IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 91 OF 2010

BETWEEN

MADRAS SECURITY PRINTERS……. APPELLANT

AND

THE PERMANENT SECRETARY
MINISTRY OF HOME AFFAIRS …….. 1ST RESPONDENT

THE NATIONAL IDENTIFICATION
AUTHORITY…… 2ND RESPONDENT

RULING

CORAM:

1. Hon. A.G. Bubeshi, J. (rtd) – Chairperson
2. Mr. M.R. Naburi – Member
3. Mr. K.M. Msita - Member
4. Mrs. N.S.N. Inyangete - Member
5. Ms. B.G. Malambugi - Secretary

SECRETARIAT:

1. Ms. E. V.A. Nyagawa – Principal Legal Officer
2. Ms. F. Mapunda – Legal Officer

FOR THE APPELLANT:

1. Mr. Dickson Mtogesewa – Advocate, Dickson Consulting (Advocates)
2. Mr. Paschal Kamala – Advocate, Kesaria & Co. Advocates
3. Mr. Rayesh B. Dolia – Consultant to the Appellant
4. Mr. Rajah Sunder Singh – Managing Director
5. Mr. Alex Lema – Business Associate of the Appellant
6. Ms. Asia Tokutoela – Legal Officer, Kesaria & Co. Advocates

FOR THE 1ST RESPONDENT

Mr. Seperatus R. Fella – Senior Legal Officer

FOR THE 2ND RESPONDENT

1. Ms. Sabina Nyoni – Corporate Legal Secretary
2. Mr. Solanus Mhenga – Legal Officer
3. Mr. Shushuu J. Maguya – Procurement Consultant

This Ruling was scheduled for delivery today 11th February, 2011 and we proceed to deliver it.

The appeal at hand was lodged by **MADRAS SECURITY PRINTERS** (hereinafter to be referred to as **"the Appellant")** against **THE PERMANENT SECRETARY, MINISTRY OF HOME AFFAIRS** (hereinafter to be referred to as **"the 1st Respondent")** and **THE NATIONAL IDENTIFICATION AUTHORITY** commonly known by its acronym NIDA (hereinafter to be referred to as **"the 2nd Respondent")**.

The said Appeal is disputing the Pre-qualification for the procurement of Goods/Supply and Installation of Equipment and Plants for the Implementation of the National Identification System based on Smart Card Technology (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 the Appeal may be summarized as follows:

The 2nd Respondent had neither a Tender Board nor a Procurement Management Unit (PMU) and therefore the Pre-qualification stage for the procurement of the tender

under Appeal was conducted by the Ministerial Tender Board for the Ministry of Home Affairs.

On 24th May, 2008, the 1st Respondent invited applications for Pre-qualification *vide* The Guardian, Daily News, Mwananchi, Habari Leo and The East African newspapers. In addition the said notice was posted on the Government website and PPRA website.

The deadline for submission of the applications for Pre-qualification was initially set for Monday, 23rd June, 2008, but was later extended to 25th June, 2008. A total of 104 firms purchased pre-qualification documents out of which only 54 returned the documents.

On 18th February, 2010, the 1st Respondent advertised through various newspapers that, six applicants were shortlisted as listed below:

1. M/s Unisys – Republic of South Africa;
2. M/s Iris Corporation Berhad – Malaysia;
3. M/s Gleseckle & Devrlent fze – United Arab Emirates;
4. M/s Madras Security Printers - India;

5. M/s Marubeni Corporation (in association with ZETES and NEC) – Japan; and
6. M/s Tata Consultancy Services (in association with On Track Innovations Ltd) – India.

On 27th November, 2009, the 1st Respondent's Tender Board approved five firms to be pre-qualified and proceed to the second stage of the tendering process. They further directed that the said firms be given the Tender Document subject to the said document being reviewed by the Tender Board prior to its issuance.

The 2nd Respondent's Director General was quoted telling News Editors that five firms had been shortlisted for the tender under Appeal.

On 3rd April, 2010, the Appellant made an inquiry from the Respondents, *vide* letter referenced MSP/OPR/117/2010 on the contradictory information they had learnt through the media, namely,

(i) That the Appellants were among the six firms shortlisted for the tender.

