

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

APPEAL CASE NO. 71 OF 2010

BETWEEN

NIPPON AUTOMOBILE GARAGE.....APPELLANT

AND

**TANZANIA STANDARD
(NEWSPAPERS) LTD.....RESPONDENT**

DECISION

CORAM:

- | | |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Hon. V.K. Mwambalasa (MP) | - Member |
| 3. Mr. M. R. Naburi | - Member |
| 4. Mr. K.M. Msita | - Member |
| 5. Ms B.G. Malambugi | - Secretary |

SECRETARIAT:

- | | |
|-----------------------|-----------------------|
| 1. Ms. E.V.A. Nyagawa | - Legal Expert, PPAA |
| 2. Ms. F. Mapunda | - Legal Officer, PPAA |

FOR THE APPELLANT:

1. Edward Mwakabungu - Managing Director
2. Musa Selemani – Manager Nippon Automobile

FOR THE RESPONDENT

1. Richard Kerissa – Head of Procurement Management unit.
2. Saqware Mwadawa - Company Secretary

This decision was scheduled for delivery today 10th August, 2010, and we proceed to deliver it.

The appeal at hand was lodged by **NIPPON AUTOMOBILE GARAGE** (hereinafter to be referred to as "**the Appellant**") against **TANZANIA STANDARD (NEWSPAPERS) LTD** commonly known by its acronym **TSN** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. PA/102/TSN/HQ/2010/N/O for Maintenance and Repair of Motor Vehicles and Machinery for 2010/2011 (hereinafter to be referred to as "**the Tender**").

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

The Respondent invited tenders for Maintenance and Repair of Motor Vehicles and Machinery for 2010/2011 vide The Daily News dated 22nd and 23rd December, 2009.

The deadline for submission of tenders was set for 22nd January, 2010, whereby three tenders were submitted as hereunder:

S/N	Tenderer's name	Price Quoted Tshs.
1.	M/s Nippon Automobile Garage	57,013,500/= VAT exclusive
2.	M/s Kwadu Mikoma Enterprises	98,091,368/= VAT inclusive
3.	M/s Kidaba Auto Works Ltd	64,945,666/= VAT inclusive

The tenders were evaluated and the award was recommended to M/s Kwadu Mikoma Enterprises at a corrected contract sum of Tshs. 56,215,331/=. On 10th March, 2010, the Tender Board awarded the tender to the said tenderer.

On 12th May, 2010, the Respondent vide a letter referenced MA/AG.ME/TSN/128/2010, informed the Appellant that their tender was not successful as it was awarded to M/s Kwadu Mikoma Enterprises at a contract price of Tshs. 56,215,331/=.

Being aggrieved by the tender results, the Appellant vide letter referenced NAG/TSN/2010/001 dated 22nd May, 2010, lodged a complaint to the Respondent disputing the said award. A copy of their complaint letter was also submitted to the Public Procurement Regulatory Authority (hereinafter to be referred to as **"PPRA"**).

Upon receipt of the letter copied to them, PPRA vide letter referenced PPRA/PA/102/4 dated 26th May, 2010, observed that the procurement contract had already entered into force and thus advised the Appellant to appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as **"the Authority"**)

On 27th May, 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, it was evident during the tender opening that the price quoted by the successful tenderer was 73.49% higher than the Appellant who had quoted the lowest price.

That, the three tenderers who took part in the tender were all pre-qualified by the Ministry of Infrastructure Development to provide services for repair of government owned vehicles.

That, the Respondent's notification letter to the Appellant stated that the award was made to M/s Kwadu Mikoma Enterprises (hereinafter to be referred to as the **successful tenderer**) at a contract price of Tshs. 56,215,331/=. The Appellant construed the Respondent's letter to mean that the said successful tenderer was the lowest evaluated tenderer.

That, the Appellant disputes the Respondent's decision to award the tender to the successful tenderer at Tshs. 56,215,331/= since the read out price submitted by the said tenderer at tender opening was Tshs. 98,910,368/=.

