IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

AT DAR ES SALAAM

APPEAL CASE NO. 34 OF 2021-22

BETWEEN

M/S GLOBAL FLUIDS INTERNATIONAL

(T) LTD ..... APPELLANT

AND

GOVERNMENT PROCUREMENT SERVICES

AGENCY (GPSA) .....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. Jeremia Mtobesya - Advocate, Juris Peritis (Advocates)
2. Ms. Violet Z. Mfinanga - Office Manager
3. Mr. Amit Noyman - Director

FOR THE RESPONDENT

1. Mr. Allen Crony Kasamala - Head of Legal Services Unit
2. Ms. Liipu Neligwa Rweyemamu - Director of Procurement
3. Mr. David Emmanuel Nganila - Manager Procurement
4. Mr. Kisandu Mashishanga - Supplies Officer

The Appeal was lodged by **M/S Global Fluids International (T) Ltd** (hereinafter referred to as "**the Appellant**") against the **Government Procurement Services Agency** commonly known by its acronym as **"GPSA"** (hereinafter referred to as "**the Respondent**").

The Appeal is in respect of Tender No. PA/044/2022-2023/HQ/G/25 for **Supply of Fuel Marker (Under Framework Agreement) Fuel Dosing System and Fuel Marker Detection System for Tanzania Bureau of Standard** (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 International 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 22nd March 2022, the Respondent on behalf of Tanzania Bureau of Standards commonly known by its acronym as **"TBS"** invited qualified

tenderers through TANePS to submit their tenders. The deadline for submission was set for 13th April 2022 whereby five tenderers, the Appellant inclusive submitted their tenders.

After completion of internal processes, on 2nd May 2022 the Respondent issued a Notice of Intention to award the contract to all tenderers that participated in the Tender. The notice indicated that the Appellant was proposed to be awarded the contract at the price of USD 2.12 per 1,000 litres exclusive of VAT and Local Taxes.

The Respondent through the Notice of Tender Cancellation dated 14th May 2022, notified all tenderers that "*the Tender has been cancelled due to exceptional circumstances encountered during tendering process pursuant to Regulation 16 (2) (d) and (5) of the Regulations.*"

Dissatisfied with the rejection, on 18th May 2022 the Appellant applied for administrative review to the Respondent. As the Respondent did not issue its decision as required by the law, on 1st June 2022, the Appellant filed this Appeal.

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

1. **Whether there was justifiable ground for rejection of the Tender; and**

2. **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 notice of Tender cancellation indicated that the Tender was cancelled due to unavoidable circumstances encountered during tendering process. According to the Appellant the reason given is vague, de-void of merits and violates basic procurement principles enshrined under Section 4A (2) of the Act which reads as follows:-

   Section 4A (2) *"Subject to this Act, all procurement and disposal shall be conducted in a manner that maximizes integrity, competition, accountability, economy, efficiency,* ***transparency*** *and achieve value for money".*

   The Appellant elaborated that, if the reason for cancellation was due to circumstances encountered during tendering process, the Respondent's Tender Board would not have approved the award and the Accounting Officer would not have ccommunicated the Notice of Intention to award the Tender to the Appellant. Thus, the Respondent's act of cancelling the tender at this juncture is an afterthought and curtail Appellant's winning right which was earlier on communicated.

   The Appellant submitted further that, the Respondent's act of cancelling the Tender was made contrary to the law, as the letter

of notification did not state what exceptional circumstances influenced the said decision as per the transparency principle provided under Section 4A of the Act. The Respondent's notice of Tender cancellation ought to have disclosed openly the circumstances that faced its office and compelled it to cancel the Tender. The Appellant added that if the directives to cancel the Tender was from TBS the project owner, the same were to be disclosed. However, the Respondent failed to disclose them, thus contravening the principle of transparency.

In support of his argument counsel for the Appellant cited Appeal Case No. 35 of 2013-2014 between ***M/S Kihelya Auto Tractor Parts Company Limited versus Tanzania Ports Authority.*** According to the Appellant in the cited appeal case the reasons for rejection were provided. The Appellant added that, much as the law is silent on disclosure of circumstances which led to rejection, the Appeals Authority's decision in this case has set a precedent which has to be followed. The Appellant recognizes the fact that the Appeals Authority is not bound by its own decision. However, for the sake of justice, consistency of decisions of the court or tribunal is crucial.

