IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 38 OF 2021-22

BETWEEN

M/S SGS TANZANIA SUPERINTENDENCE

COMPANY LTD.....APPELLANT

AND

TANZANIA COMMUNICATIONS

REGULATORY AUTHORITY.....1ST RESPONDENT

M/S BUREAU VERITAS TANZANIA LTD.....2ND 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. Mr. Penningtone Paschal - Advocate - Aymark Attorney
2. Mr. Kahoza Nicholas - Advocate - Aymark Attorney

FOR THE 1ST RESPONDENT

1. Mr. Hangi M. Chang'a - Principal State Attorney -OSG
2. Mr. Ayoub G. Sanga - State Attorney – OSG
3. Ms. Jehovaness Zacharia - Principal Legal Officer – TCRA
4. Mr. Mathew D. Fuko - State Attorney - TCR
5. Mr. Francis Ramadhan - Senior Legal Officer – TCRA
6. Mr. Richard Malipula - Senior Procurement Officer- TCRA
7. Mr. Richard Kavishe - Legal Officer – TCRA

FOR THE 2ND RESPONDENT

1. Mr. Frances Bukambu - Advocate – Amelui Legal Consultancy
2. Mr. Sam Ilimotho - M/s Bureau Veritas (T) Ltd

This Appeal was lodged by **M/S SGS Tanzania Superintendence Company Ltd** (hereinafter referred to as **"the Appellant"**) against Tanzania Communications Regulatory Authority Commonly known by its acronym as "TCRA" (hereinafter referred to as "**the Respondent"**). The Appeal is in respect of Tender No. AE-020/HQ/2020-21/C/08 for Provision of Consultancy Services for Pre-Inspection of Electronic Communication Equipment and Collection of Advance Eco- Levy Fees (hereinafter referred to as "**the Tender**").

Having been notified of the existence of the Appeal the 1st Respondent suspended the Tender process and notified all tenderers accordingly. Following such notification M/S Bureau Veritas Tanzania Ltd (the proposed bidder) applied to be joined as a party to the proceedings. It was accordingly joined as (the **2nd Respondent)**.

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 commenced with Expression of Interest (EoI) which was advertised on 23rd March 2021 through the Tanzania National electronic Procurement System (TANePS). The submitted expression of interest were evaluated and after completion three tenderers namely; M/S SGS Tanzania Superintendence Company Ltd, M/S Bureau Veritas Tanzania Ltd and M/S Intertek Caleb Brett TZN Ltd were shortlisted. On 9th June 2021, tenderers were notified of the results of the EoI.

On 19th December 2021, the 1st Respondent issued the Request For Proposal (RFP) to the shortlisted tenderers. The deadline for submission of the Technical and Financial proposals was initially set for 18th January 2022 but was later on extended to 1st February 2022. All three shortlisted tenderers submitted their technical and financial proposals as required.

The technical proposals were subjected to evaluation which was conducted into two stages namely; preliminary and technical evaluation. After completion of the evaluation process all three bidders were found to have

scored above the minimum pass mark of 70 points. The scores were as follows:-

1. M/S SGS Tanzania Superintendence Co. Ltd 98. 40;
2. M/S Bureau Veritas Tanzania Ltd 98.20;
3. M/S Intertek Caleb Brett TZN Ltd 96.87

On 22nd March 2022, the 1st Respondent informed all three tenderers results of the technical proposals. Tenderers were further informed that, their financial proposals would be opened on 4th April 2022. The Financial proposals were opened on the scheduled date and the read out price rates were as follows:-

1. M/S SGS Tanzania Superintendence Co. Ltd 25.00%;
2. M/S Bureau Veritas Tanzania Ltd 7.50%
3. M/s Intertek Caleb Brett TZN Ltd 9.40%.

The financial proposals were evaluated and accorded scores accordingly. Thereafter both weighted technical and financial scores were combined. The proposal submitted by M/S Bureau Veritas Tanzania Ltd was ranked the first by scoring 98.80. The second ranked was M/s Intertek Caleb Brett TZN Ltd which scored 91.75 and M/S SGS Tanzania Superintendence Co. Ltd was ranked the third by scoring 77.88. The Evaluation Committee recommended award of the contract to M/S Bureau Veritas Tanzania Ltd.

