IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 14 OF 2023-24

BETWEEN

M/S WEITO ENGINEERING COMPANY LTD.....APPELLANT

AND

TANZANIA RURAL URBAN ROADS

AGENCY – MARA REGIONAL OFFICE.....RESPONDENT

DECISION

CORAM

1. Hon. Justice (rtd) Sauda Mjasiri - Chairperson
2. Adv. Rosan Mbwambo - Member
3. Dr. William Kazungu - Member
4. Mr. James Sando - Secretary

SECRETARIAT

1. Ms. Florida Mapunda - Deputy Executive Secretary
2. Ms. Agnes Sayi - Senior Legal Officer
3. Ms. Violet Limilabo - Senior Legal Officer

FOR THE APPELLANT

1. Eng. Elisha Wankogera - Managing Director

FOR THE RESPONDENT

1. Mr. Speratus Chrisant	- Principal Legal Officer
2. Eng. Joseph Mkwizu	- Ag. Regional Manager
3. Eng. Hussein Abbas	- District Manager
4. Ms. Hellen Mziba	- Head of Procurement Management Unit - HPMU
5. Eng. George Mshomi	- Engineer- PMU – Member
6. Mr. Chrispin Bwogi	- Civil Technician
7. Mr. Mundhir Mrindoko	- State Attorney

This Appeal was lodged by **M/S Weito Engineering Company Ltd** (hereinafter referred to as **"the Appellant"**) against the **Tanzania Rural Urban Roads Agency – Mara Regional Office** (hereinafter referred to as "**the Respondent"**). The Appeal is in respect of Tender No. S10/012/2023/2024/W/74 for Opening up 4.0KM for Kyariko- Bwiri and Periodic Maintenance 4.0 KM for Raranya - Nyambogo Roads (hereinafter referred to as "**the Tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**"), the background of this Appeal may be summarized as follows: -

The Tender was conducted through National Competitive Tendering Method as specified in the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 446 of 2013 as amended (hereinafter referred to as "**the Regulations**").

On 27th June 2023, the Respondent invited tenderers to participate in the Tender through the National e-Procurement System of Tanzania (NeST). The deadline for submission of tenders was set on 17th July 2023. On the deadline, the Respondent received six tenders including that of the Appellant.

The received tenders were subjected to evaluation. After completion of the evaluation process, the evaluation committee recommended award of the Tender to M/S Nyanjatec Contractors Ltd. The proposed contract price was Tanzania Shillings Two Hundred Seventy Eight Million Four Hundred Ninety One Thousand Four Hundred only (TZS 278,491,400.00) VAT exclusive.

The Tender Board deliberated on the proposed award of the Tender to M/S Nyanjatec Contractors Ltd at its meeting held on 18th and 19th August 2023. The Tender Board observed that the proposed successful tenderer had already been awarded three other contracts. Therefore, the Tender Board approved the award of the Tender to the second lowest evaluated tenderer M/S Nordica (T) Ltd. The approved contract price was Tanzania Shillings Two Hundred Seventy Nine Million Five Hundred Ninety One Thousand Four Hundred only (TZS 279,591,400) VAT exclusive.

On 22nd August 2023, the Respondent issued the Notice of Intention to award the Tender which informed tenderers that it intends to award the Tender to M/S Nordica (T) Ltd. Furthermore, the Notice informed the Appellant that its tender was disqualified for failure to comply with the

requirement of audited financial statements for the year ended December 2022 and 2021.

Dissatisfied with the reason given for its disqualification, on 28th August 2023, the Appellant applied for administrative review to the Respondent. On the same date, the Respondent issued its decision which revoked the reason for the Appellant's disqualification as contained in the Notice of Intention to award. However, the Respondent informed the Appellant that a further review of its tender revealed that it submitted old manufactured Motor Grader and Water Bowser of the years 1997 and 1998, respectively which are before the year 2000 contrary to the requirements of the Tender Document. Aggrieved further, on 4th September 2023, the Appellant filed this Appeal to the Appeals Authority.

A day before the hearing, the Respondent issued a notice of Preliminary Objection (PO) on a point of law that the Appeal is incompetent and not properly before the Appeals Authority. According to the Respondent the filed Appeal contravened the requirements of Sections 95(1), 96(1) and 97(1) & (2) of the Act and Regulations 104 & 105 of the Regulations.