(ii) The Government of Tanzania had selected five firms to be given the tender documents.

The Appellant further informed the 1st Respondent that by that date they were yet to receive the tender documents and inquired as to when they would be issued to them. The said letter was copied to the Public Procurement Regulatory Authority (hereinafter to be referred to as **"PPRA"**) and the 2nd Respondent.

On 4th November, 2010, the Appellant submitted a complaint to this Authority requesting for their intervention in the matter. However the Authority advised them to, inter alia, follow the proper procedure in lodging their appeal.

On 1st December, 2010, the Appellant wrote to the 2nd Respondent vide letter referenced MSP/OPR/430/2010,

which was copied to the 1st Respondent and PPRA, raising the following issues:

- No replies had been received in respect of inquiries made in their previous letters to the 1st Respondent which was copied to the 2nd Respondent and PPRA.
- The advertisement which appeared in the newspapers included the Appellants among the companies which had qualified for short listing and it was stated therein that the necessary communication would be sent to each firm individually but this was not done.
- They were aware that the other shortlisted companies, save for the Appellant, had been called for the next stage of tendering and no reason has been given for the exclusion of the Appellant.
- In view of the fact that the Respondents' action was not communicated to the Appellant, proceeding to the next stage of tendering would be in violation of the principles of natural justice.
- Furthermore, having short listed the Appellant the 2nd Respondent could not subsequently disqualify them.

- The Appellant therefore prayed that they be allowed to take part in the tender and that the Respondent be ordered to refrain from proceeding with the Tender process until a decision on the matter has been made.

SUBMISSIONS BY THE APPELLANT

The Appellant's arguments deduced from documents availed to this Authority as well as oral submissions and responses to questions raised by the Members of the Authority during the hearing may be summarized as follows:

That, the Appellant had submitted an application as a Consortium of M/s Madras Security Printers and M/s Bharat Electronics Ltd whereby the Appellant was the lead partner.

That, the Appellant having submitted their application for pre-qualification later learnt through the media that the Government of Tanzania had selected six firms vide an advertisement dated 24th May, 2008. The names of the

six shortlisted firms, including the Appellant's, was published in the said advertisement.

That, they are a recognized and reputable company located in India and their Consortium partner is M/s Bharat Electronics Ltd, a Government of India undertaking and were shortlisted as they were considered as qualified amongst the 54 applicants.

That, they later learnt through the media that, the Government of Tanzania had shortlisted five companies who would be issued with tender documents but the said documents were not availed to them.

That, they communicated the matter to the Secretary of the Ministerial Tender Board but there was no response.

That, they feel that, their name was left out with a malafide intention which is technically orchestrated with an intention to prevent them from seeking justice in the hands of the Authority.

That, Public Notice had clearly mentioned that the Appellant was one of the short listed companies for the next stage of tendering for the tender under Appeal. Having evaluated 54 applications, a right has accrued in favour of the Appellant which cannot be taken away for whatever circumstances as it was not attributed to any fault on their part and they are therefore entitled to be given the tender documents.

That, it is not true that M/s Bharat Electronics Ltd submitted another application in Joint Venture with M/s Power Computers Telecommunications Ltd as the said M/s Bharat Electronics Ltd wrote to the Respondents on 25th February, 2010, confirming that in the tender in dispute they had only entered into a consortium with the Appellant and not with any other firm.

That, they understand that the deadline for submission of the bids was 8th December, 2010, and by 6th December, 2010 when the Appeal was lodged they were not informed as to why the tender document was not issued

to them despite being amongst the successful shortlisted companies.

That, the Appellant has repeatedly requested for information from the Respondents and they strongly suspect that they have been kept in the dark only with an evil design to keep them away from being a competitor to the other five shortlisted firms.

That, there has been a conspiracy intended to deny them their just and legitimate rights. The conduct of the 1st and 2nd Respondents is in violation of the principles of natural justice and it is arbitrary and capricious.

That, the entire action is *void ab initio* and not binding on the Appellant. If remedial measures are not taken prior to the deadline for submission date, the Appellant will be exposed to severe financial hardship as they had mobilized and garnered their staff and equipment for the implementation of the project and have invested heavily on the same.

