IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 37 OF 2021-22

BETWEEN

M/S SAHEL TRADING CO. LIMITED.....APPELLANT

AND

TANZANIA POSTS CORPORATION..... RESPONDENT

DECISION

CORAM

1. Hon. Justice (rtd) Sauda Mjasiri - Chairperson
2. Eng. Stephen Makigo - Member
3. Adv. Rosan Mbwambo - Member
4. Mr. Rhoben Nkori - Member
5. Ms. Florida Mapunda - Ag. Secretary

SECRETARIAT

1. Ms. Agnes Sayi - Senior Legal Officer
2. Ms. Violet Limilabo - Senior Legal Officer

FOR THE APPELLANT

1. Ms. Shamimu Kikoti - Advocate, DKM Advocates
2. Mr. Brian Kajiru - Legal Officer, DKM advocates
3. Ms. Vanesa Njunwa - Legal Officer, DKM advocates

FOR THE RESPONDENT

1. Mr. Ayoub Sanga	- State Attorney
2. Mr. Gervas Seth	- Secretary of the Tender Board
3. Ms. Happy A. Kikoga	- Legal Officer
4. Mr. John Edgar	- Legal Officer
5. Ms. Zainabu T. Matollah	- Member of Evaluation Committee

The Appeal was lodged by **M/S Sahel Trading Co. Limited** (hereinafter referred to as **"the Appellant"**) against **Tanzania Posts Corporation** (hereinafter referred to as **"the Respondent"**). The Appeal is in respect of Tender No. PA/091/2021-2022/HQ/G/19 for Supply of Digital Weighing Scales (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 6th April 2022, the Respondent through TANePS invited qualified tenderers to submit their tenders. The deadline for submission was set for 25th April 2022. According to the online tender opening record only seven (7) tenderers the Appellant inclusive submitted their bids.

Tenders were then subjected to evaluation which was conducted into three stages namely; preliminary, technical and financial evaluation. During preliminary evaluation one (1) tender was disqualified for being non responsive to the requirements of the Tender Document. The remaining six (6) tenders were subjected to other stages of evaluation.

After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/S Tuzo Business Group of Company Limited at a contract price of Tanzania Shillings Two Hundred Ninety Million (TZS 290,000,000.00) only. The Tender Board at its meeting held on 10th June 2022, deliberated and approved the award as recommended by the Evaluation Committee.

On 10th June 2022, the Respondent issued the Notice of Intention to award the contract to all tenderers who participated in the Tender. The notice indicated that the Respondent intends to award the contract to M/S Tuzo Business Group of Company Limited. The Notice also informed the Appellant that its tender was ranked the second with Tanzania Shillings Five Hundred Eighty Four Million and Thirty Cents (TZS 584,000.000.30) only. Thus, it was not recommended for award.

According to the Appellant upon being dissatisfied on 16th June 2022, it filed an application for administrative review to the Respondent. The Appellant stated further that, on 16th June 2022, the Respondent issued a decision which dismissed its application, Aggrieved further, the Appellant lodged this Appeal on 27th June 2022.

After the Appeal was lodged, the Appeals Authority notified the Respondent about the existence of the Appeal and required it to submit its reply. When the matter was set for hearing, parties were notified and the Respondent filed a notice of preliminary objection (PO) on a point of law to wit: -

> "*The Appeal is vexatious, frivolous and untenable in law for want of the decision by the procuring entity*".

During the hearing, the Appeals Authority directed the parties that it would hear both the PO and the merits of the Appeal. Therefore, parties were required to address it on both. In so doing the following issues were framed: -

1. **Whether the Appeal is properly before the Appeals Authority**
2. **Whether the proposed award of contract to the successful tenderer was justified; and**
3. **What reliefs, if any, are the parties entitled to?**

Parties commenced their submissions by addressing the PO. Their submissions are summarized as hereunder: -

SUBMISSIONS BY THE RESPONDENT ON THE PO

The learned State Attorney for the Respondent commenced his submissions by indicating that, the public procurement review process is governed by Sections 95, 96 and 97 of the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and Regulations 104, 105, 106 and 107 of the Public Procurement Regulations, GN. No. 446 of 2013 and GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**"). The learned State Attorney stated that a tenderer who has participated in a tender process and being aggrieved or claiming to have suffered any loss or injury as a result of breach of duty imposed to a procuring entity is required to seek redress by submitting an application for administrative review to the procuring entity before lodging an appeal to this Appeals Authority.