When the matter was called on for hearing, Members of the Appeals Authority brought to the attention of the Respondent that it observed from the record of Appeal that prior to the filing of this Appeal, the Appellant filed an application for administrative review to the Respondent. Subsequently, the Respondent issued its decision thereof. Upon being dissatisfied with the Respondent's decision, the Appellant filed this Appeal. Thus, the Appeal was filed in compliance with the requirements of the law.

After being enlightened on the requirements of the law, the Respondent prayed to withdraw the PO. There was no objection from the Appellant. Consequently, the Appeals Authority granted the prayer.

The Appeals Authority proceeded to determine the Appeal on merits and the following issues were framed namely: -

1.0 Whether the disqualification of the Appellant was justified; and

2.0 What reliefs, if any, are the parties entitled to

SUBMISSIONS BY THE APPELLANT

The Appellant's submissions were made by Mr. Elisha Wankogere, the Managing Director. He commenced his submissions on the first issue by stating that, the Appellant filed its application for administrative review to the Respondent on 28th August 2023 after being dissatisfied with the reason given for its disqualification. According to the Appellant, the Notice of Intention to award indicated that its tender was disqualified as "*Audited financial statement year end December 2022 and 2021 complied with the criteria given by the procuring entity*". The Appellant contended that the wording of the reason given for disqualification showed that the Appellant complied with the requirement of the Tender. Thus, the Appellant was surprised to learn that its tender was non-responsive.

Mr. Wankogere submitted that when issuing the decision on the Appellant's application for administrative review, the Respondent revoked the initial reason given for the Appellant's disqualification. The Respondent's decision stated that the Appellant's tender was disqualified for submitting

particulars of a Motor Grader and Water Bowser which indicated that they were manufactured before the year 2000 contrary to the requirements of the Tender Document. The Appellant was dissatisfied with the reason that disqualified its tender. Hence, it filed this Appeal.

The Appellant submitted that the reason for its disqualification which was different from the earlier reason given in the Notice of Intention to award contravened Regulation 231(4)(c) of the Regulations. According to the referred provision, the Respondent was required to include in the Notice of Intention to award all the reasons that led to the Appellant's disqualification. The Appellant contended that the Respondent's act of introducing a different reason for its disqualification when determining the application for administrative review, suggested that it was an afterthought. The given reason was not approved by the Tender Board.

The Appellant stated that it doubted if the Respondent constituted an independent review panel to review its application for administrative review in accordance with Section 96(2) of the Act. The Appellant contended that its doubtfulness is based on the fact that if the Respondent appointed any independent review panel that was different from the evaluation team, the findings thereof would not have led to the disqualification of the Appellant from the Tender process.

The Appellant submitted further that the appointed independent review panel acted *ultra vires* as it reviewed matters that were not contained in the application for administrative review. The Appellant's application for administrative review challenged its disqualification for failure to comply

with audited financial statements requirement. The said reason was challenged on the ground that the Appellant submitted the audited financial statements as per the requirements of the Tender Document. The Appellant contended that after reviewing its tender and having found that it complied with the criterion which led to its disqualification, the independent review panel should have upheld the Appellant's complaint. On the contrary, the independent review panel came up with a different reason for the Appellant's disqualification.

The Appellant stated that the act of the independent review panel of raising a different reason for the Appellant's disqualification contravened Section 96(2) of the Act. According to the referred provision, the duty of the independent review panel was to review the complaint before it and not to consider other matters that were not part of the submitted complaint. Thus, the independent review panel's act of coming up with a different reason for the Appellant's disqualification implied that it considered other matters and not the lodged complaint.

In support of his submissions, the Appellant's Managing Director cited the case of ***M/S Manyanya Engineering Company Ltd versus Tanzania National Roads Agency***, Appeal Case No. 09 of 2019-2020. In this case, the Appeals Authority stated that the independent review panel apart from reviewing the lodged complaint, considered other matters which were not part of the complaint. As a result, it came up with different findings that the first page of the Appellant's Form of Tender was not initialled. The Appeals Authority agreed with the Appellant's argument that the

independent review panel turned itself into an Evaluation Committee, as it exceeded its scope of work.

Regarding its disqualification, the Appellant stated that it submitted particulars of Motor Grader and Water Bowser which were manufactured some years before the year 2000. The Appellant contended that the submitted particulars indicated that the Motor Grader and Water Bowser were manufactured in the years 1998 and 1997, respectively. The Appellant stated that the Tender Document required Motor Grader and Water Bowser that were manufactured from 1st January 2000 to 31st December 2022. The Appellant contended that the submitted particulars of Motor Grader and Water Bowser indicated were manufactured some years before 2000, thus, such non-conformity should not have been treated as a material deviation warranting rejection of its tender.

