

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 21 OF 2024-2025

BETWEEN

M/S KGG INVESTMENT LIMITED.....APPELLANT

AND

KASULU URBAN WATER SUPPLY AND

SANITATION AUTHORITY.....RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Dr. William Kazungu | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|-------------------------|---------------------------|
| 1. Ms. Florida Mapunda | - PALS Manager |
| 2. Ms. Agnes Sayi | - Principal Legal Officer |
| 3. Ms. Violet Limilabo | - Senior Legal Officer |
| 4. Mr. Venance Mkonongo | - Legal Officer |

FOR THE APPELLANT

- | | |
|------------------------|--------------------------------|
| 1. Mr. Meswin Masinga | - Advocate - Eminent Attorneys |
| 2. Mr. Edson Bebwa | - Director |
| 3. Mr. Sharifu Hassani | - Financial Consultant |
| 4. Mr. Bahati Bilindi | - Administrator |



FOR THE RESPONDENT

- | | |
|-----------------------|--|
| 1. Mr. Ayoub Sanga | - Senior State Attorney –
Office of the Solicitor General |
| 2. Mr. Boaz Msoffe | - State Attorney - Office of
the Solicitor General |
| 3. Mr. Hussein Nyemba | - Managing Director |
| 4. Mr. Nuru Bagowe | - Head of Procurement
Management Unit |

The Appeal was lodged by **M/S KGG Investment Limited** (hereinafter referred to as "**the Appellant**") against **Kasulu Urban Water Supply and Sanitation Authority** commonly known by its acronym as "**KUWSSA**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. 49/2024/2025/W/01 for Extension of Water Network (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 using National Competitive Tendering method as specified in the Public Procurement Act, No. 10 of 2023 (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 518 of 2024 (hereinafter referred to as "**the Regulations**").

On 20th September 2024, the Respondent through National e-Procurement System of Tanzania (NeST) invited eligible tenderers to participate in the Tender. The deadline for submission of tenders was set on 27th September



2024. On the deadline, the Respondent received two tenders including that of the Appellant.

The received tenders were subjected to evaluation which was conducted in three stages namely, preliminary, technical and financial evaluation. The two tenders qualified at the preliminary and technical evaluation stages, thus, were subjected to financial evaluation. In the financial evaluation process, the Appellant was found to be the lowest evaluated tenderer. Therefore, the Evaluation Committee recommended it for award of the Tender. The recommended contract price was Tanzania Shillings Two Billion Four Hundred Ninety-Eight Million Eight Hundred Ninety-One Thousand Seventeen and Sixty-Five cents only (TZS 2,498,891,017.65) VAT exclusive. The Tender Board approved award of the Tender on 10th October 2024 as recommended by the Evaluation Committee.

On 11th October 2024, the Respondent issued the Notice of Intention to award the Tender. The Notice stated that the Respondent intended to award the Tender to the Appellant. On 24th October 2024, the Respondent issued a Notification of award of the contract to the Appellant and required it to submit a performance security. On 7th November 2024, the Appellant submitted the performance security in the form of a performance bond.

The record of Appeal indicates that the Respondent through a letter dated 23rd October 2024, submitted the draft contract to the Attorney General for vetting. On 6th November 2024, the Attorney General returned the vetted contract with several recommendations. Amongst the recommendations was for the Respondent to conduct a thorough due diligence to the



Appellant to verify its capacity and competency to execute the contract before signing the contract.

Following the Attorney General's advice, the Respondent through a letter dated 7th November 2024, inquired about the Appellant's previous performance on contracts with Mtwara Urban Water Supply and Sanitation Authority (MTUWASA), RUWASA Kigoma and Handeni Trunk Main Water Supply and Sanitation Authority (HTMWSSA). On 8th November 2024, MTUWASA and HTMWSSA responded to the Respondent's letter by stating that the Appellant's performance of the said contracts was poor as it failed to complete the projects within the time specified under the awarded contracts. Based on that information, the Respondent through a letter dated 12th November 2024, notified the Appellant about its decision of not proceeding with signing of the contract. The letter stated that the Respondent's decision was reached following the due diligence findings from various water utilities authorities which revealed that the Appellant had poor performance of the contracts awarded to it.

