IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

AT DAR ES SALAAM

APPEAL CASE No. 32 OF 2021-22

BETWEEN

M/S G.5 TECHNICAL SERVICES &

GENERAL SUPPLIES LIMITED..... APPELLANT

AND

TANZANIA COMMERCIAL BANK PLC .....RESPONDENT

DECISION

CORAM

1. Hon. Justice (rtd) Sauda Mjasiri - Chairperson
2. Eng. Stephen Makigo - Member
3. Dr. William Kazungu - 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. Pendael Patrice Chuwa - Managing Director
2. Mr. Daniel Nsulwa - Human Resource Officer

FOR THE RESPONDENT

1. Mr. Paulina Kunjumu - Chief Manager Legal
2. Mr. Lawson Kawamala - Senior Manager Procurement

3. Mr. Erick Zakayo - Head of Procurement Management Unit

4. Mr. Benedicto S. Mahela - Head of Procurement Management Unit (NSSF)

The Appeal was lodged by **M/S G.5 Technical Services & General Supplies Limited** (hereinafter referred to as "**the Appellant**") against the **Tanzania Commercial Bank PLC** (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. PA/092/2022/TCB/NC/36 for provision of repair and mantainance of air conditions (hereinafter referred to as "**the Tender**").

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

The Tender was conducted using National Competitive Tendering Method through the Tanzania National e-Procurement System (TANePS) as per 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**").

On 17th January 2022, the Respondent through TANePS invited qualified tenderers to submit their tenders. The deadline for submission was set for 1st February 2022 at 14.00 hours. According to the online tender opening record only seven (7) tenderers responded to the invitation, including the Appellant.

After completion of all internal processes, on 20th April 2022, the Respondent issued a Notice of Intention to award the contract. The notice indicated that the Tender would be awarded to M/S Bright Technical System and General Supplies Ltd at a contract price of TZS 18,006,800.00 (Eighteen Million Six Thousand Eight Hundred) only VAT inclusive. The Appellant was informed that its tender was disqualified for having poor past performance.

Dissatisfied with the reason given for its disqualification, on 26th April 2022 the Appellant applied for administrative review to the Respondent. On 29th April 2022, the Respondent issued a decision dismissing the Appellant's application for administrative review. Aggrieved further, on 12th May 2022, the Appellant filed this Appeal to the Appeals Authority.

When the matter was called on for hearing the following issues were framed by the parties and approved by the Appeals Authority: -

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 grounds of Appeal as stated in the Statement of Appeal as well as oral submissions during the hearing may be summarized as follows:-

1. That, the Appellant participated in the Tender and according to the TANePS its bid was the lowest, and was therefore entitled to be awarded the contract. The Appellant elaborated that it quoted a

lower price of TZS 11,617,100.00 VAT Inclusive. The proposed successful tenderer M/S Bright Technical Systems and General Supplies Limited quoted a higher price of TZS 18,006,800.00 VAT Inclusive. The difference of prices between the two tenderers was almost TZS 7,000,000.00. Therefore, the Respondent intends to award the contract to a tenderer who quoted the highest price.

2. That, with no justifiable reason the Respondent disqualified the Appellant's bid on the ground of poor performance on its previous contracts. The Respondent wrongly acted on unfounded reasons without any proof thereof. The Appellant claimed to have no record which indicate that it failed to execute any of its contracts with previous employers.

   The Appellant elaborated that, after receipt of the notice of intention to award and being dissatisfied, on 26th April 2022 it lodged a complaint to the Respondent. On 28th April 2022 the Appellant was invited to a meeting convened by the Respondent. In the said meeting the Respondent informed the Appellant about the feedback obtained from its previous employers which indicated poor performance. However, the Respondent was not ready to disclose the names of the said employers who gave negative recommendations on the Appellant's previous performance.

   The Appellant further stated that, the Respondent issued its decision on the complaints lodged on 29th April 2022. After receipt of the said decision, the Appellant sought recommendations on its previous performance from the National Social Security Fund (NSSF) and DCB Commercial Bank. The said requests were made

through official letters which were addressed to the head of the institutions. Both institutions vide their letters dated 9th and 12th May 2022 respectively gave positive recommendations on the Appellant's previous performance.

The Appellant expounded further that, according to the documents attached to the statement of reply, the Respondent sought recommendations on the Appellant's previous performance from NSSF and DCB Commercial Bank. Both recommendations were sought through email addressed to individuals while the official means of communication is done through formal letters addressed to the head of the institutions.

The Appellant added that, when executing its contract with NSSF it was supervised by personnel from the Estate Department. Mr. Benedicto Mahela, Head of Procurement Management Unit who signed the poor performance recommendation letter dated 9th March 2022 on behalf of the NSSF is not conversant with the Appellant's performance. Mr. Boniface Liyumba, the NSSF's Property Manager who signed the Appellant's positive recommendation letter on behalf of NSSF dated 9th May 2022 knows the Appellant's performance as its department supervised its work.

