

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL CASE NO. 07 OF 2022-23**

**BETWEEN**

**M/S PREMIER MEDICAL CORPORATION**

**PRIVATE LIMITED.....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 Twaha Taslima | - Advocate- Taslima law Chambers |
| 2. Mr. Ally Hamimu  | - Account Manager                |



## FOR THE RESPONDENT

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

The Appeal was lodged by **M/S Premier Medical Corporation Private Limited** (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 Appellant participated in 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 9<sup>th</sup> May 2022 through Tanzania National e-Procurement System (TANePS). The deadline for submission of Tenders was initially set for 31<sup>st</sup> May 2022; however, it was later extended to 14<sup>th</sup> 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 at a unit price of USD 22.90 subject to negotiations. The Tender Board at its meeting held on 11<sup>th</sup> July 2022, approved the Evaluation Committee's recommendations. On 12<sup>th</sup> July 2022, the Tender Board through Circular Resolution approved the negotiation plan. On the same date the Respondent invited three tenderers for negotiations. Negotiations took place on 13<sup>th</sup> July 2022.

On 19<sup>th</sup> July 2022 the Procurement Management Unit (PMU) tabled before the Tender Board a 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 the 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 Abbott Rapid DX International Ltd and M/S SD Biosensor Inc. During negotiations, the invited tenderers reduced their prices as follows; the Appellant from USD 23.75 to 21.75, M/S Abbott Rapid DX International Ltd from USD 22.90 to 21.80 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.

According to the Appellant it became aware that on 21<sup>st</sup> July 2022, the Respondent issued the Notice of Intention to award the Tender although the same was not received by it. On 22<sup>nd</sup> July 2022 the Appellant wrote an email to the Respondent requesting to be availed with the Notice of Intention to award. The said email was followed with reminders written on 25<sup>th</sup> and 26<sup>th</sup> July 2022 respectively. According to the Appellant there was no response from the Respondent. Consequently, on 1<sup>st</sup> August 2022, the Appellant filed an application for administrative review to the Respondent. The Respondent issued its decision on 11<sup>th</sup> August 2022. Aggrieved further, on 19<sup>th</sup> August 2022, the Appellant lodged this Appeal to the Appeals Authority.

Upon being served with the Statement of Appeal the Respondent raised a Preliminary Objection (PO) on points of law to wit:-

- i. That, the Statement of Appeal by the Appellant is incompetent as the Appellant ought to challenge the decision of the Accounting Officer instead of submitting similar grounds without stating clearly how he was aggrieved by the response.
- ii. That, the Appeal is incompetent for being wrongly moved under the wrong provision.

When the matter was called on for hearing, parties were required to clarify some issues in relation to the PO. After being informed about the requirements of the law, the Appellant applied to amend the Statement of Appeal by indicating that the Appeal was made under Section



97(2)(b) of the Act instead of Section 97(2)(a) of the Act cited earlier on. The Respondent did not object to the said amendment and stated its intention to withdraw the PO so raised. Following this development, the Appeal proceeded on merits and the following issues were framed:-

- 1.0 Whether the Appellant's grounds of Appeal relating to anomalies of the Tender Document are properly before the Appeals Authority;**
- 2.0 Whether the Appellant's price was lower compared to other tenderers' prices hence qualified for negotiations;**
- 3.0 Whether the negotiation process complied with the requirements of the law;**
- 4.0 Whether the Notice of Intention to award was issued in compliance with the law;**
- 5.0 What reliefs, if any, are the parties entitled to.**