Dissatisfied with the reason given for nullification of award of the contract, through a letter dated 14th November 2024, the Appellant applied for administrative review to the Respondent. On 18th November 2024, the Respondent issued its decision which maintained its previous position. Aggrieved further, on 21st November 2024, the Appellant filed this Appeal to the Appeals Authority.

After receipt of this Appeal, the Appeals Authority notified the Respondent about the existence of the Appeal and required it to submit a Statement of



Reply. In response to the grounds of Appeal the Respondent raised Preliminary Objections on points of law to wit that:-

- a) "The Appeal is vexatious, frivolous and untenable in law for want of the decision of the procuring entity capable of being appealed against, as the Appellant did not exhaust remedies available by lodging complaint, contrary to Section 96(1) of the Act;*
- b) In alternative to point of objection No. 1 above, the Appeal before the Appeals Authority is untenable in law for being preferred against the entity which has no capacity to be sued contrary to Section 96(6)(7) and Section 97 of the Act."*

When the matter was called on for hearing, Mr. Ayoub Sanga, Senior State Attorney from the Office of the Solicitor General who represented the Respondent, prayed to abandon the two preliminary objections subject to the Appellant amending the name of the Respondent in the Statement of Appeal. Mr. Meswin Masinga, learned counsel for the Appellant promptly prayed to amend the name of the Respondent in the Statement of Appeal by omitting the words "Managing Director". The name of the Respondent remained to be "Kasulu Urban Water Supply and Sanitation Authority". Mr. Sanga did not object to the Appellant's prayer. He also prayed to amend the name of the Respondent in the Statement of Reply to read as amended by the Appellant. The Appeals Authority granted the prayers for withdrawal of the POs and amendment of the name of the Respondent.



Consequently, the following issues were framed on the substantive merits of the Appeal, namely: -

1.0 Whether the disqualification of the Appellant's tender 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. Meswin Masinga, learned counsel. He commenced on the first issue by stating that the Appellant was one of the two tenderers which participated in the Tender. After completion of the evaluation process, the Appellant was found to be the lowest evaluated tenderer and therefore recommended for award of the Tender. After completion of all the internal processes, on 11th October 2024, the Respondent issued a Notice of Intention to award the Tender to the Appellant. On 24th October 2024, the Respondent issued notification of award of the contract to the Appellant and required it to submit performance security. On 7th November 2024, the Appellant submitted the performance bond as required and waited for the signing of the contract.

The learned counsel submitted that on 12th November 2024, the Appellant received a letter from the Respondent which notified it that the latter would not proceed with the signing of the contract. The letter stated that the Respondent reached such a decision following the due diligence process that was conducted in implementing the advice of the Attorney General. The due diligence process that was conducted on the water

6



utilities authorities revealed that the Appellant had poor performance of contracts as it failed to comply with terms and conditions as agreed.

The learned counsel submitted that the Appellant was dissatisfied with the reason given for not signing the contract, thus on 14th November 2024, it applied for administrative review to the Respondent. The learned counsel stated that the Respondent through a letter dated 18th November 2024, issued its decision which maintained its earlier position. Aggrieved further, the Appellant filed this Appeal.

The learned counsel submitted that the Respondent's letter dated 12th November 2024 was too general. In addition, it did not mention the names of the water utility authorities and a particular project where the Appellant had poor performance. He added that the Appellant became aware of the projects on which it was alleged to have poor performance after receipt of the Respondent's Statement of Reply. The mentioned water utility authorities in the Statement of Reply where the Appellant is condemned to have poor performance were MTUWASA and HTMWSSA.

The learned counsel submitted that the Respondent conducted due diligence to MTUWASA and HTMWSSA without involving the Appellant. He stated that had the Respondent involved the Appellant in the due diligence exercise, it would have come out with different findings. The learned counsel submitted that the poor performance on the MTUWASA project was caused by non-payment of the raised certificates. Thus, the Appellant was unable to proceed with the execution of the work as expected.



