

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 18 OF 2023-24

BETWEEN

M/S S. SCIENTIFIC CENTER LTD.....APPELLANT

AND

MINISTRY OF EDUCATION, SCIENCE

AND TECHNOLOGY.....RESPONDENT

DECISION

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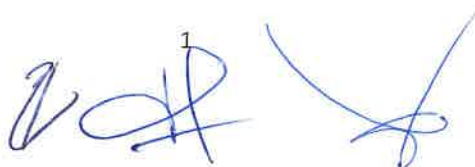
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| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Mr. Pius Mponzi | - Member |
| 3. Dr. William Kazungu | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Violet Limilabo | - Senior Legal Officer |

FOR THE APPELLANT

- | | |
|----------------------|--|
| 1. Mr. Marco Mkumbo | - Advocate, Steward & Shitong
Attorneys |
| 2. Mr. Wallace Mfuko | - Advocate, Steward & Shitong
Attorneys |



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|-----------------------|--------------------------|
| 3. Ms. Shana William | - Managing Director |
| 4. Mr. William Munisi | - Director of Operations |

FOR THE RESPONDENT

- | | |
|--------------------------|--|
| 1. Mr. Oscar Ngezi | - Legal Officer |
| 2. Ms. Metrida Kaijage | - Director of Procurement
Management Unit |
| 3. Mr. Revocatus Raymond | - Supplies Officer |

M/S S. Scientific Center Ltd (hereinafter referred to as **"the Appellant"**) has lodged this Appeal against the **Ministry of Education, Science and Technology** (hereinafter referred to as **"the Respondent"**). The Appeal is in respect of Tender No. ME-024/2022-2023/HQ/G/39 for Supply of Laboratory Equipment and Chemicals for Secondary Schools under EP4R Project (hereinafter referred to as **"the Tender"**).

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

The Tender was conducted through International 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"**).

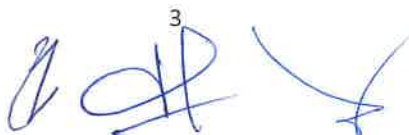
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On 17th January 2023, the Respondent floated the Tender through the Tanzania National electronic Procurement System (TANePS). The Tender had seven Lots. The deadline for submission of tenders was on 9th February 2023. On the deadline, the Respondent received twenty six (26) tenders including that of the Appellant. The Appellant participated in all seven Lots.

The received tenders were subjected to evaluation which was conducted into three stages, namely preliminary, technical and detailed evaluation. During preliminary evaluation, fifteen (15) tenders were found to be non-responsive and were disqualified from the Tender process. The remaining eleven (11) tenders were subjected to technical evaluation. At the technical evaluation stage, ten (10) tenders were disqualified for being non-responsive to the Tender requirements. The Appellant's tender was solely found responsive and subjected to detailed evaluation.

During detailed evaluation, the Appellant's tender was found to have arithmetic errors on Lots 1 and 5. The errors were corrected accordingly. The Respondent through a letter dated 3rd March 2023, notified the Appellant about the change in the total prices for the named Lots which resulted from the corrections made. The Appellant through a letter dated 6th March 2023, accepted the corrections made. After completion of the evaluation process, the Evaluation Committee recommended award of all seven Lots to the Appellant subject to post-qualification and successful negotiations. The Evaluation Committee's recommendations were tabled before the Tender Board at its meeting held on 17th April 2023. After deliberations, the Tender Board approved the recommendations as tabled.



The record of Appeal indicates that post-qualification was carried out to the Appellant on 21st April 2023. The post-qualification report indicated that the Appellant complied with all the requirements of the Tender. Thus, it was eligible for award. The Tender Board through Circular Resolution No. 91 of 2022/2023 dated 3rd May 2023, approved the post-qualification report. In addition, the Tender Board directed that negotiations on delivery arrangement and price reduction should be conducted with the Appellant.

The Respondent through a letter dated 4th May 2023, invited the Appellant to attend a negotiation meeting scheduled on 5th and 6th May 2023. The record of Appeal indicates that negotiations successfully took place on 5th May 2023. The negotiation report and award to the Appellant was approved by the Tender Board through Circular Resolution No. 98 of 2022/2023 dated 9th May 2023. The approved contract price was Tanzania Shillings Four Billion Four Hundred Forty Million One Thousand Four Hundred Ninety Six and Seventy Five Cents (TZS 4,440,001,496.75) VAT exclusive for all seven Lots.

