IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 33 OF 2021-22

BETWEEN

JEFAG LOGISTICS (T) LIMITED.....APPELLANT

AND

SHIRIKA LA USAFIRI DAR ES SALAAM LIMITED.....RESPONDENT

DECISION

CORAM

1. Hon. Justice (Rtd) Sauda Mjasiri - Chairperson
2. Adv. Rosan Mbwambo - Member
3. Ms. Ndeonika Mwaikambo - 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. Dismas Mallya - Advocate – Jodi & Associates
2. Ms. Denicia Towegale - Legal Officer

FOR THE RESPONDENT

1. Ms. Sechelela Charles Chitinka - Ag. Head of Legal and Company Secretary

2. Ms. Jamila Salim Jimmy - Procurement and Supplies Chain Manager
3. Ms. Zaituni Yusuf Hassan - Chief Human Resources Officer

This Appeal was lodged by M/S Jefag Logistics (T) Limited (hereinafter referred to as **"the Appellant"**) against Shirika la Usafiri Dar es Salaam Limited commonly known by its acronyms "UDA" (hereinafter referred to as "**the Respondent"**). The Appeal is in respect of Tender No. PA/106/2022/UDA/NCS/10 for Leasing of UDA Plot No. 2004 and 2007 Located at Kurasini, Bandari Area (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 background of this Appeal may be summarized as follows: -

The Tender was conducted using National Competitive Bidding as specified under the Public Procurement Act, No. 7 of 2011 as amended in 2016 (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No.446 of 2013 as amended by GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**").

The Respondent through the Daily News newspaper dated 29th March 2022, invited eligible tenderers to participate in the Tender. The deadline for submission of tenders was set for 12th April 2022 whereby two tenders including that of the Appellant were received.

The tenders were then subjected to evaluation which was conducted into two stages namely; preliminary and detailed evaluation. At the preliminary evaluation both tenderers were found to have complied with the requirements of the Tender Document, thus were subjected to a detailed evaluation stage. In that stage the Tender by M/S Galco Ltd was ranked the first followed by the Appellant who was ranked the second. After completion of the evaluation process the Evaluation Committee recommended award of the Tender to M/S Galco Ltd at a contract price of USD 76,000.00 VAT exclusive per month for a period of three years. The Tender Board at its meeting held on 5th May 2022 approved the award as recommended by the Evaluation Committee.

On 5th May 2022, the Respondent issued a Notice of Intention to award the contract to all tenderers who participated in the Tender. The Notice informed tenderers that the Respondent intends to award the Tender to M/S Galco Ltd at the contact price of USD 76,000.00 VAT exclusive per month for a period of three years.

Dissatisfied, on 11th May 2022, the Appellant filed an application for administrative review to the Respondent challenging its disqualification. On 13th May 2022, the Respondent issued its decision which dismissed the Appellant's application. On the same date the Appellant was notified about the award made to the proposed successful tenderer, M/S Galco Ltd. Aggrieved further, on 23rd May 2022, the Appellant filed this Appeal.

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

1.0 Whether the Application for administrative review was handled in accordance with the law;

2.0 Whether the disqualification of the Appellant's tender was justified;

3.0 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 Respondent erred in law and fact for failure to adhere to the requirement of Section 60(3) of the Act which requires tenderers who are dissatisfied with the Notice of Intention to award be accorded seven working days to submit complaints, if any. The Respondent issued the Notice of Intention to award on 5th May 2022 and required dissatisfied tenderers to submit complaints by 11th May 2022. Counting from 5th to 11th May 2022, tenderers were accorded only five working days to submit complaints contrary to Section 60(3) of the Act read together with Regulation 231(2) of the Regulations.

   The Appellant expounded further that, its application for administrative review was submitted on 11th May 2022 at 08:30 a.m as instructed in the Notice of Intention to award. On the same date at 15:46 hours, the Appellant received a letter from the Respondent which extended the time

for filing complaints from 11th May to 13th May 2022. The Appellant contended that the said extension was an afterthought and intended to pre-empt the Appellant's application for administrative review. According to the Appellant, amongst the grounds raised on its application for administrative review was the Respondent's failure to comply with Section 60(3) of the Act and Regulation 231(2) of the Regulations. Thus, the Respondent ought not to have issued such an extension after the Appellant had already submitted its application for administrative review.