The learned counsel stated that when conducting due diligence, the Respondent was required to comply with Regulation 225(1), (2) and (3) of the Regulations. The referred regulation requires the involvement of a tenderer under consideration when a due diligence is conducted. To the contrary, the Respondent conducted due diligence without involving the Appellant. The learned counsel submitted that had the Respondent involved the Appellant in the due diligence process, it would not have concluded that the Appellant had poor performance on its previously executed contracts. The alleged poor performance was contributed by the previous employers' failure to effect payment timely, the learned counsel contended.

The Appellant submitted further that when conducting due diligence, the Respondent was required to comply with Regulation 213 of the Regulations. The referred regulation requires due diligence to be conducted based on the criteria provided in the Tender Document. In addition, the provision requires due diligence to be based on the information provided by a tenderer during tendering. When conducting due diligence, the Respondent considered alien contracts which were not provided by the Appellant during tendering. The reviewed contracts were not among the documents in the Appellant's tender. Thus, the Respondent's due diligence in this regard contravened Regulation 213 of the Regulations.

The learned counsel submitted that Regulation 219 of the Regulations requires due diligence to be conducted prior to the issuance of the Notice of Intention to award. The Respondent was required to satisfy itself that

Three blue ink signatures or initials are written at the bottom of the page. The first is a stylized 'Z' or 'L' shape. The second is a more complex, flowing signature. The third is a smaller, simpler signature.

the Appellant had complied with the requirements of the Tender. In addition, it had the capacity to execute the project before awarding the Tender to the Appellant. The learned counsel elaborated that since the Respondent had issued the Notice of Intention to award the Tender and notification of award to the Appellant, this implied that the Respondent was certain that the Appellant was able to execute the intended project. Thus, the Respondent's act of conducting due diligence after awarding the Tender to the Appellant was improper and in contravention of the law, the learned counsel contended.

The learned counsel submitted that the Appellant has been registered by Contractors Registration Board (CRB) as a Civil Contractor Class II with a capacity to execute any civil works including water works worth up to Tanzania Shillings eight billion. Apart from that the Appellant had experience of executing various projects in civil works, specifically water works worth billions of Tanzania Shillings and complied with the terms and conditions of the contracts. In addition, the Appellant had been claiming some outstanding payments for works done from various Government Institutions such as Mtwara Urban Water Supply and Sanitation Authority, RUWASA Pwani, RUWASA Tabora, and RUWASA Tanga. Despite the delay of payment, the Appellant had never failed to execute the projects. Therefore, the reason given to nullify the award had no justification, the learned counsel contended.

The learned counsel submitted that the Respondent's letter dated 12th November 2024 indicated that the due diligence was conducted by the Attorney General. However, on item 2.6 of its Statement of Reply, the



Respondent indicated that the due diligence was conducted following the advice given by the Attorney General. The learned counsel submitted that Section 69(10) of the Act and Regulation 72(1) of the Regulations require procuring entities to submit a draft contract which is above One Billion to the Attorney General for vetting. According to Regulation 72(4) of the Regulations, the Attorney General is required when vetting the contract, to provide advice based on the terms and conditions of the contract. The Attorney General cannot provide advice outside the terms and conditions of the contract. The learned counsel submitted further that if at all the Attorney General had advised the Respondent to conduct due diligence as contended, the same was to be done in accordance with Regulation 225 of the Regulations.

In view of the above, the learned counsel concluded his submissions by stating that the Respondent's decision to nullify the award contravened the requirements of Sections 53 and 54 of the Act and Regulation 225 of the Regulations.

Finally, the learned counsel prayed for the following orders: -

- i) The Appeals Authority to review the procurement process and order the Respondent to proceed with signing of the contract with the Appellant; and
- ii) The Appeals Authority to consider the insurance costs that the Appellant has incurred in obtaining the performance security worth 15% of the contract price from First Assurance Company Ltd, as it was required in the award letter.

Handwritten signature and initials in blue ink, consisting of a stylized 'Z' or 'J' followed by a long horizontal line and a small flourish.