#### **SUBMISSIONS BY THE APPELLANT**

The Appellant was represented by Mr. Twaha Taslima learned counsel. He commenced his submissions in relation to the first issue by indicating that the grounds of Appeal relating to anomalies of the Tender Document are properly before the Appeals Authority. The counsel stated that on 25<sup>th</sup> May 2022, the Appellant sought for clarification from the Respondent. On 9<sup>th</sup> June 2022, the Respondent issued clarification through Addendum No. 2 which amended technical specifications, price schedule and changed the deadline for submissions of tenders from 16<sup>th</sup> June to 14<sup>th</sup> June 2022. The clarifications made left other issues unresolved as a result on 10<sup>th</sup> June 2022 the Appellant applied for administrative review to the Respondent. The Respondent issued its decision on 13<sup>th</sup> June 2022. The learned counsel stated that, the



Respondent's failure to clarify all the issues raised by the Appellant contravened Regulation 13(2) of the Regulations which requires a procuring entity to respond to all the clarifications raised within three days.

The learned counsel submitted further that, the Tender Document did not contain the evaluation criteria as required by Section 72(1) and (2) of the Act read together with Regulation 203(1) of the Regulations. The cited provisions require the criteria for evaluation to be explicitly stated in the Tender Document. The learned counsel added that, if the Respondent had considered the clarifications sought by the Appellant, the same information would have been used to evaluate the capacity and capability of tenderers.

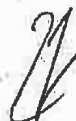
In relation to the second issue, the counsel for the Appellant submitted that according to TANEPS opening record dated 14<sup>th</sup> June 2022, the Appellant complied with Addendum No. 2 by quoting unit price of USD 23.75 DDP equivalent to TZS 54,943.23. The counsel submitted that according to the said Addendum prices were to be per unit rate as the intended contract was a framework agreement and supplies were to be made upon call off order. The Respondent during evaluation multiplied the unit price by quantity of the required goods while the supplies were to be done upon demand. The Respondent was required to assess if the unit price quoted was DDP. If the Respondent would have adhered to the requirements of Addendum No. 2 the Appellant would have been a responsive tenderer for this Tender. Tenderers who quoted a lump sum amount would not have been considered to have complied with the requirements of the Tender. The above notwithstanding, the Appellant

was invited for negotiations which implies that it was found to be the lowest evaluated tenderer and therefore qualifies for award.

On the third issue the learned counsel submitted that negotiations were not conducted as per Section 76(1) of the Act and Regulation 225(4) (a) and 225(5) of the Regulations. The said provisions required negotiations to be held with the lowest evaluated tenderer for goods, services or works or the highest evaluated tenderer for revenue collection and who has been approved by the Tender Board. To the contrary, on 12<sup>th</sup> July 2022 the Respondent invited three tenderers to negotiate with them instead of the lowest evaluated tenderer.

The learned counsel expounded that, the Respondent negotiated with three tenderers without terminating negotiations with neither the lowest evaluated tenderer nor the second lowest evaluated tenderer before inviting M/S SD Biosensor Inc. who was the third lowest evaluated tenderer. The Appellant stated that the Respondent's act in this regard contravened Regulation 228(3) of the Regulations which requires termination of negotiation with the lowest evaluated tenderer before inviting the next lowest evaluated tenderer and the Tender Board's approval must be obtained to that effect.

The learned counsel submitted further that the Respondent's negotiations process contravened Regulation 230 of the Regulations. The regulation requires that if negotiations with the lowest evaluated tenderer have failed, before commencing negotiations with the next ranked tenderer, the original tenderer should be informed in writing of the reasons for termination of negotiations. In this Tender neither M/S Abbott Rapid DX International Ltd nor the Appellant were informed about failure of the negotiations and the reasons thereof. The



Respondent negotiated with the proposed successful tenderer M/S SD Biosensor Inc. before terminating negotiations with M/S Abbott Rapid DX International Ltd and the Appellant.

