as the winning tender no final agreement has been executed.

That, the Respondent's delay in approving the final agreement as drafted by parties has no legal justification.

That, despite the Appellant's numerous and repeated reminders to the Respondent starting from May 2007, inquiring about the status of the negotiated final joint venture development agreement, the Respondent delayed without justification approving the final agreement as drafted.

That, irrespective of the Respondent's development of the new Investment Policy, retrospective application of that policy vis-à-vis the tender would be against the application of fair, competitive, transparent, non-discriminatory and value for money procurement standards and practices as provided under section 6(a) and (d) of the Act.

That, the retrospective application of the Respondent's purported new Investment Policy to a tender that was awarded in January 2007 would be inequitable, non transparent and discriminatory to the Appellant's detriment and therefore violative of not only the Appellant's rights but also the Tanzanian laws.

That, the contents of the Respondent's letter dated 19<sup>th</sup> March 2010, deviates from its own Terms of Reference by seeking to change to the Appellant's detriment, various items that formed the basis of the Appellant's tender submission which was

subsequently accepted by the Respondent as the winning tender.

That, according to Section 71(2) of the Act, "negotiation in respect of the award shall not substantially alter the original Terms of Reference". Also the same position has been provided for under Regulation 95(2) of the Public Procurement (Goods, Works, Non Consultant Services and Disposal of Public Assets by Tender) Regulations, 2005 (hereinafter to be referred to as "**GN No 97 of 2005**")

That, the bulk of the seven items that the Respondent demanded to be revised as set forth in the letter dated 19<sup>th</sup> March, 2010, was in blatant disregard of the Act and Regulations.

That, the Respondent's lack of timely responses and demand for revisions guised in terms of the newly formulated Investment Policy clearly violates the goals of the Act in proceeding in transparent and accountable manner during procurement.

That, there was "bad faith" on the part of the Respondent as depicted by their act of issuing an advertisement for an Expression of Interest for Feasibility Study for Investment on Plot No. 6, Block 12 Kisutu (No LGA/015/2009-2010/C/03) dated 18<sup>th</sup> March, 2010, for a 30 storey commercial building. Also this action may be termed as a violation of the Act insofar as the Appellant's winning tender was the subject of the same property.

That, the Appellant is the Respondent's partner in developing Plot No. 6, Block 12 Kisutu. Therefore it is illegal for the Respondent to substantially deviate from its own Terms of Reference in respect of the project.

That, it can be reasonably concluded that the Respondent had already determined to pursue a taller building in advance of issuing the 19<sup>th</sup> March, 2010, letter to the Appellant.

Finally, the Appellant prayed for the following reliefs;

- (a) Maintenance of the status quo vis-à-vis the TOR and letter of acceptance i.e. specific performance of the winning tender.
- (b) Specific damages of USD 100,000
  - i) Architectural and related fees USD 7,700
  - ii) Board member discussions in relation to the Appellant's proposal and site visit USD 25,000
  - iii) In house discussion by the company's management to weigh the possibilities and viability of the project USD 30,000
  - iv) Attendance of various meetings and negotiation with the Respondent USD 30,000

- v) Telephone expenses, project reports preparation, binding and submission USD 7,300
- (c) General damages of USD 2,000,000.00.
- (d) Legal fees of USD 6,490 and costs in the amount of Tshs. 300,000/-.
- (e) Require the Respondent to act and proceed in a lawful manner.
- (f) Any other remedy or relief deemed fit and equitable.

## **SUBMISSION 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 were as follows:

That, the Appellant was awarded Tender No. IMC/TA/4/42005 in January 2007.

That, the Appellant notification of the award was followed by the negotiation process which is yet to be finalized.

That, the proportion of shares of 30% and 70% as indicated in the letter of acceptance, was not final and conclusive as it was subject to negotiation. The Respondent further contended that the words, in the letter of acceptance, "contract negotiation and accomplishment" were inserted to mean and include

rates on shares and joint venture Agreement to be negotiated.

