IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

AT DAR ES SALAAM

APPEAL CASE No. 35 OF 2021-22

BETWEEN

M/S AROCHE SYSTECS & INVESTICO LTD..... APPELLANT

AND

TANZANIA AIRPORTS AUTHORITY .....RESPONDENT

DECISION

CORAM

1. Hon. Justice (rtd) Sauda Mjasiri - Chairperson
2. Mr. Rhoben Nkori - 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. Daudi Maneno - Advocate, DSG Consult Law Chamber
2. Mr.Gibson Mwaigonela - Advocate, DSG Consult Law Chamber
3. Mr. Charles Range - Managing Director
4. Mr. Alex Range - Director

FOR THE RESPONDENT

1.	Mr. Boaz A. Msoffe	- State Attorney, Office of The Solicitor General
2.	Mr. Ayoub Sanga	- State Attorney, Office of The Solicitor General
3.	Mr. Arthur M. Mbena	- Senior Legal Officer
4.	Mr. Josephat Msafiri	- Ag. Head of Procurement Management Unit
5.	Mr. Steve Jacob Minja	- Procurement Supplies Officer

The Appeal was lodged by **M/S Aroche Systecs & Investico Ltd** (hereinafter referred to as "**the Appellant**") against the **Tanzania Airports Authority** commonly known by its acronym as "**TAA**" (hereinafter referred to as "**the Respondent**").

The Appeal is in respect of Tender No. AE-027/2021-2022/HQ/G/16 for Supply, Installation, Configuration, Testing, and Commissioning of X-ray Machines and Walk-Through Metal Detectors for JNIA, Lindi and Musoma Airports (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 Tendering Method through the Tanzania National e-Procurement System (TANePS). On 10th March 2022, the Respondent through TANePS invited qualified tenderers to submit their tenders. The deadline for submission was set for 25th March 2022 at 11.00 hours. According to the online tender

opening record only twelve (12) tenderers submitted their bids, including the Appellant.

After completion of the evaluation processes, on 17th May 2022, the Respondent issued a Notice of Intention to award the contract which was received by the Appellant on 24th May 2022. The Notice indicated that Respondent intended to award the tender to M/S Khalil General Trading Tanzania Limited at the contract price of TZS 705,280,749.00 (Shillings Seven Hundred Five Million Two Hundred Eighty Thousand Seven Hundred Forty Nine) only VAT Inclusive. The said Notice also informed the Appellant that, its tender was not successful because it did not submit Anti-bribery compliance programme and altered the Form of Tender by deleting paragraph 5 contrary to the requirements of Clause 9 (v) of the Bid Data Sheet (BDS) read together with Clauses 12.1 (g) and 15.1 of the Instructions To Tenderers (ITT).

Dissatisfied with the reasons given for its disqualification, on 29th May 2022 the Appellant submitted an application for administrative review to the Respondent. On 1st June 2022, the Respondent issued its decision which dismissed the Appellant's application. Aggrieved further, on 13th 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:-

1.0 Whether the disqualification of the Appellant was justified;

2.0 Whether the proposed award of contract to M/S Khalil General Trading Tanzania Limited is proper in law; and

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. With regard to the first issue the learned counsel for the Appellant submitted that, it was among the tenderers who participated in the Tender; however, it was disqualified for failure to submit Anti-bribery compliance programme and for altering the Form of Tender. The Appellant stated that the reasons given for its disqualification were unfair and unreasonable which defeated the purpose of competition as enshrined under 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**").

2. Regarding non-submission of anti-bribery compliance programme, the Appellant submitted that Clause 12.1(g) of the ITT which was modified by Clause 9 (v) of the BDS provide tenderers with an option of submitting either anti-bribery policy or code of conduct and compliance programme. Thus, it was not mandatory for tenderers to submit both anti-bribery policy/code of conduct and compliance programme.

   The Appellant expounded that, Regulation 78 (2) of the Regulations prohibits procuring entities to engage in fraud and corrupt practices when competing for a tender and execution of

contract. The guidance on how tenderers would submit their non involvement in fraud and corrupt practices is provided under the Third Schedule to the Regulations. According to the said Schedule, tenderers were allowed to submit either Anti-bribery policy or code of conduct and compliance programme. The Appellant opted to submit Anti-bribery policy, thus it ought not to have been disqualified from the Tender as it complied with such requirement.