In relation to the fourth issue, the learned counsel submitted that, the Notice of Intention to award the Tender was not communicated as per the requirements of the law. The Respondent was required to communicate the Notice of Intention to award as per Section 60(3) of the Act and Regulation 231(2) of the Regulations. According to these provisions the Notice of Intention to award has to be issued to all tenderers who had participated in the tender and it should accord them seven working days to submit a complaint if any. The Appellant claimed that on 21<sup>st</sup> July 2022 it became aware that the Respondent had issued the Notice of Intention to award to other tenderers except the Appellant. Having not received the Notice of Intention to award, on 22<sup>nd</sup> July 2022 the Appellant wrote an email to the Respondent requesting to be availed with the Notice of Intention to award. The email contained email addresses where the notice could have been sent. This email was followed with reminder e-mails dated 25<sup>th</sup> and 26<sup>th</sup> July 2022. Having not received any responses from the Respondent, on 1<sup>st</sup> August 2022, the Appellant applied for administrative review to the Respondent. On 11<sup>th</sup> August 2022 the Respondent issued its decision with respect to the Appellant's application for administrative review.

The Appellant submitted that the Respondent's act of excluding it when issuing the Notice of Intention to award contravened the requirements of Regulation 12(3) of the Regulations which requires procuring entities not to discriminate against or among tenderers on the basis of the form



in which they transmit or receive documents, notification, decision or other communications.

The Appellant stated further that, the Respondent's act in this regard contravened Section 4A (3) (a) and (b) of the Act which require the procuring entity to undertake the highest standard of equity in executing its duty by observing equal opportunity and fair treatment to all tenderers.

Finally, the Appellant prayed for the following orders:-

- i. Request the Appeals Authority to review the matter and issue administrative decision;
- ii. A declaration that the Appellant was the successful tenderer;
- iii. The Respondent be ordered to bear costs of this Appeal; and
- iv. Any other relief, the Appeals Authority deems 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 the learned counsel submitted that, the grounds of Appeal in relation to anomalies of the Tender Document are not properly before the Appeals Authority. The Appellant became aware of the alleged anomalies from the moment the Tender was floated on 9<sup>th</sup> May 2022. On 25<sup>th</sup> May 2022, the Appellant sought for clarifications on some of the issues to the Respondent. Upon receipt of the Appellant's queries the Respondent issued clarification through Addendum No. 1 and No. 2. The addendums clarified all the queries raised. However, upon being dissatisfied with the clarifications issued, the Appellant applied for administrative review on



10<sup>th</sup> June 2022. The Respondent issued its decision on 13<sup>th</sup> June 2022. The Tender opening took place on 14<sup>th</sup> June 2022 and the Appellant was among the tenderers who participated in the Tender.

The learned counsel stated that if the Appellant was dissatisfied with the Respondent's decision on the application for administrative review, it ought to have challenged it by way of Appeal to this Appeals Authority pursuant to Section 97(2)(b) of the Act. Since the Appellant did not challenge the Respondent's decision made on 13<sup>th</sup> June 2022 and instead opted to submit its tender, is precluded from raising issues relating to anomalies of the Tender Document at this stage. In support of this argument the learned counsel relied on Section 123 of the Evidence Act [CAP.6 R.E. 2022] which provides guidance on the principle of estoppel. That is, if a person by his act or omission has forfeited his right, is prohibited from raising it later.

In relation to the second issue the learned counsel submitted that, the Appellant was not the lowest evaluated tenderer compared to other two tenderers who were invited for negotiations. The Appellant quoted TZS 54,943.25 per unit equivalent to USD 23.75 at the exchange rate of TZS 2,313.40 of the date of the Tender opening. The Appellant's quoted price per unit pack was multiplied by 197,039 being the quantity of the required goods. The Appellant's total price came to TZS 10,825,943,036.75. The price quoted by M/S Abbott Rapid Dx International Ltd was TZS 10,438,507,286.20 and M/S SD Biosensor Inc. was TZS 11,122,252,551.44. During evaluation it was found that the Appellant was the second evaluated tenderer. M/S Abbott Rapid Dx International Ltd was the lowest evaluated tenderer and therefore the Appellant was not the lowest evaluated tenderer as claimed.