That, the successful tenderer's new tender price of Tshs. 56,215,331/= which was considered by the Tender Board was re-submitted to ouster the lowest tender of Tshs. 57,013,500/= submitted by the Appellant.

That, the Respondent's notification letter on the tender results indicated that all the three tenderers qualified in all aspects and therefore price remained as the final determinant factor.

That, the issue of correction of bid price had been slotted in purposely so as to make the successful tenderer's bid to be more competitive.

That, the Respondent's Evaluation Committee had committed procedural error in its approach to correct the mistake by involving one bidder out of three and eventually award the contract.

That, by excluding the two other tenderers from taking part in the correction process, invokes the feeling that there was a conspiracy to favour the successful tenderer to become more competitive as there is a difference of almost 50% between the tendered price and the awarded price.

That, the consideration of the successful tenderer's revised price to be more responsive and lowest evaluated is contrary to the tendering procedures and transparency.

That, tendering procedures, rules and regulations are there to ensure that, the purchaser obtains value for money and are not there to disqualify whoever made a mistake in its bid.

That, the tender process is supposed to be flexible, dynamic and transparent in order to ensure that the purchaser achieves the highest level of its procurement objectives. Hence the power of Attorney could not be a major deviation since it does not have a major impact to the competing strength of the bid.

That, the person appointed to represent the company in the tender process can be changed or replaced without affecting the contract. No genuine purchaser can disqualify a competitive bid due to a defect in the Power of Attorney either due to format or any other shortfall.

That, since there was no format of Power of Attorney given by the Respondent, each tenderer was allowed to present a power of Attorney of its own without being disqualified and even distorting the evaluation process.

That, The Appellant's garage was established on 5th January, 2009, within a strong group in automobile repair industry which includes two spare parts shops under the name of Jidosha Enterprises and Nihon General Investment.

That, it acquired the business platform of Nippon Auto Works which was established in 1995 and merged into Nippon Automobile garage in 2009.

That, by the time the Respondent's tender was advertised and closed the Audited Accounts of Nippon Automobile garage were not ready. However, since it was a sole proprietor where its TIN and Audited Accounts reflects the sole owner, the Appellant submitted a Consolidated Personal Balance Sheet of his businesses.

That, the Appellant has been certified by the Ministry of Infrastructure Development to repair government owned vehicles and was also registered by the Contractors Registration Board to be capable of entering into contracts of up to Tshs. 150.0 Million

That, the Appellant prays for nullification of the award made to the successful tenderer, and that the same be awarded to Nippon Automobile Garage since they were the lowest tenderer.

The Appellant also prays that the Respondent be ordered to pay compensation of Tshs 120,000/= being the amount incurred in submitting this appeal.

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 were as follows:

That, during the evaluation process the tenders were subjected to correction of arithmetic errors pursuant to Regulation 90(11) of Public Procurement (goods, works, non-consultant Services and disposal of Public asset by tender) Regulations of 2005 (hereinafter to be referred to as **GN. No. 97/2005**) whereby the tender price quoted by Kwadu Mikoma Enterprises was reduced from Tshs. 98,910,368/= which was read out during the tender opening to Tshs. 56,215,331/=. The said correction was communicated to the said tenderer and accepted in accordance with Regulation 90(10) & (11) of GN. No. 97/2005.

That, the Evaluation Committee considered the revised tender price and found Kwadu Mikoma Enterprises to be the lowest evaluated tenderer pursuant to Regulation 90(17)(b) of GN.No. 97/2005.

That, the Appellant was disqualified for failure to meet the requirements of the Tender Documents pursuant to Regulation 90(6) of GN. No. 97/2005 in that:

- 1.The Appellant submitted a power of Attorney that was not attested by an Authorized Notary Public and Commissioner for Oaths.
- 2.The Appellant did not submit the Audited Financial Statements for three years and

instead submitted a Consolidated Balance Sheet for year 2008 only, which made it difficult to determine Nippon's financial capability.