The Appellant contended that the criterion set by the Respondent was unfavourable since there is a scarcity of heavy construction equipment in Mara Region and other regions that are far from large commercial cities. Therefore, it was not proper for the Respondent to require equipment that was manufactured between 1st January 2000 to 31st December 2022. The Appellant contended that the Respondent's act of specifying such a criterion implied that it was intended only for a few owners of such equipment in Mara Region to participate in this Tender. The Appellant expounded that the said criterion was not objective and quantifiable and not given a relative weight in the evaluation process as required under Regulation 212(b) of the Regulations. In addition, the criterion was not for

improving productivity. Thus, it should not have led to the Appellant's disqualification.

The Appellant submitted further that, the Respondent had the same project last year. However, such requirement was not included in the Tender Document. Furthermore, other procuring entities with similar projects, when floating tenders required equipment manufactured from the year 1990 to the year 2023. That is to say, equipment manufactured from 1990's would also suffice to implement the project. The Appellant stated further that, had it submitted equipment manufactured in the year 2023, it would have been disqualified based on the manufacturer date being above the required year as provided in the Tender Document.

The Appellant submitted that, a tender would be considered to be responsive if it conforms to all terms, conditions and specifications of the Tender Document without material deviations or reservations as provided under Regulation 202(5) of the Regulations. The Appellant added that, a procuring entity may regard a tender to be responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements as set forth in the Tender Document. A tender may also be considered responsive if it contains errors or oversights that are capable of being corrected without touching the substance of the tender. The Appellant stated that any deviation has to be quantified to the extent possible during the evaluation and comparison of tenders in compliance with Regulation 207(2) (b) and (c) of the Regulations.

The Appellant contended that the Respondent ought to have complied with the above provisions of the law while determining substantial responsiveness to commercial terms and conditions. Had the Respondent taken into consideration the requirements of the law as pointed hereinabove, it would not have disqualified the Appellant's tender. Thus, the Appellant's tender has been unfairly treated during the evaluation process.

The Appellant concluded its submissions on the first issue by stating that the Tender has been awarded to a tenderer with the highest evaluated price contrary to the requirements of the law which require award to be made to the lowest evaluated tenderer.

On the second issue, the Appellant prayed for the following orders: -

i. The second reason that disqualified the Appellant's tender be rejected;
ii. The Respondent be ordered to re- evaluate the tenders with fair treatment; and
iii. The Tender be awarded to the lowest evaluated tenderer.

REPLY BY THE RESPONDENT

The Respondent's submissions were made by Mr. Speratus Chrisant, Principal Legal Officer. He commenced his submissions on the first issue by stating that tenderers were required to submit particulars of equipment either owned or hired, manufactured from 1st January 2000 to 30th December 2022. The aim was to ensure that tenderers are capable of executing the intended project within the period set in the Tender

Document. As per the nature of the project, this requirement was a major condition considering the core purpose of the Tender which was opening and maintenance of roads.

Mr. Chrisant submitted that the Appellant was disqualified for submitting particulars of Motor Grader and Water Bowser that were manufactured in 1997 and 1998, respectively. He contended that the Appellant contravened Item 4 of Section IV-Qualification and Evaluation Criteria where mandatory requirements of equipment were provided. He contended further that the Appellant on its Statement of Appeal and oral submissions during the hearing conceded to have not complied with the said criterion. Thus, the Appellant was disqualified pursuant to Regulation 205(c) of the Regulations for offering a completely different type of equipment from the one specified by the Respondent.

Mr. Chrisant stated that after the Appellant received the Notice of Intention to award and being dissatisfied with the reason for its disqualification, it filed an application for administrative review to the Respondent. Upon receipt of the Appellant's application for administrative review, the Respondent constituted an independent review panel for reviewing the Appellant's complaint. Having reviewed the Appellant's application for administrative review, the independent review panel found that the Appellant complied with the requirement by submitting audited financial statements for the year ended December 2021 and 2022.

Mr. Chrisant clarified that when the Appellant's tender was evaluated for the first time, it was found that it did not comply with audited financial

statements requirement as no document was seen in compliance to such criterion. However, after receipt of the Appellant's application for administrative review the Respondent reviewed the Appellant's tender on NeST and found that the audited financial statements for the year ended December 2021 and 2022 were attached to the Appellant's tender. Therefore, the Appellant was considered to have complied with the criterion.