REPLY BY THE RESPONDENT

The Respondent's submissions were made by Mr. Ayoub Sanga, Senior State Attorney assisted by Mr. Boaz Msoffe State Attorney, both from the Office of the Solicitor General. Mr. Sanga commenced on the first issue by praying to adopt the Statement of Reply with its attachments to be part of the Respondent's submissions.

Mr. Sanga submitted that the Appellant was one of the tenderers which participated in the Tender. After completion of the evaluation process, the Appellant was wrongly considered as the lowest evaluated tenderer based on the information submitted during tendering. The learned State Attorney stated that the Appellant concealed some of the information on its capacity to execute contracts. Thus, since the Respondent was not aware of the Appellant's performance in other contracts apart from those submitted for the Tender in NeST, it considered the Appellant for award of the Tender. The Respondent issued the Notice of Intention to award the Tender to the Appellant which was subsequently followed with the notification of award.

Mr. Sanga submitted that after issuance of the Notice of Intention to award, the Respondent submitted the contract to the Attorney General for vetting purposes. The Attorney General through a letter dated 6th November 2024, advised the Respondent to conduct a thorough due diligence to ascertain if the Appellant had the capacity and competency to execute the intended contract. Based on that advice, the Respondent conducted a due diligence on the Appellant. The due diligence process revealed that the Appellant defaulted its contractual obligations with two water utilities institutions namely, Mtwara Water Supply and Sanitation



Authority and Handeni Trunk Main Water Supply and Sanitation Authority. The Appellant's default caused a delay in completion of the project. The Appellant was issued with the notice of delay; however, it still failed to comply with the contractual obligations.

Mr. Sanga stated that due to the Appellant's failure to complete the projects, the Handeni Trunk Main Water Supply and Sanitation Authority issued to the Appellant the notice of intention to terminate the contract. The said Authority further requested the Appellant's bank to refund it the advance payment made to the Appellant as it had not executed the work rather it had used the fund for other purposes than the intended project. The Appellant was also found to have failed to submit a work program and to attend site meetings.

Mr. Sanga submitted that after conducting a due diligence, the Respondent realized that the Appellant had delayed to complete two water projects. Hence, through a letter dated 12th November 2024, the Respondent informed the Appellant that the Respondent would not proceed with signing of the contract. Item 3 of the said letter stated clearly that the due diligence was conducted due to the Attorney General's advice. In addition, Item 4 of the same letter indicated that the due diligence conducted revealed that various water utility authorities had raised concern over the Appellant's capability to perform the contract. Due to that finding, the Respondent refrained from entering into the contract with the Appellant.

Mr. Sanga stated that Article 59(3) of the Constitution of the United Republic of Tanzania 1977, as amended, states clearly that the Attorney General is mandated to advise the Government on all legal matters.

Handwritten signature and initials in blue ink, located at the bottom of the page.

Mr. Sanga submitted that in the Tender under Appeal the Attorney General gave some advice to the Respondent after vetting the contract. He stated that Section 23(1) of the Office of the Attorney General (Discharge of Duties) Act [CAP. 268 R.E. 2019] recognizes the Attorney General as the main advisor of the government on all legal matters unless it is otherwise revised by a court of competent jurisdiction, the Cabinet or otherwise recalled by the Attorney General at the instance of the Attorney General. Thus, the Respondent was duty bound to comply with the advice given by the Attorney General after vetting its contracts, Mr. Sanga contended.

Mr. Sanga submitted that Section 69(10) of the Act read together with Regulation 72 of the Regulations require a procuring entity to submit any contract above One Billion to the Attorney General for vetting. After vetting, the Attorney General may provide an advice which has to be adhered to prior the signing of the contract. In this Tender the Respondent complied with the requirements of the law by submitting the contract to the Attorney General for vetting as its value exceeds One Billion. The Respondent has also complied with the requirements of the law by implementing the advice given by the Attorney General. In view of the position of the law, Mr. Sanga urged the Appeals Authority to disregard the Appellant's contention that due diligence should not have been conducted after issuance of notification of award.

