

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

**APPEAL CASE NO. 72 OF 2010**

**BETWEEN**

**M/S TRADE C.P.LIMITED.....APPELLANT**

**AND**

**NATIONAL DEVELOPMENT  
CORPORATION.....RESPONDENT**

**DECISION**

**CORAM:**

- |                                |             |
|--------------------------------|-------------|
| 1. Hon. A.G. Bubeshi, J.(rtd)- | Chairperson |
| 2. Hon. V.K. Mwambalawa (MP)-  | Member      |
| 3. Mr. K.M. Msita              | - Member    |
| 4. Ms. E.J. Manyesha           | - Member    |
| 5. Ms. B.G. Malambuigi         | - Secretary |

**SECRETARIAT:**

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

**FOR THE APPELLANT:**

1. Mr. George F. Fuko – Managing Director, Trade  
C.P. Ltd
2. Mr. Venance E. Rwegoshora – Director, Trade  
C.P. Ltd
3. Mr. Sadala S. Hulwe – Accountant, Trade C.P. Ltd

**FOR THE RESPONDENT:**

1. Ms. Joyce E. Maselle – Legal Counsel, N.D.C
2. Mr. Sospeter Kerefu – Head Steel & Electrical, N.D.C

This decision was scheduled for delivery today 17<sup>th</sup> August, 2010 and we proceed to deliver it.

The Appeal at hand was lodged by **M/s TRADE C.P. LIMITED** (hereinafter to be referred to as "**the Appellant**") against **NATIONAL DEVELOPMENT CORPORATION** commonly known by its acronym **NDC** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of breach of procurement procedures on the invitation to Pre-qualify for Mchuchuma Integrated Coal Mine and Thermal Power Station Concession and Liganga Iron Ore Concession.

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

The Respondent invited Expression of Interest (hereinafter to be referred to as "**EOI**") from potential investors worldwide for Mchuchuma and Liganga concessions. The said advertisement was posted in various websites and also published in various newspapers between 11<sup>th</sup> and 19<sup>th</sup> December, 2009.

The deadline for submission of EOIs was 25<sup>th</sup> January, 2010 at 2.00p.m but the opening time was not mentioned in the said advertisement.

Some of the Applicants sought clarification on various matters whereby the Respondent circulated emails to all Applicants informing them, among other things, that the opening of the EOI was scheduled for 25<sup>th</sup> January, 2010 at 2:30p.m.

The opening took place on 25<sup>th</sup> January, 2010 at 2:30p.m. as scheduled, whereby twenty one Applicants who were listed as having submitted applications before the deadline are as shown in the Table herein below:

<b>S/ No</b>	<b>Name of a tenderer</b>	<b>Date of submission</b>	<b>Time submitted</b>
1.	The AES Corporation	22.01.2010	13:12
2.	Diyong (Tian Jin Centre) Mining Science and Technology Development Co. Ltd	22.01.2010	13:51
3.	Vale South Africa (Pty)	22.01.2010	14:15
4.	China Haudian Engineering Company Ltd	22.01.2010	14:30
5.	Rion Tinto Minerals Development Ltd	25.01.2010	09:30 am
6.	China National Machinery Industry Corporation	25.01.2010	09:25 am
7.	BHP Billiton World Exploration Inc.	25.01.2010	10:10 am
8.	Nava Bharat (Singapore) PTE Limited	25.01.2010	10:42 am
9.	EMCO Limited	25.01.2010	10:53 am
10.	Patel Engineering Limited	25.01.2010	10:53 am
11.	Anik Industries Limited	25.01.2010	11:00 am
12.	Sarda Energy & Minerals	25.01.2010	12:15 am