In this Tender the Respondent issued the Notice of Intention to award on 10th June 2022. Upon being dissatisfied, on 16th June 2022 the Appellant wrote a letter to the Respondent seeking for some clarifications. The Respondent submitted that the Appellant's letter was not an application for administrative review as it did not comply with the requirements of Regulation 105(3) of the Regulations.

According to the Respondent Regulation 105(3) of the Regulations laid down the mandatory requirements to be included in an application for administrative review. However, the Appellant's letter dated 16th June 2022, did not contain any of the listed requirements. The Respondent added that, Regulation 105(3) of the Regulations uses the word **shall** which according to Section 53 of the Interpretation of Laws Act Cap 1 R.E 2002 means mandatory. Thus, the Appellant was required to comply with requirements of Regulation 105(3) of the Regulations.

The learned State Attorney elaborated further that, the referred Appellant's letter demanded confidential information on the proposed successful tenderer while the law prohibits disclosure of such information. The Respondent also submitted that, as a matter of procedure it responded to the Appellant's letter on 16th June 2022. However, such a response did not change the fact that the Appellant did not submit an application for administrative review. In the absence of an application for administrative review the Appellant ought not to have lodged this Appeal as it was required to exhaust the available remedy at the first instance. According to the learned State Attorney, the Appeals Authority is vested with powers of hearing and determining Appeals and not fresh complaints as lodged by the Appellant.

In support of his arguments the learned State Attorney cited Miscellaneous Civil Cause No. 32 of 2021 between ***M/S Aqua Power Tanzania Ltd (T/ATurbine Tech) versus the Public Procurement Appeals Authority and 3 Others***, High Court of Tanzania (Main Registry) Dar es salaam (Unreported). In the referred case, the High Court stated the requirements of an application for administrative review pursuant to Regulation 105(3) of the Regulations. The court ruled that in order for an application for administrative review to be proper the same has to comply with requirements of Regulation 105(3) of the Regulations.

The Respondent submitted that based on the requirements of Regulation 105(3) and the analysis of the court in the above cited case, the Appellant's letter dated 16th June 2022 was not an application for administrative review. In that regard the Appellant has no decision which is capable of being appealed against. Thus, the Appeal was lodged prematurely. Therefore, the Respondent prayed for dismissal of the Appeal.

REPLY BY THE APPELLANT ON THE PO

In response to the PO, the learned counsel for the Appellant submitted that, after it was served with the Notice of Intention to award the contract and being dissatisfied, it filed an application for administrative review to the Respondent on 16th June 2022. The said application for administrative review complied with requirements of Regulation 105(3) of the Regulations. The Appellant submitted further that the Respondent after receipt of the application for administrative review responded

immediately thereafter by issuing its decision on 16th June 2022. Having been dissatisfied with the Respondent's decision, the Appellant filed this Appeal on 27th June 2022. Thus, the Appeal followed the review procedures as required. Therefore, the Appellant prayed that the PO be overruled and the Appeal be heard on merits as it is properly before the Appeals Authority.

ANALYSIS OF THE APPEALS AUTHORITY ON THE PO

1.0 Whether the Appeal is properly before the Appeals Authority

In determining the PO raised, the Appeals Authority revisited the provisions of Sections 60(3) and 96(1) of the Act read together with Regulations 104 and 105(1) and (3) of the Regulations. According to Section 60(3) of the Act, a tenderer who is dissatisfied with the Notice of Intention to award may file a complaint/an application for administrative review to the procuring entity. Regulation 105(3) of the Regulations provides for contents of an application for administrative review. The regulation reads as follows:-

Reg.105(3) "the application for administrative review shall contain-

(a) details of the procurement or disposal requirements to which the complaint relates;

(b) details of the provisions of the Act, Regulations or provisions that have been breached or omitted;

(c) an explanation of how the provisions of the Act, Regulations or provisions have been breached or omitted including the dates and name of the responsible public officer, where known;

(d) documentary or other evidence supporting the complaint where available;

(e) remedies sought; and
(f) any other information relevant to the complaint."

