

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 06 OF 2022-23

BETWEEN

M/S ABBOTT RAPID DX INTERNATIONAL LTD..... APPELLANT

AND

MEDICAL STORES DEPARTMENT.....RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|-----------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Ms. Ndeonika Mwaikambo | - Member |
| 3. Mr. Rhoben Nkori | - Member |
| 4. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------|
| 1. Ms. Agnes Sayi | - Senior Legal Officer |
| 2. Ms. Violet Limilabo | - Senior Legal Officer |

FOR THE APPELLANT

- | | |
|-------------------------------|--------------------------------|
| 1. Mr. Godlove Godwin | - Advocate- Blue Ice Attorneys |
| 2. Mr. Herman Kilenzi | - Advocate- Blue Ice Attorneys |
| 3. Ms. Hildegalda S. Mng'anya | - Country Manager |
| 4. Ms. Mary Katwaza | - County Representative |
| 5. Mr. Berno E. Sa | - Sales Director |



FOR THE RESPONDENT

- | | |
|-----------------------|--|
| 1. Mr. Lukezo Samwel | - Principal State Attorney |
| 2. Ms. Batuli Mushi | - Senior Legal Officer |
| 3. Erigh Rumisha | - State Attorney - OSG |
| 4. Mr. Mkama Mbugana | - Ag. Director of Procurement |
| 5. Mr. Hassan Mkuwa | - Procurement Officer |
| 6. Mr. Baraka Udoba | - Ag. PMSSS |
| 7. Mr. Noel Mhadu | - Ag. PMP |
| 8. Mr. Frank Nkone | - Chairperson- Tender Board |
| 9. Ms. Angela Mahinya | - Legal Officer |
| 10. Ms. Anna Mushi | - Office Management Secretary-
Director General |

The Appeal was lodged by **M/s Abbott Rapid DX International Ltd** (hereinafter referred to as "**the Appellant**") against Medical Stores Department commonly known by its acronym as "**MSD**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. IE-009/2021/2022/HQ/G/006A for Supply of HIV Laboratory Reagents and Supplies under Framework Agreement (hereinafter referred to as "**the Tender**"). The Tender had five Lots and the Appeal at hand is in relation to Lot three.

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 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 and GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**").

The Respondent floated an invitation to Tender on 9th May 2022 through Tanzania National e-Procurement System (TANePS). The deadline for submission of Tenders was initially set for 31st May 2022; however, it was later extended to 14th June 2022. On the deadline, nine tenders were received including that of the Appellant.

Tenders were then evaluated accordingly. After completion of the evaluation process, the Evaluation Committee recommended award of the tender to M/S Abbott Rapid DX International Ltd for Lot 3 at a unit price of USD 22.90 subject to negotiations. The Tender Board at its meeting held on 11th July 2022, approved the award as recommended by the Evaluation Committee. On 12th July 2022, the Tender Board through Circular Resolution approved negotiation plan. On the same date the Respondent invited three tenderers for negotiations. Negotiations took place on 13th July 2022.

On 19th July 2022 the Procurement Management Unit (PMU) tabled before the Tender Board the negotiation report for approval. The tabled report included an explanation that, due to the urgency need of the goods to be supplied, the PMU thought it would be more convenient to negotiate with three tenderers on the same day in order to save time. Thus, the three tenderers were invited for negotiations that is, the Appellant, M/S Premier Medical Corporation Private Ltd and M/S SD Biosensor Inc. During negotiations, the invited tenderers reduced their prices as follows; the Appellant from USD 22.90 to 21.80, M/S Premier Medical Corporation Private Ltd from USD 23.75 to 21.75 and M/S SD

Biosensor Inc from USD 24.40 to 20.00. M/S SD Biosensor Inc. emerged to be the lowest evaluated tenderer and was recommended for award of the Tender at the unit price of USD 20.00. Finally, the Tender Board approved the award as recommended by the negotiation team.

On 21st July 2022, the Respondent issued the Notice of Intention to award the Tender. The Notice informed the Appellant that, its tender was unsuccessful as its price was high.

