

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

**APPEAL CASE NO. 128 OF 2012**

**BETWEEN**

**M/S CATS TANZANIA LIMITED..... APPELLANT**

**AND**

**MINISTRY OF EDUCATION AND  
VOCATIONAL TRAINING.....RESPONDENT**

**DECISION**

**CORAM:**

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

**SECRETARIAT:**

- |                         |                         |
|-------------------------|-------------------------|
| 1. Ms. E.V.A. Nyagawa – | Principal Legal Officer |
| 2. Ms. F.R. Mapunda     | – Legal Officer         |
| 3. Mr. H.O. Tika        | - Legal Officer         |
| 4. Ms. V.S. Limilabo    | - Legal Officer         |

**FOR THE APPELLANT:**

1. Mr. Zeno Tarimo – Advocate, Octavian & Co.  
Advocates
2. Mr. Cyrus Dupetawalla – Managing Director

**FOR THE RESPONDENT**

1. Ms. Tunu Temu – Head of Legal Services Unit
2. Mr. J.J. Kibona – Head of Procurement Management  
Unit

This Decision was scheduled for delivery today 10<sup>th</sup> September, 2012, and we proceed to deliver it.

The Appeal at hand was lodged by **M/s Cats Tanzania Limited** (hereinafter to be referred to as "**the Appellant**") against the **Ministry of Education and Vocational Training** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. ME-024/2011-2012/SEDP II/G/02 for the Supply of Computers and Multimedia Facilities which had two Lots. The Appeal at hand is confined to Lot No. 2 which was for Supply of 50 units of DVD/CD Players, 50 TV sets and 50 units of Stabilizers (hereinafter to be referred to as "**the tender**").

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

The invitation for tenders was advertised in the Daily News dated 20<sup>th</sup> January, 2012, and the East African Business of 23<sup>rd</sup>-29<sup>th</sup> January, 2012.

The deadline for submission of tenders was set for 22<sup>nd</sup> February, 2012, whereby the following eight tenders were submitted for the tender in dispute:

<b>S/ NO</b>	<b>TENDERER'S NAME</b>	<b>QUOTED PRICE (VAT INCLUSIVE)</b>
<b>1</b>	<b>M/s Comptech ICS (T) Ltd.</b>	<b>USD 270,098.39</b>
<b>2</b>	<b>M/s Venita Company Ltd.</b>	<b>TSHS. 530,646,000.00 (for Lots 1 &amp; 2)</b>
<b>3</b>	<b>M/s Power Computers</b>	<b>TSHS. 224,495,000.00</b>
<b>4</b>	<b>M/s Freedom Electronics</b>	<b>TSHS. 482,499,999.31</b>
<b>5</b>	<b>M/s Cats Tanzania Ltd.</b>	<b>USD 223,803.71</b>
<b>6</b>	<b>M/s Sura Technologies</b>	<b>TSHS. 464,650,000.00</b>
<b>7</b>	<b>M/s Simply Computers Ltd</b>	<b>USD 356,171.20</b>
<b>8</b>	<b>M/s Scan Tanzania Co. Ltd.</b>	<b>USD 298,017.50</b>

The tenders were thereafter evaluated whereby five tenders were rejected during preliminary evaluation for non conformity with the Tender Document while three tenders, the Appellant's tender inclusive, were found to be substantially responsive.

The said three tenders were subjected to detailed evaluation whereby the price quoted by the Appellant was corrected to read **USD 227,775.99** compared to their original price of **USD 223,803.71**. The said tenders were thereafter subjected to currency conversion and ranked as follows:

<b>TENDERER'S NAME</b>	<b>QUOTED PRICE IN TSHS.</b>	<b>RANK</b>
<b>M/s Cats Tanzania Ltd.</b>	<b>362,412,099.93</b>	<b>1</b>
<b>M/s Comptech ICS (T) Ltd.</b>	<b>429,750,847.35</b>	<b>2</b>
<b>M/s Simply Computers Ltd</b>	<b>566,700,434.61</b>	<b>3</b>

The Evaluation Committee recommended the award of the tender to be made to the Appellant at a contract sum of **Tshs. 362, 412,099.93 (USD 227,775.99)**. The said recommendation was approved by the Tender Board on 10<sup>th</sup> April, 2012.