The Appellant added that, if it could be assumed that the deadline for submission of complaint was 13th May 2022 as extended, the Respondent awarded the Tender on the same date prior to the lapse of the cool off period within which tenderers were allowed to submit complaints.

2. That, the Respondent erred in law and fact for its failure to suspend the procurement process pending determination of the application for administrative review. According to Regulation 106 (1) of the Regulations the Respondent was required after receipt of the Appellant's application for administrative review to suspend the Tender process until it delivers a written decision. To the contrary, the Respondent proceeded with Tender process and on 13th May 2022 at 12:42 p.m communicated an award of the contract to M/S Galco Ltd. On the same date, that is 13th May 2022 at 17:00 hours the Respondent issued its decision with respect to the Appellant's application for administrative review.

The Appellant elaborated that, the Respondent's act of communicating an award letter before issuing its decision with respect to the Appellant's

application for administrative review, is sufficient proof that it did not suspend the Tender process as required by the law. The Appellant submitted further that, the Respondent's conduct in this regard indicates that it was biased and had an ill motive of not awarding the tender to the Appellant. The Appellant contended that, the Respondent's Tender process was marred with irregularities as there was no fair or equal treatment during the whole process.

In support of its argument, the Appellant cited **Appeal Case No. 29 of 2021/22 between M/s General De Pharmacy Ltd versus Regional Administrative Secretary Manyara.** According to the Appellant, in the cited case, the Appeals Authority nullified the award for the Respondent's failure to suspend the tender process after receipt of an application for administrative review.

3. That, the Respondent erred in law and fact for failure to address each of the ground raised in the application for administrative review and to state reasons for its decision. The Respondent's act contravened Regulation 106(6) of the Regulations which requires an accounting officer of a procuring entity to deliver a written decision in respect of a complaint or dispute by addressing all the grounds raised. An accounting officer is also required to indicate in its decision if the application is held in whole, in part or rejected. The Appellant submitted that, the Respondent's decision was general as it stated that the Tender Process adhered to all procedures. The Respondent was required to address each ground as submitted.

The Appellant contended further that, had the Respondent considered the application for administrative review on its merits, the same would have been successful. In the said application for review the Appellant raised irregularities observed during the Tender opening which includes M/S Galco Ltd's act of submitting two (2) bid documents which were neither marked nor sealed as required by the Tender Document.

4. That, the Respondent was obliged to conduct the Tender process in compliance with the procurement principles that maximizes competition, achieve economy, efficiency, transparency and value for money. Elaborating on this ground, the Appellant stated that it quoted a monthly rent of USD 75,233.30 based on the Schedule of Prices provided in the Tender Document. The said Schedule of Prices had seven (7) items and each item had an area or space for lease different in size from one another. Tenderers were required to quote for each item, the minimum rent per square meter per month. The successful tenderer M/s Galco Ltd purportedly quoted a generic figure of USD 76,000.00 per month which is unrealistic because the quotation was not based on seven (7) rentable spaces. Had the successful tenderer honestly quoted for each item as it is alleged by the Respondent, the figure arrived would not have been exactly USD 76,000.00 without any additional cent.

5. Finally, the Appellant prayed for the following orders:-

    i. A declaration that the whole Tender process by the Respondent was tainted with irregularities;

ii. Nullify the decision of the Respondent and subsequently order it to or award the contract to the Appellant; and

iii. Costs for this Appeal and Application for review be borne by the Respondent.

REPLY 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, on 5th May 2022, the Respondent issued the Notice of Intention to award to all tenderers who participated in the Tender. The said notice informed tenderers that those who would be dissatisfied were required to lodge complaints by 11th May 2022. However, having realized that the time given for submission of complaints was shorter than the required time under the law, on 11th May 2022, the Respondent extended the time for submission of complaints to 13th May 2022. On the same date, that is 11th May 2022, the Respondent received the Appellant's application for administrative review. After reviewing it, the Respondent observed that the main contention based on time for submission of the complaint had already been clarified through a letter dated 11th May 2022. Thus, the issue of time for submission of complaints ought not to have been raised.

2. That, the Respondent's decision issued with respect of the Appellant's application for administrative review, indicated clearly that the Tender process was conducted in observance of the law. The Respondent submitted that, it issued such a decision as there were no irregularities

which were observed in the whole Tender process. The Respondent added that, the Appellant's contention mainly centered on the issue of time for submission of complaints which was already clarified. Thus, the Respondent opted not to pursue further the Appellant's contention on that point.