That, due to the above factors, the Appellant was found to be substantially non responsive and disqualified during Preliminary Evaluation.

That, the Tender Board accepted the Evaluation Report and approved award of tender to Kwadu Mikoma Enterprises as service provider for maintenance and repair of Motor vehicles and Machinery for 2010/11.

That, based on the above reasons, the Respondent was of the view that the award of the tender was done fairly, transparently and objectively in accordance with the procurement laws and regulations and that Kwadu Mikoma Enterprises was more responsive than the other tenderers.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard oral submissions from parties, the Authority is of the view that, this Appeal is centred on the following three main issues;

- **Whether the Appellant was unfairly disqualified**

- **Whether the award of tender to the Successful tenderer was proper at law**
- **To what reliefs, if any, is the Appellant entitled to.**

Having identified the issues in dispute, the Authority proceeded to resolve them as hereunder;

1.0 Whether the Appellant was unfairly disqualified

In order to establish whether the Appellant was unfairly disqualified, the Authority deemed it prudent to revisit the Evaluation Report and see how the said process was conducted.

The Authority first reviewed the Tender Document so as to ascertain if it complied with the requirements of Regulation 83 of GN No. 97 of 2005 which provides guidance on the contents of the solicitation documents. According to the said Regulation, the content thereof should include, among others; eligibility criteria, technical specifications, and evaluation criteria. Having reviewed the Tender Document, the Authority finds that it did contain the requisite information necessary to be provided in the solicitation documents.

Having established that the Tender Document had contained the necessary information the Authority finds it prudent to review the evaluation process in order to determine if it was conducted in accordance

with the criteria provided in the Tender Document. In so doing, the Authority revisited the Evaluation Report and noted that the evaluation process was carried out in two stages, namely; Preliminary Evaluation and Detailed Evaluation. The Authority finds this to be contrary to the provisions of the Tender Document which specifically indicates that the evaluation was to be done in the following stages;

- Preliminary examination of tenders as per Clause 28 of the ITB;
- Examination of Terms and conditions; Technical evaluation in accordance with Clause 29 of the ITB;
- Correction of Errors as per Clause 30 of the ITB;
- Commercial evaluation of tenders – as per Clauses 32 of the ITB; and
- Post-qualification in line with Clause 35 of the ITB read together with Item 34 of the Tender Data Sheet.

The Authority further observed that, during Preliminary Evaluation tenderers were checked for compliance with Eligibility Criteria, Bid Securing Declaration, Completeness of Bid and Substantial Commercial Responsiveness. The Authority noted that at this stage of Evaluation, the Appellant's Tender was found to be non responsive due to a defective Power of Attorney and failure to submit Audit Financial Account for three years. The Authority observes that this contravened Clause 11.1 (f) of the ITB read together with Item 26 of the Bid

Data Sheet. For the purpose of clarity the said provisions are reproduced hereunder;

**“Clause 11.1 The Bid prepared by the bidder shall constitute the following components;
(f) Written Power of Attorney authorizing the signatory of the bid to commit the bidder in accordance with ITB sub Clause 20.2”** (Emphasis added)

“Item 26 Written confirmation of Authorization are: **Duly signed Power of Attorney”** (Emphasis supplied”)

The Authority revisited the Appellant’s submission on this point that no genuine purchaser can disqualify a competitive bid due to discrepancy in the Power of Attorney, either due to its format or any other shortfall since it does not have a major impact on the competing strength of the bid.

The Authority having reviewed Clause 11.1 of the ITB read together with Item 26 of the Bid Data Sheet disagrees with the Appellant’s submission that the Power of Attorney was an optional requirement. The Authority finds that the Power of Attorney is a mandatory requirement as the word **“Shall”** under Clause 11.1 of the ITB indicates that the compliance is not optional. The Authority perused the Appellant’s bid document and noted that the Power of Attorney submitted by the Appellant was defective in that it was in the form of a letter which did not fit the description of a Power of Attorney. The Authority

therefore finds the Respondent's act of rejecting Appellant's Power of Attorney to be proper.