On 20<sup>th</sup> April, 2012, the Respondent *vide* a letter referenced ME-020/2011-12/SEDP II/G/02/39 informed the Appellant that they had been awarded the tender at a contract sum of USD 197,536.56. They were also requested to furnish Performance Security equivalent to 10% of the contract price within twenty eight days as per Clause 42.1 of the Instructions to Bidders (hereinafter to be referred to as "**ITB**").

On 11<sup>th</sup> May, 2012, the Appellant acknowledged receipt of Respondent's letter of acceptance. However, in the same letter they indicated that the models quoted in their tender were no longer in production and therefore they would supply a new model which was of higher specification. Additionally, they indicated that the said higher model would take 75 days to manufacture and deliver against the tendered period of 28 days.

On 25<sup>th</sup> May, 2012, *vide* a letter referenced ME-024/2011-12/SEDP II/G/02/49 the Respondent acknowledged receipt of Performance Bond from the Appellant and required them to extend their bid validity for at least 14 days.

On 28<sup>th</sup> May, 2012 the Appellant *vide* a letter referenced CATS/SALES/0020/2011 extended the bid validity period for twenty eight days from 22<sup>nd</sup> May 2012 to 18<sup>th</sup> June, 2012.

The Tender Board meeting held on 25<sup>th</sup> June, 2012, deliberated on the changes proposed by the Appellant in relation to the new TV model to be supplied and the request for extension of the delivery period and observed that, the proposed changes were unacceptable. Accordingly, they resolved to cancel the award made to the Appellant and directed that the specifications be rechecked prior to re-advertising the said tender.

On 26<sup>th</sup> June, 2012, the Respondent *vide* letter referenced No.ME-024/2011-12/SEDP II/G/02/59 informed the Appellant that the award of the tender made in their favour had been cancelled.

Being dissatisfied with the cancellation of the award the Appellant wrote two letters referenced

CATS/SALES/021/2012 and CATS/SALES/022/2012 dated 28<sup>th</sup> June, 2012, and 29<sup>th</sup> June, 2012, respectively requesting the Respondent to reconsider their decision to cancel the award. In the said letters the Appellant explained the reasons which forced them to supply a new model of TV with higher specifications and the need to extend the delivery period. In addition, they informed the Respondent that they had already placed an order immediately after receiving the notification of award of the tender and had made a 50% upfront payment for the items ordered in order to speed up the process.

On 20<sup>th</sup> July, 2012, vide a letter referenced ME-024/2011-12/HQ/G/02/73 the Respondent informed the Appellant the reasons for cancellation of award made to them.

Being dissatisfied with Respondent's decision, on 3<sup>rd</sup> August, 2012, the Appellant filed an Appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**").

Upon receiving notification of the Appeal, the Respondent raised a Preliminary Objection on the ground that the Appellant had erred in law for lodging the Appeal directly to this Authority. As a matter of procedure, the Authority is obliged to resolve the Preliminary Objection raised before addressing the merits of the Appeal.

### **THE RESPONDENT'S SUBMISSIONS ON THE PRELIMINARY OBJECTION**

The Respondent's Preliminary Objection was that, the Appeal is bad in law for contravening the requirements of Sections 81 and 82(1) of the Public Procurement Act, Cap. 410 (hereinafter to be referred to as "**the Act**") and Clause 52.1 of the ITB.

Having stated the Preliminary Objection, the Respondent proceeded to submit as follows:

That, the Appellant had erred in law for lodging their Appeal directly to this Authority, in that, having received the Respondent's decision to cancel the award, they

ought to have referred the matter to the Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**") in accordance with Section 81 of the Act. It was further submitted that, if the Appellant could still be dissatisfied by PPRA's decision then the matter could have been referred to this Authority.

That, according to Section 55(7) of the Act a procurement contract enters into force once the notice of award has been communicated to the successful tenderer, however, it is the Respondent's view that the said provision should be read together with the Regulation 97(4) of the Public Procurement (Goods, Works, Non consultancy Services and Disposal of Public Assets by Tender) Regulations, Government Notice No. 97 of 2005 (hereinafter to be referred to as "**GN No. 97 of 2005**") which states that a procurement contract enters into force upon contract signing by parties. Thus, as regards the tender under Appeal the contract is yet to be signed, as the Respondent intends to re-advertise the tender. Hence, the Appellant ought to have referred the

matter to PPRA instead of lodging an appeal directly to this Authority.