2. That, according to Section 59 (2) (e) of the Act and Regulation 16 (2) (d) of the Regulations, exceptional circumstances which might render normal performance of the contract impossible must relate to the circumstances of the contract in question and not otherwise. The Respondent has never disclosed circumstances which would render the execution of the contract imposible, rather it indicated

that the rejection was made due to problems encountered during the tendering process.

3. That, the Notice of Tender cancellation indicates that the Respondent had cancelled and not rejected the Tender. According to Section 19 (1) (a) and (b) of the Act, powers to cancel tenders are solely vested to the Public Procurement Regulatory Authority (PPRA). The Appellant submitted that, procuring entities do not have powers to cancel the tender but have powers of rejection. Thus, in this Tender if the the Respondent meant cancellation as it appears in the notice, it acted ultravires as it usurped powers which it did not have under the law.

4. That, the Appellant lodged its application for administrative review manually because the notice of Tender cancellation was issued after the cool off period. Thus, it was imposible for the Appellant's application for review to be submitted through TANePS.

   The Appellant submitted further that, its application for administrative review was filed within the time stipulated under the law. However, the Respondent failed to issue its decision within the seven working days as per Section 96 of the Act, hence this Appeal.

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

   i. "*Declaration that the decision to cancel the tender made by the Respondent is null and void;*

ii. *Declaration that the Respondent acted ultra vires in cancelling the tender and acted on the powers it does not possess under the law;*

iii. *The decision to cancel the tender be reversed for the reasons given and the process be retrieved where it ended and award accordingly, since the Appellant was the lowest evaluated bidder, based on the Notice issued;*

iv. *The Appeals Authority review the evaluation process of the tender as conducted by the Respondent to test the legitimacy of the Respondent's act in terms of the powers vested to the Appeals Authority under Section 97 (5) of the Act and award the tender to the Appellant under powers provided under Section 97 (5) (e) of the Act. Ipso facto; and*

v. *Any other relief(s) as 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, the Respondent acted in conformity with the law and specifically to the provision of Section 4(A) (2) of the Act. This is evidenced by the fact that the tendering process had no complaints throughout until the exceptional circumstances arose which were beyond the ability of the Respondent.

2. That, the Respondent floated the Tender on behalf of a third party (TBS). TBS withdrew its instructions to the Respondent. After withdrawal of the instructions, the Respondent could not have proceeded with the Tender process as the contract execution thereof would have been impossible. Thus, the Respondent's act of rejecting the Tender was not an afterthought but rather it was caused by exceptional circumstances which cropped up during the process.

3. That, when issuing the Notice of Tender rejection, the Respondent mistakenly wrote "Notice of Tender Cancellation". The Respondent's act of using the words cancellation instead of rejection was a mere typing error. The Respondent intended to reject the Tender and Regulation 16(2)(d) and (5) of the Regulations cited in the said notice proves the Respondent's intention thereof.

4. That, the Respondent did not act ultra vires or usurped powers of PPRA as contended by the Appellant. PPRA's powers to cancel the tender are provided under Section 19(1) (a) and (b) of the Act. The Respondent rejected the Tender pursuant to Section 59 (2) (e) of the Act read together with Regulation 16(2)(d) of the Regulations.

5. That, the Tender process was conducted through TANePS as per the Government directives. The Appellant upon being dissatisfied with the notice of Tender rejection it ought to have submitted its complaints through TANePS. However, the Appellant submitted its complaint manually and it came to the attention of the Respondent when it was too late.

6. That, with regard to the Appellant's prayers, the Respondent request the Appeals Authority to disregard all of them for the reasons above stated.

7. Finally, the Respondent prayed that the status of tender rejection as it stands now be maintained.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether there was justifiable ground for rejection of the Tender.