Dissatisfied, on 27th July 2022, the Appellant applied for administrative review to the Respondent challenging the reason given for its disqualification. On 28th July 2022, the Respondent issued a decision dismissing the Appellant's application for administrative review. The said decision was sent to the Appellant via email on 4th August 2022. Aggrieved further, on 15th August 2022, the Appellant lodged this Appeal to the Appeals Authority.

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

- 1. Whether the negotiation process complied with the requirements of the law;**
- 2. Whether the Notice of Intention to award complied with the requirements of the law;**
- 3. Whether the disqualification of the Appellant's tender was justified; and**
- 4. What reliefs, if any, are the parties entitled to?.**

SUBMISSIONS BY THE APPELLANT

The Appellant was represented by Mr. Godlove Godwin and Mr. Herman Kilenzi learned counsel. In relation to the first issue they submitted that negotiations were conducted in contravention of Regulation 225(5) of the Regulations which requires negotiations to be held with the lowest evaluated tenderer for goods, services or works or the highest evaluated tenderer for revenue collection for national and international competitive tender. The learned counsel submitted that on 12th July 2022 the Appellant received an invitation from the Respondent to attend negotiation meeting scheduled on 13th July 2022. To the Appellant's surprise, on the date scheduled for negotiations, other two tenderers namely; M/S Premier Medical Corporation Private Ltd and M/S SD Biosensor Inc. were also invited to attend negotiations of the same Tender and the same Lot 3.

The learned counsel submitted that, according to Clause 37.3 of the Instruction to Tenderers (ITT) negotiations were to be conducted with the lowest evaluated tenderer and if it fails the next lowest evaluated tenderer should be invited. The guidance under Clause 37.3 of the ITT is similar to Regulation 228(3) of the Regulations. Regulation 228(3) of the Regulations requires negotiations to be conducted with the lowest evaluated tenderer and where the negotiation team recommends rejection of the tenderer, it may recommend invitation of the next ranked tenderer in the case of competitive method of procurement or a new tenderer to submit a tender in the case of direct contracting.

The learned counsel submitted further that, Regulation 230 of the Regulations requires that when negotiations have been commenced with the next ranked tenderer, negotiations with the previous tenderer should

not be re-opened. The tenderer whose negotiations have failed should be informed of the reasons for termination of negotiations. The learned counsel stated that the Respondent invited three tenderers for negotiations and the negotiations were conducted on the same day. The Appellant, who was the lowest evaluated tenderer was not informed if negotiations conducted had failed and for what reasons. The minutes of negotiations indicates that the Appellant reduced its unit price from USD 22.90 to 21.80 and the lead time was adjusted to 3-4 weeks upon call off order. There was no indication that negotiations failed.

The learned counsel expounded further that, the invitation for negotiation did not itemize issues for negotiations. During negotiation the Appellant was informed that negotiations would centre on reduction of price and lead time. In relation to price the Appellant contended that, the market price of USD 20.00 DDP MSD warehouse raised by the Respondent as a reason for inviting three tenderers for negotiations did not comply with the fairness and honesty principle as provided under Regulation 4(1) of the Regulations. The said regulation requires the basic principles of public procurement to make the best use of public funds with honesty and fairness.

The Appellant expounded that as the goods to be procured are not available in Tanzania's general market, then reference should have been made to MSD's previously procured price that was USD 37.5 CIP or from Global Fund PPM reference price ranges from USD 23.75 to USD 37.5 FCA. According to counsel since the fund was from Global Fund PPM then its reference price should have been used which ranges from USD

23.75 to USD 37.5 FCA incoterms which is USD 0.95 test to USD 1.50 test excluding freight insurance and clearance for HIV/Syphilis DUO.