According to the record of Appeal the Notice of Intention to award was issued on 10th June 2022. The Appellant on 16th June 2022 filed a letter titled application for administrative review which was responded by the Respondent on 16th June 2022. On 27th June 2022 the Appellant lodged this Appeal. In responding to the Appeal, the Respondent raised a preliminary objection.

The PO raised by the Respondent needs the Appeals Authority to ascertain facts for it to be substantiated, since the nature of the PO centers on the ascertainment as to whether or not the Appellant's letter dated 16th June 2022 was an application for administrative review/complaint under Regulation 105(3) of the Regulations. The issue to be determined is whether or not the preliminary objection raised by the Respondent qualifies to be a pure point of law. In ***Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd.*** **(1969) EA 696,** it was held that:-

> *"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct it cannot be raised if any fact has to be ascertained."*

The Appeals Authority is of the considered view that the PO raised is not a pure point of law which could be determined without ascertaining the facts. Therefore, PO is hereby overruled. The Appeal Authority proceeds to determine merits of the Appeal.

SUBMISSIONS BY THE APPELLANT ON THE MERITS OF THE APPEAL

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 intending to award the contract to M/S Tuzo Business Group of Company Limited, the proposed successful tenderer as it failed to comply with the requirements of the Tender Document.

2. That, the proposed successful tenderer failed to comply with requirement of Clause 3.1 of the Instructions To Tenderers (ITT) as modified by Clause 10(5) and (6) of Tender Data Sheet (TDS). The Clause requires tenderers to submit copies of certificates for importation, installation and maintenance of electronics communication equipment. The Appellant asked the Respondent to prove if such a requirement was complied with.

3. That, the proposed successful tenderer failed to comply with requirement of Clause 11.1(h) of the ITT as modified by Clause 15 of TDS which requires tenderers to submit a copy of certificate issued by Weight and Measures Agency.

4. That, according to Clause 12.3(c) of the ITT as modified by Clause 18(a) of the TDS tenderers were required to submit audited Financial Statements of the past three years so as to prove an annual turnover of TZS. 200,000,000.00. The Appellant doubted if the proposed successful tenderer complied with this requirement.

5. That, the proposed successful tenderer lacked experience of seven years as required by Clause 12.3(c) of the ITT as modified by Clause 18(b)(i) and (ii) of the TDS. According to the said Clause tenderers were required to submit evidence which proves seven years working experience and references of at least three similar contracts in nature and size. The proposed successful tenderer was incorporated in February 2016. At the time this Tender was floated it did not posses seven years experience as required.

6. That, the proposed successful tenderer lacked manufacturer's authorization as required by Clause 3.1 of the ITT as modified by Clause 10(3) of the TDS.

7. That, according to Clause 12.3(c) of the ITT as modified by Clause 18(c)(i) and (ii) of the TDS, tenderers were required to provide a list of experts who are certified by Weights and Measures Agency (WMA) for the installation and commissioning of the machines. The Appellant doubted if the proposed successful tenderer complied with this requirement.

8. That, Item 2.1(e) and 2.2(e) of the Evaluation Criteria required tenderers to prove availability of spare parts and after sales services in Tanzania. The Appellant doubted if the proposed successful tenderer complied with this requirement.

9. That, the delivery of equipment needs an approved pattern registered by WMA as per the Weights and Measures Act, Cap 340 of 2002 as revised. The proposed successful tenderer lacked the approved pattern as according to the Weights and Measures website

(www.wma.go.tz), the firm is not included in the list of the approved registered pattern.

10. That, sales, installation, calibration, commissioning and services of the items to be supplied need technical personnel who are licensed and certified by WMA as per Regulations 166 and 167 of the Weights and Measures (General) Regulations GN No. 288 of 2019 as revised. The proposed successful tenderer did not have qualified personnel who are licensed and certified by WMA. This is in accordance with the list provided in the website of WMA (www.wma.go.tz).

11. That, due diligence to determine the capacity, technical personnel and facility was not conducted to the Appellant as it was done to the proposed successful tenderer despite the fact that the Appellant was ranked the second.