That, the Appellant requests the Authority to issue an interim order of stay by directing the 1st Respondent or the 2nd Respondent refrain from proceeding further with the tender process pending determination of the Appeal. Furthermore, the Appellant prays for any other orders as the Authority may deem fit.

JOINT REPLIES BY THE 1ST AND 2ND RESPONDENTS

The 1st and 2nd Respondents' documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing may be summarized as follows:

To start with, the Respondent raised a Preliminary Objection on the following legal points:

(i) The Appeal is time barred as no application for extension of time has been applied for and granted contrary to Sub Rule (1) of Rule 6 of the Public Procurement Appeals,

Rules of 2005 (hereinafter to be referred to as **"GN. No. 205/2005")**

That, the Appellant's letter dated 3rd April, 2010, shows that at that time they were aware of the decision they are appealing against. The Appeal is time barred as it was lodged on 6th December, 2010, while the decision of the subject matter of this Appeal took place in April, 2010.

That, the decision to disqualify the Appellant was made in December, 2009. On 4th November, 2010, the Appellant filed a Notice of Intention to appeal and thereafter lodged the appeal on 6th December, 2010, without seeking the leave of the Authority. The Appeal should have been lodged within 14 days from the date when the Notice was filed. The Appeal was therefore filed out of time and should not be entertained by this Authority.

(ii) The Authority is not properly moved for an application for an interim order

The Statement of Appeal contains two different prayers, that is, an interim order of stay of tender proceedings and a request that the Appeal be entertained. In the opinion of the Respondents, the two prayers should have been submitted in two different applications instead of combining them as it was done by the Appellant.

(iii) The Appeal contravenes the provisions of Sub-Rule (3) of Rule 6 of GN. No. 205/2005

That, the Appeal contravened Rule 6(3) of GN. No. 205/2005 as it was not signed by the person who signed the Application for Pre-qualification. Since the institution of legal proceedings is related to the tender process, it is pertinent that the person to whom the powers of Attorney were conferred in the Application for Pre-qualification be the one signing Appeal documents.

(iv) The Appeal contravenes the provisions of Sections 79, 80, and 81 of the Public Procurement Act, Cap. 410 (hereinafter to be referred to as **"the Act")**

The Appellant was supposed to observe the dispute resolution mechanism provided for under Sections 79, 80 and 81 of the Act in submitting their Appeal. That is to say, they were obliged to exhaust the machinery set under Section 80 of the Act, to wit, the application must first be submitted to the accounting officer, then to PPRA pursuant to Section 81 and thereafter to this Authority.

That, the Appellant had ignored the procedural requirements by skipping the first stage, namely, the Accounting Officer and the second stage, that is, PPRA before lodging an appeal to the Authority. Furthermore, the Authority's powers are only exercised where the complainant has exhausted the other review stages in accordance with Sections 80 and 81 of the Act.

That, instead of applying for administrative review to the Accounting Officer, the Appellant submitted letters seeking clarification.

Without prejudice to the above, the Respondent went on to submit on the merits as follows:

That, the Appellant's request for an interim order is not maintainable.

That, the advertisement relied upon by the Appellant cannot be taken as a binding and conclusive notification of the Appellant's qualification into the next stage of tendering process.

That, the said advertisement contained a precaution that necessary guidance to the shortlisted applicants would be communicated to them individually. Moreover, this was not an advertisement to individuals but rather to the public. Furthermore, the said advertisement was issued prematurely.

That, on 8th December, 2010, the Appellant was informed vide letter referenced CFA.31/273/02/55 that following a thorough evaluation of the submitted applications, the Ministerial Tender Board established that M/s Bharat Electronics Ltd had submitted another application in Joint Venture with another applicant, namely, M/s Power Computers Telecomms Ltd contrary to Clause 10.3 of the Pre-qualification Documents.

That, the 2nd Respondent asserts that the National ID project is classified as a security tender as per Regulation 29 of GN. No. 97/2005. It is of great national interest to be implemented unhindered on trivial pretexts as the Appellant is attempting to do.

The Respondent therefore prays for dismissal of the Appeal with costs.