The Tender Board at its meeting held on 5th May 2022, approved the recommendations of the Evaluation Committee subject to successful

negotiations. On 11th May 2022 the Tender Board approved the negotiation plan. Negotiations took place on 12th May 2022 and were successful. The Tender Board at its meeting held on 10th June 2022 approved the award of the contract to M/S Bureau Veritas Tanzania Ltd at a rate of 7.5% VAT exclusive for the duration of three years.

On 10th June 2022, the 1st Respondent issued a Notice of Intention to award the contract to all tenderers who participated in the Tender process. The 1st Respondent informed tenderers that it intends to award the contract to M/S Bureau Veritas Tanzania Ltd at a rate of 7.50 % VAT exclusive after scoring 98.80%. The Notice also informed the Appellant that it scored 77.88%.

According to the Appellant upon being dissatisfied with the Notice of Intention to award, on 17th June 2022, it wrote a letter to the Respondent titled "*COMPLAINT AGAINST THE INTENTION TO CONTRACT AWARD TO M/S BUREAU VERITAS TANZANIA LTD*". In the said letter the Appellant requested information relating to experience, breakdown of scores on criterion and sub criterion of the qualifying tenderers. On 21st June 2022, the 1st Respondent replied to the Appellant's letter and informed it that the requested tenderers information were confidential and could not be disclosed. However, a summary of combined Technical and financial scores were availed. Aggrieved further, on 30th June 2022, the Appellant filed this Appeal.

After the Appeal was lodged, the Appeals Authority notified the 1st Respondent about the existence of the Appeal and required it to submit its

reply. The Respondent's reply was preceded with a Preliminary Objection (**PO**) on points of law to wit that:-

a) *"The Appeal is vexatious, frivolous and untenable in law for want of the decision by the procuring entity capable of being appealed against;*

b) *The Appeal is incompetent for want of authorization to institute this Appeal; and*

c) *In the alternative to point number 1 and 2 above, the Appeal is untenable in law for being crafted with grounds which were not raised before 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 and the following issues were framed:-

1.0 Whether the Appeal is properly before the Appeals Authority;

2.0 Whether the award of the contract was made pre-maturely;

3.0 Whether the award of the contract to M/S Bureau Veritas Tanzania Ltd is proper in law; and

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

SUBMISSIONS BY THE 1ST RESPONDENT ON THE PO

Mr. Hangi Chang'a the learned Principal State Attorney for the 1st Respondent commenced his submissions by addressing the first PO and stated 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 Principal State Attorney submitted that a tenderer who has participated in a tender process and being aggrieved or claim 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.

According to the record of Appeal, the Appellant after receipt of the 1st Respondent's Notice of Intention to award, on 17th June 2022 wrote a letter to the 1st Respondent. The said letter had a subheading titled "*COMPLAINT AGAINST THE INTENTION TO CONTRACT AWARD TO M/S BUREAU VERITAS LTD*". Apart from the subheading the contents of the letter did not indicate that the Appellant was challenging the Notice of Intention to award issued by the 1st Respondent but was rather seeking clarifications. The 1st Respondent expounded further that, the Appellant's letter did not specify particulars of the tender process, details of the provisions which have been breached and remedies sought. According to the 1st Respondent the Appellant's letter could not have been regarded as a

complaint/an application for administrative review as it did not comply with the requirements of Regulation 105(3) of the Regulations.

The 1st Respondent stated that on 21st June 2022, it responded to the Appellant's letter by informing it that the requested information about other tenderers' qualifications were confidential and that the same could not be disclosed. However, the Appellant was availed with the results of combined technical and financial scores. The 1st Respondent submitted further that, its response to the Appellant's letter cannot be termed as the decision against the Appellant's purported application for administrative review.