3. That, the Respondent did not suspend the Tender process as at the time it received the Appellant's application for review, the process had already been concluded. Thus, there was no need of suspending the Tender process.

4. That, the Appellant's application for administrative review contravened the requirements of Regulation 105(1) and (2) of the Regulations. According to Regulation 105(2) of the Regulations a tenderer who is dissatisfied with the Notice of Intention to award is not required to submit an application for administrative review to the accounting officer of the procuring entity. The Respondent clarified that complaints which could be filed under Regulation 105 are not the ones arising out of the Notice of Intention to award. Thus, the Appellant's act of submitting an application for administrative review upon being dissatisfied with the notice of Intention to award was not proper under the law.

5. That, the Respondent did not contravene Sections 47(c) and 63(2) of the Act, since the price quoted by each tenderer was readout in lump sum during the Tender opening. Detailed analysis was done during the evaluation process whereby the Evaluation Committee came up with competitive price for the interest of the public at large.

6. That, the Respondent complied with Regulation 7 (2) of the Regulations, as the said provision is silent on the number of people from the procuring entity who are required to attend the Tender opening ceremony. The Respondent stated further that, all tenders were marked and sealed as observed by the Evaluation Committee which conducted the evaluation process.

7. That, immediately after the Tender opening ceremony the Appellant wrote a letter to the Respondent alleging some irregularities prior to evaluation of the Tender. The Respondent avers that the law prohibits any communication with a procuring entity prior to the issuance of the Notice of Intention to award as per Regulation 201 of the Regulations. Thus, the Appellant's act indicates that it had wilful intention to influence the Respondent.

8. Finally, the Respondent prayed for the following orders:-

i. The Appeals Authority to declare that the procurement process was not tainted with any irregularities; and

ii. Costs of this Appeal be borne by the Appellant.

ANALYSIS BY THE APPEALS AUTHORITY

During the hearing, the Appellant did not wish to pursue complaints related to anomalies noted during the Tender Opening, thus the same would not be addressed in this analysis. Having so pointed out, the Appeals Authority proceeded to resolve the issues as follows:-

1.0 Whether the Application for administrative review was handled in accordance with the law;

In relation to this issue, the Appellant raised three points which are summarized as follows:-

i. Time given for submission of the application for administrative review contravened Section 60(3) of the Act;

ii. Non-suspension of the Tender process and premature award of the contract; and

iii. Non-adherence to the requirement of Regulation 106(6) of the Regulations.

i. Time given for submission of the application for administrative review contravened Section 60(3) of the Act

The record of Appeal indicates that, the Respondent's Notice of Intention to award issued on 5th May 2022 required tenderers dissatisfied with the said notice to submit complaints by 11th May 2022. The Appellant disputed the time given for submission of complaints as it was only five working days instead of seven working days as required under Section 60(3) of the Act read together with Regulation 231(2) of the Regulations.

The Appeals Authority revisited Section 60(3) of the Act and Regulation 231(2) of the Regulations and observed that both provisions provide guidance on the time for submission of complaint after issuance of the notice of intention to award. Section 60(3) is reproduced as hereunder:-

Section 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"***

(Emphasis supplied)

The above quoted provision is crystal clear that the notice of intention to award should accord tenderers seven working days for filing complaints, if any. The Respondent's Notice of Intention to award issued on 5th May 2022 required tenderers to submit complaints by 11th May 2022. Counting from 5th to 11th May 2022, tenderers were accorded four working days to submit their complaints. The counting of days is in accordance with Section 60(1) (c) of the Interpretation of Laws Act, Cap 1.

The record of Appeal indicates that the Respondent on 11th May 2022 extended time for submission of complaints to 13th May 2022. The record indicates further that on the same date which the Respondent extended time for submission of complaints, the Appellant at around 08:30 a.m submitted its application for administrative review to the Respondent. There is no proof at what time the Respondent's extension for submission of complaints was served to the tenderers. The Appellant claimed to have received the said extension on 11th May 2022 at 15.46 hours after it had lodged its complaint while the Respondent claimed to have served the same to the Appellant before it submitted its application for review.