In relation to lead time the Appellant submitted that, the Respondent ought not to have negotiated on this item as it was among the crucial factor in the evaluation of tenders. According to Section 76(2) (c) of the Act, negotiations are prohibited on any criterion which formed a crucial or deciding factor in the evaluation of the tender. Lead time was among the crucial deciding factor for determination of the successful tenderer. The Appellant complied with such requirement as provided under Section VI of the Tender Document as tenderers were required to commit themselves that the delivery of the goods would commence in 4-8 weeks from the date of Call Off Order signing. However, the Respondent made such a requirement as part of the negotiations and the Appellant reduced lead time to be 4-6 weeks. In this regard, the Respondent contravened Section 76(2) (c) of the Act.

The learned counsel further disputed the reason given by the Respondent in its decision with respect to the Appellant's administrative review that it negotiated with three tenderers due to public interest and the need for saving lives. According to the learned counsel the Respondent has misconstrued Section 65(7) of the Act. The provision requires that where the procurement meets the requirement of subsection (1) conditions relating to procurement limits, methods, tender processing periods and advertisement may be waived except conditions relating to tender evaluation and obtaining approval of the Tender Board. The Respondent was required to obtain the Tender Board's approval before proceeding with negotiations with the next lowest evaluated tenderer.

The Appellant submitted further that it was informed by the Respondent that its tender was unsuccessful due to a higher price. However, its tender was commercially, technically and financially responsive. Thus, it was found to be the lowest evaluated tenderer, hence invited for negotiations. Surprisingly, the Respondent negotiated with all the three tenderers with intention to alter the decision to award the Appellant. This can be found at page 4 of the Respondent's decision on administrative review where it was stated that *"the outcome of the negotiations with bidders changed the lowest evaluated bidder to be M/S SD Biosensor Inc at USD 20.00 following price reduction."*

The Appellant stated that the proposed successful tenderer was not the lowest evaluated rather it was the third ranked tenderer. Thus, it was wrong to term such a tenderer the lowest evaluated tenderer merely as a result of the negotiations which was conducted contrary to Section 76(2) of the Act.

In relation to the second issue the learned counsel submitted that, the Respondent issued the Notice of Intention to award the Tender in contravention of Regulation 231(4) of the Regulations. The said regulation requires the Notice of Intention to award to state the name of the successful tenderer, the contract sum, completion period and reasons why other tenderers were not successful. The Notice of Intention to award issued by the Respondent on 21st July 2022 addressed to the Appellant only indicated the reason as to why the Appellant's tender was not successful. The proposed successful tenderer's name, contract value and completion period were not disclosed. The Respondent's conduct in this regard contravened Section

4A(2) of the Act which requires procuring entities in conducting procurement processes to adhere to amongst others the principle of transparency. The Appellant further conceded not to have raised this ground when filing an application for administrative review to the Respondent.

With regard to the third issue the learned counsel referred their submissions on the first and second issue and stated that the Appellant was the lowest evaluated tenderer and as a result it was invited for negotiations. According to the minutes, negotiations were successful and the Appellant ought to have been declared as the successful tenderer. To the contrary, the Respondent intends to award the Tender to M/S SD Biosensor Inc. The learned counsel submitted that, the Respondent's act of disqualifying the Appellant and proposing award of the Tender to M/S SD Biosensor Inc who was the third ranked tenderer contravenes the requirement of the law.

In relation to the Respondent's argument as contained in the Statement of Reply that the Appellant rushed to lodge this Appeal as it ought to have waited for the Respondent to handle the matter internally, the Appellant submitted that it could not have waited and lose its right of Appeal while the Respondent had not officially communicated on what was going on. The Appellant lodged this Appeal on the last date having not received the Respondent's updated status on the matter. The Appellant could not have waited for an unknown period. The Respondent's act of not updating the Appellant on the status of the matter was done deliberately so as to defeat the Appellant's rights of appeal in this regard. Thus, the Appellant opted to lodge this Appeal.



Finally, the Appellant prayed for the following orders:-

- i) The Appeals Authority should intervene by requiring the Respondent to comply with the requirement of the law;
- ii) A declaration that the Appellant's disqualification is not justified;
- iii) The Respondent be ordered to award the Tender to the Appellant;
- iv) A declaration that the Respondent's act of inviting three tenderers for negotiations was not proper; and
- v) Any other relief the Appeals Authority may deem fit to grant.