The Appellant submitted further that, if non-submission of anti-bribery compliance programme was deemed to be fatal, the Respondent ought to have treated it as a minor deviation pursuant to Regulation 207(2)(b) of the Regulations, as it does not materially alter or depart from the characteristics, terms, conditions and requirements of the Tender. The Appellant's failure to submit Anti-bribery policy/code of conduct and compliance programme was capable of being corrected without touching the substance of the tender.

3. Regarding alteration of paragraph 5 of the Form of Tender, the Appellant submitted that, the anomaly ought to have been treated as a minor deviation since it neither materially altered nor touched the substance of the Tender. The Appellant stated that, according to Regulation 204(2)(a) of the Regulations and Clause 29.6(a) of the ITT, a Form of Tender may only lead to disqualification of a bid if it is not signed by the authorized person. In the matter at hand, the Appellant's Form of Tender was duly signed; however it was merely altered under paragraph 5. According to the Appellant such an alteration should not have led to its disqualification.

The Appellant submitted further that, Clause 15.1 of the ITT contravenes Regulation 204(2)(a) of the Regulations and Clause 29.6(a) of the ITT for indicating that alteration of the Form of Tender may lead to a rejection of a tender. The wording of Clause 15.1 of the ITT ought to have considered the requirement of Regulation 204(2)(a) of the Regulations which provide a clear guidance on the circumstances that may render a Form of Tender to be rejected.

The Appellant added that, the anomaly of altering the Form of Tender ought to have been treated as a minor deviation pursuant to Regulation 207(2)(b) of the Regulations and Clause 29.4 of the ITT. According to the Appellant, the said provisions require any minor informality or non conformity with the requirement of the tender be waived provided that such an anomaly do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the Tender Document. The Appellant claimed that, the anomaly observed on its Form of Tender could have been rectified during negotiation stage.

The Appellant elaborated further that, the omitted paragraph 5 in the Form of Tender deals with appointment of an adjudicator. The Appellant stated that Clause 45.1 of the ITT as modified by Clause 29 of the BDS provides clearly that the proposed adjudicator is the Tanzania Institute of Arbitrators. Further to that, procedures for appointment of an adjudicator are well stated under Section 18 (1) of the Arbitration Act, 2020. Thus, since the proposed adjudicator and procedures for its appointment were well known, the Appellant's alteration of paragraph 5 of the Form of Tender could

not have been regarded as fatal to the extent of disqualifying the Appellant's tender.

4. In relation to the second issue, the Appellant submitted that, Clause 14.3(b) of the ITT which has been modified by Clause 11 of the BDS, requires tenderers to submit audited financial statements of three consecutive years from 2018 to 2020. The proposed successful tenderer, M/S Khalil General Trading Tanzania Limited was incorporated on 27th May 2020 as per the extract from the Registrar of companies. The Appellant stated that the deadline for submission of tenders was 25th March 2022. Counting from the date when the proposed successful tenderer was incorporated, it had only existed for a period of one year and a half before the deadline for submission of tenders.

The Appellant expounded further that, Clause 14.3 (b) (i) of the ITT modified by Clause 11 of the BDS required bidders to prove their experience by submitting at least three (3) recently performed contracts of supplying X-ray machines and items of similar nature (between 2015-2021). Since the proposed successful tenderer had only one year and a half from incorporation, the Appellant doubts if the firm complied with the Tender requirements and therefore qualified for the award.

The Appellant added that, if the firm qualified for award it might have submitted either untrustworthy documents with regard to its experience and financial capabilities or the evaluators have considered its deviation in this regard as minor. According to the Appellant Financial capacity and experience were among the

important criteria for this Tender, hence non-compliance with the same is a material deviation. Therefore, the Appellant invited the Appeals Authority to scrutinize the legality of the award.

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

   i. Suspension of the procurement process to pave way for this appeal;

   ii. Quash the letter of intent to award this tender to the proposed bidder;

   iii. Omissions in the form of tender and non-submission of the compliance programme be declared as minor deviations which do not go to the substance of the tender;

   iv. Re-evaluation of this tender;

   v. Payment of TZS 5,000,000.00 being costs of this Appeal; and

   vi. Any other relief this Appeals Authority may wish 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. With regard to the first issue on non-submission of anti-bribery policy/code of conduct and compliance programme, the learned State Attorney submitted that in the disputed Tender, tenderers were mandatorily required to comply with Clause 12.1(g) of the ITT as modified by Clause 9(v) of the BDS. The said provisions indicate clearly that tenderers were required to submit a signed form of undertaking on anti-bribery policy and to attach copies of

the tenderer's anti-bribery policy/code of conduct and compliance programme. The format of the form of undertaking was provided under Section IX - Forms of Integrity of the Tender Document.