THE APPELLANT'S REPLIES TO THE PRELIMINARY OBJECTION RAISED BY THE RESPONDENT

The Appellant's replies to the Respondents' four points of Preliminary Objection may be summarized as follows:

That, for the Appellant to be able to dispose of the Preliminary Objection raised they needed to refer to the evidence which goes to the merit of the Appeal. They therefore requested the Authority to allow the hearing to proceed on the merits of the Appeal.

That, the Respondents are not certain as to the time when the Appellant became aware of the circumstances giving rise to the Appeal at hand. The Appellant became aware around the time when their letter of 1st December, 2010, was written and not before that date.

That, the Respondents' objection on the manner the prayer for interim order of stay was submitted has no merit as the Authority did relax procedural requirements and no alternative guidance thereof had been issued.

That, the person who signed PPAA Form No. 1 on behalf of the Appellant was duly authorized as the power of Attorney to that effect was issued. Moreover, a person who signed the application for Pre-qualification need not

necessarily be the one who should sign the PPAA Form No. 1.

That, the Respondents' letter dated 8th December, 2010, which communicated the results of the Pre-qualification was not delivered to the Appellant and they saw it for the first time during the hearing.

That, the Authority has revisionary powers under Section 82(4)(e) of the Act where an illegality has been committed by a procuring entity. The Authority is mandated to entertain disputes of this nature.

That, the Appellant sent three letters to the Respondents as well as PPRA but none of the said bodies replied. The silence of the said bodies left the Appellant with no choice but to seek recourse to the Authority.

That, this matter could not be referred to PPRA as it was involved in the procurement process.

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 the Appeal centres on the following four issues:

- **Whether the Appeal is properly before the Authority**
- **Whether the public notice advertised by the Respondent in newspapers amounted to proper notification to the Appellant**
- **Whether the rejection of the Appellant's application 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 hereunder;

1.0 Whether the Appeal is properly before the Authority

The Authority wishes to put it on record that, during the hearing of the Preliminary Objections, it was obliged to hear the merits of this Appeal as the evidence which was needed to substantiate the arguments relied upon by parties, centered on, amongst others, various correspondences between the parties to this Appeal and the role of PPRA in the procurement process.

In resolving this issue the Authority revisited each of the four points raised in the Respondents' Preliminary Objection and arguments by parties on the said points *vis-a-vis* the applicable law as follows:

(i) The Appeal is time barred and no application for extension of time was applied for and granted contrary to Rule 6(1) of GN. No. 205/2005

In their submissions the Respondents contended that the Appeal is time barred for the following reasons:

- It was lodged on 6th December, 2010 while the Appellant's letter to the Respondent dated 3rd April, 2010, connotes that they were aware of the decision giving rise to their Appeal. The law requires an appeal to be lodged within 14 days of becoming aware of the subject matter of the appeal.
- The decision to disqualify the Appellant was made way back in December, 2009.
- The Appellant filed a Notice of Intention to Appeal on 4th November, 2010, but lodged the Appeal on 6th December, 2010, almost a month later, without seeking leave of the Authority. This was contrary to the law as they were supposed to lodge the appeal within 14 days of giving the said notice.

The Appellant's replies to the argument that the appeal is time barred were that, the Respondents are uncertain as to the time when the Appellant became aware of their disqualification. Moreover, the letter relied upon by the Respondents as proof of the Appellant's knowledge does not contain any phrase to that effect.

Having summarized submissions by parties on this particular point, the Authority started by revisiting Rule 6(1) of GN. No. 205/2005 which was relied upon by the Respondents. The said Rule reads as follows:

> **"A person who is dissatisfied with the matter or decision giving rise to a complaint or dispute may give notice of intention to appeal within seven days from the date when he became aware of the matter or decision."** (Emphasis added)

The Authority observes that, the above quoted Rule is not mandatory but rather discretionary as the catch word

used is **"may"** and not **"shall"**. This means an aggrieved person has the option to give notice of intention to appeal or not to. The Authority therefore is of the considered view that, since adherence to Rule 6(1) of GN. No. 205/2005 is optional, the Appellant cannot be said to have contravened it.