REPLY BY THE RESPONDENT

The Respondent's submissions were made by Mr. Lukezo Samwel Principal State Attorney, Mr. Erigh Rumisha State Attorney and Ms. Batuli Mushi Senior Legal Officer. In relation to the first issue, they conceded that the negotiation process was not conducted in accordance with the law. Having realized such an anomaly, the Respondent decided to handle the matter internally. The Appellant was informed about the Respondent's internal process through the Respondent's decision on the application for administrative review where it was stated particularly under paragraph 6 that *"I hereby return the matter to the Tender Board for further negotiation procedural compliance as provided under the law following any honest human error that occurred during the Tender process as a result of consideration of public interest"*.

As a proof that the matter was to be handled internally, the counsel indicated that there was an Internal Memo from the Accounting Officer to the Chairman of the Tender Board. The Memo returned the matter

back to the Tender Board in order to comply with negotiation procedures.

The counsel for the Respondent submitted that, the Appellant after being informed of the Respondent's position that the matter was being handled internally, it ought to have waited for the outcome. To the contrary, the Appellant lodged this Appeal while the matter was still being handled by the Respondent's office.

Counsel submitted that having been served with the notification of the existence of the Appeal and being required to suspend the procurement process by this Appeals Authority, the Respondent stopped all the internal processes for rectifying the anomalies noted in relation to negotiations. On 23rd August 2022, the Respondent sought for waiver of the Appeals Authority's suspension order to the Public Procurement Regulatory Authority (PPRA) pursuant to Section 100(2) of the Act. The waiver was sought as there is a high demand of the reagents as they are out of stock countrywide. The absence of reagents would cause many infants be born with HIV infections taking into consideration that the Tender was put on hold for almost ten (10) months. Thus, there is urgent public interest. PPRA granted the waiver on 26th August 2022 and on 2nd September 2022 the Respondent communicated a letter of award to M/S SD Biosensor Inc. The counsel added that at the time of hearing this Appeal the contract was not signed.

In support of the argument on public interest, the learned counsel for the Respondent cited the case of ***Alhaj Muhldin Ndolanga and Another versus the Registrar of Sports Association and Others***, Miscellaneous Civil Cause No. 54 of 2000, High Court of Tanzania at Dar



es salaam, (unreported) where the court stated that public interest should prevail over the private interest.

The learned counsel further disputed the Appellant's argument in relation to Section 65 (5) (i) of the Act. The learned counsel stated that the referred section is not relevant for this Tender as it deals with emergency procurement and the Tender under Appeal was not floated using emergency procurement procedures.

In challenging the Appellant's arguments relating to market price of the required goods, the learned counsel submitted that, the fact that the Tender is funded by Global Fund, it is not necessary for procurement price to be based on Global Fund PPM reference price ranging from USD 23.75 to USD 37.5 FCA. The Respondent's counsel added that, there is no provision which dictates that determination of the price of the reagents to be in accordance with the financier. The Respondent expounded that, the fact that Global Fund finances the procurement of the items and the funds are channeled through the Government (the Respondent), suffices to treat that fund as public money. Therefore, Regulation 4(1) of the Regulations must be observed to ensure the best possible use of public money in order to obtain value for money and consequently reduce the cost of the goods to be procured.

The Respondent stated further that, Section 4 of the Public Finance Act of 2001, defines public money to include *"the public revenues of the United Republic, any trust or other money held, whether temporarily or otherwise, by an officer in his official capacity either alone or jointly with any other person, whether an officer or not."*



The Respondent submitted that, the basis for market price is not only considered where the products are available for sale within or outside the country, but other factors such as advancement of technology and fluctuation of market price globally which depends on demand and production cost on that particular period are considered. Hence, relying on Global Fund procurement price of USD 37.5 as contended by the Appellant was not proper.