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

    i. Costs of this Appeal;
    ii. Re-evaluation of the tender; and
    iii. Award of the tender to a tenderer who properly complied with tender requirements.

REPLY BY THE RESPONDENT ON THE MERITS OF THE APPEAL

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, Clause 3.1 of the ITT as modified by Clause 10(5) and (6) of TDS required tenderers to attach certificates of importation, installation and maintenance of electronic communication equipment. According to the

Respondent the requirement was neither made part of the attachments in TANePS nor was used during evaluation process. The Respondent submitted that the floated tender was for supply of weighing digital scales. The nature and scope of the Tender did not require installation or commissioning. Therefore, the Clause was found to be redundant as it was not relevant for this Tender. Thus, the Respondent waived this requirement and it was not used during evaluation. The Respondent added that, none of the tenderers was disqualified for non-compliance with this criterion, thus the Appellant was not prejudiced.

2. With regard to the certificate issued by Weights and Measures Agency the Respondent submitted that the said criterion was waived through a circular resolution dated 29th April 2022 after realizing that it was not required at the bidding stage. After it was waived, the criterion was not assessed during evaluation process. The Respondent submitted further that, according to the Weight and Measures Act Cap 340, the certificate is to be submitted by a tenderer before importing the weighing scales once awarded the tender.

3. That, the Appellant through its letter dated 16th June 2022 requested to be informed if the proposed successful tenderer complied with the Tender requirements. However, the Respondent in compliance with the principle of confidentiality was unable to disclose the information of the proposed successful tenderer to the Appellant. The Respondent added that in order to have equal treatment, information regarding qualifications of tenderers were not disclosed so as to ensure that there is equal footing between tenderers and none is prejudiced.

4. Regarding compliance with financial capability criterion, the Respondent submitted that the proposed successful tenderer submitted three years audited Financial Statements as required under Clause 12.3(c) of the ITT as modified by Clause 18 (a) of the TDS. Thus, the firm complied with such criterion.

5. That, with regard to experience, the Respondent strongly disputes the Appellant's argument on this point as the proposed successful tenderer possessed the requisite experience as required under Clause 12.3(c) of the ITT as modified by Clause 18(b)(i) of the TDS. The Respondent stated further that, Clause 18(b)(i) was modified on TANePS and indicates that tenderers were required to submit proof of three years working experience. The Respondent expounded that, the proposed successful tenderer was incorporated in February 2016, thus at the time the Tender was floated it had more than three years of existence. Thus, it complied with the experience criterion.

   The Respondent added that, during evaluation all tenderers were assessed if they had three years working experience. None was assessed based on seven years working experience as provided for in the Tender Document. The Respondent submitted further that, since all tenderers were assessed based on three years working experience none of them was prejudiced as the criterion was applied equally to all.

6. That, the Respondent disputes the Appellant's argument that the proposed successful tenderer lacks three contracts which prove that the firm has executed works of a similar nature and scope. The Respondent stated that the proposed successful tenderer complied with Clause 12.3(c) of the ITT as modified by Clause 18(b)(ii) of the TDS as it has

already executed three contracts of a similar nature. Thus, the firm complied with this criterion.

7. That, with regard to manufacturer's authorization, the Respondent submitted that the proposed successful tenderer complied with Clause 3.1 of the ITT as modified by Clause 10(3) of the TDS as it submitted manufacturer's authorization as required.

8. That, in relation to providing lists of experts in compliance with Clause 12.3(c) of the ITT as modified by Clause 18(c) of the TDS, the Respondent submitted that the proposed successful tenderer complied with this criterion as it provided lists of experts as required. The required experts were for provision of technical expertise when required since the Respondent has its own internal technical expertise.

9. That, the digital weighing scales to be supplied by the proposed successful tenderer, its spare parts and technical services support were available thus the firm complied with the Qualification and Evaluation Criteria.

10. That, the Respondent disputes the Appellant's argument that, the price quoted by the proposed successful tenderer was abnormally low. The Respondent submitted that the price quoted by the proposed successful tenderer was evaluated and found to be in compliance with the conditions provided in the Tender Document. Further, it stated that, the intended equipments met all the specific technical specifications in compliance with the Weight and Measures Agency Act.