Submitting on the third issue the Respondent's counsel conceded that negotiations were not conducted in accordance with the requirements of the law. However, there were prevailing circumstances which resulted in such anomalies. The circumstances included the following: - first, high demand of the reagents as they were out of stock countrywide. Reagents were for preventing transmission of infections from a mother to a child. Thus, its absence would cause infants to be born with HIV infections. Second, there were differences in price as the market value was USD 20.00 and the invited tenderers had a difference of almost USD 1 amongst them. The Respondent intended to procure the said items as per the market price. Third, delays in conducting the Tender process. According to the Respondent the Tender was floated way back in 2021 but due to unavoidable circumstances it was cancelled and started afresh around May 2022. Thus, there was an urgent need of finalizing the process so that the required reagents could be imported.

The learned counsel submitted further that, the project has been financed by the Global Fund. The released funds are to be utilized within the prescribed period. Failure to utilize the same would cause the Fund to be rescinded and therefore causing loss to the Government.

The Respondent's counsel concluded his submissions on the third issue by indicating that despite the fact that the negotiations were conducted in contravention with the requirements of the law, such irregularities were necessitated by public interest which prevails over private interest.

On the fourth issue, the learned counsel submitted that, it was purely a human error that the Notice of Intention to award was sent to a wrong and a non-existing email address. However, the Appellant acknowledged

that it was aware that the Notice of Intention to award has been issued and reacting against it, it applied for review on 1<sup>st</sup> August 2022. The Respondent issued its decision on 9<sup>th</sup> August 2022. The decision was communicated to the Appellant on 11<sup>th</sup> August 2022. Thus, the fact that the Notice of Intention to award was sent to a wrong email, the Respondent conceded to have done so without any malicious intention. The Respondent stated further that, despite the anomaly in serving the Notice of Intention to award, the Appellant's rights have not been prejudiced in anyway as it submitted its application for administrative review as per the requirement of the law and the same was entertained by the Respondent.

Finally, the Respondent prayed for dismissal of the Appeal with costs.

#### **ANALYSIS BY THE APPEALS AUTHORITY**

##### **1.0 Whether the Appellant's grounds of Appeal relating to anomalies of the Tender Document are properly before the Appeals Authority**

In resolving this issue, the Appeals Authority reviewed the record of Appeal and observed that, the Tender was floated on 9<sup>th</sup> May 2022. On 25<sup>th</sup> May 2022 the Appellant sought clarification from the Respondent on various issues relating to technical specifications. On 9<sup>th</sup> June 2022 the Respondent sent a response to the Appellant by issuing Addendum No.

2. The Appellant was dissatisfied with the clarification given, thus on 10<sup>th</sup> June 2022 it applied for administrative review to the Respondent. On 13<sup>th</sup> June 2022 the Respondent issued its decision which dismissed the Appellant's application for review.

In compliance with Section 97(1) and (2)(b) of the Act, the Appellant was required to submit its Appeal to the Appeals Authority within seven working days if it was dissatisfied with the Respondent's decision. Section 97(1) and (2)(b) reads as follows:-

*"Sec. 97 (1) a tenderer who is aggrieved by the decision of the accounting officer may refer the matter to the Appeals Authority for review and administrative decision.*

*(2) Where:-*

*(a) .... or*

*(b) the tenderer is not satisfied with the decision of the accounting officer,*

***the tenderer may make a complaint to the Appeals Authority within seven working days from the date of communication of the decision by the accounting officer or upon the expiry of the period within which the accounting officer ought to have made a decision."***

*(Emphasis Added)*

The above quoted provision indicates that, if a tenderer is dissatisfied with the decision issued by the accounting officer it may refer the matter to the Appeals Authority within seven working days from the date of communication of the decision.

Counting from 13<sup>th</sup> June 2022, when the Respondent issued its decision on the Appellant's application for administrative review, the seven working days within which the Appellant ought to have lodged the appeal lapsed on 22<sup>nd</sup> June 2022. The Appellant did not exercise its rights as provided under the law until on 19<sup>th</sup> August 2022 when it submitted this Appeal and raised amongst others, grounds relating to anomalies of the Tender Document.