According to the requirement under Section 60(3) of the Act and Regulation 231(2) of the Regulations tenderers were to be accorded seven working days for filing complaints. Counting from 5th May 2022 the seven working days lapsed on 16th May 2022. That is to say, tenderers were to be allowed to file complaints up to 16th May 2022. Therefore, the Appeals Authority is of the settled view that, the Respondent's act of limiting tenderers' time within which to file complaints by 11th May 2022 and later on extending the same to 13th May 2022 contravened the requirements of the law. However, since there were only two bidders in this Tender and the Appellant managed to submit its application for administrative review within the time given by the Respondent, the Appeals Authority is of the view that the Appellant was not prejudiced in any way.

ii. Non suspension of the Tender process and premature award of the contract

In resolving this ground, the Appeals Authority reviewed Section 100 (1) of the Act read together with Regulation 106(1) of the Regulations which provide as follows :-

> ***"Sec. 100(1) Upon receipt of the complaint or dispute, the Accounting officer shall subject to subsection (2), suspend the procurement process pending determination of a complaint or an appeal."***

> ***"Reg. 106 (1) An accounting officer shall, upon receipt of an application for administrative review, suspend***

the procurement or disposal proceedings of the tender in dispute, until he delivers a written decision of the complaint."

(Emphasis added)

The above quoted provisions indicate clearly that procuring entities are required to suspend the tender process after receipt of an application for administrative review until it delivers a written decision.

The Appeals Authority reviewed the record of Appeal and observed that, the Respondent received the Appellant's application for administrative review on 11th May 2022 and issued its decision on 13th May 2022. The Respondent was required to suspend the procurement process immediately upon receipt of the Appellant's complaint. However, the Respondent on its Statement of Reply conceded that it did not suspend the Tender process. The Respondent submitted that according to Regulation 105(2) of the Regulations, a tenderer who is dissatisfied with the Notice of Intention to award is not required to submit an application for administrative review; hence there was no need to suspend the Tender process.

The Respondent's dispatch book indicates that on 13th May 2022 it served the Appellant with notification of award to M/S Galco Ltd. The time of receipt of the said notification of award was not indicated. The dispatch book also indicates that the Appellant was served with another document relating to leasing of UDA Plot No. 2004 and 2007, which was served on 13th May 2022 at 16.15 hours. From the dispatch book it cannot be

ascertained if the document served at 16.15 hours was the Respondent's decision on the Appellant's application for administrative review. Be that as it may, parties are in agreement that the notification of award and the Respondent's decision on the application for administrative review were served and received on 13th May 2022.

Based on the above observations, the Appeals Authority cannot determine with certainty as to whether the Respondent issued a notification of award prior to issuing its decision on the application for administrative review or if both decisions and notification were served simultaneously.

The Appeals Authority further considered the Respondent's argument that it did not suspend the Tender process as Regulation 105(2) of the Regulations, prohibits tenderers from submitting complaints arising out of the notice of intention to award. According to Section 60(3) of the Act tenderers are allowed to file complaints if dissatisfied with the notice of intention to award. Sections 95 and 96 of the Act also allow tenderers to submit complaints to procuring entities if dissatisfied with procuring entity's decisions or the tender process in general.

Regulation 105(2) of the Regulations prohibits tenderers from submitting complaints arising out of the notice of intention to award. The wording of Regulation 105(2) is in conflict with the parent Act, thus it cannot prevail over the requirement of Sections 60(3), 95 and 96 of the Act. Therefore, the Appellant's act of submitting an application for administrative review after receipt of the notice of intention to award was proper.

Since the Appellant was right to submit its application for administrative review, the Respondent upon receipt of the same ought to have suspended the Tender process pursuant to Section 100(1) of the Act and Regulation 106(1) of the Regulations.

The Appeals Authority reviewed ***Appeal Case No. 29 of 2021/22 between M/s General De Pharmacy Ltd versus Regional Administrative Secretary Manyara*** cited by the Appellant in support of its proposition that the Tender should be nullified for the Respondent's failure to suspend the tender process. In the said Appeal, the Appeals Authority nullified the Tender based on the findings that were made on the first and second issues. Non suspension of the tender process was dealt with on the third issue and the same was not the basis for nullification of the Tender.