The Respondent expounded that, the Appellant submitted a form of undertaking which was altered as it was not in the original format as provided for in the Tender Document. The Respondent added that, the Appellant's form of undertaking indicated that the Appellant's anti-bribery policy/code of conduct and compliance programme would be attached. However, the same were not attached.

The Respondent disputed the Appellant's argument that according to Clause 9(v) of the BDS tenderers had an option of submitting either the anti-bribery policy or code of conduct and compliance programme. The Respondent stated that, the Appellant has misinterpreted Clause 9(v) of BDS. According to the said provision tenderers were mandatorily required to submit anti-bribery policy/code of conduct and compliance programme. Tenderers had an option of using either of the two format of the form of undertaking provided under Section IX of the Tender Document. There was no option for tenderers to submit a form of undertaking without attaching the firm's anti-bribery policy/code of conduct and compliance programme.

The Respondent submitted further that, Regulation 78(2) of the Regulations read together with the Third Schedule to the Regulations stipulate clearly that on each tender process tenderers are required to submit anti-bribery policy/code of conduct and compliance programme. Paragraph 4 of the Third Schedule states

clearly that a tenderer who fails to comply with the anti-bribery requirement, its bid should not be considered. In that regard the Appellant bid was disqualified for failure to submit anti-bribery policy/code of conduct and compliance programme as required.

2. Regarding alteration made on the Form of Tender, the Respondent submitted that Clause 15.1 of the ITT required tenderers to fill the Form of Tender as per the format provided under Section VIII of the Tender Document. Clause 15.1 also prohibited alteration of the Form of Tender and provided that if the form would be altered the same should not be accepted by the procuring entity.

   According to the Respondent, the Appellant submitted the Form of Tender which has been altered not only in paragraph 5, but in paragraphs 4, 8 and the table therein was omitted. Generally, the wording of the Appellant's Form of Tender was different from the Form of Tender provided in the Tender Document.

   The Respondent submitted that, alterations made on the Appellant's Form of Tender cannot be regarded as a minor deviation as the Appellant propounded. Form of Tender is among the important documents for the Tender and thus its alteration is strictly prohibited under Clause 15.1 of the ITT. According to Section 53(2) of the Interpretation of Laws Act, the word **shall** is imperative, thus once used implies that the requirement is a must and is to be complied. The Respondent stated that the word shall has been used under Clause 15.1 of the ITT which means compliance of the requirement under the named clause was mandatory.

The Respondent submitted further that, the Appellant's non-compliance with the Form of Tender cannot be treated as a minor deviation pursuant to Regulation 207(2)(b) of the Regulations. The Respondent stated that the alterations made by the Appellant were fatal and a waiver could not have been invoked under the circumstances as it would unfairly affect the rights of bidders in the tender process.

In support of his argument the learned State Attorney cited Appeal Case No. 25 of 2021/22 between ***M/S SGS Tanzania Superintendence Company Limited versus Tanzania Bureau of Standards***. According to the Respondent the Appellant in the cited Appeal was disqualified for failure to attach a Bank Statement. The Appeals Authority found the Appellant's disqualification to be fair as it failed to comply with the requirement of the Tender Document. The Respondent invited the Appeals Authority to apply the same principle in considering the Appellant's non compliance in the Tender.

3. With regard to the second issue, the learned State Attorney submitted that Clause 11 of the BDS provides for criteria to be complied with by the tenderers in proving their financial capabilities, experiences and qualification of technical personnel. The proposed successful tenderer whose award is challenged, in proving its financial capacity and experience attached the documents of sister companies namely KGT UK and KGT Kenya. The learned State Attorney conceded that the attached documents were unable to substantiate the successful tenderer's financial capacity and experience as the documents belonged to separate

entities which did not participate in the Tender. According to him this was just an oversight on the part of the Respondent.

The Respondent submitted that, much as the proposed successful tenderer did not comply with some of the requirements of the Tender, the said oversight on the part of the Respondent has not prejudiced the Appellant as its tender was disqualified for non-compliance in the early stages of evaluation.

4. With regard to the Appellant's prayers the Respondent submitted that a refund of TZS 5,000,000.00 claimed by the Appellant as costs has not been substantiated, thus the same should be disregarded. The above notwithstanding, the Respondent prayed for the following orders:-

   i. The Appeal be dismissed with costs;

   ii. The Respondent be allowed to proceed with award of the tender to the recommended bidder in respect of the tender in issue; and

   iii. Any other order as the Appeals Authority may deem fit to grant.