That, the Respondent has a new Investment Policy which requires most of the items in the draft Joint Venture Agreement to be negotiated by the parties. The items to be discussed include;

- value of the land,
- transfer of the ownership of the land into joint venture's name,
- Appellant's ownership for 8 years without any benefits on the Respondent side,
- percentage of shareholding and
- **composition of directors.**

That, the Respondent's advertisement which appeared in the Raia Mwema newspaper of 18<sup>th</sup> March 2010, was for search of a consultant to carry out a Feasibility Study on Plot No. 6 Block 12 in order to find out the possibility of developing a thirty (30) storey building on the same plot. However, the advertisement was taken to the newspaper prematurely as it had not been approved by the Accounting officer; hence it was illegal and not enforceable.

That, the letter dated 19<sup>th</sup> March 2010 was meant to inform the Appellant of what the Respondent was planning to negotiate in reaching the final Joint Venture agreement. It was not meant to deprive the Appellant of his rights in the said tender.

That, the Appellant's act of filing this appeal skipped the negotiation process which the Respondent still believes is the best procedure of reaching the final decision.

That, the Appellant's prayer that the status quo be maintained is disputed as the changes to the draft Joint Venture agreement are of importance due to the existence of the new Investment Policy. Also the prayer on specific and general damages is prematurely claimed as the negotiations are still going on.

Finally, the Respondent prayed for the dismissal of Appeal and each party to bear its own costs.

## **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 two main issues

- **Whether the award of tender to the Appellant 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 award of tender to the Appellant was proper at law.**

In order to ascertain whether the award of tender to the Appellant was valid at law, the Authority undertook to review the whole procurement process to see if the statutory requirements were adhered to. In so doing the Authority revisited documents submitted by parties and oral submissions vis-à-vis the applicable law as well as the RFP. In its endeavour to resolve the first issue, the Authority framed the following sub-issues;

- **Whether the tender process adhered to the law with respect to procurement under Public Private Partnerships.**
- **Whether the Appellant's proposal was submitted after the deadline for submission of the bids**
- **Whether the award made to the Appellant was done within the tender validity period**
- **Whether the changes proposed for re-negotiation of the Joint Venture agreement were proper at law**

The Authority proceeded to resolve the said sub-issues as hereunder:

**i) Whether the tender process adhered to the law with respect to Procurement under Public Private Partnerships**

In analyzing this sub-issue the Authority reviewed the applicable law and the Request for Proposals vis-à-vis documentary and oral submissions by parties in order to ascertain whether the tender process adhered to the procurement procedures under the Public Private Partnership as required by the law. In so doing the Authority started by revisiting Regulation 74(3) of GN No. 97/2005 which sets out the procedures to be followed by the procuring entity in the procurement of projects which involve public private partnerships. The said Regulation 74(3) states as follows:

**“As soon as the procuring entity identifies a project that may be concluded as public private partnership it must;**

- a) ensure that it has the expertise within that procuring entity to proceed with a public private partnership**
- b) appoint project officer from within or outside procuring entity.**
- c) Appoint transaction advisor”**  
(Emphasis supplied)

As it was conceded by the Respondent during hearing that, they did not observe the requirements of Regulation 74(3) of GN. No. 97/2005.

Furthermore, the Authority observes that a feasibility study was not done prior to the advertisement of the tender in terms of Regulation 74(4) of GN No. 97 of 2005, which provides as hereunder:

**“For public private partnership project, the procuring entity shall undertake a feasibility study in order;**

- a) to confirm affordability of the project for the procuring entity if it will incur any financial commitments**
- b) to establish factors that will determine value for money**
- c) to assess the potential of a public private partnership to deliver value for money**
- d) to identify the forms of public private partnership most likely to deliver for value for money**
- e) to establish optimum scope of the public private partnership**
- f) to identify parameters to be used to assess value for money at the procurement stage**
- g) to provide a sound basis for the procuring entity to decide on the procurement approach**