The Authority also revisited the Respondent's argument that the Appellant's bid was found to be non responsive at the preliminary stage of evaluation due to failure to submit the Audited Financial Reports for three years. The Authority noted that, the Appellant had submitted a Consolidated Personal Balance sheet of Nippon Jidosha Enterprises which is not the same as the Audited Financial Reports of Nippon Automobile Garage who tendered for the work. The Authority also considered the Appellant's submission on this point that, they had submitted the Audited accounts of another business because as a sole proprietor and as reflected in the TIN certificates the owner of the businesses is the same. Hence, the financial capability of the company can be easily verified.

The Authority revisited Clause 11.1 (g) of the ITB read together with Item 11 of the Bid Data Sheet which provides for the eligibility criteria to be complied by the tenderers. The said Clause is reproduced hereunder:

**ITB "Clause 11.1 the Bid prepared by the bidder shall constitute the following components:
(g) Any other Document required in the Bid Data Sheet"**

BDS "Item 11 In addition to the documents stated in ITB Clause 11 the following documents must be included in the Bid;

- i. Vat /Tin Registration Certificate
- ii. Three years Audited Financial Reports**
- iii. Performance Report from previous clients
- iv. Relevant Business licence
- v. Certificate of incorporation/Registration"**
(Emphasis added)

Based on the above provision the Authority is of the view that, the Appellant was required to submit the Audited Financial Reports of three years belonging to Nippon Automobile Garage. It was also conceded by the Appellant, that the firm was registered on 30th January, 2009 under the Business Names (Registration) Act Cap. 213, hence that indicates that the business had been in existence for only one year and hence could not submit the Audited Financial Reports for three years. Therefore the Appellant did not comply with the requirements of Item 11(ii) of the Bid Data Sheet.

The Authority further noted that, the Appellant's Business is not incorporated under the Companies Act Cap. 212 but is registered under the Business Names (Registration) Act, Cap 213. The Authority finds that the firm lacks capacity to contract.

In view of the above findings, the Authority's conclusion in respect of the first issue is that, the Appellant's disqualification was justified.

2.0 Whether the award to the Successful tenderer was proper at law.

In its endeavour to ascertain whether the award to the successful tenderer was proper at law, the Authority reviewed the documents submitted and the contesting oral submissions by parties *vis a vis* the applicable law. In so doing the Authority reviewed the Evaluation Report and discovered that, during Preliminary Evaluation, the Evaluation Committee failed to note that, the successful tenderer, namely Kwadu Mikoma Enterprises had submitted an incomplete Bid Securing Declaration which did not indicate the period of time in which they would be suspended from tendering in the event there was a breach of the tendering process.

The Authority finds this to be contrary to Clause 18.1 of the ITB which provides as hereunder;

“Pursuant to ITB Clause 11, unless otherwise specified in the Bid Data Sheet **the Bidder shall furnish as part of its bid, a bid security in original form and in the amount and currency specified in the Bid Data Sheet **or Bid Securing Declaration as specified in the Bid Data Sheet**”.** (Emphasis added)

The Authority also revisited Item 22 of the Bid Data Sheet which provides as follows;

“A bid Securing Declaration shall be filled by the bidder” (Emphasis supplied)

Based on the above provisions, the Authority is of the considered view that, filling of a Bid Securing Declaration form had to be complied with as provided in the Tender Document. Thus, non adherence to this mandatory requirement should have resulted into non responsiveness of the tender. The Authority therefore is of the view that, had the Evaluators been diligent enough they would have noted the anomaly and disqualified the successful tenderer as well during Preliminary Evaluation.