## **THE APPELLANT'S REPLIES ON THE PRELIMINARY OBJECTION**

In reply to the Preliminary Objection raised by the Respondent, the Appellant submitted that following the cancellation of the award, they went to PPRA and sought advice on the matter. PPRA advised them verbally to lodge their Appeal directly to this Authority.

In conclusion, they prayed that the Preliminary Objection be rejected as the Appeal has been properly filed before the Authority.

## **THE AUTHORITY'S ANALYSIS AND RULING ON THE PRELIMINARY OBJECTION**

Having gone through the documents submitted and having heard oral submission by parties, the Authority is of the view that, the Preliminary Objection is based on

the jurisdiction of this Authority to entertain the Appeal. Hence, the Authority deems it prudent to first resolve the issue as to whether the Appeal is properly before it.

In resolving this issue, the Authority started by revisiting submissions by parties on this point. The Respondent claimed that the Appeal is improperly before this Authority for the Appellant's failure to observe the dispute resolution procedures. They claimed further that, it was wrong for the Appellant to lodge an appeal directly to this Authority instead of submitting their complaints first to the Accounting Officer, then to the PPRA and thereafter to this Authority. In reply thereof the Appellant submitted that, in exercise of their statutory right to administrative review they visited PPRA Offices where they were verbally advised to lodge the Appeal to this Authority. It is evident that while the Respondent avers that this Authority does not have jurisdiction to entertain the Appeal for the Appellant's failure to adhere to procedural requirements, the Appellant does not know why they appealed directly to this Authority, save for the fact that, they were so advised by PPRA. According to

the submissions by parties the Authority noted that both of them are not conversant with the review procedures provided for in the Act.

In view of the foregoing, the Authority wishes to state that, once a procurement contract has entered into force by virtue of Section 55(7) of the Act, any complaint which arises thereafter is lodged directly to this Authority in accordance with Section 82(2)(a) of the Act. For purposes of clarity the Authority reproduces the said provisions hereunder:

**S. 55(7) "The procurement contract shall enter into force when a written acceptance of a tender has been communicated to the successful supplier, contractor or consultant." (Emphasis added)**

**S. 82(2) "A supplier, contractor or consultant entitled under section 79 to seek review may submit a complaint or dispute to the Public Procurement Appeals Authority:-"**

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

The above quoted provisions entail that, this Authority has sole original jurisdiction in complaints where a procurement contract has already entered into force.

Relating Section 55(7) of the Act as quoted above to the Appeal at hand, the Authority observes that according to the documents availed by the Respondent, the procurement contract pertaining to the tender in dispute entered into force on 20<sup>th</sup> April, 2012, when the

notification of award was made. That is to say, by the time this Appeal was lodged on 3<sup>rd</sup> August, 2012, the procurement contract had already entered into force pursuant to Section 55(7) of the Act. In this case therefore, by lodging their complaint directly to this Authority the Appellant was correctly exercising their right under Section 82(2) (a) of the Act.

Having noted that parties to the Appeal at hand are not acquainted with the dispute resolution procedures under the Act, the Authority wishes to enlighten them that, the procedures stated by the Respondent are only applicable in situations where the cause of action arose before the communication of acceptance of award of tender has been made.

In view of the above analysis, the Authority rejects the Preliminary Objection and concludes that the Appeal is properly before it.

Having rejected the Respondent's Preliminary Objection the Authority proceeded to determine the matter on merit.

## **SUBMISSIONS BY THE APPELLANT ON THE MERITS OF THE APPEAL**

The Appellant's arguments as 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 Appeal has been made against the Respondent's decision to cancel the award of tender made to the Appellant valued at USD 197,536.56.

That, the offer to supply TVs with higher specifications came up after they had been awarded the tender and consulted the official distributor for Samsung products in Tanzania, namely, M/s Freedom Electronics; who informed them that the TV model quoted in their original

tender was obsolete and was no longer available in their stock.

That, they were further informed by the said distributor that, because the new products were not in stock, the manufacturer, namely, Samsung needed 75 days for production and delivery since it was a back to back order. Thus, the Appellant requested for extension of delivery period from 28 days to 75 days.