In relation to the second issue the learned counsel submitted that, a ground relating to the Notice of Intention to award is a new ground raised at this Appellate level as it was not raised when the Appellant submitted its application for administrative review to the Respondent. The Respondent urged the Appeals Authority not to entertain the same. This position notwithstanding the Respondent claimed to have issued the Notice of Intention to award which complies with the requirement of the law.

On the third issue the Respondent submitted that, the Appellant was fairly disqualified for having a higher price than the Respondent's budget. However, if the Appellant would have been patient, it might have been invited for negotiations and subsequently being awarded the Tender. The Respondent submitted further that, Section 97(2)(b) of the Act requires a tenderer who is aggrieved by the procuring entity's decision to lodge an Appeal before this Appeals Authority. The lodged Appeal should state the areas in which a tenderer is dissatisfied with the procuring entity's decision with respect to administrative review. In this Appeal the Appellant raised all the grounds which were submitted during application for administrative review while some of the issues were

upheld by the Respondent. The Appellant ought to have challenged grounds which were not upheld by the Respondent.

Finally, the Respondent prayed for dismissal of the Appeal with costs as the Appellant's prayers have been overtaken by events.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the negotiation process complied with the requirement of the law.

In considering the parties' arguments on this issue, the Appeals Authority revisited the evaluation report and observed that the Appellant was recommended for award of the Tender subject to negotiations on price and lead time. The recommendations of the Evaluation Committee were approved by the Tender Board at its meeting held on 11th July 2022. The record of Appeal indicates that, approval of negotiations plan was obtained by way of circular resolution which was submitted and signed by the members of the Tender Board on 12th July 2022. The said negotiation plan comprises the name of the Appellant and two other tenderers namely; M/S Premier Medical Corporation Private Ltd and M/S SD Biosensor Inc. who were the second and third lowest evaluated tenderers. The record indicates further that on 12th July 2022, the Respondent invited three tenderers to attend negotiations which took place on 13th July 2022. The invited tenderers reduced their quoted prices as follows:- the Appellant from USD 22.90 to USD 21.80, M/S Premier Medical Corporation Private Ltd from USD 23.75 to USD 21.75 and M/S SD Biosensor Inc. from USD 24.40 to USD 20.00.

The Tender Board at its meeting held on 19th July 2022 approved negotiations and award to M/S SD Biosensor Inc. at a unit price of USD 20.00.

In order to verify if negotiations which resulted to the award of the Tender to M/S SD Biosensor Inc. was conducted in accordance with the requirement of the law, the Appeals Authority reviewed Section 76(1) and (4) of the Act and Regulations 225(4) (a) and (5), 228(3) and 230 of the Regulations which read as follows:-

"Sec.76(1)subject to the conditions stipulated in the regulations, a tenderer evaluated to have the capacity and capability to supply the goods, undertake the works, provide the services or purchase the assets shall be invited for negotiations by the procuring entity.

- (4) *where the negotiation under subsection (2) fails to result in an acceptable contract, the procuring entity shall terminate the negotiations and after consultation with the appropriate tender board, invite the next ranked firm for negotiations.***

Reg.225(4) *Negotiations with a tenderer are not permitted until after the tender board has approved the evaluation committee's recommendations:-*

- (a) of the lowest evaluated tenderer in case of goods, works or services or highest evaluated tenderer in case of revenue collection, and the need to hold negotiation or.***

- (5) ***Negotiations shall only be held with the lowest evaluated tenderer for goods, services or works, or the highest evaluated tenderer for revenue collection for national and international competitive tendering.***

Reg.228(3) ***where the negotiation team recommends rejection of the tenderer, it may also, where appropriate, recommend inviting the next ranked tenderer for negotiation in the case of competitive methods of procurement or a new tenderer to submit a tender in the case of direct contracting.***

Reg.230 ***Where negotiations are commenced with the next ranked tenderer or a new tenderer is invited, the procuring entity shall not reopen earlier negotiations; and the original tenderer shall be informed in writing of the reasons for termination of the negotiations"***

(Emphasis supplied)

The above quoted provisions clearly indicate that a tenderer who has been determined to be the lowest evaluated tenderer for goods, works or services or the highest evaluated tenderer in case of revenue collection and who has been approved by the Tender Board can be invited for negotiations. The provisions indicate further that, if negotiations fail with the lowest evaluated tenderer, new negotiations may be commenced with the next lowest evaluated tenderer after

obtaining the Tender Board's approval. The law requires a tenderer whose negotiations have been terminated to be informed in writing the reasons for termination.