Mr. Sanga stated further that based on the requirement of the law, the Respondent could not be compelled to sign the contract after discovering that the Appellant had failed to execute some of its ongoing contracts. In addition, the Appellant did not disclose information relating to some of

Three handwritten signatures in blue ink are visible at the bottom of the page. The first signature on the left is a stylized, cursive 'S'. The middle signature is a long, sweeping horizontal stroke followed by a small loop. The third signature on the right is a more complex, cursive signature.

the ongoing contracts which indicated that the Appellant had failed to fulfil its contractual obligations. Thus, having learnt that the Appellant had poor performance of awarded contracts with other procuring entities, the Respondent could not proceed with signing of the contract.

In addition, Mr. Msoffe submitted that the due diligence conducted by the Respondent was for purposes of investigating the capability and competence of the Appellant to execute the contract. The due diligence conducted went further in reviewing several contracts that were performed by the Appellant and were not disclosed on its tender. Thus, the Respondent's due diligence was above the normal verification which is conducted in accordance with Regulation 225 of the Regulations. Due to the sensitivity of the due diligence process that was conducted, the Appellant could not have been involved as contended.

Finally, the Respondent prayed for the following orders: -

- i) The Appeal be dismissed in its entirety for lack of merits;
- ii) The Respondent be allowed to proceed with the re-tendering process;
- iii) Costs of the Appeal be borne by the Appellant; and
- iv) Any other relief as the Appeals Authority may deem appropriate to grant in the circumstances.

REJOINDER BY THE APPELLANT

On his brief rejoinder, the learned counsel submitted that the Appellant is aware of requirement of Article 59 of the Constitution of the United Republic of Tanzania on the role of the Attorney General in advising the Government. However, he insisted that the Respondent was required to



comply with the requirements of Regulation 225 of the Regulations while conducting the due diligence.

The learned counsel submitted that the Respondent had not interpreted properly the wording of Regulation 225 of the Regulations, as it does not provide a clear distinction between verification and due diligence. Regulation 225 of the Regulations governs the verification process be it in the name of post-qualification or due diligence. The referred regulation requires that if the procuring entity has decided to verify the information provided by a tenderer during tendering, such a tenderer must be involved by providing the required information. However, in the Respondent's due diligence process, the Appellant was not accorded an opportunity to clarify on any of the findings that were obtained. Thus, the Respondent's due diligence was marred with irregularities and therefore improper under the law.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the disqualification of the Appellant's tender was justified

In resolving this issue, the Appeals Authority reviewed the record of Appeal. It observed that the Appellant was one of the two tenderers which participated in the Tender. After completion of the evaluation process, the Appellant was found to be the lowest evaluated tenderer and therefore recommended for award of the contract. The recommended contract price was Tanzania Shillings Two Billion Four Hundred Ninety-Eight Million Eight Hundred Ninety-One Thousand Seventeen and Sixty-Five Cents only (TZS 2,498,891,017.65) VAT exclusive. Having completed the internal



processes, on 11th October 2024, the Respondent issued the Notice of Intention to award the Tender to the Appellant. The said Notice was followed with a notification of award of the contract to the Appellant issued on 24th October 2024.

The record indicates that on 23rd October 2024, the Respondent submitted the draft contract to the Attorney General for vetting. On 6th November 2024, the Attorney General returned the vetted contract to the Respondent with several recommendations. One of the recommendations provided was that before signing the contract, the Respondent should conduct a thorough due diligence on the Appellant to verify its capacity and competency to execute the contract.

After receipt of the Attorney General's advice, the Respondent inquired about the Appellant's previous performance contracts with MTUWASA, RUWASA Kigoma and HTMWSSA. MTUWASA and HTMWSSA responded to the Respondent's letter by stating that the Appellant had poor performance on the ongoing contracts. Following such a finding, the Respondent through a letter dated 12th November 2024, notified the Appellant about its decision of not proceeding with the signing of awarded contract. The Respondent's position was based on the outcome of the due diligence process conducted on various water utility authorities which revealed that the Appellant had poor performance on its ongoing contracts. Aggrieved with the Respondent's decision of not proceeding with the signing of the contract, the Appellant filed an application for administrative review and subsequently this Appeal.