That, if the Respondent was not satisfied with the TV model with higher specifications that the Appellant had intended to supply, they ought to penalize the Appellant for the changes, if the explanations given were not satisfactory. However, since the Appellant had provided explicit reasons behind the change in model of the product and the delay in delivery of the ordered items, there were no justifiable reasons for cancelling the award.

That, since the TV model to be supplied had additional features, the tendering rules requires a tenderer to either

match the same or supply a model with higher specifications, but not lower specifications. Hence, the Respondent ought to have accepted the new TV model and should not have cancelled the award.

That, since the model to be supplied was the latest, the data sheet was not yet available on the Samsung Website by the time the Respondent requested for the specifications thereof. That is why they were not able to provide the same before the expiry of the bid validity period.

That, the Appellant had informed the Respondent on the additional features contained in the new model *vide* letters dated 28<sup>th</sup> and 29<sup>th</sup> June, 2012, and that the said features would benefit schools and colleges. In the said letters the Respondent was also informed that the supply of the new model would not affect the tender price.

That, in spite of explaining in detail and submitting all specifications required for the new model *vide* letters of

28<sup>th</sup> June and 29<sup>th</sup> June, 2012, the Respondent insisted on the cancellation of the award.

Therefore, the Appellant prayed for the following;

- (i) the Respondent's decision to cancel the award be revoked;
- (ii) the Respondent be ordered to accept the goods from the Appellant; and
- (iii) the Respondent be ordered to pay the Appellant a sum of USD 197,536.56 being costs for the ordered products.

## **REPLIES BY THE RESPONDENT ON THE MERITS OF THE APPEAL**

The Respondent's arguments as 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 tender under Appeal was divided into two Lots, namely; Lot 1 and Lot 2. The Appellant's tender was found to be substantially responsive, that is why they were awarded Lot 2 and were required to furnish a Performance Bond of 10% of the contract value within 28 days.

That, the Appellant confirmed the award but informed the Respondent that they would not be able to supply the Samsung Model 55D6400 TV as quoted in their original tender. They instead offered to supply a new model which was of higher specifications because the quoted model was no longer in stock as the product had become obsolete. The Appellant therefore requested that the delivery period be extended as the new products required 75 days to be manufactured and delivered.

That, the Appellant was verbally requested to provide specifications for the new TV model which they intended to supply in order to verify if the same could be acceptable to the Respondent; but they failed to do so.

That, the Performance Bond was accepted and the bid validity period extended in order to give the Appellant an opportunity to submit specifications of the new model and sign a contract if the same could be acceptable to the Respondent. It is true that the Respondent received and accepted the Performance Bond from the Appellant and returned the Bid Security. However, the Performance Bond does not amount to a contract.

That, until the expiry of the extended bid validity on 25<sup>th</sup> June, 2012, the Appellant had not submitted the details of the specifications of the new TV model.

That, the phrase "higher specifications" does not provide parameters upon which the Respondent could verify and examine the suitability of the model being offered by the Appellant. It was therefore, the duty of the Appellant to provide full details of the proposed new TV model at the time of submitting the request for model change.

That, it is only after communicating the award cancellation of the award, on 26<sup>th</sup> June, 2012, the

Appellant wrote a letter dated 28<sup>th</sup> June, 2012, referenced CATS/SALES/021/2012, which disclosed that the TV model to be supplied was "Samsung SMART TV (Samsung VASSEL 7500-series 7 55 Inch 3D LED TV".

That, the Appellant's failure to abide by the tender requirement to supply the quoted model amounted to interference with the entry into force of the procurement contract as per Regulation 97(4) of GN No. 97/2005.

That, the request to delay delivery of the goods applies to contracts which are in the execution stage which is not the case in the Appeal at hand. Also Clause 24.2 of the ITB stipulates that the extension of time can be made at the contract execution stage at the discretion of the procuring entity.

That, the decision to cancel the award had been reached after the Appellant had offered to supply a higher specification model of TV contrary to the requirements of the Tender Document, upon which the award was made.

Finally, the Respondent prayed for dismissal of the Appeal in its entirety.