The Authority revisited item 11(i) of the Bid Data Sheet and observed that, the successful tenderer was required to submit VAT or TIN Certificates of Kwadu Mikoma Enterprises as it appears in the Certificate of Incorporation so as to provide proof that the company is a tax payer and is either VAT registered or has a Tax payer Identification Number (TIN) or both of them.

However, the Successful tenderer submitted documents belonging to three different personalities. The Authority noted that, the successful tenderer had submitted the Certificate of Incorporation with the name of **Kwadu Mikoma Enterprises**, a VAT certificate with the name of **Abdallah Mohamed Kwadu T/A Kwadu Mikoma Enterprises** and a TIN certificate with the name of **Mr. Abdurhaman Mohamed Kwadu**.

The Authority finds that Abdallah Mohamed Kwadu T/A Kwadu Mikoma Enterprises, **ABDURHAMAN**

MOHAMED KWADU and Kwadu Mikoma Enterprises are not one and the same company. The three names which appear in three different certificates attached to the successful tenderer's bid connote that there are three different companies and there is no supporting evidence to prove that the companies are interrelated. The Authority is of the view that the successful tenderer ought to have been disqualified at the Preliminary Evaluation Stage for failure to comply with Item 11 of the Bid Data Sheet.

The Authority reviewed further the Evaluation Report and noted that during detailed evaluation, tenderers were checked for financial capability, terms of payment, experience in repair and maintenance of motor vehicle and machinery, qualification of key personnel, availability of working tools and support services. The Authority finds the evaluators to have erred in law by conducting detailed evaluation using criteria for post qualification. Detailed evaluation was to be done in accordance with Clause 29.2 of the ITB which provides as hereunder;

“The Procuring entity shall evaluate the technical aspects of the bid submitted in accordance with ITB Clause 12 and ITB Clause 13 to confirm that all requirements specified in Section VI Schedule of Requirements of the Bidding documents and Section VII Technical Specification have been met without Material deviation or reservation”. (Emphasis supplied)

The Authority also revisited Regulation 94 (2) of GN No. 97 of 2005 and Item 34 of the Bid Data Sheet which provides as hereunder;

“Reg. 94 (2) The Criteria for Post Qualification shall be set out in the solicitation documents and may include;

- a) Experience and Past performance on similar contracts;**
- b) Knowledge of local working conditions;
- c) Capabilities with respect to personnel, equipment and construction or manufacturing facilities;**
- d) Financial capability to perform the contract;**
- e) Current commitments
- f) Litigation record; or
- g) Any other relevant criteria.

“Item 34 Post Qualification will “be undertaken” on experience, support services, financial capability and past performance on similar contracts.”

(Emphasis added)

Having considered the provisions above the Authority is of the considered view that, Detailed Evaluation was not carried out as per Clause 29.1 instead the evaluators did post qualification after Preliminary Evaluation. That means the two tenderers who were found to be responsive at the preliminary evaluation were not checked if they had complied with the

Technical Specifications and Schedule of Requirements as provided in the Tender Document. The Authority wonders how the Respondent managed to know that the two tenders had complied with Technical Specifications without detailed evaluation pursuant to Clause 29.1 of the ITB.

The Respondent's Schedule of Requirements contained a list of equipment and spare parts against which the tenders were to be checked for compliance during the evaluation process. However, the Evaluation Report does not show that the said specifications were checked so as to ensure that the awarded tenderer had complied with the requirements.

The Authority reviewed the contents of Table No. 3. of the Evaluation Report with the heading "**Detailed Evaluation (Technical Responsiveness)**" The Authority observes that six factors were listed namely; financial capability, experience in repair and maintenance of motor vehicles and machinery , qualifications of key personnel , availability of working tools and support services. However, the Table does not show that the said evaluation was carried out.

Based on the above analysis the Authority is of the considered view that, Detailed Evaluation was not done as per Clause 29 of the ITB.

The Authority further considered the Appellant's concern on the rationale behind the price adjustment

made by the Respondent which reduced the successful tenderer's original quoted price from Tshs. 98,091,368/= to Tshs. 56,215,331/=.