11. With regard to the proposition that due diligence was to be conducted to the Appellant, the Respondent submitted that, due diligence was

conducted on the lowest evaluated tenderer. In this Tender the lowest evaluated tenderer was the proposed successful tenderer, thus due diligence was conducted on it in order to verify its technical capacity.

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

    i. Appeal be dismissed with costs;
    ii. Respondent be allowed to proceed with tender process and award the Tender to the responsive bidder; and
    iii. Any other relief deemed fit by the Appeals Authority.

ANALYSIS OF THE APPEALS AUTHORITY ON THE MERITS OF THE APPEAL

2.0 Whether the proposed award of the contract to the successful tenderer was justified

In challenging the award proposed to the successful tenderer the Appellant raised several points in relation to compliance with requirements of the Tender Document. In order to ascertain if the proposed successful tenderer complied with the requirements of the Tender, the Appeals Authority deems it proper to analyze each of the raised points as hereunder:-

a) Certificates of importation, installation and maintenance of electronic communication equipment

In ascertaining compliance with the above named requirement, the Appeals Authority revisited Clause 3.1 of the ITT as modified by Clause 10(5) and (6) of TDS which provide as follows:-

"Clause 10 Eligible tenderers

(5) A copy of Certificate of Import Electronic Communication equipment

(6) A copy of certificate of Install and Maintain of Electronic Communication equipment".

In substantiating if the proposed successful tenderer complied with the above named requirement, the Appeals Authority revisited its tender submitted on TANePS and observes that there were no certificates attached relating to importation, installation and maintenance of electronic communication equipment. The Appeals Authority further reviewed the evaluation report on TANePS and observed that the above named requirements were not amongst the evaluated criteria in this Tender.

During the hearing Members of the Appeals Authority required the Respondent to clarify on this point and in response thereof, the Respondent submitted that, the criteria were not evaluated as they were waived after realizing that they were not relevant for the Tender. The Appeals Authority having reviewed the Appeal record could not establish if the said criteria were waived as contended by the Respondent.

b) Certificate of Weights and Measures

Clause 11.1(h) of the ITT modified by Clause 15 of TDS required tenderers to submit a certificate issued by Weights and Measures Agency. Clause 15 reads as follows:-

"Clause 15 In additional to the documents stated in ITT 11, the following documents must be included with the Tender:-

(f) Certificate issued by Weight and Measure Agency."

To ascertain if the proposed successful tenderer complied with the above quoted requirement, the Appeals Authority reviewed its tender on TANePS and observed that, at the slot where it was required to attach a certificate issued by Weights and Measures Agency, it uploaded a Business License.

During the hearing the Respondent presented a circular resolution dated 29th April 2022 which indicates that the said requirement was waived as it was not supposed to be assessed during tendering stage. The Respondent added that the said criterion was not used to disqualify any of the tenderer.

Based on waiver made by the Respondent the Appeals Authority is of the view that none of the tenderers was affected.

c) Audited Financial Statements for the past three years

According to Clause 12.3(c) of the ITT as modified by Clause 18 (a) of the TDS tenderers were required to submit audited Financial Statements of the past three years preferably from 2018, 2019, 2020 or latest so as to prove an annual turnover of TZS. 200,000,000.00. Clause 18(a) of TDS reads as follows:-

"Clause 18 Other procurement specific documentation requirements are:-

(a) Financial Capability

Provide Audited Financial Statements for the past three (3) years, preferably 2018, 2019, 2020 or latest to indicate proof of having annual turnover for two years having not less than TZS 200,000,000.00 or equivalent to any convertible currency in any of two years.