## **THE AUTHORITY'S ANALYSIS ON THE MERITS OF THE APPEAL**

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

- **whether the cancellation of the award of the tender to the Appellant was justified; and**
- **to what reliefs, if any, are the parties entitled to.**

Having identified the issues in dispute, the Authority proceeded to resolve them as follows:

## **1.0 Whether the cancellation of the award of tender to the Appellant was justified**

In resolving this issue the Authority deems it necessary to revisit the circumstances surrounding the cancellation of the award of the tender and submissions by parties thereof vis-à-vis the applicable law and the Tender Document. To start with the Authority considered the Appellant's main argument that their request to supply TV models with higher specifications arose after they had realized that the models quoted in their tender were no longer in production. The Appellant insisted that there was no change whatsoever in the specifications, but that the TV model to be supplied had, in addition to the specifications contained in the Tender Document, other features which could benefit the Respondent.

In reply to the Appellant's contention the Respondent stated that, the Appellant was required to supply the TV model which was quoted in their tender. Therefore, a request to supply a TV model with higher specifications indicated that they had intended to supply a TV model

with new specifications which were not known to the Respondent. It was contended further that, the change of specifications before signing of the contract amounted to interference with the entry into force of a procurement contract contrary to Regulation 97(4) GN. 97 of 2005. Thus, the Respondent was forced to cancel the award made to the Appellant.

Before analyzing the validity of submissions by parties the Authority deems it prudent to revisit two pertinent questions posed by the Members of the Authority to the Appellant during the hearing for purposes of bringing clarity to the actual cause of the Appellant's request to supply a new TV model and extension of delivery period. Firstly, the Appellant was requested to explain why they had tendered without inquiring from the manufacturer whether the goods to be supplied would be available or not, knowing well that once an offer has been accepted it becomes a binding contract between parties. The Appellant's reply was that they were not in direct communication with the manufacturer but they obtained all the information regarding the TV models through M/s

Freedom Electronics who is Samsung's Authorized Distributor in Tanzania. They further stated that, they became aware of the non availability of the TV model they had originally offered to supply after they were awarded the tender and communicated with the distributor for purposes of ordering the said products.

Secondly, the Appellant was asked to elucidate the reasons for not having direct communication with the Manufacturer as submission of the Manufacturer's Authorization was amongst the mandatory requirements under Item 15 of the Bid Data Sheet but instead they submitted two documents, namely, a '**Trading Authorization**' from M/s Freedom Electronics who is the official distributor of Samsung products in Tanzania and a Manufacturer's Authorization in the name of M/s Freedom Electronics. The Appellant conceded that they did not submit a Manufacturer's Authorization in their name as they are not authorized dealers and that they did not comply with this criterion.

It is evident therefore that the requirement to submit Manufacturer's Authorization was crucial as per Item 15 of the Bid Data Sheet which required tenderers to submit evidence from the manufacturer that they have been authorized to supply the goods they had offered. The said provision states as follows:

**“The bidder is required to include with its Bid, documentation from the manufacturer of the goods, that it has been duly authorized to supply, in the United Republic of Tanzania the goods indicated in its bid.”** (Emphasis added)

Given the fact that the Appellant conceded during the hearing that they did not submit the said authorization, the Authority does not comprehend the Evaluation Committee's act of indicating that the Appellant had complied with the requirement to submit Manufacturer's Authorization in the absence of such evidence in their respective tender. The Authority's concern emanates from the fact that, the Evaluation Report indicates that two tenders were disqualified for failure to submit

Manufacturer's Authorization, in that, M/s Sura Technologies had attached authorization from the distributor of the offered products while M/s Scan Tanzania Ltd had submitted an authorization from the supplier of the offered goods. The Authority is dismayed that the Appellant's tender was found to be substantially responsive, despite this material omission. The Authority is of the settled view that had the Evaluators been fair and consistent they would have equally disqualified the Appellant's tender for failure to comply with Item 15 of the Bid Data Sheet.

The Authority also considered the Appellant's contention that the new TV model to be supplied was similar to the one specified in their tender, except that, the new model had more features which were beneficial to the Respondent. The Authority does not agree with the Appellant for the following reasons:

- Regulation 83 of GN. No. 97 of 2005 requires the solicitation documents to specify, amongst others, the specifications of the goods to be supplied. When

the Appellant submitted their tender they were aware of the specifications requested by the Respondent and they offered to supply TVs which fitted the description specified in the Tender Document.