Furthermore, the Appellant's letter to this Authority dated 4th November, 2010, was a Statement of Appeal and not a notice of intention to appeal as contended by the Respondents as the content thereof does not suggest that it was a mere notice. Moreover, the said Statement of Appeal is not related to the Appeal at hand as the transaction relating to the said letter ended on 22nd November, 2010, when the Executive Secretary of the Authority informed the Appellant that their complaint could not be processed, in the following words:

> **"... on the basis of the information you have supplied we are unable to consider your complaint as an appeal and are therefore not in**

the position to accept the same for further processing." (Emphasis supplied)

The Authority's position is supported by the Appellant's letter to this Authority dated 4th December, 2010, where it was stated that:

"... We thank you for your letter under reference advising us the procedure to be adopted as set out in your law and comply with the same in order to allow you to consider the same in future. Thus, taking note of your advice, we are resubmitting our appeal and request you to consider the same and pass suitable emergent orders to prevent miscarriage of justice..." (Emphasis added)

Having established that, the purported Notice and the lodging of this Appeal were different transactions, the Respondents' contention that the Appellant should have lodged the Appeal within 14 days from the date when the Notice was lodged is not valid.

With regard to the controversy as to when the Appellant became aware of the matter giving rise to the Appeal, the Authority accepts the Appellant's replies that, their letter dated 3rd April, 2010, does not have any indication that by that time they were aware of their disqualification. Moreover, the Respondents conceded that the said letter was neither replied to nor did they communicate the outcome of the Pre-qualification proceedings to the Appellant before the Appeal was lodged. However, the Appellant also conceded during the hearing that they became aware around the period when they wrote their letter to the 2nd Respondent dated 1st December, 2010, which was also copied to the 1st Respondent and PPRA. For purposes of clarity, the Authority reproduces part of the said letter which indicates the Appellant had that knowledge at that time:

> **"Now we reliably learn that the other short listed companies have been called for the next stage of tendering however our name seems to have been omitted without any rhyme or**

reason. All of us are aware that it is a Global Tender, and it is very competitive. However, if your action is not communicated to us, the next stage of tendering is in violation of the principles of natural justice, and arbitrary. After having qualified us as early as on (sic) 24.05.2008, you cannot reject our claim." (Emphasis added)

In view of the above analysis, the Authority finds that the Appeal is not time barred as the cause of action arose on 1st December, 2010, while the Appeal was lodged on 6th December, 2010, which was within the statutory period of 14 days.

(ii) The Authority is not properly moved for an application for an interim order

In their submission the Respondents contended that the Statement of Appeal contain two distinct prayers, to wit, a request for an interim order of stay directing the Respondents to refrain from proceeding with the tender

process pending determination of this Appeal; and that the tender process be reviewed by the Authority. The Respondents were of the opinion that, the two matters should have been filed and handled separately. In reply thereof, the Appellant submitted that the Authority had relaxed procedural requirements and in the absence of clear guidance as to how one should proceed they deemed it fit to combine the same in one application since the Authority has mandate to grant them.

The Authority observes that, first of all, the point under discussion is not an objection as such as the Respondents themselves stated that they were expressing their opinion. However, Rules 7 and 8 of GN. No. 205/2005 state clearly that an appeal shall be lodged by filing a Statement of Appeal which shall contain, amongst others the following:

- Statement of facts giving rise to a complaint or a dispute; and
- Relief or remedy being sought.

The Authority wishes to enlighten the parties that, a Statement of Appeal should contain all matters that need to be addressed by the Authority and therefore the Appellant's request for an interim order of stay is quite in order.

(iii) The Appeal contravenes the provisions of Sub Rule (3) of Rule 6 of GN. No. 205/2005

In its endeavour to ascertain whether the Appeal contravened Rule 6(3) of GN. No. 205/2005, the Authority revisited submissions by parties on this point *vis-a-vis* the said Rule.

The Respondents argued that, the person who signed the said Forms for the Appellant was different from the one who signed the Appellant's application for Pre-qualification. They further stated that, the legally authorized person in terms of Rule 6(3) is the person who was given the power of Attorney in the process that gave rise to the Appeal. The Appellant's on the other hand submitted that, the person who signed the said

Form was authorized as a power of Attorney to that effect was issued. In their opinion, the signed Forms were for purposes of appeal procedure and not the application for Pre-qualification and therefore the person who signed the said application documents need not be the same who signed the said Forms.