In ascertaining if the Respondent's decision not to proceed with the signing of the contract with the Appellant was proper, the Appeals Authority reviewed Section 69(10) of the Act and Regulation 72(1), (3) and (4) of the Regulations which read as follows: -

69(10) "Mkataba wowote wenye thamani inayozidi ukomo ulioainishwa katika kanuni unaotokana na kukubaliwa kwa mzabuni au ofa chini ya Sheria hii utafanyiwa upekuzi na Mwanasheria Mkuu wa Serikali kabla ya kusainiwa na pande zote.

72(1) Mkataba wowote uliotokana na kukubalika kwa zabuni-

(a) ambao thamani yake ni shilingi bilioni moja na zaidi; na

(b) kwa mikataba yote ya ununuzi wa kimataifa, utafanyiwa upekuzi na Mwanasheria Mkuu wa Serikali kabla ya kusainiwa na pande zote.

(3) Afisa masuuli atapaswa, ndani ya siku tatu za kazi baada ya –

(a) kutoa tuzo ya mkataba; au

(b) kujulishwa na bodi ya zabuni kuhusu uamuzi wake wa kutoa tuzo ya mkataba,

kuwasilisha kwa Mwanasheria Mkuu wa Serikali rasimu ya mkataba kwa ajili ya upekuzi.

(4) Mwanasheria Mkuu wa Serikali atapaswa, ndani ya siku kumi na nne baada ya kupokea rasimu ya mkataba kutoka



kwa afisa masuuli, kufanya upekuzi wa rasimu ya mkataba na kutoa ushauri wa kisheria kwa afisa masuuli."

[Emphasis supplied]

The above quoted provisions require a procuring entity after issuing a notification of award or obtaining the tender board's approval of award to submit a draft contract with a value that exceeds TZS One Billion to the Attorney General for vetting. The Attorney General is required after receipt of the draft contract to vet the same within fourteen days and provide legal opinion to the respective procuring entity.

The Appeals Authority related the above quoted provisions to the facts of this Appeal. It observed that the contract value for the Tender under appeal was TZS 2,498,891,017.65 VAT Exclusive. Thus, its value exceeded TZS One Billion. The Appeals Authority observed further that after issuance of the notification of award, the Respondent submitted the draft contract to the Attorney General for vetting. In view of this fact, the Appeals Authority is of the firm view that since the contract value exceeded TZS One Billion, it was proper for the Respondent to submit the draft contract to the Attorney General for vetting.

The Appeals Authority observed further that after the vetting process was completed, the Attorney General returned the contract to the Respondent with advice which was to be adhered to before signing of the contract. The Respondent conducted due diligence which came up with findings that the Appellant had poor performance on some of the ongoing contracts to the extent that some of the procuring entities intended to terminate the



contracts. Thus, the Respondent decided not to proceed with the signing of the contract with the Appellant.

The Appeals Authority finds the Respondent's act of adhering to the advice of the Attorney General to be proper and in accordance with Regulation 72(5) of the Regulations which reads as follows: -

"72(5) Afisa masuuli, baada ya kupokea ushauri wa kisheria kuhusu rasimu ya mkataba kutoka kwa Mwanasheria Mkuu wa Serikali, atazingatia na kujumuisha ushauri huo kwenye rasimu ya mkataba".

[Emphasis supplied]

The Appeals Authority considered the Appellant's contention that the Respondent was not required to conduct due diligence after issuance of the Notice of Intention to award. In ascertaining the validity of the Appellant's contention in this regard, the Appeals Authority reviewed Regulation 72(3)(a) of the Regulations and observed that it allows a procuring entity to submit a draft contract to the Attorney General for vetting after award of the contract has been made. Furthermore, Regulation 72(5) of the Regulations requires a procuring entity to adhere to the advice given by the Attorney General after vetting the contract. Based on the requirement of the law, the Appeals Authority finds the Respondent's act of conducting due diligence after it had issued the notification of award to be proper, as it complied with the advice given by the Attorney General. Thus, the Appeals Authority rejects the Appellant's proposition in this regard.