- h) to set out the proposed allocation of financial and technical risks between the procuring entity and the private party; and**
- i) to explain the capacity of the procuring entity to procure implement, manage, enforce and monitor the public private partnership project”** (Emphasis added)

The above quoted Regulation clearly stipulates the benefits of conducting a feasibility study in the public private partnership prior to the advertisement issued on 21<sup>st</sup> April 2005. The said advertisement invited eligible investors who were capable of developing a well designed commercial centre on Plot No. 12. The Authority wonders how the Terms of Reference could be prepared to suit the needs of the project while there was no feasibility study carried out prior to inviting joint venture partners for development of the plot. Had the Respondent carried out a feasibility study, it could have helped the Respondent to know the specific requirements of the project.

The Authority further noted that, the Terms of Reference issued by the Respondent on 21<sup>st</sup> April, 2005, contained contradictory information as it was not clear whether the tenderers were invited to conduct a feasibility study, or to submit a plan on how to develop Plot No.12 the former Kisutu Bus Terminal, or develop the said plot. For purposes of

clarity the Authority reproduces the relevant paragraphs as hereunder:

- 1.1 **"...The main objective of the project is to develop a well designed user friendly commercial center** which will generate reasonable returns to the investments..."
- 1.2 **"...Therefore the principle objective of the assignment is to carry out a feasibility study** and submit technical and financial proposal for the most economical investment indicating the resources required for the smooth accomplishment of the project". (Emphasis supplied)

Based on contradictions shown in the two paragraphs cited above, the Authority is of the firm view that, the Terms of Reference were not well prepared which connotes lack of expertise on the subject matter on the part of the Respondent. The Authority observes that, had the Respondent observed the requirements of Regulation 74(3) of GN. No. 97/2005 with regard procurement under Public Private Partnership arrangement they would have ensured that they would have the necessary expertise before commencing the procurement process.

The Authority also considered the Appellant's argument that, the Respondent had advertised the same tender which was awarded to the Appellant in January, 2007, while the contract negotiation process was yet to be finalized. In reply thereto the

Respondent submitted that the said advertisement which appeared on Raia Mwema newspaper of 24<sup>th</sup>-30<sup>th</sup> March, 2010 and Business Times of 19<sup>th</sup>-24<sup>th</sup> March, 2010 was an invitation for *Expression of Interest* for carrying out a Feasibility Study on the same Plot No. 12 and was not for inviting new developers. Moreover they submitted that, the said advertisement was not duly authorized as it was advertised prematurely. Based on the two submissions, the Authority is of the view that, if the Respondent was aware that the said advertisement was issued prematurely then they were supposed to take appropriate steps to clarify the said situation by issuing another advertisement. However, the Respondent's failure to denounce the same indicates that it was a valid advertisement as it is not possible for the general public including the Appellant to know that it was mistakenly issued. It is no wonder that the Appellant felt his rights have been infringed.

In view of the above findings, the Authority's conclusion on first sub issue is that, the Respondent's tender process did not adhere to the law with respect to procurement under Public Private Partnership, hence rendering the whole process a nullity.

**ii) Whether the Appellant's proposal was submitted after the deadline for submission of the bids**

In resolving this sub issue the Authority revisited Regulation 86 (1) of GN No. 97 of 2005 which provides guidance on submission of tenders. The said Regulation provides as hereunder;

**86(1) "The procuring entity shall fix the place for and specific date and time as the deadline for submission of tenders"**  
(Emphasis supplied)

The Authority revisited the Respondent's Terms of Reference issued on 20<sup>th</sup> of October, 2005 and noted that it was specifically stated that the deadline for submission of tenders will be on 5<sup>th</sup> December, 2005 that is 45 days from the date they were issued.