ANALYSIS BY THE APPEALS AUTHORITY

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

From the record of Appeal it is evident that the Appellant was disqualified from the Tender process on the following grounds:-

i) Non submission of anti-bribery policy/code of conduct and compliance programme.

ii) Alteration of the Form of Tender.

In relation to the non-submission of the anti-bribery policy/code of conduct and compliance programme, the Appeals Authority revisited Clause 9 (v) of the BDS in order to ascertain the validity of the Appellant's disqualification. The Clause provides as follows:-

Clause 9 *"In addition to the documents stated in ITB 12, the following documents must be included with the Tender*

(v) ***A duly filled, signed and signed Statement of Undertaking by tenderer on Anti-bribery Policy/Code of Conduct and Compliance programme".***

(Emphasis added)

The above quoted Clause mandatorily required tenderers to submit a statement of undertaking which would be attached with anti-bribery policy/code of conduct and compliance programme.

The Appeals Authority revisited further the Tender Document and observed that Section IX provides a format of "Undertaking by a tenderer on anti-bribery policy/code of conduct and compliance programme". The said form requires tenderers to commit themselves that they would submit their anti-bribery policy/code of conduct and compliance programme.

The Appeals Authority reviewed the Appellant's tender and observed that, it has attached a form titled "Forms of Integrity" instead of

"Undertaking" which shows that it would submit copies of its company's anti-bribery policy/code of conduct and compliance programme. However, the Appeals Authority observed that the said anti-bribery policy/code of conduct and compliance programme was not attached to the Appellant's tender.

Regulation 78(2) of the Regulations read together with the Third Schedule to the Regulations requires tenderers on each tender process to submit an anti-bribery policy/code of conduct and compliance programme. Paragraph 4 of the Third Schedule requires any tender which had not complied with an anti-bribery requirement to be rejected. Paragraph 4 reads as follows:

> "***Tenders which do not conform to these requirements shall not be considered***".
>
> (Emphasis added)

From the record of Appeal, it is crystal clear that the Appellant had submitted an undertaking committing itself to submit an anti-bribery policy/code of conduct and compliance programme. However, the same was not attached. The Appellant's argument that non-submission of an anti-bribery policy/code of conduct and compliance programme ought to have been treated as minor deviation is rejected as it is a requirement under the law.

Given the facts of this Appeal, the requirements of the Tender Document and the law, the Appeals Authority is of the firm view that the Respondent's act of disqualifying the Appellant for failure to submit anti-bribery policy/code of conduct and compliance programme to be proper and in accordance with the law.

In resolving the parties' contentious argument on the Form of Tender, the Appeals Authority revisited Clause 15.1 of the ITT which reads as follows:-

> Clause 15.1 ***"The Tenderer shall fill the Form of Tender furnished in the Tendering documents. The Form of Tender must be completed without any alterations to its format and no substitute shall be accepted".***

The above quoted Clause mandatorily requires bidders to complete the Form of Tender without alterations to its format. The Appeals Authority revisited the Appellant's Form of Tender attached on its tender and observed that paragraph 4 and part of paragraph 5 were omitted. The execution clause was partly altered as the sentence "duly authorized to sign this tender for and on behalf of ..." was omitted.

During the hearing the Appellant was required to clarify as to why it altered the Form of Tender. In response thereof, the Appellant submitted that alteration of paragraph 5 was made purposely as the required information was provided under Clause 45 of the ITT as modified by Clause 29 of the BDS.

Having related the above facts to the requirement of Clause 15.1 of the ITT, the Appeals Authority is of the settled view that, Form of Tender ought not to have been altered despite the circumstances.

The Appeals Authority considered the Appellant's argument that the act of deleting paragraph 5 was not fatal as the information required was already provided for in the Tender Document and observes that, the paragraph required the Appellant to confirm the appointment of an

adjudicator as provided under Clause 29 of BDS. Thus, the Appellant misinterpreted paragraph 5 of the Form of Tender.

The Appeals Authority further considered the Appellant's argument that alteration made on the Form of Tender ought to have been treated as a minor deviation and observes that, according to Clause 8.1 of the ITT Form of Tender is among the key documents of the Tender. Form of Tender ensures tenderers' commitment to the Tender. Therefore, non-compliance cannot be waived as it goes to the root of the Tender.