The record of Appeal indicates further that the Respondent's Accounting Officer through an Internal Memo dated 6th June 2023 addressed to the chairperson of the Tender Board, disagreed with Tender Board's approval of award. The reason for disagreement was that M/S Mbesa Books Distributors Ltd was unfairly disqualified for lack of experience. This was due to the fact that the Evaluation Committee did not consider the contracts performed under joint venture arrangement. Furthermore, the Accounting Officer stated that the Tender Document prohibits award of all

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seven Lots to a single tenderer. The maximum award for a single tenderer was four Lots. Therefore, the Accounting Officer returned the matter to the Tender Board for reconsideration.

The Tender Board at its meeting held on 13th June 2023, deliberated on reinstatement of M/S Mbesa Books Distributors Ltd into the Tender process which was earlier disqualified for lack of experience. The evaluation report indicates that the assessed experience did not consider contracts performed under joint venture arrangement. In order to ascertain whether experience obtained under joint venture was to be considered during evaluation of tenders, the Tender Board sought guidance from the Public Procurement Regulatory Authority (PPRA) through a letter dated 13th June 2023. PPRA through a letter dated 26th June 2023, informed the Respondent that experience obtained in implementing contracts under joint venture should be considered as tenderers' experience.

Having received PPRA's guidance, the Respondent re-evaluated all the tenders. The re-evaluation process was completed on 19th July 2023. After completion of the re-evaluation process, the evaluation committee recommended award of Lots 1, 4 and 5 to M/S Mbesa Books Distributors Limited whereas Lots 2, 3, 6 and 7 were recommended to be awarded to the Appellant. The Evaluation Committee's recommendations were tabled to the Tender Board's meeting held on 14th August 2023. After deliberations, the Tender Board approved the award as recommended subject to post-qualification of M/S Mbesa Books Distributors Limited. The Tender Board indicated that post-qualification should not be conducted to the Appellant as it was already post-qualified before re-evaluation of



tenders. In addition, the Tender Board directed that negotiations should not be conducted due to lapse of time and considering that the contract prices are within the Respondent's budget.

Post-qualification to M/S Mbesa Books Distributors Limited was conducted from 24th to 28th August 2023. After completion, M/S Mbesa Books Distributors Limited was found to be eligible for award of the contract. The post-qualification findings were approved by the Tender Board through Circular Resolution No. 39 of 2023/2024 dated 29th August 2023. The Tender Board also approved award of Lots 1, 4 and 5 to M/S Mbesa Books Distributors Limited. The approved contract price for Lot 1, 4 and 5 was Tanzania Shillings Three Billion Seventy Million only (TZS 3,070,000,000.00) VAT exclusive. Furthermore, award for Lots 2, 3, 6 and 7 was approved to the Appellant. The approved contract price was Tanzania Shillings Nine Hundred Sixty Two Million Seventy Two Thousand Three Hundred Three and Twenty Seven cents only (962,072,303.27) VAT Exclusive.

On 06th September 2023, the Respondent issued the Notice of Intention to award which informed tenderers that it intends to award Lots 1, 4 and 5 to M/S Mbesa Books Distributors Limited and Lots 2, 3, 6 and 7 to the Appellant respectively.

On 12th September 2023, the Appellant filed an application for administrative review to the Respondent disputing the proposed award to M/S Mbesa Books Distributors Limited. On 13th September 2023, the Respondent issued its decision which rejected the Appellant's application



for administrative review. Dissatisfied with the Respondent's decision, the Appellant filed this Appeal on 19th September 2023.

When the matter was called on for hearing, the following issues were framed, namely: -

1.0 Whether the Appellant was eligible for award of All seven Lots;

2.0 Whether award of the Tender to M/S Mbesa Books Distributors Limited was proper in law; and

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

SUBMISSIONS BY THE APPELLANT

In this Appeal, the Appellant's submissions were led by Mr. Marco Mkumbo, learned counsel. He commenced his submissions by adopting the Statement of Appeal. In relation to the first issue the learned counsel stated that the Appellant is aware that the Tender process was governed by the Act, Regulations and criteria provided under the Tender Document. The learned counsel contended that the Appellant was among the tenderers which participated in the Tender. The Appellant submitted a tender that was successful in all stages including post-qualification and negotiations.