Having related the facts of this appeal to the above quoted provisions, the Appeals Authority observes that it is evident that the Appellant was the lowest evaluated tenderer and the Tender Board approved that the firm be invited for negotiations. To the contrary, the Respondent invited and conducted negotiations with the Appellant and other two tenderers who were not the lowest evaluated. The Appeals Authority finds the Respondent's conduct in this regard to have contravened the requirements of Regulation 225(4) and (5) quoted herein above which requires negotiations to be conducted with the lowest evaluated tenderer who has been approved by the Tender Board.

The Appeals Authority observes further that, the Respondent conducted negotiations with all the three tenderers in contravention with Section 76(4) of the Act and Regulation 228(3) of the Regulations. The referred provisions require negotiations to be conducted with the lowest evaluated tenderer. If the negotiations fail the next lowest evaluated tenderer may be invited subject to the Tender Board's approval. However, this requirement was not adhered to by the Respondent in this Tender.

The Appeals Authority observed further that Regulation 230 of the Regulations requires a tenderer whose negotiations have failed to be informed in writing the reasons which led to termination of the negotiations. In this Appeal although the Appellant was invited for negotiations, there was no indication that the same was not successful. Yet the award was made to the third lowest evaluated tenderer.

The Appeals Authority considered the Respondent's proposition that the reagents the subject matter of the Tender were out of stock countrywide and its absence may result to many infants being born with HIV infections. According to the Respondent in order to mitigate the situation, it conducted negotiations with three tenderers so as to save time and to speed up the process of importation of the required reagents.

In order to ascertain the validity of the Respondent's proposition the Appeals Authority reviewed the record of Appeal and observed that, the Respondent issued the Notice of Intention to award and after receipt of the same the Appellant lodged a complaint. Upon reviewing the complaint lodged the Respondent realized that its negotiation process did not comply with the requirement of the law. On 28th July 2022 the Respondent issued a decision on the application for administrative review and indicated that the matter would be returned to the Tender Board for review and compliance with negotiation procedures. The Respondent's decision was followed up by an Internal Memo from the Respondent's Accounting Officer to the Chairperson of the Tender Board dated 9th August 2022 which required negotiations procedures to be complied. During the hearing the Respondent conceded that the negotiation process did not comply with the requirement of the law. However, due to urgent public interest on 23rd August 2022 the Respondent requested from PPRA a waiver of the suspension order issued by this Appeals Authority following the institution of this Appeal by the Appellant on 15th July 2022. PPRA granted the waiver on 26th August 2022 and on 2nd September 2022 the Respondent issued an award letter to M/S SD Biosensor Inc. though anomalies on negotiations were not yet corrected.



The Appeals Authority reviewed further the record of Appeal and observed that on 11th July 2022 the Respondent's Tender Board approved the evaluation report which recommended the Appellant to be invited for negotiations as it was the lowest evaluated tenderer. The Tender Board approved negotiations plan on 12th July 2022. Tenderers were invited for negotiations through letters written on 12th July 2022 and negotiations took place on 13th July 2022. The Tender Board approved negotiation report on 19th July 2022. Following this sequence of events the Appeals Authority observed that within 10 days the Respondent managed to execute several activities as pointed out herein above. The Appeals Authority failed to comprehend why the Respondent did not rectify the anomalies noted on the negotiations procedures. The Respondent had all the time from 28th July 2022 when it issued its decision on the application for administrative review and observed that negotiations procedures were not followed up to 15th August 2022 when this Appeal was lodged.