From the above observations, the Appeals Authority finds the Respondent's act of disqualifying the Appellant to be proper and in accordance with Regulation 206 (2) of the Regulations. The provision reads as follows:-

> 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".***

Under the circumstances the Appeals Authority concludes the first issue in the affirmative that, the disqualification of the Appellant's tender was justified.

2.0 Whether the proposed award of the contract to M/S Khalil General Trading Tanzania Limited is proper in law.

In resolving this issue, the Appeals Authority considered the Appellant's contention that, the proposed tenderer M/S Khalil General Trading Tanzania Limited failed to comply with Clause 14.3(b) of the ITT as modified by Clause 11(i) and (ii) of the BDS which provide requirements on the financial capacity and experience required for the Tender.

Before considering the validity of the Appellant's argument on this point, the Appeals Authority deemed it proper to reproduce Clause 11(i) and (ii) of the BDS which provides as follows:-

> **Clause 11** "*The qualification criteria required from Tenderers in ITB 14.3 (b) is modified as follows*:
>
> **i. Financial capability**
>
> ***Bidder shall submit audited financial statements of three consecutive years (2018-2020).*** *The minimum required capital to be at least Tshs. 500 Million.*
>
> **ii. Experience of the Company**
>
> *a)* ***Bidder shall have experience of at least three (03) recent performed contracts*** *of supplying X-ray machines and items of similar nature (between 2015-2021)*
>
> *b)* ***Bidder shall submit at least three (03) recommendation letters from previous employers*** *addressed to Director General, Tanzania Airports Authority".*
>
> (Emphasis Added)

In order to ascertain if the proposed successful tenderer M/S Khalil General Trading Tanzania Limited complied with the above requirements, the Appeals Authority revisited its tender submitted on TANePS and observed that, in relation to the audited financial statements, the proposed successful tenderer submitted unaudited financial statements of KGT UK Limited. It was further observed that in relation to experience (three recent performed contracts) the proposed successful tenderer attached recognition certificates of KGT Kenya Limited. With regard to recommendation letters from three previous employers, the proposed successful tenderer attached three letters of KGT Kenya Limited and one letter indicating that it had worked with Kilimanjaro International Airport.

The Appeals Authority revisited the Appeal record and observed that an extract from the Business Registrations and Licensing Agency (BRELA) indicates that the proposed successful tenderer's company was incorporated on 27th May 2020, thus at the time of submission of tenders, it had only one year and a half of existence. It was further observed that, the proposed successful tenderer participated in this Tender as M/S Khalil General Trading Tanzania Limited.

During the hearing members of the Appeals Authority required the Respondent to clarify as to why it proposed to award the Tender to a tenderer who submitted documents of KGT UK to prove its financial capacity and KGT Kenya Limited to prove its experience. In response thereof, the Respondent conceded that it was an oversight on its part.

The Appeals Authority failed to comprehend the Respondent's motive of disqualifying other tenderers for non-compliance and yet qualifying the

proposed successful tenderer who submitted documents of other companies as proof of its financial capacity and experience.

From the above observations, the Appeals Authority is of the settled view that, the Respondent erred in law for proposing to award the Tender to a tenderer who failed to comply with the requirements of the Tender Document. The proposed successful tenderer ought to have been disqualified pursuant to Regulations 204(2)(f)&(k) and 206(2) of the Regulations. Regulations 204(2)(f)&(k) read as follows:-

> Reg. 204(2) "***Material deviations to commercial terms and conditions, which justify rejection of a tender*** *shall include the following:-*
>
> *(f)* ***failure to comply with minimum experience criteria as specified in the tendering documents;***
>
> *(k)* ***failure to submit major supporting documents required by the tendering documents to determine substantial responsiveness of a tender".***
>
> (Emphasis supplied)

Based on the above findings, the Appeals Authority concludes the second issue in the negative that the proposed award to the successful tenderer M/S Khalil General Trading Tanzania Limited is not proper in law.

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

Taking cognizance of the findings hereinabove that, the Appellant's disqualification is justified and that the proposed award to the successful tenderer is not proper in the eyes of the law, the Appeals Authority

hereby partly allows the Appeal to the extent of the findings made on the second issue.

Since the evaluation report indicates that there is no other responsive tender amongst the submitted bids, the Respondent is hereby ordered to re-start the Tender process in observance of the law.

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 14th day of July 2022.

HON. JUSTICE (rtd) SAUDA MJASIRI

.....

CHAIRPERSON

MEMBERS:

1. MR. RHOBEN NKORI .....

2. DR. WILLIAM KAZUNGU .....