The learned counsel submitted that Clause 2 of Tender Data Sheet (TDS) allowed tenderers to participate in all seven Lots and may be awarded a maximum of four Lots. As per the wording of Clause 2 of TDS, the word "may" implies that award is not confined to only four Lots. A tenderer may be awarded more than four Lots and the same would not amount to

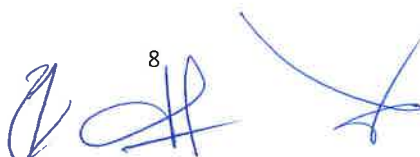


contravention of the Tender Document. The learned counsel contended that since the Appellant's tender was found to be responsive to the Tender requirements, it should have been awarded all seven Lots. This is due to the fact that the Tender Document does not prohibit award of more than four Lots to a single tenderer.

The learned counsel stated that on 20th July 2023 the Appellant received a letter from the Respondent requiring it to accept the correction of errors made on its Tender. The Respondent through the same letter informed the Appellant that its letter dated 3rd March 2023 that related to correction of arithmetic errors and the letter dated 4th May 2023 that invited the Appellant for negotiations were both cancelled. On 22nd July 2023, the Appellant wrote a letter to the Respondent requesting to be given justification on the correction of arithmetic errors made to its Tender. The Appellant also requested to be provided with the reasons for cancellation of the letters dated 3rd March 2023 and 4th May 2023. The Respondent through a letter dated 31st July 2023, clarified the Appellant's concern on the correction of arithmetic errors. On the same letter, the Respondent informed the Appellant that the Tender Board had ordered for re-evaluation of tenders. Hence, this led to cancellation of letters dated 3rd March 2023 and 4th May 2023.

The learned counsel submitted that the Appellant does not object the Respondent's act of invoking Section 36(3) and (4) of the Act, that confers the Accounting Officer with powers to reverse the Tender Board's decision. However, having decided to re-evaluate the tenders, the Respondent

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should have conducted the re-evaluation and subsequent processes in accordance with the law.

The learned counsel contended that after completion of the re-evaluation process, the findings were required to be tabled before the Tender board for approval. The Tender Board may approve and direct that negotiations be conducted with the lowest evaluated tenderer. In the Tender under Appeal, there is no proof that the Tender Board approved and directed that negotiations should be conducted. In addition, there is no proof that the negotiation plan was approved by the Tender Board as required by Regulation 227 of the Regulations. The learned counsel expounded that Regulation 228(2)(a) of the Regulations requires the Procurement Management Unit (PMU) to submit the recommendations of the negotiation team to the Tender Board for deliberations after completion of the negotiation process. However, there is no proof that the Respondent complied with this requirement of the law in the Tender under Appeal.

The learned counsel submitted that much as the Appellant does not challenge the Respondent's act of re-evaluating the tenders, it challenges the Respondent's subsequent acts thereafter. After completion of the re-evaluation process, the Respondent should have conducted post-qualification and negotiations. This is due to the fact that the post-qualification and negotiations that were previously conducted to the Appellant were all cancelled through the Respondent's letter dated 20th July 2023.

The learned counsel stated further that from the available documents it is not certain if the cancellation of the initially conducted post-qualification

and negotiations were approved by the Tender Board. Regulation 228(2) of the Regulations gives the Tender Board three options after the negotiation report is tabled before it. The Tender Board may accept the recommendations, direct further negotiations to be carried out or terminate the negotiations. The Appellant claimed to have not received any notification from the Respondent which indicated that the previously carried out negotiations were terminated. The Appellant claimed to have received a letter which cancelled the earlier invitation for negotiations. However, the same could not be considered as cancellation of negotiations that were successfully completed. The Respondent should abide to the requirements of Regulation 228(2) of the Regulations, the learned counsel contended.

The learned counsel submitted that after completion of the second evaluation process, the Respondent was required to conduct post-qualification and negotiations so as to be in line with the re-evaluation process. Thus, the Respondent's failure to conduct post-qualification and negotiations after re-evaluation process contravened the requirements of the law.

The learned counsel contended that Regulation 106(1) of the Regulations requires the procuring entity to suspend the procurement process after receipt of an application for administrative review or after receipt of notification of the existence of an Appeal from the Appeals Authority. To the contrary, the Respondent proceeded with the Tender process and required the Appellant to submit performance security. The Respondent through an email dated 19th September 2023 required the Appellant to



furnish the performance security. The said email was followed with a reminder letter dated 12th October 2023 while the Respondent was aware of the existence of the pending Appeal before this Appeals Authority. The Respondent's act of issuing reminder letters to the Appellant to furnish performance security implied that the Respondent had not suspended the procurement process as required by the law. Thus, this is a clear breach of the law.