	Limited		
13.	VNIIMETSMASH Holding Company	25.01.2010	12:45 am
14.	M.M Intergrated Steel Mills Limited	25.01.2010	12:50 am
15.	Mawarid Mining LLC/MB Holding Co. LLC	25.01.2010	12:55 am
16.	Jeune Limited/CADB	25.01.2010	13:00 pm
17.	Mosscapital Pty Limited	25.01.2010	13:11 pm
18.	Sichuan Hongda Co. Limited	25.01.2010	13:25 pm
19.	STX Corporation (Korea) / Singida Wind Power Ltd	25.01.2010	13.40 pm
20.	Henan No. 1 Thermal Power Construction Company	25.01.2010	13:52 pm
21	Tancoal Energy Limited	25.01.2010	13:57 pm

The Appellant submitted their EOI at 2:15p.m on 25<sup>th</sup> January, 2010; that is, 15 minutes after the deadline for submission.

During the opening ceremony, the Respondent's representative announced that the Appellant's application was submitted out of time hence it would not be considered.

On 25<sup>th</sup> January, 2010, the Appellant wrote a letter referenced TCP/A/LM/02/2010 to the Respondent requesting that their EOI be considered as the company has the capability to undertake the projects and that the delay in submission was caused by traffic congestion.

On 25<sup>th</sup> February, 2010, the Respondent replied to the Appellant's request vide a letter referenced CMD/MtDC/10/02/22 by informing them that their EOI could not be considered as it was submitted after the deadline.

On 2<sup>nd</sup> March, 2010, the Appellant applied for administrative review to the Public Procurement Regulatory Authority (hereinafter to be referred to as **"PPRA"**)

The correspondence between the Appellant, PPRA, and the Respondent on this matter went on until 11<sup>th</sup> March, 2010, when the Appellant was advised to lodge an official complaint for review purposes.

On 17<sup>th</sup> June, 2010, the Appellant lodged an 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 and responses from questions raised by the Members of the Authority during the hearing may be summarized as follows:

That, the Respondent's EOI document indicated the deadline for submission of the tenders to be 2p.m on 25<sup>th</sup> January, 2010.

That, on 19<sup>th</sup> January, 2010, the Respondent circulated an email to Applicants indicating that the opening of the

tenders would take place on 25<sup>th</sup> January, 2010 at 2.30p.m.

That, according to Section 61(4) of the Public Procurement Act, Cap. 410 (hereinafter to be referred to as "**the Act**"), 2:30p.m was the time for the deadline of submission of tenders. The said section stipulates that the time specified for the opening of tenders shall be the same as the deadline for receipt of tenders. The Appellant's tender was submitted at 2.15p.m on 25<sup>th</sup> January, 2010, therefore did meet the deadline.

That, the Respondent refused to comply with Section 61(4) of the Act on the ground that the provision was not binding on their part hence rejected the Appellant's tender.

That, the Appellant's letter to the Respondent dated 25<sup>th</sup> January, 2010, was intended to resolve the matter amicably following some arguments that took place during the opening ceremony. That, the said letter should

not be taken as an admission of late submission rather as a way of trying to resolve the matter in an amicable way.

That, the tender opening process did not adhere to the laid down procedures provided for under Section 66(3) and (4) of the Act. Thus, the process of evaluation was not transparent from that point.

That, the tenders were not opened as the law requires; instead the Respondent's representative presented a list with names claimed to be those who submitted their EOIs within the scheduled time.

That, there was a possibility of a company's name to be added in the list without actual submission of documents. Hence, the Appellant was not certain that all the companies whose names were read out had actually submitted applications.

That, due to non adherence to the procedures during the opening ceremony, the evaluation process was neither transparent nor fair.

The Appellant prayed for the following reliefs;

- a) Their tender be accepted, evaluated and duly considered as it was submitted within time.
- b) The Respondent be ordered to compensate the Appellant for expenses incurred for transport, communication etc and the expected benefits arising from the projects at a sum as deemed fit by the Authority.

## **THE RESPONDENT'S REPLIES**

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

That, the Pre-qualification Document clearly indicated the deadline for submission of applications.