The Authority further noted that the Appellant's proposals were submitted on 7<sup>th</sup> December, 2005, instead of 5<sup>th</sup> December, 2005 as specified in the Terms of Reference. This is evidenced vide the Appellant's covering letter to their Technical Proposal as well as the letter from their Counsel to the Respondent dated 15<sup>th</sup> March, 2010, and the Respondent's letter to the Appellant dated 5<sup>th</sup> January, 2007. The Authority does not buy the Appellant's contention that, their proposals were submitted on 5<sup>th</sup> December, 2005, and that those were mere typographical errors, as the evidence pointed above does not indicate so. The Authority therefore is of the view that the Appellant's proposal was submitted out of time and ought not to have been considered. The Authority finds the

Respondent's act of considering the Appellant's proposal to be contrary to Regulation 89 (11) which is reproduced hereunder;

**"The tenders received after the time stipulated as well as those not opened and not read out at the tender opening shall not be considered shall be returned unopened"** (Emphasis added)

The Authority also noted that, despite the fact that the Respondent's Terms of Reference provided the deadline for submission of proposals; the opening date was not specifically indicated. The Authority noted from the Respondent's documents that the Technical proposals were opened on 23<sup>rd</sup> December, 2005. The said date was not indicated in the Terms of Reference hence it is not known as to how the tenderers were able to attend the opening ceremony. The Authority finds this to be in contravention with Section 66 (3) of the Act, read together with Regulation 86 (2) of GN No.97 of 2005 which provides as hereunder;

66(3) "All tenders submitted before the deadline time and date for submission shall be opened in public in presence of the tenderers or their representative and other parties with legitimate interest in the tender proceeding and **the tender opening shall take place at or immediately after the deadline date and time given in the tender documents for receipt of tenders ...**" (Emphasis added)

**86(2)“The time for the tender opening shall be the same time for the deadline for receipt of tenders or promptly thereafter and shall be announced, together with the place of the tender opening in the invitation to tender”**  
(Emphasis supplied)

Based on the above quoted provisions, the Authority is of the view that the Respondent erred in law for opening the proposals on 23<sup>rd</sup> December 2005; instead of 5<sup>th</sup> December 2005.

In view of the above findings, the Authority’s conclusion in respect of the second sub-issue is that, the Appellant’s proposal was submitted after the deadline for submission of proposals

**iii) Whether the award made to the Appellant was within the tender validity period**

In resolving this sub-issue the Authority revisited the Terms of Reference issued by the Respondent in order to determine the validity period specified for that particular tender. In course of doing that the Authority discovered that the Terms of Reference issued did not specify the tender validity period as required by the law. The said Terms of Reference specified only the date for submission of the proposals. The Authority finds this to be in contravention of Regulation 87(1) of GN No 97 of 2005. The said Regulation provides as hereunder;

**“87(1) The validity period required for tenders shall be specified in the invitation to tender.** Any tender which purport to be valid for a shorter period shall be rejected by the procuring entity as being substantially non responsive.”  
(Emphasis added)

Based on the above quoted Regulation, the Authority is of the firm view that, the specification of the tender validity period in tender documents is a mandatory requirement. Hence, the Respondent’s failure to specify the same is a breach of the law.

The Authority further revisited Regulation 87(3) of GN No. 97/2005 which provides as hereunder:

**“The validity period shall not exceed one hundred and twenty days from the final date fixed for the submission of tenders but it may vary depending on the nature and complexity of the contract”.** (Emphasis supplied)

According to the above-quoted provision, the tender validity period should not exceed one hundred and twenty days, unless there are special circumstances necessitating extension as per Regulation 87(4) of GN No. 97/2005. Therefore, the Respondent was required to finalize the procurement process within one hundred and twenty days (120) from the date the tenders ought to have been opened namely on

5th December, 2005. Since the Technical Proposals were to be opened on 5th December, 2005, the tender validity period ended in April 2006. Thus, the tender process was to be finalized before expiration of the tender validity period.