In order to verify if the proposed successful tenderer complied with the above quoted requirement, the Appeals Authority reviewed its tender submitted on TANePS and observed that it attached audited Financial Statements for the year 2019, 2020 and 2021. The Financial Statements indicate that the proposed successful tenderer has a total income of over Tanzanian shillings one billion for each year. Thus, the Appeals Authority finds that the proposed successful tenderer complied with this requirement.

d) Experience of seven years and firms references of at least three contracts

Clause 12.3(c) of the ITT as modified by Clause 18(b)(i) and (ii) of the TDS requires tenderers to prove experience of seven years in supply of office equipment and to have references of at least three contracts of similar nature. Clause 18(b)(i) and (ii) of the TDS read as follows:-

"Clause 18 Other procurement specific documentation requirements are:-

(b) Experience

The Tenderer shall furnish documentary evidence to demonstrate that it meets the following experience requirement (s):-

(i) ***Provide evidence of firm's experience of not less than seven (7) years in supply of office equipment and other related services.***

(ii) ***Provide firms reference of at least three (3) similar contracts of the similar nature and size in any of the three (3) years.*** *The list should indicate the following necessary contents:-*

(a) Contract description

(b) Value of the contract

(c) Name and address of the client

Physical address, mobile number and email address

(d) Date of contract commencement and completion."

Furthermore, the Appeals Authority reviewed TANePS and observed that it contained a different requirement in relation to experience. As per the TANePS tenderers were required to provide evidence of not less than three years experience in supply of weighing scales and other related services.

Section 72(1) of the Act read together with Regulation 203(1) of the Regulations requires evaluation of tenders to be in accordance with terms and conditions provided for in the Tender Document. The provisions read as follows:-

Sec. 72 (1) "***The basis for tender evaluation and selection of the successful tenderer shall be clearly specified in the tender document***".

Reg. 203 (1) "***The tender evaluation shall be consistent with terms and conditions prescribed in the tender documents and such evaluation shall be carried out using the criteria explicitly stated in the tender documents***".

(Emphasis added)

The Appeals Authority observes that while the Tender Document requires tenderers to submit evidence of **seven years experience in supply of office equipment and other related services,** TANePS requires **three years experience in supply of weighing scales**.

Based on the noted inconsistency, the Appeals Authority is of the firm view that the Respondent was required to insert in the TANePS the experience requirement as provided for in the Tender Document. This is due to the fact that TANePS is a web based collaborative system developed in accordance with the requirement of public procurement laws to facilitate public procurement process in Tanzania. Thus, TANePS is not part of the Tender Document.

In view of the above findings, the Appeals Authority finds the Respondent to have contravened Section 72(1) of the Act and Regulation 203(1) of the Regulations as evaluation was to be carried out using criteria explicitly provided for in the Tender Document and not otherwise.

The Appeals Authority is of the firm view that the Respondent's act of evaluating experience based on three years and not seven years had

unfairly affected the rights of tenderers in this process. This is due to the fact that, firms having less than seven years experience might have qualified whereas if the seven years experience criterion was used, tenderers with less than seven years experience would have been disqualified.

In order to ascertain if the proposed successful tenderer has the requisite experience, the Appeals Authority reviewed its Tender submitted on TANePS and observed that, it attached Form-EXP-1Experience which indicates that it has executed four contracts with the following; Roars Capitals with a value of TZS 500,000,000.00, Alaf Tanzania with a value of TZS 800,000,000.00, Kilimanjaro Christian Medical Center (KCMC) with a value of TZS 800,250,000.00 and International School of Tanganyika (IST) with a value of TZS 1,000,000,000.00. The Appeals Authority observed further that, all the listed contracts were for supply of motor vehicles for the year 2019, 2020 and 2021.

Based on the above facts, the Appeals Authority failed to comprehend how the Respondent managed to assess experience of the proposed successful tenderer even if it could have been assumed that the required experience was three years in supply of digital weighing scales and other related services as provided on TANePS. The contracts listed by the proposed successful tenderer do not indicate if the firm has experience in supply of digital weighing scales and related services. Therefore the Appeals Authority is of the considered view that supply of motor vehicles cannot be related to supply of weighing scales or other related services.

The Appeals Authority is of the view that, if the proposed successful tenderer was assessed on the basis of seven years working experience, the firm could not have qualified. According to The Respondent the proposed successful tenderer was incorporated in February 2016, thus at the time this Tender was floated it had only six years of existence.