In order to ascertain the validity of the arguments by parties on this point, the Authority revisited Rule 6(3) of GN. No. 205/2005 relied upon by the Respondents which reads as follows:

> "Notice of intention to appeal shall be made in three copies on Form PPAA No. 1 prescribed in the First Schedule to these Rules and **shall be signed by the person who signed the tender documents** or **his legally authorized representative."** (Emphasis supplied)

The Authority is of the settled view that, the content of Rule 6(3) is quite explicit in that, it gives two options. The first option is that, it allows the Form to be signed by

a person who signed the tender documents and for purposes of this Appeal, the person who signed the application for Pre-qualification. The second option is that, the Form may be signed by "**his legally authorized representative".** The Authority is of the view that, the first option is the only one tied to the signing of the tender document or Pre-qualification document while the second option may be any person as long as he has been duly authorized by the Appellant. The Authority concurs with the Appellant's interpretation of the said Sub-rule and finds that, the Appellant's representative who signed the said Form was duly authorized.

(iv) The Appeal contravenes the provisions of Sections 79, 80, and 81 of the Public Procurement Act, Cap. 410

In their oral and written replies the Respondents submitted that, the Appellant did not observe the dispute settlement procedures provided under Sections 79, 80 and 81 of the Act as they were supposed to direct their

complaints first to the Accounting Officer, then to PPRA and thereafter to this Authority. The Respondents further submitted that, the Appellants instead of directing their complaint to the Accounting Officer they sought for clarification on 3rd April, 2010, which was not replied to as the pre-qualification process was still in progress. The Appellant wrote again to the Respondents on 1st December, 2010, whereby a reply thereof dated 8th December, 2010, informed them that they had been disqualified.

In reply thereof, the Appellant stated that, they learnt from a public Notice in local newspapers that they were among the 6 firms which were shortlisted for the tender under Appeal, and the subsequent information *vide* newspapers that the Government of Tanzania had shortlisted five firms. They sought clarification on the conflicting information from the 1st Respondent three times, that is, on 17th February, 2010, 3rd April, 2010, and 1st December, 2010, respectively. The Appellant's letter of 3rd April, 2010, was also written to the 2nd Respondent and to PPRA, while the third letter dated 1st

December, 2010, was addressed to the 2nd Respondent and copied to the 1st Respondent and to PPRA but they did not receive any response. The Appellant further stated that the 2nd Respondent's letter dated 8th December, 2010, which purported to communicate the Pre-qualification results to the Appellant, did not reach them and they saw the letter for the first time during the hearing.

Furthermore, the Appellant stated that, PPRA was duly informed of the Appellant's complaints by virtue of the letters dated 3rd April, 2010, and 1st December, 2010, but they failed to intervene in their capacity as regulators. Moreover, PPRA was involved in the procurement process as a regulator and therefore referring the dispute to them would have prejudiced the Appellant's rights. The Appellant further submitted that, the Authority has inherent revisionary powers over illegal activities committed by procuring entities.

In reply to the Appellant's submissions on this point, the Respondents conceded to the involvement of PPRA in the

process stating that it was in exercise of their statutory powers as they had conducted an investigation on the procurement process following public outcry through the media that there was political interference in the said process.

Having reviewed submissions by parties on this point, the Authority observes that, the Respondents' failure to reply to the Appellant's letters on the ground that, they could not do so because the Pre-qualification process was still on going is unacceptable as it defeats the basic principles of Good Governance. The Authority is of the view that, the Respondents should have replied to the Appellants letters as they only sought to clear the contradiction pertaining to the actual number of shortlisted applicants which was brought about by the 1st Respondent's advertisement which appeared in newspapers on 18th February, 2010, *vis-a-vis* the statement of 2nd Respondent's Ag. Director General as quoted in the newspapers. Moreover, failure to respond to the Appellant's letters by the 1st Respondent, 2nd Respondent as well as PPRA portrayed a negative connotation and

triggered the Appellant's suspicion that there was a conspiracy between the said institutions.