Mr. Chrisant submitted that after observing that some documents that were considered to have not been submitted by tenderers were now available on NeST, the Respondent constituted a new Evaluation Committee to re-evaluate all the tenders. The constituted team conducted the re-evaluation process and found amongst others that the Appellant failed to comply with the equipment criterion. The submitted particulars of Motor Grader and Water Bowser indicated that they were manufactured in the years 1997 and 1998 while the Tender Document requires the equipment to be manufactured from 1st January 2000 to 31st December 2022. Consequently, the Respondent issued the decision on the Appellant's application for administrative review that informed the Appellant that its tender was disqualified for failure to comply with equipment criterion.

On the Appellant's contention that there is a scarcity of the required equipment in Mara Region, Mr. Chrisant submitted that the Tender was open to all qualified tenderers in Tanzania and was not confined to Mara Region only. Therefore, the Appellant's non-conformity to the requirements of the Tender should not be based on an excuse that the

equipment was not available in Mara Region. He insisted that tenderers were required to comply with the requirements provided in the Tender Document. Therefore, the requirements for this Tender were never meant for certain tenderers as contended by the Appellant.

Mr. Chrisant stated that Clause 8.1 of the Instructions To Tenderers (ITT) allowed tenderers to seek clarification from the Respondent if the requirements provided in the Tender Document were not clear. However, the Appellant never sought for any clarification. Thus, it implied that the Appellant was satisfied with all the criteria set in the Tender Document.

On the Appellant's contention that the Respondent's previous tenders allowed equipment manufactured before 2000, Mr. Chrisant submitted that according to Regulation 203(1) of the Regulations, every Tender has to be evaluated based on the specific requirements and standard set in a particular Tender Document. Hence, tenderers were required to comply with all the specific criteria provided in the Tender Document and not to make a comparison with previous tenders. Thus, the Appellant's argument on this point is baseless.

With regard to the Appellant's argument that its non-compliance should be treated as a minor deviation pursuant to Regulation 207(2)(b) and (c) of the Regulation, Mr. Chrisant stated that the Appellant's non-conformity could not be treated as a minor deviation. Compliance with the equipment criterion was among the key factors that were to be assessed during evaluation of tenders. Hence, the Appellant's non-compliance with the equipment criterion could not be regarded as a minor deviation as it goes

to the root of the implementation of the project. Thus, the Appellant was fairly disqualified for failure to comply with equipment requirement as provided in the Tender Document.

In concluding his submissions on the first issue, Mr. Chrisant stated that a tenderer would be considered to be the lowest evaluated, if it is found to have complied with all the requirements at the commercial, technical and financial evaluation stages. According to Regulation 212 (a) and (b) of the Regulations, a successful tenderer is a tenderer whose tender has been found to be the lowest evaluated. The Appellant had the lowest price but was not the lowest evaluated tenderer. Thus, it could not have been considered for award of the Tender.

In response to the Appellant's prayers the Respondent submitted that: -

i. On the prayer that the Tender be re-evaluated, the Respondent stated that such a prayer would not serve the purpose, since the system indicated clearly that the Appellant failed to comply with equipment criterion. Based on that fact, the Appellant's prayer on this regard should be dismissed.

ii. Regarding the prayer that award be made to the lowest evaluated tenderer, the Respondent submitted that it is a requirement of the law as provided under Regulation 213 of the Regulations that a contract should be awarded to the lowest evaluated tenderer. According to Regulation 237 of the Regulations, powers to award contracts are vested to a procuring entity that would determine the lowest evaluated tenderer based on the requirements provided in

the Tender Document. Thus, as per Respondent's evaluation the Appellant was not the lowest evaluated tenderer. Therefore, it could not be awarded the Tender.

Finally, the Respondent prayed for dismissal of the Appeal as it is meritorious-less and with no legs to stand on before this Appeals Authority.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the disqualification of the Appellant was justified

In resolving this issue, the Appeals Authority reviewed the record of Appeal. It observed that it is an undisputed fact that the Notice of Intention to award stated only one reason for disqualification of the Appellant. That is, it failed to comply with the requirement of audited financial statements for the year ended December 2022 and 2021. It is also clear from the record of this Appeal that upon being dissatisfied with the reason for its disqualification, the Appellant applied for administrative review to the Respondent. According to the Respondent after receipt of the Appellant's application for administrative review it constituted an independent review panel to review the complaint.