Given the above, the Appeals Authority is of the settled view that the proposed successful tenderer did not comply with the experience criterion as required in this Tender.

e) Manufacturer's Authorization

Clause 3.1 of the ITT as modified by Clause 10(3) of the TDS indicates clearly that tenderers were required to submit Manufacturer's Authorization. In order to ascertain if the proposed successful tenderer complied with such a requirement, the Appeals Authority revisited its Tender on TANePS and observed that it attached a Manufacturer's Authorization Form issued by Zhejiang Haivo Electrical Co. Ltd from China. The said manufacturer confirmed to have authorized the proposed successful tenderer to supply the digital weighing scales.

Based on this fact, the Appeals Authority is of the firm view that, the proposed successful tenderer complied with this requirement.

f) List of experts and biographical data of key personnel

Clause 12.3(c) of the ITT as modified by Clause 18(c) of the TDS requires tenderers to provide list of experts which would install and commission the machines and to provide biographical data of key

personnel which would carry out after sale services. Clause 18(c) of the TDS reads as follows:-

> *"Clause 18 Other procurement specific documentation requirements are:-*
>
> *(c) Technical Capacity*
>
> *(i) Provide list of experts that could install and commission the machines successfully if awarded the contract*
>
> *(ii) Provide biographical data of key personnel for carrying out after sales support indicating academic qualification experience".*

In ascertaining if the proposed successful tenderer complied with this requirement, the Appeals Authority reviewed its tender on TANePS and observed that, it has listed five names and indicated number of years without elaborating what the qualification and experience related to.

During the hearing the Members of the Appeals Authority, required the Respondent to clarify how the requirement was assessed. In response thereof, the Respondent submitted that since the Tender was for supply of digital weighing scales; installation, commissioning or after sales services was not relevant. However, since the Respondent has its own internal systems and expertise, it just wanted some few experts from the supplier for providing technical assistance if the need would arise.

The Appeals Authority finds the requirement in relation to lists of experts and biographical data of key personnel to be vague and not clear as it is not certain what was required and how it would be assessed.

g) Approved pattern registered by Weights and Measures Agency

The Appellant contended that the weighing scales to be supplied require an approved pattern registered by WMA and the proposed successful tenderer lacks the same. Having reviewed the record of Appeal, the Appeals Authority observed that this requirement was not provided for in the Tender Document and therefore not applicable.

h) The sales, installation calibration, commissioning and services of the items needed technical personnel licensed and certified by Weights and Measures Agency

The Appellant contended that, according to Regulations 166 and 167 (1) of the Weights and Measures (General) Regulations GN No. 288 of 2019 technical personnel are to be licensed and certified by the Weights and Measures Agency. The Appellant claimed that technical personnel of the proposed successful tenderer were neither licensed nor certified. The Respondent on its part stated that the licensing and certification of technical personnel would have been done after award have been made. It is not a requirement that a tenderer should have complied with it at the time of bidding.

In ascertaining the validity of parties' contentions, the Appeals Authority reviewed the Appeal record and observed that the said requirement was not provided for in the Tender Document and therefore not applicable.

i) The proposed successful tenderer has quoted abnormally low price.

In ascertaining validity of parties' contention on this point, the Appeals Authority took cognizance of its findings and the Respondent's own admission hereinabove that some of the requirements contained in the Tender Document were not relevant for this Tender and some were ambiguous. It is difficult to establish if the quoted price is abnormally law or otherwise.

j) Due diligence not conducted to the Appellant despite being the second lowest evaluated bidder.

Regarding this contention, the Appeals Authority would like to enlighten the Appellant that due diligence is conducted to the lowest evaluated bidder pursuant to Section 53 of the Act read together with Regulation 224 of the Regulations.

From the above findings, we are of the view that the proposed bidder did not comply with some of the requirements of the Tender Document, therefore the proposal to award it the contract was not justified.

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

Taking cognizance of the findings hereinabove on the second issue that, the Respondent's Tender process is marred with irregularities; the Appeals Authority hereby allow the Appeal to the extent stated and orders the Respondent 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 28th day of July 2022.

HON. JUSTICE (rtd) SAUDA MJASIRI

.....

CHAIRPERSON

MEMBERS:

1. **ENG. STEPHEN MAKIGO**.....
2. **ADV. ROSAN MBWAMBO**.....
3. **MR. RHOBEN NKORI**.....