On the second issue, the learned counsel submitted that according to the first evaluation report, M/S Mbasa Books Distributors Limited was disqualified for failure to comply with experience requirement. The learned counsel stated that Clause 12.3(c)(ii) of the TDS required tenderers to attach a list and copies of the recent performed contracts successfully completed during the last ten years (2013-2021). Among the three contracts at least three of them should be contracts for the supply of laboratory equipment and chemicals each with a minimum value of Tanzania Shillings One Billion (TZS 1,000,000,000.00).

The learned counsel contended that the Appellant and M/S Mbasa Books Distributors Limited have been working together in the same industry and knew each other. Having been worked together, the Appellant is certain that M/S Mbasa Books Distributors Limited does not have three contracts each having a minimum value of TZS 1,000,000,000.00. In addition, for the contracts that were executed in a joint venture, its shares are not above TZS 1,000,000,000.00. The learned counsel contended that the Tender Document did not allow joint venture contracts to be considered in both experience and similar assignment. Thus, M/S Mbasa Books

Distributors Limited should not have been found responsive and proposed for award.

The learned counsel submitted that M/S Mbesa Books Distributors Limited does not qualify for award of the Tender as it lacked the relevant business licence. The learned counsel stated that Clause 11.1(h)(iv) of the TDS required tenderers to submit a valid business licence for the Tender. After receipt of the Notice of Intention to award and realizing that M/S Mbesa Books Distributors Limited was to be awarded Lot 4 for supply of Chemistry Laboratory Basic Reagents Chemicals, the Appellant conducted due diligence to verify whether M/S Mbesa Books Distributors Limited had the relevant business licence. The Appellant learnt that M/S Mbesa Books Distributors Limited lacked the required licence.

The learned counsel contended that Section 3 of the Business Licensing Act, Cap 208 R.E 2002 prohibits a business to be carried out without having a valid and relevant business licence. M/S Mbesa Books Distributors Limited lacked the required business licence. Therefore, in view of the requirement of Section 3 of the Business Licensing Act, M/S Mbesa Books Distributors Limited should not have been recommended for award.

The learned counsel stated further that Section 51 of the Act and Regulation 118 of the Regulations require a local tenderer to comply with all relevant registration requirements prior to submission of tenders. M/S Mbesa Books Distributors Limited should have complied with the business licence requirement prior to submission of tenders. Therefore, it should not have been proposed for award of Lots 1, 4 and 5.

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On the third issue, the learned counsel prayed for the following reliefs: -

- i) Respondent's act of setting aside the first evaluation report be nullified. The Respondent should be ordered to continue with the first evaluation process as re-opening of the concluded evaluation was unlawful and contravened the requirements of the Acts and its Regulations;
- ii) The Respondent's decision to award the Tender to M/S Mbesa Books Distributors Limited be overruled as the firm lacks the requisite experience; and
- iii) The proposed award to M/S Mbesa Books Distributors Limited be nullified as the firm does not have a valid business licence which would have rendered its disqualification from the preliminary evaluation stage.

REPLY BY THE RESPONDENT

The Respondent's submissions were led by Mr. Oscar Ngezi, Legal Officer from the Respondent's office. He commenced his submissions on the first issue by stating that the Appellant was among the tenderers which participated in the Tender. The Respondent subjected all the received tenders into the evaluation process. After completion of the evaluation process, the Appellant was the only tenderer that was found to be responsive to the requirements of the Tender. Therefore, it was subjected to post-qualification and negotiations which were successful. The Legal Officer contended that the Appellant was recommended for award of all seven Lots. The recommendations were approved by the Tender Board.

The Legal Officer stated that the recommendations for award were submitted to the Respondent's Accounting Officer. Having reviewed the same, the Accounting Officer disagreed with the Tender Board's approval of award. This was due to the reason that the Evaluation Committee did not consider experience of tenderers in the contracts executed under a joint venture. In addition, the Accounting Officer stated that the Tender Document prohibits award of all seven Lots to a single tenderer. Thus, the Accounting Officer invoked Section 36(3) and (4) of the Act and Regulation 51(a) of the Regulations and required the Tender Board to reconsider the approved award decision.