The Authority revisited the Respondent's argument on this point that, the price of the successful tenderer was corrected during evaluation process because it was discovered that there were some arithmetic errors which needed to be corrected as per Clause 30.1 of the ITB.

In order to ascertain the validity of the contentions by parties on this point, the Authority examined the applicable law as well as the Tender Document in order to establish whether the alleged corrections of arithmetic errors were done in accordance with the law. In so doing, the Authority revisited Clause 30.1 of the ITB which provides for the circumstances in which correction of errors will be done. The said Clause state as follows:

"30.1 Bids determined to be substantially responsive will be checked by the Employer for any arithmetic errors. **Errors will be corrected as follows:**

- (a) **if there is any discrepancy between unit prices and the total price ...;**
- (b) **if there is an error in a total corresponding to the addition or subtraction of subtotals, the sub totals shall prevail and the total shall be corrected ;and**

(c) where there is a discrepancy between the amount in figures and in words, the amount in words will govern” (Emphasis added)

The Authority reviewed the Evaluation Report in order to ascertain if the arithmetic corrections were done in accordance with Clause 30.1. However, the Authority noted that, the Evaluation Report does not show the nature of the arithmetic errors and how those errors were corrected; it only shows the price to have been reduced from Tshs. 98,091,368/= to Tshs. 56,215,331/=.

During the hearing the Respondent submitted that, there were two types errors, namely; arithmetic errors and improper pricing of some items. The Respondent elaborated that the successful tenderer’s bid had *wrongly indicated values in certain columns of the item where the only requirement was to indicate **complied or not comply***. The total amount resulting from improper pricing was Tshs. **1,964,720/-** as shown below;

VEHICLES GENERAL SERVICES

1. Service of Toyota Hiace SU 37914 – Tshs. 1,018,045
 2. Service of Toyota Noah – Tshs. 232,755/-
 3. Service of Suzuki Maruti Tshs. 469, 640/-
 4. Service of Toyota Hiace Tshs. 244,260/-
- Total Tshs. 1,964,720/-**

The Evaluators considered this to be a minor deviation and therefore omitted the said values by deducting that figure from the total tender price.

Based on the above analysis the Authority is of the view that the Respondent's Evaluation Committee had deducted the prices on the items which were not to be priced. The Authority finds the Respondent's act to have contravened Clause 28.4 of the ITB since the action taken by the Respondent does not fit in either of the three situations in which the correction of arithmetic errors are to be done.

The said Clause 28.4 of the ITB provides for waivers to be given for some minor informality or non conformity as hereunder;

“The Procuring Entity may waive any Minor informality, non conformity, or irregularity in a bid which does not constitute a material deviation, **provided such waiver does not prejudice or affect the relative ranking of any bidder**”. (Emphasis added)

Having analyzed the above quoted Clause the Authority is of the view that the Respondent had erred in law, as the modification or waiver which had been done on the successful tenderers bid document, affects the relative ranking of other tenderers by giving the successful tenderer lower price than other tenderers.

The Authority's findings on this point is further backed by Regulation 90(11)(a) of GN. No. 97 of 2005, which guides as to what corrections should be made. The said Regulation is hereby reproduced:

"Notwithstanding sub-regulation (6), the procuring entity shall correct purely arithmetical errors that are discovered during the examination of tenders ..."
(Emphasis supplied)

Based on the above provision the Authority is of the view that, what had been done by the Respondent was not arithmetic correction of errors as it does not fall under the circumstances provided under Clause 30.1 of the ITB. The Authority finds that to be a modification of the tenderer's bid on the areas which they failed to comply with the requirements of the Tender Document contrary to Regulation 90(11) (a) of GN No. 97 of 2005 and Clause 28.4 of the ITB.

Moreover, during the hearing the Respondent was unable to substantiate how the said correction of arithmetic errors in the successful tenderers' bid resulted in the reduction of the tendered price by Tshs. 41,876,037/=. The explanation given by the Respondent above justifies the adjustment to the tune of Tshs. 1,964,700/- only. Hence, the difference of Tshs. 39, 911,337/- could not be substantiated by the Respondent.