The Appellant submitted further that the poor performance recommendation letter from the DCB Commercial Bank was issued by one Theresia Majula, a procurement personel who had not supervised the Appellant's execution of the contract. Thus, she was not conversant with the Appellant's performance.

The Appellant contended further that, it failed to understand, how it was possible for NSSF and DCB Commercial Bank to issue two different recommendation letters on its previous performance. The Appellant highly doubts the validity of the recommendations obtained by the Respondent which resulted into its disqualification.

3. Finally, the Appellant prayed for the following orders:-
   i. Re-evaluation of the reasons used by the Respondent to disqualify the Appellant as the same are baseless and unfounded;
   ii. An order for a declaration that the Respondent wrongly acted on unfounded reason(s) of poor performance to disqualify the Appellant's tender without any proof;
   iii. The Respondent be ordered to award the Tender to the Appellant as it was the lowest evaluated tenderer;
   iv. Costs of the Appeal at hand be borne by the Respondent herein; and
   v. Any other relief this Appeals Authority may deem fit and just to grant.

SUBMISSIONS BY THE RESPONDENT

The Respondent's reply to the Appellant's grounds of Appeal as well as oral submissions during the hearing may be summarized as follows: -

1. That, according to Regulation 224 (3) of the Regulations, procuring entities are allowed to seek independent reference of a tenderer and results thereof may be used in determining the award of the contract. The Respondent added that, Clause 22 (v) of the Tender

Data Sheet (TDS) stated clearly that *"the Bank SHALL carry out post-qualification (site visit) to some of their Clients and offices to verify the genuiness of their submission".* Thus, it was on this basis that the Respondent sought recommendations of the Appellant's performance from its previous employers.

The Respondent expounded that during evaluation, the evaluation committee deemed it proper to verify tenderers' performance by seeking references from their previous employers. In the course of so doing, the Respondent sought references from four previous employers of the Appellant and three employers of the proposed successful tenderer (M/S Bright Technical Systems and General Supplies Limited). According to the Respondent, among the employers who were contacted on the part of the Appellant, two gave negative recommendations that the Appellant had poor performance. These were NSSF and DCB Commercial Bank. On the part of the successful tenderer, all the contacted employers gave positive recommendations, that the firm successfully executed its contracts. Based on such recommendations the evaluation committee disqualified the Appellant's tender for poor performance on previous contracts.

The Respondent submitted further that, Regulation 232 (2) of the Regulations requires award of the Tender to be made to a tenderer who met the required financial and managerial capability, legal capacity, experience and resources to carry out the contract effectively. The said requirement was also amplified under Clause 22 (v) of the TDS.

2. That, the Appellant was informed of the reason for its disqualification through a notice of intention to award issued on 20th April 2022. Being dissatisfied with the decision, it submitted an official complaint on 26th April 2022. Having received the Appellant's complaint, on 28th April 2022 the Respondent convened a meeting with the Appellant. In the said meeting the Respondent informed the Appellant's representatives the feedback obtained from its previous employers which revealed poor performance. The names of the Appellant's employers who gave negative recommendations were disclosed. The Respondent officially issued its decision on 29th April 2022 whereby it rejected the Appellant's complaint.

   The Respondent submitted further that, after the Appellant was informed of the names of its previous employers who gave negative recommendations, it wrote to them seeking recommendations. To the Respondent's surprise the same employers, through different officials from different departments gave positive recommendations on the Appellant's performance. The Respondent highly doubts the genuiness of the recommendation letters from NSSF and DCB Commercial Bank attached to the Appellant's Statement of Appeal. The Respondent failed to understand how it was possible for the same procuring entity to have two different recommendations on the Appellant.

3. The Respondent's reply to the Appellant's remedies were as follows:-
   i. The evaluation was conducted in accordance with the criteria provided in the Tender document and the award was proposed to the lowest evaluated tenderer. The Appellant

was not the lowest evaluated tenderer, thus its request to re-evaluate the tender should be disregarded;

ii. An order for declaration that the Respondent wrongly acted on the unfounded reason on the Appellant's poor performance be rejected as proof of its previous poor performance was disclosed at the meeting held on 28th April 2022; and

iii. According to Regulation 206 of the Regulations as well as Clause 22 (v) of the TDS the Appellant's bid was fairly rejected at the technical evaluation stage due to poor performance on its previous contracts, thus it cannot be awarded the Tender.