From the above observations, the Appeals Authority finds the Appellant's act of raising grounds relating to anomalies of the Tender Document in this Appeal to be improper and in contravention of Section 97(1) and (2)(b) of the Act.

Under the circumstances, the Appeals Authority concludes the first issue in the negative that the Appellant's grounds relating to anomalies of the Tender Document are not properly before the Appeals Authority.

**2.0 Whether the Appellant's price was lower compared to other tenderers hence qualified for negotiations.**

In resolving this issue the Appeals Authority reviewed the Evaluation Report and observed that the Appellant was the second lowest evaluated tenderer for having quoted a unit price of USD 23.75 equivalent to TZS 54,943.25 as per the exchange rate of TZS 2,313.40. The Appeals Authority observed further that M/S Abbott Rapid Dx International Ltd was found to be the lowest evaluated tenderer for having quoted a unit price of USD 22.90 equivalent to TZS 52,976.86. M/S Biosensor Inc. was found to be the third evaluated tenderer with a quoted unit price of USD 24.40 equivalent to TZS 56,446.96. According to the Tender Document Section VI - Schedule of Requirement the estimated quantity of the required goods was 197,039. During the hearing the Respondent indicated that the unit price was multiplied with the estimated quantity and prices were as follows:- M/S Abbott Rapid Dx International Ltd had TZS 10,438,507,520.00, the Appellant had TZS 10,825,943,036.75 and M/S Biosensor Inc. had TZS 11,122,252,551.44. Therefore, the Evaluation Committee recommended award of the Tender to M/S Abbott Rapid Dx International Ltd the lowest evaluated tenderer subject to negotiation.

From the above observations, the Appeals Authority is of the firm view that the Appellant was the second lowest evaluated tenderer and therefore it was not the lowest evaluated tenderer as contended.

The Appeals Authority also considered the Appellant's contention that that there is no market price for the required goods within the country, therefore the Respondent's price of USD 20.00 is not justified. The Appellant added that since the project is funded by Global Fund, the Respondent's price ought to have reflected the Global Fund PPM reference price which ranges from USD 23.75 to USD 37.5 FCA. The Appeals Authority having reviewed the record of Appeal could not establish anything which compels the Respondent to use the financier's prices. Given the circumstances, the Appeals Authority finds that the Respondent was at liberty to use the price which suits its conditions. Therefore the Appellant's argument in this regard is rejected.

Based on the above findings and observations the Appeals Authority concludes the second issue in the negative that the Appellant's price was not lower compared to other tenderers.

### **3.0 Whether the negotiation process complied with the requirements of the law**

In considering the parties' arguments on this issue, the Appeals Authority revisited the evaluation report and observed that M/S Abbott Rapid Dx International Ltd 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 11<sup>th</sup> July 2022. The record of Appeal indicates further 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 12<sup>th</sup> July 2022. The said negotiation plan comprises the names of M/S Abbott Rapid Dx International Ltd who was the lowest evaluated tenderer, the Appellant who was the second lowest evaluated tenderer and M/S SD Biosensor Inc. who was the third lowest evaluated tenderer. The record of appeal indicates further that, on 12<sup>th</sup> July 2022, the Respondent invited three tenderers as listed in the negotiation plan to attend negotiations which took place on 13<sup>th</sup> July 2022. The invited tenderers reduced their quoted prices as follows:- M/S Abbott Rapid Dx International Ltd from USD 22.90 to USD 21.80, the Appellant 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 19<sup>th</sup> July 2022 approved negotiations report and award to M/S SD Biosensor Inc. at a unit price of USD 20.00.