Furthermore, the Respondent received a waiver from PPRA on 26th August 2022. The waiver required it to proceed with the Tender process by ensuring efficiency, transparency and attainment of value for money in procurement. Since the Respondent was aware that negotiations did not comply with the requirement of the law, it ought to have proceeded with the Tender process by rectifying the anomalies. To the contrary, the Respondent proceeded to award the Tender on 2nd September 2022 without rectifying the anomalies on negotiations.

Given the above findings, the Appeals Authority observes that the Respondent's acts were contrary to the requirement of the law and were not justified. The Appeals Authority is of the considered view that the

Respondent could have easily addressed the anomalies having known of their existence from the time the decision on the application for administrative review was made. Therefore, the Respondent cannot now hide under the pretext of public interest.

The Appeals Authority is of the further considered view that the case of ***Alhaj Muhidin Ndolanga and Another versus the Registrar of Sports Association and Others*** (supra) relied upon by the Respondent is not applicable in this matter.

The Appeals Authority also considered the Appellant's argument that lead time ought not to have been negotiated as it forms a crucial factor for determination of the successful tenderer. To ascertain the validity of the Appellant's argument on this point, the Appeals Authority revisited the Tender Document under Section VI: Schedule of Requirement and observed that it provided for a delivery schedule of goods which commences in 4-8 weeks from the date of call of order signing.

Regulation 225(1) (f) of the Regulations allows negotiations on final delivery and work schedule. The Regulation reads as follows:-

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

(f) agreeing final delivery or work schedule to accommodate any changes required by the procuring entity."

Therefore, the Appeals Authority is of the firm view that it was proper for the Respondent to negotiate on lead time or delivery schedule.

Under the circumstance, the Appeals Authority concludes the first issue in the negative that negotiations process was not conducted in accordance with the law despite the fact that the Respondent was allowed under the law to negotiate lead time.

2.0 Whether the Notice of Intention to award complied with the requirements of the law

In resolving this issue the Appeals Authority considered the Respondent's argument that this is a new ground raised at the Appellate stage as it was not raised in the application for administrative review. The Appellant on his part conceded to have not raised it during application for administrative review; however, it is of the view that since it relates to non-compliance with the requirement of the law, it can be entertained at the Appellate stage.

According to Section 97(1) and (2) of the Act, an appeal to this Appeals Authority may be lodged if a tenderer is dissatisfied with the decision of the Accounting Officer or if the Accounting Officer fails to issue its decision within the prescribed time limit. This Appeal was lodged after the Appellant was dissatisfied with the Respondent's decision. Thus, when filing this Appeal it ought to have complied with Regulation 107(1)(b) of the Regulations by raising matters which were not amicably settled by the Respondent.

Based on such requirement of the law the Appeals Authority concurs with the Respondent that a ground relating to notice of intention to award is a new ground and therefore cannot be entertained at this juncture.

3.0 Whether the disqualification of the Appellant's tender was justified; and

Based on the findings made herein above on the first issue that the negotiation process was not conducted in accordance with the law, it goes without saying that the disqualification of the Appellant was not justified.

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

Taking cognizance of the findings on the first issue hereinabove, the Appeals Authority hereby allows the Appeal. Since it has been established that negotiations were conducted in contravention of the law and the anomalies have not been rectified, the Appeals Authority hereby orders the Respondent to re-start the negotiations in observance of the law. We make no order as to costs.

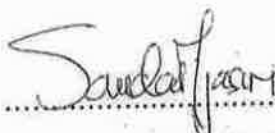
It is so ordered.

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 16th day of September 2022.

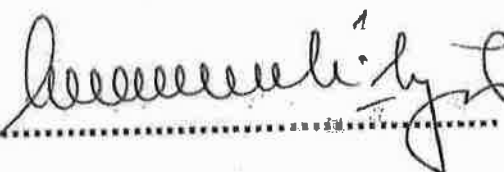
HON.JUSTICE (RTD) SAUDA MJASIRI



CHAIRPERSON

MEMBERS:-

1. MR. RHO BEN NKORI.....



2. MS. NDEONIKA MWAIKAMBO.....