Despite the above findings that the Respondent contravened the law for failure to suspend the Tender process, the Appeals Authority is of the view that non suspension on this particular Tender did not prejudice the Appellant's right as no development had taken place and the Tender was subsequently suspended after the Appeal was filed before this Appeals Authority as confirmed by the Respondent.

iii. Non adherence to the requirement of Regulation 106(6) of the Regulations

Regarding the Appellant's contention that the Respondent contravened the law for failure to address all the grounds raised in the application for

administrative review, the Appeals Authority reviewed Regulation 106(6) of the Regulations which read as follows:-

> *"Reg. 106(6) The decision of the accounting officer shall Address fully the tenderer's grounds of complaints and shall indicate-*
>
> *(a) Whether the application is upheld in whole, in part or rejected;*
>
> *(b) The reasons for the decision; and*
>
> *(c) Any corrective measures to be taken;"*

The Appellant's application for review contains several grounds. The Respondent's decision dated 13th May 2022 simply stated that: - "***the tender process adhered to all procedures guiding our company on this tender for now.***"

From the wording of the Respondent's decision it is evident that it did not comply with the requirements of Regulation 106 (6) quoted above. The Respondent's decision ought to have analyzed and determined all the grounds raised by the Appellant. In this Appeal the Respondent did not determine any of the grounds raised so it can be taken that there is no decision at all. However, the above irregularity did not prejudice the Appellant as it has a right to file an Appeal to the Appeals Authority pursuant to Section 97 of the Act which provides 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) the accounting officer does not make a decision within the prescribed period specified under this Act; 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 decision".

According to Section 97 of the Act, a tenderer can Appeal to the Appeals Authority if it is dissatisfied with the procuring entity's decision as the Appellant did in this Appeal. The section also allows a tenderer to file an Appeal directly to the Appeals Authority if a procuring entity does not make a decision within the prescribed time.

Under the circumstances the Appeals Authority concludes the first issue in the negative that the application for administrative review was not handled in compliance with the law.

2.0 Whether the disqualification of the Appellant's tender was Justified;

From the record of Appeal the Appellant's tender was not considered for award as its price of USD 75,233.30 per month VAT exclusive was considered to be lower than the price quoted by the proposed successful tenderer M/S Galco Ltd of USD 76,000.00 per month VAT exclusive. The Appellant contended that the price of the proposed successful tenderer was a lump sum figure as it did not consider all the items provided in the Schedule of Prices. The Respondent on its part claimed that the price of the proposed successful tenderer considered all the items provided in the Schedule of Prices.

In substantiating the validity of the parties' contention, the Appeals Authority revisited the Tender Document and observed that Section VII amongst other things provide for a Schedule of Prices which has eight items describing the area size (SQM) of the assets to be leased.

The Appeals Authority observed further that, the Respondent issued a clarification on 6th April 2022 which required tenderers not to quote for Item 1 which related to Main Office Block. Thus, tenderers were required to quote for seven Items only.

Having established that tenderers were required to quote their prices as per the Schedule of Prices, the Appeals Authority revisited the tender submitted by the successful bidder and observed that it has quoted for all seven items as per the Schedule of Prices. The proposed successful tenderer's price was USD 89,687.95 VAT inclusive equal to USD 76,000.00

VAT exclusive per month. The Appellant's tender indicates that its price was USD 75,233.30 VAT exclusive per month.

From the above, the Appeals Authority is of the firm view that the price quoted by the successful tenderer is higher than the price quoted by the Appellant. Since the Tender relates to leasing, the Appeals Authority finds the Respondent's act of awarding the Tender to the successful tenderer to be proper and in compliance with Regulation 212 of the Regulations which 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, concludes the second issue in the affirmative that the disqualification of the Appellant's Tender was justified.

3.0 What reliefs; if any; are the parties entitled to.

Taking cognizance of the findings hereinabove on the first and second issues, the Appeals Authority finds that the Appeal partially succeeds to the extent explained above. Therefore, the Respondent is hereby ordered to proceed with the Tender process in accordance with the law.

Each party to bear its own costs.

Order accordingly.

The right of Judicial Review as per Section 101 of the Act explained to the parties.

This Decision is delivered in the presence of the parties this 23rd day of June 2022.

HON. JUSTICE (Rtd) SAUDA MJASIRI

.....

CHAIRPERSON

MEMBERS:

1. **ADV. ROSAN MBWAMBO**.....

2. **MS. NDEONIKA MWAIKAMBO**.....