That, had the Respondent changed the deadline for submission of the applications, the same would have been properly communicated to the Applicants.

That, in response to some requests for clarification, the Respondent informed the Applicants *vide* emails that the opening would take place at 2.30p.m and that no changes were made on the submission deadline.

That, the Appellant submitted their application at 2.15p.m which was 15 minutes after the submission deadline time.

That, during the tender opening, the Chairman of the Tender Board read out 21 names of those who had submitted their applications on time.

That, the Appellant's name was not read out during the opening as their document was submitted after the deadline and the same was agreed by all Applicants in

attendance except the Appellant who tried to argue that the deadline was 2.30p.m and not 2.00p.m.

That, the Respondent rejected the Appellant's EOI in accordance with Clause 8.2 of the EOI Document, read together with Section 66(1) of the Act and Regulation 86 (6) of GN. No. 97 which provide guidance on submission of tenders.

That, the Appellant *vide* a letter referenced No. TCP/A/LM/-02/2010 of 25<sup>th</sup> January, 2010, acknowledged to have submitted their application fifteen (15) minutes late and gave reasons for being late. The Appellant's admission connotes that they were aware of the submission deadline.

That, the Respondent complied with Section 61(4) of the Act as the law requires the time specified for the opening of tenders to be the deadline time or promptly thereafter, hence the law does not require the two events to be done at the same time.

That, the disputed tender was not an ordinary tender as it involves procurement of investors which is different from procurement of consultancy services, works or goods where the winner receives public funds while in this tender the funds flow from investors.

That, during the opening a list of all applicants who submitted their EOI on time was read out and distributed to all who were present, hence it was not possible for the Respondent to bring in an additional applicant who did not submit an EOI.

That, in practice the opening of EOI is not necessary as they comprise a big number of applicants. The EOI is intended to shortlist few out of many; whereby the shortlisted applicants would thereafter submit their proposals.

That, the Respondent has been carrying out the process of securing investors for the Mchuchuma and Liganga projects in an open and transparent manner. The process is being monitored by a High Level Technical Committee,

comprising of senior Government officials from various key Government ministries and institutions appointed by the Cabinet to oversee the procurement process and ensure that everything is being done in accordance with the law.

That, the Appellant is not entitled to any compensation as the rejection of their application was caused by their own negligence.

Accordingly, the Respondent prayed for the dismissal of the Appeal.

### **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 three main issues, namely;

- **Whether the rejection of the Appellant's Expression of Interest was justified.**
- **Whether the opening of Expressions of Interest was conducted in accordance with the 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. Whether the rejection of the Appellant's Expression of Interest was justified.**

In resolving this issue the Authority revisited the Respondent's reason for the rejection of the Appellant's EOI, the Appellant's submissions on this point *vis-a-vis* the applicable law and the invitation for EOI. According to the evidence adduced before the Authority, the

Respondent rejected the Appellant's EOI because it was submitted after the expiry of the deadline for submission.

The Appellant disputes the said rejection on the following grounds:

- According to Section 61(4) of the Act the deadline for submission should be the same as the opening time and so the Respondent erred in rejecting their tender as it was submitted at 2.15p.m. while the opening was set at 2.30p.m.
- When the Respondent circulated emails informing the applicants that the opening of the EOI would be done on 25<sup>th</sup> January, 2010, at 2.30p.m they confused the Appellant since the latter's understanding of the law is that the deadline for submission should coincide with the opening.
- The Respondent should have been objective by considering the Appellant's qualifications for the project which would have been very beneficial to the

nation instead of rejecting their application without giving them an opportunity to be pre-qualified.

Having re-stated the submissions by parties on this point, the Authority proceeded to examine the said submissions *vis-a-vis* the applicable law and the invitation for EOI. To start with the Authority analyzed the validity of the Appellant's arguments. The Authority deemed it necessary to satisfy itself whether the reasons as well as the legal provisions relied upon by the Appellant are relevant to the Appeal at hand.