The intent of tender validity period is well elaborated under Regulation 87(2) of GN No. 97/2005 in the following words:

“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 the **notification of the award of contracts** and **finalise a contract.**”  
(Emphasis added)

The Authority noted that, the notification of award to the Appellant was made on 5<sup>th</sup> January, 2007, that is approximately twelve months from the date of tender opening and almost eight months after the expiry of the tender validity period contrary to Regulation 87(3) of GN No. 97 of 2005. This means that, the Respondent communicated their acceptance of the Appellant’s Proposals after the expiry of the tender validity period. The Authority finds this to be a breach of the law; a fact conceded by the Respondent during the hearing.

Furthermore, the Authority noted that, the negotiation between the Appellant and the Respondent, prior to contract signing started in January, 2007, and continued up to the time this

Appeal was filed. During the hearing, it was evident that both parties were still eager to continue with the negotiations. The Authority noted that, the negotiation process has taken more than three years and finds this to be in contravention of Regulation 87(2) of GN No. 97 of 2005 which requires the whole tender process to be completed within the tender validity period.

Based on the analysis above the Authority is of the view that, the Respondent's failure to indicate the tender validity period contravened Section 64 of the Act read together with Regulation 87 of GN No. 97/2005. Furthermore, the Respondent's aforesaid omission coupled with the fact that negotiations have dragged for over three years, equally contravened the law.

In view of the above findings, the Authority's conclusion in respect of the third sub-issue is that, the award to the Appellant was made outside the tender validity period and therefore a nullity in the eyes of the law.

**iv) Whether the changes proposed for re-negotiation of the joint venture agreement were proper at law.**

In resolving this sub issue the Authority revisited the parties' argument vis-a-vis the applicable law in order to establish whether the proposed changes during negotiation process were proper at law.

To start with the Authority revisited the Appellant's argument that the Respondent's letter dated 19<sup>th</sup> March 2010 imposed new terms and conditions during the negotiation process contrary to Regulation 95(2) of GN No. 97 of 2005 which provides for the specific areas not to be negotiated during negotiation process. The said proposed new terms are reproduced hereunder:

- 1) shares in the joint venture shall be 50%-50%
- 2) The Right of Occupancy for Plot No. 6 Block 12 shall remain in the name of Ilala Municipal Council
- 3) The right of occupancy for the plot shall not at all times be used as collateral in securing loans from any financial institution
- 4) The number of joint ventures shall be equal
- 5) Dividends from investments shall be paid to shareholders after project construction
- 6) If the soil testing allows and other factors on that site proves to be suitable in terms of soil bearing capacity to accommodate more than 25 storeys then in the development of this plot 25 storeys should be the minimum.

In reply, the Respondent submitted that, they had not imposed new terms different to the original Terms of Reference as claimed by the Appellant, instead they merely proposed conditions which they felt were necessary to be incorporated in the Joint Venture agreement in line with the Respondent's new Investment Policy.

The Authority finds that negotiation for this kind of agreement was to be conducted in accordance with Regulation 74(10) of the GN No. 97 of 2005 which provides guidance on how a preferred tenderer can be obtained under the Public Private Partnerships projects. For the purpose of clarity the Authority reproduces the said Regulation as hereunder;

**“Selection of the preferred tenderer shall be done in accordance with the guidelines issued by the Authority”**  
(Emphasis added)

The Authority referred to in the above quoted provision means PPRA.

Based on the quotation above, the Authority is of the view that the selection of the preferred tenderer was to be done in accordance with guidelines issued by PPRA which means that even the negotiation process was to be conducted in accordance with the PPRA guidelines on the public private partnership. However, by then such guidelines had not been issued by PPRA.

The Authority therefore is of the considered view that Regulation 95 (1) and (2) of GN No. 97 of 2005 quoted by the Appellant to be the basis for negotiation under the public private partnership project is not applicable as the law has clearly provided what has to be applied when searching for

a preferred tenderer under public private partnership.