- The Appellant's tender was evaluated with the other tenders submitted therefore the change introduced after the award of the contract meant that the new model to be supplied would not be subjected to evaluation which is wrong, in that, there was no room for the other tenderers to be accorded equal opportunity in the process. Such conduct defeats the principles of equality of opportunity and fairness of treatment to tenderers provided for under Section 43(a) and (b) of the Act. The said provisions read as follows:

"43. In the execution of their duties tender boards and procuring entities shall strive to achieve the

highest standards of equity, taking into account:-

(a) **equality of opportunity to all prospective suppliers, contractors or consultants;**

(b) **fairness of treatment to all parties; and**

(c) the need to obtain the best value for money in terms of price, quality and delivery having regard to set specifications and criteria”  
(Emphasis supplied)

- The Appellant’s original offer indicated a delivery period of 28 days which was in compliance with Item 36 of the Bid Data Sheet which stated categorically that the goods should be delivered **“within four weeks from the date of signing the Contract”**. It was not proper for the Appellant to request for extension of delivery period to 75 days as this was one of the criteria which was considered during the evaluation process. Had the Appellant’s tender indicated such a delivery period their tender would have been rejected for non compliance.

In view of the above findings, the Authority considered the Appellant's request to supply a new TV model as tantamount to submitting an alternative tender which was not allowed under Item 24 of the Bid Data Sheet which stated categorically that 'Alternative bids to the requirements of the bidding documents **"will not"** be permitted'. Assuming alternative bids were allowed, the same ought to have been submitted together with their tender at the time of tender submission so that it could have been equally evaluated.

The Authority also considered the Respondent's attitude towards the Appellant's request for supply of a TV model which was not specified in their tender and observes that they contravened the law in the following respect:

- The Respondent had, by conduct as well as their self admission during the hearing, requested and gave the Appellant adequate time to submit the data sheet for the new TV model to be supplied for consideration. They further conceded that had the

Appellant submitted the said information before the expiry of the extended tender validity period they would have sought the approval of the Tender Board to proceed with contract signing and execution of the contract. The Authority wonders as to the motive behind the Respondent's attitude towards the Appellant's request, knowing that accepting the change of the TV model to be supplied and extending the delivery period after the award of the tender was highly improper.

- Their letter referenced ME-024/2011-12/SEDP II/G/02/49 dated **25<sup>th</sup> May, 2012**, which requested the Appellant to extend the validity of their tender for at least 14 days, acknowledged that the validity of the said tender had expired on **22<sup>nd</sup> May, 2012**. This was a clear contravention of Regulation 87(4) of GN. No. 97 of 2005, which requires the said extension to be made prior to the expiry of the original period of effectiveness of tender. Additionally, the said extension was only requested from the Appellant and not all tenderers as

envisaged under the law. As a result of this omission, when the award of the tender to the Appellant was purported to be cancelled on 26<sup>th</sup> June, 2012, the Respondent could not resort to the second lowest evaluated tenderer as the validity of their tender had already expired.

The Authority also deemed it necessary to address the Respondent's main contentions that the change of specifications before signing of contract amounts to interference with the entry into force of a procurement contract contrary to Regulation 97(4) of GN. 97 of 2005, and that by the time the award of the tender was purported to be cancelled there was no contract between them and the Appellant. For purposes of clarity the Authority reproduces the provision relied upon by the Respondent, namely, Regulation 97(4) herein below:

**“Between the time when the notice referred to in sub-regulation (1) was dispatched to the contractor, service provider, supplier or asset buyer and the entry into force of the**

**procurement or disposal contract, neither the procuring entity nor the contractor, service provider, supplier or asset buyer shall take any action that interferes with the entry into force of the procurement or disposal contract, or its performance.”** (Emphasis added)

The Authority observes that the above quoted provision is not relevant to the Appeal at hand as the change of the TV model and delivery period were introduced by the Appellant after the procurement contract had entered into force; while the above provision prohibit parties from taking any action that interferes with the coming into force of a procurement contract. The Authority also noted that the said provision is contradictory in itself, in that, it talks about **“the coming into force of a procurement contract”** as distinct from **“communication of acceptance”**. The Authority observes that, by virtue of Section 55(7) of the Act the two are interrelated, in that, a procurement contract enters into force when the notice of acceptance is communicated to the successful tenderer.