The Legal Officer contended that the Tender Board accepted the advice given by the Accounting Officer and ordered for re-evaluation of tenders. The Legal Officer stated that after completion of the re-evaluation and other internal processes, it was observed that M/S Mbesa Books Distributors Limited was unfairly disqualified as it complied with the requirements of the Tender. Thus, M/S Mbesa Books Distributors Limited was recommended for award of Lots 1, 4 and 5 while the Appellant was recommended for award of Lots 2, 3, 6 and 7. The Legal Officer expounded that the Respondent's decision not to award all Lots to a single tenderer was to avoid the risk of non-performance during execution of the contract.

The Legal Officer agreed with the Appellant that Regulations 227 and 228 of the Regulations require the Tender Board to approve both negotiation plan and negotiation report. In this Tender, all the procedures were adhered to as required by the law. However, since the Appellant was post-

qualified after completion of the first evaluation process, the Tender Board decided not to post-qualify it after the re-evaluation. In addition, the Tender Board opted not to conduct negotiations due to lapse of time and the fact that the quoted prices were within the Respondent's budget. Thus, there were no negotiations after the re-evaluation process.

On the second issue, the Legal Officer submitted that M/S Mbesa Books Distributors Limited complied with experience requirement as it had three contracts each with a minimum value of TZS 1,000,000,000.00. In addition, Regulation 9(10)(a) of the Regulations requires parties to a joint venture agreement to be jointly and severally liable for the performance of the contract. The provision does not require assessment of a party to a joint venture to be based on the amounts of shares it owns. Thus, the same principle was applied when evaluating experience of tenderers in the Tender under Appeal. The whole joint venture contract was considered as tenderer's experience. Thus, M/S Mbesa Books Distributors Limited had the requisite experience.

On the business licence of M/S Mbesa Books Distributors Limited, the Legal Officer submitted that Clause 15 (ITT 11.1(h)(iv)) of the TDS required tenderers to have a valid business licence for the Tender. M/S Mbesa Books Distributors Limited had a valid business licence and registration certificates that were required for the Tender. Thus, the Appellant's contention in this regard is baseless.

The legal Officer stated further that the Respondent conducted the Tender process in a fair and reasonable manner. This is due to the fact that, had the Respondent been strict, it would have disqualified the Appellant for



failure to submit a Certificate for Importer and Distributor of Chemicals from Government Chemist Laboratory Agency as required by Clause 15(ix) of TDS. The Appellant submitted a mere letter indicating that the certificate was still in the process.

In relation to the third issue, the Legal Officer responded to the Appellant's prayers as follows: -

- i) On the prayer of re-opening of the Tender process, the Respondent stated that the prayer should not be allowed as the Respondent has conducted the Tender process in accordance with the law.
- ii) Regarding nullification of award to M/S Mbesa Books Distributors Limited the Respondent stated that the award to the said tenderer is justified and in accordance with the law. Therefore, the prayer should be rejected.

Finally, the Respondent prayed that the Appeal be dismissed for lack of merits.

APPELLANT'S REJOINDER

In his brief rejoinder the learned counsel for the Appellant conceded that the Appellant submitted a letter instead of a certificate from the Government Chemist Laboratory Agency. This was due to the fact that the Appellant had completed all the requirements for obtaining the said certificate. However, the same was yet to be issued as it awaited for approval of the Government Chemist Laboratory Agency's Board which sits twice in a year.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the Appellant was eligible for award of all seven Lots

In resolving this issue, the Appeals Authority considered the Appellant's contention that it should be awarded all seven Lots as after completion of the first evaluation process its tender was found to be substantially responsive in all stages. The Appellant contended that the Respondent's re-evaluation process was conducted in contravention of the law since post-qualification and negotiations were not carried out as required. The re-evaluation was incomplete, thus the same is invalid in the eyes of the law.

The Respondent on its part stated that its decision to re-evaluate all the tenders came after the Respondent's Accounting Officer disagreed with the Tender Board's approval of awarding all seven Lots to the Appellant. According to the Tender Document, a tenderer should be awarded a maximum of four Lots. The Respondent stated further that it was observed by the Accounting Officer that on the first evaluation report, assessment of experience to some of the tenderers did not consider the executed contracts under joint venture. Thus, the Tender Board's decision to award the tender to the Appellant was reversed and the tenders were re-evaluated. After completion of the re-evaluation process, the Respondent opted not to conduct post-qualification and negotiations to the Appellant as this was already done.