The record of Appeal indicated further that in considering the Appellant's application for administrative review, the independent review panel reviewed the submitted tenders on NeST. In its "*TENDER REVIEW REPORT AND RECOMMENDATION*" dated 28th August 2023, the independent review panel observed that the audited financial statements that were earlier found not to have been submitted were attached to the Appellant's tender.

Thus, the Appellant complied with the requirement of audited financial statements for the year ended December 2022 and 2021. Following such a finding, the independent review panel recommended that the Appellant be re-instated into the Tender process and should be considered for technical evaluation. Furthermore, the panel recommended that the Accounting Officer constitutes an Evaluation Committee that would re-evaluate the tenders.

The record of Appeal revealed that the Respondent constituted the Evaluation Committee that re-evaluated the tenders. After completion of the re-evaluation process, the Appellant's tender was found to have not complied with equipment requirement. This was due to submission of particulars of Motor Grader and Water Bowser manufactured before the year 2000 contrary to the requirement of the Tender Document. The Appellant's non-compliance on this criterion was communicated to the Appellant through the Respondent's decision that was issued in respect of the Appellant's application for administrative review in a letter dated 28th August 2023.

The Appeals Authority considered the Appellant's contention that when handling its application for administrative review, the Respondent contravened Section 96(2) of the Act. Section 96(2) of the Act reads as follows: -

> *"96- (2)* ***On receiving a complaint under this section the accounting officer may, depending on the nature of the complaint, constitute an independent review panel from within or outside his organization***

which shall review the complaint and advise him on the appropriate actions to be taken".

(Emphasis added)

The facts of the instant Appeal are clear that after receipt of the Appellant's complaint the Respondent constituted an independent review panel which was different from the evaluation committee. After completion of the review process, the independent review panel found the Appellant to have complied with the financial statements requirement. It recommended for the re-instatement of the Appellant in the Tender process and that tenders should be re-evaluated. After completion of the re-evaluation process, the Appellant was found to have not complied with the years of manufacturing requirement for Motor Grader and Water Bowser. In view of this observation, the Appeals Authority is of the settled view that the process that led the Respondent to come up with a different reason for the disqualification of the Appellant was proper and in accordance with the law.

The Appeals Authority is of the considered view that the circumstances in the case of ***M/S Manyanya Engineering Company Ltd versus Tanzania National Roads Agency*** (supra) relied upon by the Appellant are different from the instant Appeal and are distinguishable. In the said case, the independent review panel apart from reviewing the lodged complaint, it considered other matters which were not part of the complaint. However, in the instant Appeal, the independent review panel reviewed the Appellant's complaint and the findings thereof led to a recommendation for re-evaluation of the tenders. Thus, after the re-evaluation process was completed, the Appellant' tender was found to have

not complied with the year of manufacturing requirement for Motor Grader and Water Bowser. Hence, it was unsuccessful for that reason.

Regarding the Appellant's contention that the Respondent had not responded to its application for administrative review, the Appeals Authority observes that the above findings narrated clearly on how the Appellant's application for administrative review was dealt with by the Respondent. In addition, the Respondent's decision stated clearly that the initial reason for the Appellant's disqualification was revoked and a different reason was given. Thus, the Appeals Authority rejects the Appellant's contention in this regard as the Respondent's decision complied with Section 96(6)(a)(b) of the Act which reads as follows: -

> *"96(6)* ***The accounting officer shall, within seven working days after the submission of the complaint or dispute deliver a written decision which shall: -***
>
> ***(a) state the reasons for the decision; or***
>
> ***(b) if the complaint or dispute is upheld in whole or in part indicate the corrective measures to be taken".***
>
> (Emphasis added)

The Appeals Authority considered the reason given for the Appellant's disqualification as contained in the Respondent's decision on the Appellant's application for administrative review. The Appeals Authority finds it proper to ascertain the validity of the said reason. In so doing, it

reviewed the Tender Document, specifically, Section IV - Qualification and Evaluation Criteria and observed that Item 4 - Technical submissions, required tenderers to demonstrate their ability to obtain equipment amongst others Motor Grader and Water Bowser both manufactured from 1st January 2000 to 31st December 2022.

The record of Appeal indicated that in compliance with the above named criterion, the Appellant submitted particulars which showed that Motor Grader and Water Bowser were manufactured in the years 1997 and 1998. The Appellant in its Statement of Appeal as well as oral submissions conceded to have not submitted the required specification in relation to Motor Grader and Water Bowser. However, the Appellant was of the view that such non-conformity should be treated as a minor deviation.