The Authority also considered the Appellant's claim that they did not receive the letter from the 2nd Respondent dated 8th December, 2010, which communicated the results of the Pre-qualification process. During the hearing the Respondents gave contradictory statements on the modality in which the said letter was delivered to the Appellant. The first version was that it was sent via email and the second was that it was collected by hand by the Appellant's representative without signing anywhere. However, upon delivery of the additional documents which were requested by the Authority, the Respondents submitted a dispatch where the said letter was listed but it was indicated that it was posted. Given the contradictory information given by the Respondents and failure on their part to substantiate that the said letter was duly delivered to the Appellant, the Authority is inclined to accept the Appellant's submission that the Pre-qualification results were not communicated to them.

The Authority further observes that, during the hearing the Respondents submitted that the notification of the Pre-qualification results to the shortlisted applicants was made in September, 2010, but the unsuccessful applicants were not notified until December 8th 2010, by which time the Appellant had already lodged this Appeal. The Authority is of the view that, communicating the Pre-qualification results to the qualified applicants entails that by that time all the necessary approvals had been obtained and therefore the unsuccessful applicants were equally entitled to be informed within one week pursuant to Regulation 15(21) of GN. No. 97/2005 which provides as follows:

> "**Applicants who are not successful in the pre-qualification shall be accordingly informed, by the procuring entity, within one week after receipt of all the required approvals to the pre-qualification.** Only suppliers, contractors, service providers or buyers that have been pre-qualified are entitled to participate further in the procurement or disposal proceedings." (Emphasis supplied)

Furthermore, the Respondents' failure to inform the unsuccessful applicants, the Appellant inclusive, contravened Clause 10.1 of the General Instructions to Applicants (hereinafter to be referred to as **"GITA"**) of their own document which reads:

> "**Within the period stated in the PITA from the date for submission of applications, the procuring entity will notify all Applicants in writing of the results of their application**, including eligibility for domestic applicant price reference, in accordance with Clause 6, and of the names of all pre-qualified applicants and conditionally pre-qualified applicants…" (Emphasis added)

The Authority noted that, according to the Particular Instructions to Applicants (hereinafter to be referred to as **"PITA"**) the applicants were supposed to be notified **within 84 days** from the date of submission of applications. The Authority observes that, given the

nature, sensitivity and complexity of the tender, the pre-qualification process took more than two years, that is, from 26th June, 2008, when the applications were submitted until September, 2010, when the pre-qualified applicants were notified, the Respondents was duty bound to update all the applicants on the process. Had the Respondents duly notified the Appellant, it would have been easy to establish as to when the Appellant became aware of the circumstances giving rise to the complaint.

Having analyzed the evidence adduced, the Authority observes that, the Appellant's letter to the Respondents dated 1st December, 2010, was more than a request for clarification as it sought to, among other things, contest the Respondents' failure to invite them for the next stage of the tendering process whereby an ultimatum of seven days was issued. The Authority therefore considers that the said letter was an application for review in accordance with Section 80 of the Act since it highlighted the Appellant's specific complaints. Furthermore it also indicates that it is at that time the Appellants became

aware of their disqualification. Having submitted their complaint to the Accounting Officer, the Appellants were required to wait for the expiration of the statutory 30 days within which a decision from the 2nd Respondent's Accounting Officer was supposed to be made in accordance with Clauses 11.6 and 11.7 of the GITA which are similar to Section 80(4) and (5) of the Act which provide as hereunder:

> "(4) Unless the complaint or dispute is resolved by mutual agreement of the supplier, contractor or consultants that submitted it and the procuring entity, **the head of the procuring entity** or of the approving authority **shall**, **within thirty days after the submission of the complaint or dispute deliver a written decision** which shall:-
>
> (a) State the reasons for the decision; and
>
> (b) If the complaint or dispute is upheld in whole or in part indicate the corrective measures to be taken.