In ascertaining the validity of the parties' arguments, the Appeals Authority, revisited the record of Appeal. It observed that the Respondent subjected

all the received tenders by the deadline for submission of tenders to evaluation. After completion of the evaluation process, the Appellant was solely found to be substantially responsive and recommended for award of all seven lots subject to post-qualification and negotiations. Subsequently, Post-qualification and negotiations were successfully conducted. Thus, the Tender Board approved award of all seven Lots to the Appellant.

The record of Appeal indicates further that the Respondent's Accounting Officer disagreed with the Tender Board's approval of awarding all seven Lots to the Appellant. The disagreement was due to the reason that the Tender Document prohibits award of all seven Lots to a single tenderer. In addition, the Accounting Officer pointed out that during evaluation, tenderers' experience based on contracts performed under joint venture was not considered. Hence, this led to unfair disqualification of some tenderers. Thus, the Tender Board was required to reconsider the approved award.

Following the Accounting Officer's directives to the Tender Board that the award decision should be re-considered, the Respondent sought guidance from PPRA if experience obtained in implementing contracts under joint venture could be considered as tenderers' experience. In response thereof, PPRA indicated that such an experience should be considered when evaluating tenderers' experience. Based on the PPRA's guidance the Tender Board ordered for re-evaluation of tenders. After completion of the re-evaluation process, the Appellant and M/S Mbesa Books Distributors Limited were found to be the lowest evaluated tenderers and were therefore recommended for award.

From the above sequence of events, the Appeals Authority deems it proper to consider the two reasons provided by the Respondent's Accounting Officer which led to the Tender Board's approval of award to be reconsidered. On the point that the first evaluation report was conducted without considering experience obtained under the contracts executed under the joint venture, the Appeals Authority observes that Regulation 9(10)(a) of the Regulations requires a party to a joint venture to be jointly and severally liable for the performance of the contract. Regulation 9(10)(a) of the Regulations reads as follows: -

"(10) Where a solicitation document allows a tenderer to submit a tender as part of a joint venture, consortium or association, the solicitation document shall require, where appropriate, that-
(a) a party to a joint, consortium or association shall be jointly and severally liable for the performance of the contract".

Having reviewed the above quoted provision, the Appeals Authority observes that the law recognizes the liability of the parties to a joint venture contract to be jointly and severally. Thus, all parties to a joint venture contract are liable for the execution of the same. In that regard, the experience attained in the execution of a joint venture contract should be considered as experience of both parties to a joint venture contract. Hence, the act of the Respondent's Accounting Officer of requiring experience to be also considered from contracts executed under joint venture was justified.



Regarding the point that award of all seven lots could not have been made to a single tenderer, the Appeals Authority revisited Clause 2 of the TDS which reads as follows: -

"Tenders are encouraged to tender for all 7 lots, but the tenderer may only be contracted for a Maximum of Four (4) lots".

(Emphasis supplied)

The above quoted provision states clearly that tenderers were allowed to tender for all seven Lots. However, a tenderer may only be awarded a maximum of four Lots.

The Appeals Authority considered the Appellant's contention that Clause 2 of the TDS contained the word "may" which in the Appellant's view does not prohibit a tenderer to be awarded all seven Lots. The Appeals Authority is of the firm view that much as the wording of Clause 2 of the TDS does not mandatorily limits the award of four Lots to a tenderer, the discretion of awarding more Lots lies on the Respondent. The Tender Document gave the Respondent an option of deciding on the number of Lots to be awarded to a tenderer.

In view of the above, the Appeals Authority is of the settled view that the Respondent's Accounting Officer's decision of requiring the Tender Board to reconsider its award decision to be proper and in accordance with Regulation 51(a) of the Regulations which states as follows: -

"51. Where the accounting officer disagrees with the decision of the tender board regarding application or



interpretation of any procurement method, process or practice by tender under these Regulations, the accounting officer shall-

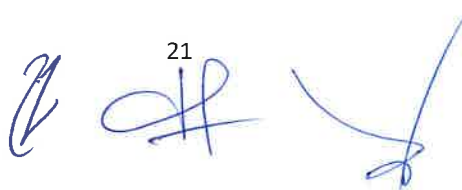
(a) return the decision to the tender board for review giving written reasons for the dissatisfaction"

The Appeals Authority considered the Appellant's assertion that the Respondent's re-evaluation process was marred with irregularities as post-qualification and negotiations were not conducted as required by the law. The Appeals Authority observes that from the record of Appeal it is clear that post-qualification was conducted to the Appellant after completion of the first evaluation process. It is obvious from the available records that the Appellant's post-qualification came up with the findings that the firm is eligible for award. In addition, it is evident from the record of Appeal that the Appellant's post-qualification findings were not nullified. In view of this fact the Appeals Authority is of the settled view that under the circumstances of this Tender post-qualification to the Appellant was not necessary.