It is not disputed that, the Respondent's advertisement was titled "**REQUEST FOR PRE-QUALIFICATION**" and the content thereof read in part as follows:

**"THE REQUEST FOR PRE-QUALIFICATION:** The NDC now seeks eligible investors/developers to submit their application for pre-qualification for the above mentioned Projects".

The Respondent's intention to pre-qualify the applicants is signified by the use of the term "pre-qualification" repeatedly in the Request for Pre-qualification. The Authority revisited the definition of the term pre-qualification under Section 3 of the Act to mean:

**"a formal procedure whereby suppliers, contractors or consultants are invited to submit details of their resources, and capabilities which are screened prior to invitation to tender on the basis of meeting the minimum criteria on experience, resources, capacity and financial standing;"** (Emphasis added)

The above mentioned definition is cemented by Section 47 of the Act and further expanded under Regulation 64 of GN. No. 97/2005 which states as to what pre-qualification seeks to achieve in the following words:

**"S.47** A procuring entity may engage in pre-qualification proceedings **with a view to identifying suppliers, contractors or**

**consultants either prior to inviting tenders** for procurement of goods, works or services, or after taking part in any other procurement proceedings.

**Reg.64** Before inviting open tenders a procuring entity shall consider pre-qualifying suppliers, contractors or service providers further to Regulation 15 **so as to identify those who possess the necessary resources and competence** for completion of the eventual contract. " (Emphasis supplied)

The Authority is satisfied that the Respondent did not invite tenders, but submission of documents for pre-qualification. Having established that, the Authority proceeded to ascertain whether the provision relied upon by the Appellant was applicable in pre-qualification proceedings. In order to do that, the Authority revisited the said Section 61(4) of the Act which is reproduced herein below:

**“The time specified for the opening of the tenders submitted shall be the same as the deadline for receipt of tenders or immediately thereafter, and shall be repeated, together with the place for tender opening, in the invitation to tender.”** (Emphasis added)

The Authority observes that, first of all, the above quoted provision applies specifically to **submission and opening of tenders** and not pre-qualification. For purposes of clarity, the Authority reproduces the definition of tender as stated under Section 3 of the Act, that:

**“tender” means an offer, proposal or quotation made by a supplier, contractor or consultant in response to a request by procuring entity;”**  
(Emphasis added)

As it has already been established, the Respondent did not invite tenders but submission of documents for pre-qualification. Therefore, the Appellant relied upon a

wrong provision since pre-qualification procedures are guided by Regulation 15 of GN. No. 97/2005 and not Section 61 of the Act. The Authority further observes that, the provisions applicable should have been those guiding pre-qualification and that since the project involved Public Private Partnership (hereinafter to be referred to as **"PPP"**) Regulation 74 of GN. No. 97/2005 should have been applied hand in hand with Regulations 15 and 64 of GN. 97/2005.

Regulation 15(10) (d) read together with Regulation 74(9)(d) of GN. No. 97/2005 provide the *modus operandi* in the following words:

**"Reg.15(10) The pre-qualification documents shall include, at a minimum the following information:**

**(d) the manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing**

**sufficient time for suppliers or contractors to prepare and submit their application, taking into account the reasonable needs of the procuring entity;**

**Reg.74 (9) The notification of the request for qualification shall contain the following-**

**(d) A declaration reciting the date, time and place where the request for qualification submissions must be filed with the government sponsor."**

(Emphasis supplied)

The Authority noted that although the above quoted provisions are silent on the issue of opening, Item 14.1 of the Standard Request for Qualification – PPP Projects of June 2008, issued by PPRA (hereinafter to be referred to as "**PPP Guidelines**") fills in the gap by the following words:

“The PE **shall open** the AFQs **immediately after the deadline for submission**, at the place specified in the PITA and in the presence of the Applicants who choose to attend.” (Emphasis supplied)

Since the Appellant’s main contention is centred on the perception that Section 61(4) of the Act provides that the deadline for submission should be the same as the opening time, the Authority decided to consider it briefly. The Authority observes that, the Appellant’s interpretation is purely a misconception as the words “**or immediately thereafter**” under Section 61(4) of the Act which have the same meaning as the words “**or immediately after the deadline for submission**” contained in the above quotation were purposely promulgated to accord an option to a procuring entity in setting the opening time.