Therefore, the Authority's conclusion on the fourth sub issue is that the proposed changes for re-negotiation of the joint venture agreement cannot be construed to have contravened the law as there was no such legal provisions for conducting negotiation under public private partnership arrangement.

In view of the findings under sub issue 1, 2, and 3 the Authority's conclusion on issue number one is that the award of tender to the Appellant was not proper at law.

## **2.0 To what reliefs, if any, are the parties entitled to?**

Having analyzed the contentious issues in dispute, the Authority finds it prudent to revisit prayers of the parties. To start with the Authority considered the Appellant's prayers which were as follows:

### **APPELLANTS' PRAYERS**

#### **a) Maintenance of the status quo vis-à-vis the Terms of Reference.**

In the light of the findings made above the Authority cannot order for the status quo to be maintained as it has been found, among other things, that the award to the Appellant was not

proper in the eyes of the law. This prayer is therefore rejected.

**b) Compensation for Specific damages of USD 100,000, general damages of USD 2,000,000 and Legal fees of USD 6,490.**

As regards to this prayer the Authority finds that, the compensation for general and specific damages cannot be ordered as they are too remote and the Appellant did not substantiate as to how they were arrived at. As for the legal fees, the Authority is satisfied that had it not been for the Respondent's conduct the Appellant would not have incurred expenses to pursue this Appeal. Therefore they are entitled to some compensation on the Legal fees. However, having established that the Appellant's proposal ought to have not been considered, the Authority finds it prudent to order for compensation for the legal fees at the sum of USD 3,245 only.

**c) Order the Respondent to act and proceed in a lawful manner**

With regard to this prayer the Authority is of the view that, the Respondent cannot be ordered to proceed in a lawful manner as it had been already established that they had failed to comply with the law from the beginning of the tender process, thus the whole process is a nullity. The Authority therefore orders the Respondent to re-start the tender process afresh in observance of the law.

## **RESPONDENT PRAYERS**

The Authority also considered the prayers by the Respondent that the Appeal be dismissed and each party to bear own costs as the negotiations were still in progress. The Authority observes that, the Appeal has some merit as observed in the Authority's conclusions in sub issue No 1, 2, and 3 above and therefore the Authority cannot grant the Respondent's prayer in this regard.

## **Other matters that caught the Authority's attention**

In the course of handling this Appeal the Authority came across some pertinent matters which are worth mentioning as hereunder:

- a) The Authority noted with concern the Respondent's system of record keeping as it was evidenced during the hearing that most of the important communication between the Respondent and the Appellant were not easily traceable at the time this matter was set for hearing. The Authority acknowledges the Respondent's apology that most of the officials who were conversant with this matter were no longer in the office. However, that could not be an excuse for failing to submit most of the important

documents, including recent communication between the parties.

- b) The Authority also noted that there is lacuna in the law as the guidelines referred to under Regulation 74(10) of GN 97/2005 are yet to be issued by PPRA.

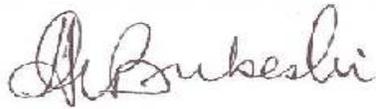
Having considered all facts and evidence, the Authority concludes that, the tender process was marred by irregularities and that the subsequent award of the tender in favour of the Appellant contravened the law and is therefore a nullity.

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

- **Re-start the tender process afresh in observance of the law.**
- **Compensate the Appellant a sum of USD 3,245 being legal costs**

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 02<sup>nd</sup> day of June, 2010.



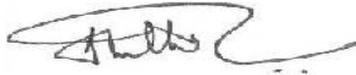
.....  
JUDGE (rtd) A. G. BUBESHI  
**CHAIRPERSON**

**MEMBERS:**

1. MR. M.R. NABURI .....



2. MR. K. M. MSITA .....



3. MRS. R. MANG'ENYA .....