Regarding the Respondent's failure to conduct negotiations after completion of the re-evaluation process, the Appeals Authority observes that according to Regulation 225(1) of the Regulations, conducting of negotiations is not mandatory. Regulation 225(1) of the Regulations reads as follows: -

"225(1) Negotiations may be undertaken with the lowest evaluated tenderer relating to...."

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The above quoted provision contained the word "may" which entails clearly that a procuring entity may decide whether to conduct negotiations or not. Under the circumstances of the Tender in dispute, the Respondent had the mandate to decide if negotiations would be conducted or not. Therefore, the Respondent cannot be faulted for not conducting negotiations after re-evaluation of tenders.

The Appeals Authority considered the Appellant's assertion that the Respondent contravened the requirement of Regulation 106(1) of the Regulations by proceeding with the Tender process while it was required to suspend the process pending determination of this Appeal. In ascertaining the validity of the Appellant's contention in this regard, the Appeals Authority revisited the record of Appeal and observed that this Appeal was lodged on 19th September 2023. The Respondent was notified about the existence of the Appeal on 20th September 2023. The record of Appeal indicates that the Respondent through a letter dated 12th October 2023 reminded the Appellant to submit performance security. The first letter that required the Appellant to submit performance security was sent on 19th September 2023.

In view of the summarized sequence of events, it is evident that the Respondent proceeded with the Tender process despite being aware of the existence of this Appeal. Section 100(4) of the Act requires the procuring entity to suspend the procurement process if it has been required by the Appeals Authority to do so. Section 100(4) reads as follows: -

"100(4) Upon receipt of a complaint or an appeal, the Appeals Authority may suspend the procurement process or where necessary, the performance of the concerned procurement contract pending determination of the complaint or an appeal".

Based on the facts of this Appeal, the Appeals Authority is of the settled view that the Respondent's act of reminding the Appellant to submit performance security while there is a pending Appeal and therefore failing to suspend the procurement process contravened Section 100(4) of the Act. However, the Appeals Authority finds the Respondent's act in this regard to have not prejudiced the Appellant's rights in any way.

In view of the above, the Appeals Authority concludes the first issue in the negative that the Appellant was not eligible for award of all seven Lots despite the fact the Respondent failed to suspend the procurement process as required by the law.

2.0 Whether award of the Tender to M/S Mbesa Books Distributors Limited was proper in law

In this Appeal, the Appellant challenged the award to M/S Mbesa Books Distributors Limited for two main reasons, namely; lack of the required experience and relevant business licence. The Respondent on its part contended that M/S Mbesa Books Distributors Limited possessed the requisite experience and had the relevant business licence. In ascertaining if M/S Mbesa Books Distributors Limited complied with requirements of the

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Tender, the Appeals Authority considered the Appellant's assertions as hereunder: -

a) Lack of relevant experience

Clause 18 (ii) of the TDS provides guidance on the required experience and technical capacity. Clause 18(ii) of TDS reads as follows: -

"18 Other procurement specific documentation requirements are: -

*(ii) **Experience and Technical Capacity***

The tenderer shall furnish documentary evidence to demonstrate that it meets the following requirement(s)

- Attach evidence to show at least 10 current years' (2013 to 2021) experience in supplying and/or manufacturing laboratory Equipment's and Chemicals in public schools in the United Republic of Tanzania; and***
- Attach evidence to show a list and copies of the recent contracts successfully completed during the last ten (10) years (2013 to 2021) at least three (3) performed contracts for the supply of laboratory Equipment's and Chemicals each with minimum value of TZS 1 Billion each which makes a total of Minimum TZS 3 Billion"***

(Emphasis supplied)