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 in order to ascertain if negotiations resulting in the award of the Tender to M/S SD Biosensor Inc. was conducted in accordance with the requirements of the law. The provisions 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 as per the evaluation report the Appellant was the second lowest evaluated tenderer. However, the Appellant, M/S Abbott Rapid Dx International Ltd who was the lowest evaluated tenderer and M/S SD Biosensor Inc. the third lowest evaluated tenderer were all invited for negotiations by the Respondent. 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. In this regard M/S Abbott Rapid Dx International Ltd was the only firm which was to be invited for negotiations as it was approved by the Tender Board to be the lowest evaluated tenderer.

The Appeals Authority observed 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 as it conducted negotiations with three tenderers on the same day and there was no Tender Board's approval for inviting the next lowest evaluated tenderer.

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 the second ranked tenderer and was invited for negotiations, no reason was provided for termination of negotiation. 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 are 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 the three tenderers so as to save time and to speed up the process of importation of the required reagents. The Respondent also contended that the project is funded by Global Fund and therefore if the funds would not be used within the specified period the same would be rescinded. The Respondent claimed that the Tender process had taken more than 10 months and therefore there was an urgent need for the same to be finalized so that the reagents could be supplied and the relevant funds not being rescinded by the financier.

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 on 21<sup>st</sup> July 2022 and thereafter M/S Abbott Rapid Dx International Ltd lodged an application for administrative review. Upon reviewing the application for administrative review lodged, the Respondent realized that its negotiation process did not comply with the requirements of the law. On 28<sup>th</sup> 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 copied to the Appellant in this Appeal. The record of appeal indicates further that, the Respondent's decision was followed by an Internal Memo from the Respondent's Accounting Officer to the Chairperson of the Tender Board dated 9<sup>th</sup> August 2022 which required the Tender Board to review the matter and to ensure that negotiations procedures are complied with.

During the hearing the Respondent conceded that negotiations were not conducted in accordance with the law. However, due to urgent public interest it was required to proceed with the Tender process. The Respondent elaborated that following the institution of Appeal Case No. 6 of 2022/23 by M/S Abbott Rapid Dx International Ltd the Appeals Authority suspended the Tender process. However, according to the Respondent, due to urgent public interest, on 23<sup>rd</sup> August 2022 the Respondent requested a waiver from PPRA of the suspension order issued by this Appeals Authority. PPRA granted the waiver on 26<sup>th</sup> August 2022 and on 2<sup>nd</sup> September 2022 the Respondent issued an award letter to M/S SD Biosensor Inc. although the anomalies on negotiations were not yet corrected.



The Appeals Authority reviewed further the record of Appeal and observed that on 11<sup>th</sup> July 2022 the Respondent's Tender Board approved the evaluation report which recommended M/S Abbott Rapid Dx International Ltd be invited for negotiations as it was the lowest evaluated tenderer. The Tender Board approved the negotiations plan on 12<sup>th</sup> July 2022. Tenderers were invited for negotiations through letters written on 12<sup>th</sup> July 2022 and negotiations took place on 13<sup>th</sup> July 2022. The Tender Board approved the negotiation report on 19<sup>th</sup> July 2022. Following this sequence of events the Appeals Authority observed that within a period of ten (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. The Respondent had all the time from 28<sup>th</sup> July 2022 when it issued its decision on the application for administrative review by M/S Abbott Rapid Dx International Ltd and was aware that the negotiations procedures were not followed. The Respondent had more than ten (10) days from 28<sup>th</sup> July 2022 to 15<sup>th</sup> August 2022 when Appeal Case No. 6 of 2022/23 by M/S Abbott Rapid Dx International Ltd was lodged before this Appeals Authority and the Tender being suspended. The Respondent could have rectified the anomalies with the same spirit and speed it used in processing the Tender prior to the issuance of the Notice of Intention to award.

Furthermore, the Respondent received a waiver from PPRA on 26<sup>th</sup> 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 2<sup>nd</sup> September 2022 without rectifying anomalies on the negotiations.