Furthermore, the Authority opines that there is an apparent contradiction between sub-regulation (3) of Regulation 97 of GN. No. 97 of 2005 which was relied upon by the Respondent and Section 55(7) of the Act. Since Section 55(7) of the Act has already been quoted in this Decision, the Authority reproduces Regulation 97(3) of GN. 97 of 2005 which states:

“Subject to sub-regulation (4), where a written procurement contract is required to be signed pursuant to sub-regulation 1 of this Regulation, **the procurement or disposal contract enters into force when the contract is signed by the supplier, service provider, contractor or asset buyer and by the procuring entity.**” (Emphasis supplied)

The contradiction centres on the fact that while Section 55(7) states categorically that a procurement contract enters into force when communication of acceptance is done, Regulation 97(3) provides that a procurement

contract enters into force upon contract signing. The Authority is of the considered opinion that, since Section 55(7) of the Act does not provide for any exceptions as to when a procurement contract enters into force, it is wrong for the said regulation to depart from the provision of the Act. In addition, as a general rule, where there are contradictions between the Act and the Regulations the Act supersedes the provisions of the regulations.

The Authority further observes that the documents submitted by the Respondent indicate that, the said provision (Regulation 97(4) of GN. No. 97 of 2005) only came into play when the cancellation of the award was being deliberated upon by the Tender Board, instead of the time when the proposed changes were received by the Respondent. The Authority noted that the Respondent had by conduct and in their written submissions conceded that the Appellant's request was not proper but proceeded to accommodate it and were even prepared to consider the same, as evidenced under Paragraph 2.3 of their Written Replies which reads:

“... In view of the Ministry (sic), failure to abide by the quoted Model amounted to interference with the entry into force of procurement Contract contrary to Reg. 97(4), G/N. No. 97 of 2005. Apart from this weakness on the part of the supplier, **the Ministry gave room for the supplier to submit specifications for the “higher specification Model” so that the request could be examined for possible consideration** but the supplier could not do so.” (Emphasis supplied)

It is the view of the Authority that the Respondent was bound to act in accordance with the law as soon as they received the Appellant’s request to change the model of the TV to be supplied and extension of delivery period. As for the Respondent’s contention that there was no contract at the time when the award of the tender was cancelled, the Authority states that there was a binding contract between parties as per Section 55(7) of the Act.

With regard to the Appellant’s contention that the Respondent had erred in cancelling the award of the

tender made in their favour, the Authority reiterates its findings in this Decision earlier on that the Appellant was not qualified to be awarded the tender. It goes without saying that, the award of the tender to the Appellant was a nullity in the eyes of the law and therefore there was nothing to be cancelled by the Respondent. That said, the Authority cannot further address the issue of cancellation of award as it has already been overtaken by events.

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

Having resolved the main issue in dispute and having satisfied itself that, the Appellant's tender was non responsive and should have been rejected during preliminary evaluation, the Authority revisited prayers by parties.

The Authority considered the Appellant's prayer that the cancellation of the award by the Respondent be revoked, and observes that there is nothing to be revoked as the purported award of the tender was, in the first place, a

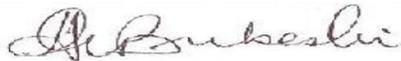
nullity in the eyes of the law. With regard to the Appellant's prayer that an order of Specific Performance be issued, the Authority is of the firm view that, such an order cannot be issued as the Appellant did not deserve to be awarded the tender. As regards the issue of compensation of USD 197,536.56 for cancellation of the award of the tender, the Authority equally rejects it as the purported award was a nullity at law.

Having considered the prayers by the Appellant, the Authority revisited the Respondent's prayer that the Appeal be dismissed. The Authority upholds the Respondent's prayer as the Appeal has no merit. That said, the Authority dismisses the Appeal for lack of merit and each party is ordered to bear its own costs.

On the basis of the aforesaid findings and conclusions, the Authority dismisses the Appeal and orders **each party to bear their own costs.**

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

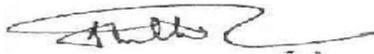
Decision delivered in the presence of the Appellant and the Respondent this 10<sup>th</sup> September, 2012.



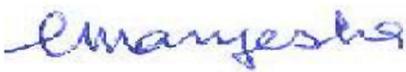
.....  
JUDGE (rtd) A. BUBESHI

**CHAIRPERSON**

**MEMBERS:**

1. MR. K.M MSITA  .....

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

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