4. Finally, the Respondent prayed for dismissal of the Appeal and with no order as to costs.

ANALYSIS BY THE APPEALS AUTHORITY

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

From the record of Appeal it is clear that the Appellant was disqualified from the Tender process for poor performance in its previous contracts. To substantiate if the disqualification of the Appellant was justified, the Appeals Authority revisited the Tender Document and observed that Clause 22 (iii) and (iv) of the TDS required tenderers to attach letters of references from at least two employers and to list a minimum number of three employers they recently served in the last three years with their

contacts. Clause 22 (v) of the TDS allowed the Respondent to verify the genuiness of the submitted information. Clause 22 (iii), (iv) and (v) read as follows:-

> *TDS 22. (iii)* "***Attach two reference letters from at least two clients of similar nature between 2020 to 2021 (references from banks will be given high priority)*** *including names and addresses of the Employers for verification.*
>
> *(iv)* ***A list of a minimum of three clients you recently served for the last three years indicating name of the Client, contact person, phone and emails for ease of reference (between 2019-2021).***
>
> *(v)* "***the Bank SHALL carry out post-qualification (site visit) to some of your clients and your office to verify genuiness of your submission.*** *This shall also cover office visit, key staff confirmation, equipment, storage facility etc."*
> (Emphasis added)

The Appeals Authority reviewed the Appellant's tender submitted through TANePS and observed that it attached three recommendation letters from Azania Bank Limited, Amana Bank Limited and Akiba Commercial Bank PLC. The Appellant also listed its previous employers namely Azania Bank Limited, Bank of Africa (BOA), NSSF, CRDB Bank PLC and Julius Nyerere International Airport (JNIA).

The record of Appeal indicates that during the evaluation process the Respondent sought references of the Appellant's past performance from

its previous employers. The references were sought from CRDB Bank PLC, NSSF and DCB Commercial Bank. In response thereof, NSSF and DCB Commercial Bank indicated that the Appellant's performance was not satisfactory. Thus, the Respondent used the said recommendations to disqualify the Appellant for poor performance.

The Appeals Authority observed further that, the Appellant on its Statement of Appeal attached recommendation letters from NSSF dated 9th May 2022 and DCB Commercial Bank dated 12th May 2022, both indicating that the Appellant had a satisfactory performance. However, the said recommendations were made after the notification of the award.

The Appeals Authority is of the view that, much as Clause 22(iii) and (iv) of the TDS required tenderers to submit recommendations from their past employers, the Respondent under Clause 22(v) of the TDS was allowed to verify the genuiness of the same. Thus, the Appeals Authority finds the Respondent's act of verifying tenderers' information during evaluation process to be proper.

The Appeals Authority is of the view that since the Respondent's verification process revealed that the Appellant's past performance was not satisfactory to some of its clients, the Respondent's act of disqualifying its tender was proper and in accordance with Clause 28.3 of the Instructions To Tenderers (ITT) read together with Regulation 206 (2) of the Regulations. The provisions read as follows:-

ITT 28.3 ***"If after the examination of the terms and conditions and the technical evaluation, the Procuring Entity determines that the***

Tender is not substantially responsive *in accordance with ITT 27, it shall reject the Tender."*

Regulation 206 (2) *"**Where a tender is not responsive to the tender document, it shall be rejected by the procuring entity,** and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation."*

(Emphasis added)

The Appeals Authority is of the considered view that the Appellant's act of attaching recommendation letters from NSSF dated 9th May 2022 and DCB Commercial Bank dated 12th May 2022 which state that it had satisfactory performance was not proper. The sequence of events clearly indicate that the said letters were sought after the Appellant had received the Respondent's decision on its complaint issued on 29th April 2022. Further to that, at the time the said letters were issued the Respondent had already communicated a notification of the award to the successful tenderer.

According to Regulation 206 (1) of the Regulations, determination of a successful tenderer is to be based on the contents of the tender itself without recourse to extrinsic evidence. Under the circumstances the Appellant's recommendation letters cannot be considered at this juncture as they did not form part of its bid submitted for this Tender.

The Appeals Authority rejects the Appellant's contention that an award has been made to a tenderer who quoted the highest price. The

evaluation report indicates that the Appellant's tender was disqualified at the technical evaluation stage. Thus, it did not qualify for the financial evaluation stage. Furthermore, the Appeals Authority would like to enlighten the Appellant that quoting a lower price would not necessarily render an award. According to Regulation 212(a) an award is to be made to a tenderer who is found to be the lowest evaluated after complying with the tender requirements. Regulation 212 (a) of the Regulations reads as follows:-

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

The Appeals Authority therefore conclude the 1st issue in the affirmative, that the Appellant's disqualification was justified.

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

Taking cognizance of the findings hereinabove that, the Appellant's disqualification is justified, the Appeals Authority hereby dismiss the Appeal. The Respondent is allowed to proceed with the Tender process. Each party is to bear its own costs.

It is so ordered.

This Decision is binding on the Parties and may be executed in terms of Section 97 (8) of the Act.

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

The Decision is delivered in the presence of the parties this 17th day of June 2022.

HON. JUSTICE (rtd) SAUDA MJASIRI

.....

CHAIRPERSON

MEMBERS:

1. ENG. STEPHEN MAKIGO .....

2. DR. WILLIAM KAZUNGU .....