Given the above findings, the Appeals Authority observes that the Respondent's acts in this regard were contrary to the requirements 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.

Under the circumstances the Appeals Authority concludes the third issue in the negative that negotiation process did not comply with the requirements of the law.

#### **4.0 Whether the Notice of Intention to award was issued in compliance with the law**

In resolving this issue the Appeals Authority revisited Section 60(3) of the Act read together with Regulation 231(2) of the Regulations which read as follows:-

*"Sec. 60(3) upon receipt of notification, **the accounting officer shall, immediately thereafter issue a notice of intention to award the contract to all tenderers who participated in the tender in question giving them seven working days within which to submit complaints thereof, if any.***

*Reg. 231(2) Upon receipt of the notification of award decision from the tender board, the accounting officer*



*shall, having satisfied himself that the proper procedures have been followed and within three days, **issue a notice of intention to award the contract to all tenderers who participated in the tender in question giving them seven working days within which to submit a complaint, if any.***"

(Emphasis supplied)

The above provisions require the accounting officer to issue the notice of intention to award the contract to all tenderers who participated in the Tender process giving them seven working days within which to submit a complaint if any.

In this Appeal the Appellant claimed to have not been served with the Notice of Intention to award while other tenderers who participated on this same Tender were served. The Respondent on its part stated that on 21<sup>st</sup> July 2022 it issued the Notice of Intention to award to all tenderers who participated in the Tender. Unfortunately, on the part of the Appellant the notice was sent to a wrong email address. The Respondent claimed that the same was not done with any ulterior motive but was rather a human error.

The Appeals Authority reviewed the record of Appeal and observed that on 28<sup>th</sup> July 2022 the Respondent sent the Notice of Intention to award to the Appellant via email vnkrani@premiermedcorp.com. During the hearing the Appellant denied having such an email address and indicated that the right email address is vnakrani@premiermedcorp.com.

The Appeals Authority reviewed Appendix 9.0 of the Appellant's Statement of Appeal and observed that on 22<sup>nd</sup>, 25<sup>th</sup> and 26<sup>th</sup> July 2022 the Appellant wrote emails to the Respondent requesting to be availed



with the Notice of Intention to award. In the said emails the Appellant provided three different email addresses where the notice of intention to award could be sent. However, on 28<sup>th</sup> July 2022, the Respondent sent the Notice of Intention to award to an email address which did not exist. It was further observed that while the same notice was sent to other tenderers on 21<sup>st</sup> July 2022 the Respondent purported to have sent it to the Appellant on 28<sup>th</sup> July 2022.

Given the above observations, the Appeals Authority finds the Respondent's conduct to have contravened Section 60(3) of the Act and Regulations 231(2) of the Regulations which requires the Notice of Intention to award to be served to all tenderers who had participated in the Tender. Furthermore, the Respondent mode of issuing the Notice of Intention to award contravened Regulation 12(3) of the Regulations which reads as follows:-

*"Reg.12(3) the procuring entity shall not discriminate against or among tenderers on the basis of the form in which they transmit or receive documents, notifications, decisions or any other communications."*

The above quoted provision requires procuring entities not to discriminate tenderers when issuing or transmitting communications. The Respondent discriminated the Appellant by not sending to it the Notice of Intention to award on the same date it was sent to other tenderers and by using a non-existing email address while the correct email addresses were availed to it.

Under the circumstances the Appeals Authority concludes the fourth issue in the negative that the Notice of Intention to award was not issued in accordance with the law.





### **5.0 What reliefs, if any, are the parties entitled to**

Taking cognizance of the findings on the third and fourth issues 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 19<sup>th</sup> day of September 2022.

**HON.JUSTICE (RTD) SAUDA MJASIRI**

*Sauda Mjasiri*

**CHAIRPERSON**

**MEMBERS:-**

**1. MS. NDEONIKA MWAIKAMBO**

**2. MR. RHOEN NKORI**