Before resolving this issue, the Appeals Authority deemed it proper to first consider the Appellant's contention that the Respondent cancelled the Tender. According to the Appellant the Respondent has no power to cancel the Tender. Powers to cancel tenders are vested to PPRA according to Section 19 (1) (a) and (b) of the Act. In response thereof, the Respondent stated that when issuing the Notice the word "cancellation" was used mistakenly instead of "rejection" as intended. The Notice was made under Regulation 16(2)(d) and (5) of the Regulations that deals with rejection of tenders.

The Appeals Authority revisited Regulation 16(2)(d) of the Regulations cited in the Notice. The provision reads as follows:-

Regulation 16(2) *"Rejection of a tender or selection proceeding may take place where:*

(d) exceptional circumstances render normal performance of the contract impossible."

(Emphasis added)

The quoted provision deals with rejection and not cancellation of tenders. Under the circumstances the Appeals Authority is of the view that the Respondent used the word "cancellation" instead of "rejection" as intended. Therefore, the Tender was rejected.

In order to determine if the rejection was justified, the Appeals Authority considered the Appellant's contention that the Notice of Rejection should have disclosed the reasons for rejection. Failure to disclose reasons for rejection contravenes the principle of transparency as enshrined under Section 4A (2) of the Act.

The Appeals Authority reviewed Section 59(1) of the Act which provides as follows:-

Section 59 *(1)* ***"Tender documents and request for proposals may provide that procuring entities reject all tenders or all proposals."***

(Emphasis added)

Section 59 (1) of the Act quoted hereinabove stipulates clearly that Tender Documents may provide for rejection of tenders or proposals. The Appeals Authority revisited the Tender Document particulary Clause 38 of the Instuctions To Tenderers (ITT) and observed that it provides

for the Respondent's right to reject any or all tenders. The Clause reads as follows:-

Clause 38.1 "*Notwithstanding award criteria ITT 36,* ***PE reserves the right to accept or reject any tender, and annul the tendering process and reject all tenders at any time prior to award of contract,*** *without thereby incurring any liability to the affected Tenderer or Tenderers or* ***any obligation to inform the affected Tenderer or Tenderers of the grounds for the PE's action.***

Clause 38.2 Notice of the rejection of all tenders shall be given promptly to all suppliers that have submitted tenders.

Clause 38.3 The PE shall upon request communicate to any Tenderer the grounds for its rejection of its Tenders, ***but is not required to justify those grounds."***

(Emphasis added)

The above quoted Clause allows the Respondent to reject any or all of the Tenders without stating grounds for rejection. Neither does it require the Respondent to justify the reasons for rejection.

The Appeals Authority revisited Appeal Case No. 35 of 2013-2014 between **M/S Kihelya Auto Tractor Parts Company Limited and Tanzania Ports Authority** relied upon by the Appellant that it set precedent on disclosure of reasons which lead to a rejection of the

tender. In the said Appeal, the procuring entity disclosed reasons for rejection of the tender.

Having reviewed the said Appeal, the Appeals Authority is of the view that the circumstances of the two cases are different. In the refered Appeal the issue of whether the procuring entity should disclose reasons for rejection was not a basis of that decision.

The Appeals Authority finds that the Respondent's act of rejecting the Tender was in accordance with Section 59(1) of the Act and Clause 38 of the ITT.

The Appeals Authority also revisited Regulation 16(2)(d) of the Regulations cited by the Respondent in the Notice. The said Regulation, provides that rejection of tenders is justified where there are exceptional circurmstances which render normal performance of the contract impossible. The Appellant stated that, the Respondent should have divulged the alleged exceptional circumstances. In view of the above findings, the Respondent was not required to justify the reasons for rejection.

Based on the above findings, the Appeals Authority concludes the first issue in the affirmative that the rejection of the Tender was justified.

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

Taking cognizance of the findings hereinabove that, the rejection of the Tender is justified. Therefore the Appeals Authority hereby dismiss the Appeal.

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 24th day of June 2022.

HON. JUSTICE (rtd) SAUDA MJASIRI

.....

CHAIRPERSON

MEMBERS:

1. ADV. ROSAN MBWAMBO.....

2. MS. NDEONIKA MWAIKAMBO .....