It is not surprising therefore that, in their Statement of Appeal the Appellant chose to quote part of the said subsection which was in favour of their argument and

omitted the words "**or immediately thereafter**". The Authority insists that, a legal provision has to be read in its totality so as to get the intended meaning. It is the considered view of the Authority that, had the legislature intended the said provision to mean what the Appellant claims; it would have expressly stated so without including the words "**or immediately thereafter**".

The Authority further observes that, the Appellant's argument on this point that their application was submitted before the expiry of the deadline for submission, does not have merit due to the following:

- The deadline for submission of the applications was stated in the Invitation for Pre-qualification that:

**"Completed applications for pre-qualification must be submitted** in five (5) hard copies (one original plus four copies including electronic copy on CD) in sealed envelopes, **and delivered to the address below by 2pm on Monday 25 January 2010**, 6<sup>th</sup> Floor, Room No. 604, clearly marked

“Application to pre qualify for the Mchuchuma and Liganga Projects.” (Emphasis added)

- In clarifying issues raised by some of the Applicants, the Respondent’s email sent to the applicants on 19<sup>th</sup> January, 2010, partly reads as follows:

“1 ... In view of this the **NDC had no intention to extend the deadline for submission of applications** at this stage.

2 ... **Opening session** of the Expression of Interest/Pre qualification documents (not ‘opening of bids’ as earlier reported) **will take place on the 25<sup>th</sup> January, 2010 at 2.30pm NDC Board room...**” (Emphasis added)

- In their letter to the Respondent referenced TCP/A/LM/02/2010 dated 25<sup>th</sup> January, 2010, the Appellant concedes late submission of their application to pre-qualify by stating that:

**“We have submitted our tender for the expression of Interest for the Mchuchuma and Liganga Projects at 2.15p.m. which is 15 minutes late from the submission and deadline.”** (Emphasis added)

The Authority opines that, the Appellant’s statement that their application was submitted 15 minutes after the deadline connotes that they were aware that the submission deadline was 2.00p.m. Hence, the other arguments are mere after-thoughts. The Authority also agrees with the Respondent that, the Appellant’s late submission was occasioned by negligence on their part as evidenced in the reasons given in their letter to the Respondent of 25<sup>th</sup> January, 2010. The Appellant’s admission of late submission further exonerates the Respondent from the blame that, late submission was caused by the confusion created by the Respondent’s email which stated the opening time. Accordingly, the Authority is satisfied that there was no confusion whatsoever.

With regard to the contention that the Respondent should have considered the merits of the Appellant's application despite late submission, the Authority does not accept the Appellant's argument as the law requires the deadline for submission to be set so that it can be strictly observed and not otherwise. Had the Respondent accepted the Appellant's application despite late submission, they would have breached the law. In this regard therefore, the Respondent acted correctly in rejecting the Appellant's application as per Clause 8.2 of the EOI Document which states as follows:

**"8.2 The procuring entity will reject late applications."** (Emphasis supplied)

The Authority further noted that, the Respondent rejected the Appellant's EOI in accordance with Clause 8.2 of the EOI Document read together with Section 66(1) of the Act and Regulation 86 (6) of GN. No. 97/2005. The Authority observes that there was confusion on the application of the law in the pre-

qualification process, which was conceded to by the Respondent during the hearing. It is evident from the documents availed to this Authority that, in some instances the Respondent treated this as an invitation to tender and in others as a pre-qualification for a PPP project. This is well illustrated in the first paragraph on page 3 of the Respondent's Written Replies where the Respondent was justifying rejection of the Appellant's EOI by relying on provisions that apply to tenders as follows:

“Further to this the Public Procurement Act 2004 section 66(1) and Public Procurement Regulations 2005 section 86(6) gives guidance on **submission of tender**. Regulation 86(6) states that **“Tenders received after the deadline for submission of tenders stipulated in the tender documents shall not be opened and shall not be considered...”**. (Emphasis added)

It is the considered view of the Authority that, the Respondent erred in citing Section 66(1) of the Act and

Regulation 86(6) of GN. No. 97/2005 as these apply to submission of **tenders** and not to pre-qualification or PPP projects.

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

## **2. Whether the opening of Expressions of Interest was conducted in accordance with the law.**

Having established that the project earmarked by the Respondent was a PPP, the Authority proceeded to examine whether the said opening was done in accordance with the applicable provisions under the law that guide procurement of such projects. The Authority started by revisiting submissions by parties on this particular issue.

The Appellant contended that there was no proper opening as the applications submitted were not actually opened by the Respondent in the presence of the

Applicants contrary to Section 66(3) and (4) of the Act. Much as the Respondent does not dispute the Appellant's narration of what actually transpired during the opening ceremony; they submitted that a list of the Applicants was circulated to those present and thereafter read out as the applications received were bulky and could not be taken to the opening venue. The Respondent further argued that, what took place amounted to opening as it was intended to be merely symbolic.

Having summarized parties arguments on this point, the Authority analyzed them in order to ascertain whether what transpired during the opening was done in accordance with the applicable law. With regard to the Appellant's contention and the legal provisions relied upon, that is, Section 66(3) and (4) of the Act, the Authority deemed it necessary to reproduce them herein below:

**"S.66(3) All tenders submitted before the deadline time set for submission shall be opened in public, in the presence of**

**the tenderers or their representatives and other parties with a legitimate interest in the tender proceedings and the tender opening shall take place at, or immediately after the deadline time and date given in the tender documents for the receipt of the tenders and the names of all those present at the tender opening and the organisations they represent shall be recorded by the Secretary of the respective tender board.**

**(4) The names and addresses of each tender and the total amount of each tender, and of any alternative tenders, if they have been requested or permitted, shall be read aloud by the Chairman of the meeting and recorded by the Secretary of the tender board or his delegate, as each tender is opened.” (Emphasis added)**

The Authority observes that the above provisions apply to the opening of **tenders** and are therefore not relevant to the Appeal at hand.

The Authority went on to ascertain whether what the Respondent did during the opening ceremony was proper. In doing so the Authority revisited Regulation 74 of GN. No. 97/2005 which deals with PPP projects and found that it is confined to submission of request for qualifications but is silent with regard to the opening thereof. The Authority reverted to Item 14.1 of the PPP Guidelines which guides as follows:

**“The PE shall open the AFQs immediately after the deadline for submission, at the place specified in the PITA and in the presence of the Applicants who choose to attend.”** (Emphasis added)

The Authority is of the settled view that, the Respondent erred in reading a list of the names of the Applicants instead of opening the applications in the presence of the

Applicants. The Respondent's reason that the applications were bulky and could not be carried to the opening venue is not acceptable because when this Authority requested for the documents, the same were delivered. Furthermore, where the law requires the opening of applications to take place, one cannot waive such a mandatory procedural requirement; the bulkiness of the documents notwithstanding. The Authority's firm view is that the Respondent should have opened the applications in the presence of the Applicants as the issues of transparency and fairness are amongst the pillars of the procurement law.

Upon being asked by the Members of the Authority, the reasons for not using the PPP Guidelines of June 2008, issued by PPRA, the Respondent replied that the said Guidelines were not yet posted on PPRA's Website. Furthermore, had the said Guidelines been in place at that time, they would have known as the Chief Executive Officer of PPRA is one of the members of the Respondent's High Level Technical Committee which monitors the process of the projects under Appeal. The

Authority finds this submission to lack merit as the said Guidelines are dated June 2008.