The Authority noted further that, the process of correction of arithmetic errors on the successful tenderer's bid was not shown either in the Evaluation Report or in the minutes of Tender Board meeting which approved the said award to the successful tenderer. Therefore Authority shares the Appellants' concern that, the magnitude of the said correction of errors which lead to price adjustment in respect of the price quoted by the Successful tenderer was improper and contrary to the law.

In view of the above findings, the Authority's conclusion on the second issue is that the award to the successful tenderer was not proper at law.

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

Having resolved the contentious issues in dispute, the Authority revisited the prayers by the Appellant who had requested this Authority to order for the following;

- Annulment of the tender award and the same awarded to the Appellant.
- Compensation of Tshs. 120,000/- being appeal filling fees.

In the light of the findings made above that, the tender process was, in its totality marred by irregularities and that there was no award in the eyes of the law as the whole process was a nullity. The Authority cannot order the award to be made to the Appellant for want of Jurisdiction; and even if the

Authority was vested with such jurisdiction the Appellant would not have qualified for award since his tender was substantially non responsive. The Authority therefore, orders the Respondent to re-start the tender process in observance of the law and compensate the Appellant the sum of Tshs. 120,000/- being appeal filling fees.

Other matters that caught the attention of the Authority:

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

a) The Authority noted with concern that the composition of the Evaluation committee did not comply with the requirements of the law, that is Section 37(4) of the Act which requires that Members of the Evaluation Committee be of an appropriate level of seniority and experience. The Authority does not consider the Driver to have these qualifications. The Authority therefore is of the view that the Respondent contravened Sections 37 (3), (4) and (5) of the Act.

b)The Authority also noted that the evaluation was carried out from 3rd February 2010 up to 4th March 2010, and the personal covenants were signed on 5th March, 2010 i.e. after completing the Evaluation process instead of prior to starting the Evaluation process. The

Authority further observes that the requirement to sign Personal Covenants before beginning the evaluation process is intended to allow members to confirm that they do have any conflict of interest and to allow them not to take part in the evaluation process where they find that they have a conflict of interest. The Authority deems that this act breached the requirements of Section 37 (6) of the Act.

- c) It was evident during the hearing that the Evaluation Committee did not act independently when discharging its duty. The Head of the Procurement Management Unit conceded that he did play part in the evaluation process through continuous consultation between him and the members of the Evaluation Committee. The Authority finds this to have contravened Section 38 of the Act which require the Accounting Officer, Tender Board, Procurement Management unit, User Department and Evaluation Committee to act independently with respect to their powers and functions.

- d)** The Authority is of the view that both the PMU and the Tender Board were not diligent and acted irresponsibly for failure to detect the anomalies in the Evaluation Report and institute relevant remedial measures.

- e) While going through the Minutes of the Tender Tender Board Meeting of 10th March 2010, the Authority discovered that Tender Board approved a tender document for “**procurement of Reconditioned vehicles**”, the Authority finds such approval to have contravened Regulation 58 (3) of the GN 97 of 2005 which requires Motor Vehicles , Heavy plant and equipment and spare parts to be purchased be brand new.

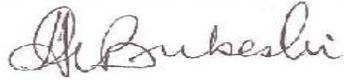
Having considered all facts and evidence, the Authority concludes that, the tender process was marred by irregularities and that the award of the tender in favour M/s Kwadu Mikoma Enterprises contravened the law and hence a nullity.

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

- **To re-start the tender process afresh in observance of the law.**
- **Compensate the Appellant the sum of Tshs. 120,000/- being Appeal filling fees.**

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 10th day of August, 2010.



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

MEMBERS:

1. HON. V.K. MWAMBALASWA (MP) 

2. MR. M.R. NABURI 

3. MR. K. M. MSITA 