The Appeals Authority further considered the Appellant's argument that when conducting due diligence, the Respondent was required to involve the Appellant as provided under Regulation 225 of the Regulations. The Appeals Authority reviewed Regulation 225 of the Regulations and observed that it does not mandatorily require a tenderer to be involved during post-qualification. The provision gives a procuring entity an option of either involving a tenderer or not. The Appeals Authority therefore rejects the Appellant's proposition that the Respondent should have been involved when due diligence was conducted.

The Appeals Authority also considered the Appellant's proposition that when conducting due diligence, the Respondent was to confine the process on the documents submitted during tendering. The Appeals Authority reviewed Regulation 231(3) of the Regulations and observed that it allows a procuring entity to seek independent reference of a tenderer and the results thereof may be used to determine the award of the contract. Regulation 231(3) of the Regulations reads as follows: -

"231(3) Taasisi nunuzi inaweza kutafuta marejeo huru ya mzabuni na matokeo ya ukaguzi wa marejeo yanaweza kutumika katika kuamua utoaji wa tuzo ya mkataba."

[Emphasis Added]

In view of the above position of the law, the Appeals Authority is of the firm view that the Respondent's act of seeking independent reference of the Appellant's performance of contracts from other procuring entities whose contracts were not attached by the Appellant on its tender to be



proper and in accordance with the law. Thus, the Appeals Authority equally rejects the Appellant's proposition on this point.

The Appeals Authority observed that the Appellant did not deny having been awarded the contracts with MTUWASA and HTMWSSA and these were yet to be completed. The Appellant had indicated that it was unable to complete the contract with MTUWASA as there were delays in effecting payments on the raised interim certificates. However, no evidence was provided by the Appellant to substantiate its contention in this regard. The record of Appeal indicates that the delay in executing the contract prompted MTUWASA to issue the Appellant with the "*Notice of Work delay*".

The Appeals Authority observed further that the Appellant had a challenge of not completing the contract with HTMWSSA. The record of Appeal indicates that the Appellant entered into a contract with HTMWSSA on 27th December 2023. The contract was for a period of one year. On 15th April 2024, HTMWSSA paid 15% advance payment to the Appellant which commenced to execute the work. However, the Appellant did not execute the project as expected. HTMWSSA invited the Appellant on several meetings, but it did not show up. Thus, on 30th October 2024 HTMWSSA issued the Appellant with a notice of Intention to terminate the contract. HTMWSSA through a letter dated 13th November 2024 addressed to the United Bank of Africa Tanzania Ltd, the Appellant's Bank claimed a refund of TZS 144,344,902.14 which was paid to the Appellant as advance payment for the project. The Appellant through its letters dated 2nd October 2024 and 15th November 2024 indicated that it was making some



efforts to resume work on the site. The Appellant also requested HTMWSSA to withdraw a letter of advance payment refund that was submitted to its bank, United Bank of Africa Tanzania Ltd as it had already returned to the site.

Given the above position, the Appeals Authority finds the Respondent's act of not proceeding with signing of the contract with the Appellant to be proper and in accordance with the law. Consequently, the Appeals Authority concludes the first issue in the affirmative that the disqualification of the Appellant's tender was justified.

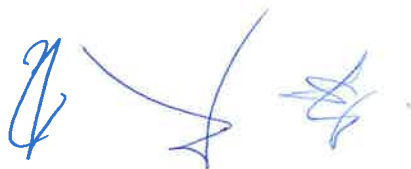
2.0 What reliefs, if any, are the parties entitled to?

Taking cognizance of the above findings, the Appeals Authority hereby dismiss the Appeal for lack of merit. The Appeals Authority hereby grants the Respondent's prayer to proceed with the re-tendering. We make no order as to costs.

It is so ordered.

This decision is binding and can be enforced in accordance with Section 121(7) of the Act.

The Right of Judicial Review as per Section 125 of the Act is explained to the parties.



This decision is delivered in the presence of the Appellant and in the absence of the Respondent though duly notified this 23rd day of December 2024.

HON. JUSTICE (rtd) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS: -

1. ENG. STEPHEN MAKIGO.....



2. DR. WILLIAM KAZUNGU.....