In their submissions, the Appellant contended further that, the Respondent's failure to open the EOI in public was suspicious as there was a possibility of adding a name of an applicant who did not submit an application. The Authority observes that, the Appellant's suspicion of foul play during the opening was occasioned by the Respondent's lack of transparency at the opening ceremony. The Authority therefore finds that the procedure followed during the opening of the EOI contravened the law. However, the Appellant was not prejudiced in any way by the Respondent's omission as their application was not entitled to be considered by reason of late submission. The Authority's position emanates from the fact that, the opening of the applications for EOI is not a competitive process as all those who qualify are entitled to be shortlisted.

In their oral submissions, the Appellant further claimed that, the Respondent returned their rejected application

after one month. The Authority revisited the Respondent's reply to the Appellant's complaints referenced CMD/MtDC/10/02/22 dated 25<sup>th</sup> February, 2010, whose last sentence mentioned in passing that:

**"You are advised to collect your documents from our office if you wish to do so."** (Emphasis added)

The Authority observes that, it was the duty of the Respondent to return the rejected application unopened in accordance with Clause 8.2 of the EOI Document, read together with Item 12.1 of the PPP Guidelines which state as follows:

"8.2 The procuring entity will reject late applications.

12.1 **AFQs received by the PE after the specified deadline for submission shall be declared late, shall not be eligible for consideration and shall be returned**

**unopened to the Applicant.”** (Emphasis added)

In view of the foregoing, the Authority’s conclusion with regard to the second issue is that, the opening of the Expression of Interest was not conducted in accordance with the law.

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

Having resolved the first two issues, the Authority proceeded to consider the third issue, namely, the Appellant’s prayers. The Appellant had prayed that their application be accepted, evaluated and considered and further that they be compensated for costs incurred as well as expected benefits arising from the projects. Taking cognizance of the findings and conclusion in the first issue, the Appellant’s prayers are rejected in their totality as the Authority is satisfied that their application for EOI was submitted after the expiry of the deadline.

Hence, they are not entitled to benefit from the shortcomings of their own making.

### **ANOTHER MATTER THAT CAUGHT THE ATTENTION OF THE AUTHORITY**

In the course of reviewing this Appeal the Authority noted that the Respondent has a High Level Technical Committee whose role in these projects is as quoted in the Respondent's Written Reply that:

“...NDC is carrying out the procurement process to secure investors for the Mchuchuma and Liganga projects in an open and transparent manner. **The process is being carefully monitored by the High Level Technical Committee, comprised of Senior Government Officials from various key Government Ministries and Government Institutions appointed by the Cabinet to oversee the procurement process and to ensure that**

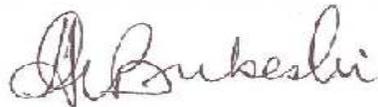
**everything is being done in accordance with the law.”** (Emphasis added)

During the hearing it came to light that, the PPRA’s Chief Executive Officer is a member of the said Committee. The Authority is concerned that, there is an apparent conflict of interest, in that, at a certain stage the Appellant’s complaint was handled by the said Chief Executive Officer in his capacity as a regulator while he was already part of the Respondent’s High Level Technical Committee.

Having considered all facts and evidence, the Authority concludes that, the Appeal has no merit and therefore it is dismissed in its entirety.

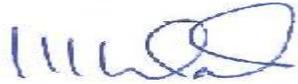
Right of Judicial Review as per Section 85 of the Act explained to parties.

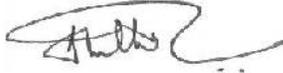
Decision delivered in the presence of the Appellant and the Respondent this 17<sup>th</sup> day of August, 2010.



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

**MEMBERS:**

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

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

3. MS. E. MANYESHA  .....