The Appeals Authority revisited Section IV - Qualification and Evaluation Criteria, Item 4 - Technical submissions. It observed that such a requirement was among the mandatory requirement that were to be complied with by tenderers in this Tender. Regulation 203(1) of the Regulations requires evaluation of tenders to be conducted in accordance with terms and conditions provided in the Tender Document. Regulation 203(1) of the Regulations reads as follows: -

> *"203.-(1) The tender evaluation shall be consistent with the terms and conditions prescribed in the tender documents and such evaluation shall be carried out using the criteria explicitly stated in the tender documents".*

In view of the above quoted provision, the Appellant was required to comply with requirements of the Tender as prescribed in the Tender Document.

The Appeals Authority considered the Appellant's contention that its non-conformity should be treated as a minor deviation and observed that Clause 28.4 of the ITT gives the Respondent a discretion of waiving any minor informality, non conformity or irregularity in a tender which did not constitute a material deviation, provided that such waiver would not affect the relative ranking of any tenderer. Thus, the power of determining whether or not any non-conformity is a minor deviation is solely vested on the Respondent. In view of the requirements under Section IV - Qualification and Evaluation Criteria (supra), the Appeals Authority is of the firm view that the Respondent properly exercised its discretion and in accordance with the law.

The Appeals Authority considered the Appellant's argument that a requirement that Motor Grader and Water Bowser should be manufactured from 1st January 2000 to 31st December 2022 was unrealistic for this Tender. The Appeals Authority is of the view that if the Appellant considered such a requirement to be unrealistic, it could have sought for clarification pursuant to Clause 8.1 of the ITT and Regulation 13 of the Regulations. Since the Appellant did not seek for clarification, it implied that it was ready to comply with terms and conditions of the Tender. Thus, the issue of scarcity or being unrealistic could not be raised at this juncture.

Under the circumstances, the Appeals Authority finds the Respondent's act of disqualifying the Appellant to have complied with Regulation 205(c) and 206 (2) of the Regulations which read as follows: -

> *"205. All tenders shall be checked for substantial responsiveness to the technical requirements of the tendering documents and non-conformity to technical requirements, which are justifiable grounds for rejection of a tender includes the following:*
>
> *(a) ...*
>
> *(b) ...*
>
> *(c)* ***failure to meet major technical requirements, such as offering completely different types of equipment or materials from the types specified, plant capacity well below the minimum specified, equipment not able to perform the basic functions for which it is intended;***
>
> *206.-* ***(2) Where a tender is not responsive to the tender document, it shall be rejected by the procuring entity, and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation".***
>
> (Emphasis added)

The above quoted provisions state generally that a tender that fails to comply with major technical requirements of the Tender Document should

be rejected. In addition, such a tender should not subsequently be made responsive by correction or withdrawal. Based on the requirements of the cited provisions, the Appeals Authority is of the settled view that the Appellant was required to comply with requirements of the Tender and therefore its failure justified its disqualification.

Regarding the Appellant's contention that, it had quoted a lower price than the awarded tenderer, the Appeals Authority reviewed the evaluation report. It observed that the Appellant was disqualified at the technical evaluation stage for failure to comply with the requirements of the Tender Document. The Appellant did not reach the financial evaluation stage where its quoted tender price could have been compared with other tenders. According to Regulation 212(a) of the Regulations, a tender would only be awarded to the lowest evaluated tenderer. Regulation 212 (a) of the Regulations reads as follows: -

> *"212. The successful tender shall be-*
>
> > *(a) the tender with the lowest evaluated tender price in case of goods, works or services, or the highest evaluated tender price in case of revenue collection, but not necessarily the lowest or highest submitted price, subject to any margin of preference applied."*

In conclusion the Appeals Authority answers the first issue in the affirmative that the disqualification of the Appellant was justified.

2.0 What reliefs, if any, are the parties entitled to?

Taking cognizance of the findings made hereinabove, the Appeals Authority hereby dismiss the Appeal for lack of merit. The Respondent is ordered to proceed with the Tender process in observance of the law. We make no order as to costs.

It is so ordered.

This decision is binding and can be enforced in accordance with Section 97(8) of the Act.

The Right of Judicial Review as per Section 101 of the Act is explained to the parties.

This decision is delivered in the presence of the parties this 29th day of September 2023.

HON. JUSTICE (rtd) SAUDA MJASIRI

.....

CHAIRPERSON

MEMBERS: -

1. **ADV. ROSAN MBWAMBO**.....
2. **DR. WILLIAM KAZUNGU**.....