In ascertaining if M/S Mbesa Books Distributors Limited complied with above quoted experience requirement, the Appeals Authority reviewed its Tender on TANePS. It observed that the M/S Mbesa Books Distributors Limited attached three contracts for supply of laboratory equipment and chemicals which exceeded the value of TZS One Billion per each contract. The contracts are listed as follows: -

- i) Contract for Supply of Chemistry Laboratory Equipment, Apparati and Reagents for 1258 Secondary Schools in Mainland Tanzania. The contract was entered between the Permanent Secretary President's Office Regional Administration and Local Government and M/S Mbesa Books Distributors Limited in JV with Hans Raj Scientific Metal Works. The contract value was Tanzania Shillings One Billion Fifty Million Seven Hundred Twenty Four Thousand Three Hundred Twenty One and Sixty Eight Cents (TZS 1,050,724,321.68) VAT exclusive. The contract was entered on 12th July 2019.
- ii) Contract for procurement of Laboratory Equipment, Apparati and Reagents for 1258 Secondary Schools in Mainland Tanzania (Lot 1-Chemistry). The contract was entered between the Permanent Secretary President's Office Regional Administration and Local Government and M/S Mbesa Books Distributors Limited. The Contract value was Tanzania Shillings One Billion Three Hundred Nineteen Million Twelve Thousand Four Hundred Twenty Three and Thirty Three Cents only (TZS 1,319,012,423.33). The contract was entered on 1st March 2021.

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iii) Contract for procurement of Laboratory Equipment, Apparati and Reagents for 1258 Secondary Schools in Mainland Tanzania (Lot III-Biology). The contract was entered between Permanent Secretary President's Office Regional Administration and Local Government and M/S Mbesa Books Distributors Limited. The contract value was Tanzania Shillings One Billion Two Hundred Ninety Million Six Hundred Forty Thousand Six Hundred Forty Five and Forty Two Cents only (TZS 1,290,640,645.42). The contract was entered on 1st March 2021.

The Appeals Authority considered the Appellant's contention that M/S Mbesa Books Distributors Limited lacked the requisite experience as the contract executed under a joint venture, its shares did not amount to TZS 1,000,000,000.00. The Appeals Authority reiterates its position stated on the first issue above that parties to a contract executed under a joint venture arrangement are jointly and severally liable and the same goes to the assessment of experience. That is experience attained under contract executed through a joint venture has to be considered as experience of each member to a joint venture.

In view of the attached contracts, the Appeals Authority is of the settled view that M/S Mbesa Books Distributors Limited complied with the experience requirement as provided under Clause 18 (ii) of the TDS.

b) Lack of relevant Business Licence

Clause 15(iv) of the TDS required tenderers to submit valid and relevant business licence. Clause 15(iv) of the TDS reads as follows: -

"15 In addition to the documents stated in ITT 11, the following documents must be included with the Tender;

iv. A Valid and Relevant Business License;"

(Emphasis supplied)

In ascertaining if M/S Mbesa Books Distributors Limited complied with the above quoted requirement, the Appeals Authority reviewed its tender on TANEPS. It observed that M/S Mbesa Books Distributors Limited attached a Business Licence for Laboratory Equipment issued by the Dar es Salaam City Council. The licence was issued on 10th July 2022 and expired on 30th June 2023. The Appeals Authority reviewed the record of Appeal and observed that the deadline for submission of tenders was on 9th February 2023. Therefore, by the deadline for submission of tenders M/S Mbesa Books Distributors Limited's business licence was valid.

Having reviewed further M/S Mbesa Books Distributors Limited's tender on TANEPS, the Appeals Authority observed that it attached other certificates issued by Tanzania Medicines and Medical Devices Authority (TMDA) and Government Chemist Laboratory Agency (GCLA). All the certificates were valid by the deadline for submission of tenders.

In view of the above observations, the Appeals Authority is of the settled view that M/S Mbesa Books Distributors Limited complied with the requirement by submitting the relevant business licence.

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Under the circumstances the Appeals Authority concludes the second issue in the affirmative that award of the Tender proposed to M/S Mbesa Books Distributors Limited was proper in law.

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

Taking cognizance of the findings hereinabove, the Appeals Authority hereby dismiss the Appeal and allows the Respondent to proceed with the Tender process.

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 27th day of October 2023.

HON. JUSTICE (rtd) SAUDA MJASIRI



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CHAIRPERSON

MEMBERS: -

1. MR. PIUS MPONZI.....



2. DR. WILLIAM KAZUNGU.....