(5) **Where the head of the procuring entity** or of the approving authority **does not issue a decision within the time specified in subsection (4),** the supplier, contractor or consultant submitting the complaint or dispute or the procuring entity shall be entitled immediately thereafter to institute proceedings under sections 81, 82, or 85 and upon such institution of such proceedings, the competence of the head of the procuring entity or of the approving authority to entertain the complaint or dispute shall cease. ” (Emphasis added)

The Authority observes that, the Appellant erred in giving the 2nd Respondent an ultimatum of 7 days within which to address their complaints as the law provides for 30 days. The Authority further observes that, had the Appellant read between the lines, the letter from this Authority dated 22nd November, 2010, they would have made an effort to acquaint themselves with the dispute resolution mechanism under the Act, which was also

provided for in the GITA, as it was advised in the following words:

> **"We advice you to take note of the procedural requirements as set out in our Law and comply with the same in order to allow us to serve you better in future."** (Emphasis added)

The Authority observes further that, the Appellant lodged this Appeal on 6th December, 2010, when they re-submitted their Statement of Appeal and by that time the jurisdiction on the matter was still in the hands of the Accounting Officer. The jurisdiction of the Accounting Officer ended on 31st December, 2010, whereby the Appellant should have referred the matter to PPRA pursuant to Section 80(5) of the Act read together with Clause 11.8 of the GITA. The Authority is of the settled view that, the Appellant erred in lodging an Appeal to this Authority before the expiry of the 30 days after submitting their complaints to the 2nd Respondent.

The Authority also considered the Appellant's contention that, they could not submit their complaints to PPRA as the latter was part of the Pre-qualification process. The Authority revisited submissions by parties on this point. The Respondents conceded during the hearing that, the decisions which were made by the procuring entity after PPRA's investigation were in implementation of the directives and recommendations of the said regulatory body. Having reviewed additional documents submitted by the Respondents, the Authority discovered that, the involvement of PPRA was quite substantial. The Authority therefore agree with the Appellant that PPRA was not competent to entertain complaints arising from a procurement process in which some of the decisions made were in execution of its directives. This is in line with the principles of natural justice, namely, no man can be a judge in his own cause. However, since the applicable law has given both mandates to PPRA, namely, that of providing advice to procuring entities and that of being a review level and is silent as to the role of PPRA in settling disputes arising from a procurement process in which they had issued directives or recommendations,

the Appellant was required to observe the provisions of Section 80(4) and (5) of the Act and should have proceeded to refer their complaint to PPRA who would have made a decision on whether to entertain it or refrain from doing so. After this stage, the Appellant's only recourse could have been to this Authority in terms of Section 82(1) of the Act which states as follows:

> **"Complaints or disputes not amicably settled by the Authority shall be referred to the Public Procurement Appeals Authority."** (Emphasis added)

In view of the aforegoing, the Authority is satisfied that, the Respondent did provide adequate guidance in their Pre-qualification Document of the review mechanism. The said mechanisms have been explicitly provided for under Clause 11 (from Sub-clauses 11.1 to 11.16) of the GITA. Thus in the event any of the applicants including the Appellant had any complaints, they were duty bound to follow. It is the firm view of the Authority that, the Appeal was lodged prematurely to this Authority in

contravention of the dispute resolution procedures under the Act.

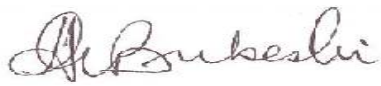
Having resolved the four points of Preliminary Objection, three of which have been rejected and one upheld, the conclusion is that the Appeal is not properly before this Authority. Accordingly, the Authority cannot address the issues pertaining to the merits of the Appeal for want of jurisdiction.

In view of the above analysis, the Respondents' fourth point of Preliminary Objection is upheld and concludes that, the Appeal is not properly before this Authority.

On the basis of the aforesaid findings, the Authority rejects the Appeal and orders each party to bear its own costs.

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

Ruling delivered in the presence of the Appellant and the Respondents this 11th February, 2011.



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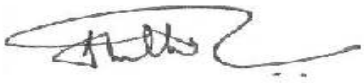
JUDGE (rtd) A. BUBESHI

CHAIRPERSON

MEMBERS:

1. MR. M. R. NABURI ……..

2. MRS. N.S.N. INYANGETE……



3. MR. K. M. MSITA ……..