In support of his arguments the learned Principal State Attorney cited Miscellaneous Civil Cause No. 32 of 2021 between ***M/S Aqua Power Tanzania Ltd (T/A Turbine Tech) versus the Public Procurement Appeals Authority and 3 Others***, High Court of Tanzania (Main Registry) at 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 1st 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 17th June 2022 was not an application for administrative review. In that regard, there was no decision which is capable of being appealed against. Thus, the Appeal was lodged prematurely. Therefore, the Respondent prayed for dismissal of the Appeal.

With regard to the second PO, the learned State Attorney Mr. Ayoub Sanga argued that Section 147 of the Companies Act, CAP 212 R.E. of 2019, provide clearly that anything done by a company must be initiated by a Board Resolution. The learned State Attorney expounded that the Board Resolution will prove that anyone who institute proceedings on behalf of the company has been authorized to do so. This Appeal has been filed by the legal representative of the Appellant, but there is no proof if he has been authorized to transact on behalf of the company. In order for this Appeal to be properly before the Appeals Authority, a board resolution authorizing the institution of this Appeal should have been attached.

In support of his arguments the learned State Attorney cited the case of ***Ursino Palms Estate Ltd Versus Kyela Valley Foods Ltd and 2 Others,*** Civil Application No. 28 of 2014, Court of Appeal of Tanzania at Dar es Salaam (unreported) whereby the Court held that;

> *"When companies authorize the commencement of legal proceedings a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes..."*

The learned State Attorney also cited the case of ***Kati General Enterprises Ltd Versus Equity Bank Tanzania Ltd and Another***, Civil Case No. 22 of 2018, High Court of Tanzania at Dar es salaam (unreported). In this case the High Court relied on the principle stated in the case of ***Plasco Ltd versus Efam Ltd & Fatma Rweyemamu***, High

Court of Tanzania, Commercial Division at Dar es salaam Commercial Case No. 60 of 2012 where the court stated that:-

> *"...the requirement for authorizing by the company for instituting a suit not expressly stated in the Civil Procedure Code, [Cap. 33 R.E 2002] or any other written laws dealing with institution of action in this country...**It seems to me therefore that the requirement for a company board resolution authorizing institution of a suit by a corporation is largely judge- made law, traceable to the Bugerere Coffee Growers Ltd Vs. Sebaduka and another (1970) EA 147, which has been religiously followed by courts of this country."***

The 1st Respondent submitted that based on the above decisions, the Appellant's failure to attach a Board Resolution on its Statement of Appeal makes this Appeal incompetent. The learned State Attorney added that, in the absence of a Board Resolution authorizing institution of this Appeal, a company may deny responsibility.

With regard to the third PO, the learned State Attorney submitted that the Appellant's Statement of Appeal contained new grounds which were previously not raised in the Appellant's letter dated 17th June 2022. The 1st Respondent stated that complaints in relation to the Respondent's failure to advertise the Tender internationally and the delay in commencement of the Tender process are new grounds. According to the 1st Respondent the new grounds of Appeal were not previously raised in the Appellant's application

for administrative review. The counsel for the 1st Respondent submitted that the Appeals Authority is mandated to hear appeals and not fresh complaints.

Therefore, the 1st Respondent prayed that the new grounds of Appeal should be expunged from the record of Appeal.

SUBMISSIONS BY THE 2ND RESPONDENT ON THE PO

Mr. Frances Bukambu, the learned counsel for the 2nd Respondent supported the PO raised by the 1st Respondent and also adopted the submissions made on the first and third PO. The 2nd Respondent submitted that with respect to the first PO, in order for an appeal to be filed before this Appeals Authority there should be a decision which is being challenged. In the Appeal at hand there is no decision which would warrant the Appellant to file this Appeal as there was no application for administrative review. The counsel submitted that the right of appeal is not automatic but statutory. The counsel cited the case of ***Hon. Minister for Finance and Planning and two others Versus Legal and Human Rights Center,*** Misc. Civil Application No. 16 of 2021 High Court of Tanzania, Main Registry Dar es Salaam (unreported) whereby the court held that:-

> *"a right to Appeal can only be found on a statute and any party who seeks to enjoy that right must strictly comply with the requirement provided by the statute failure of that it lacks that right."*

The learned counsel submitted that, since there was no application for administrative review which was lodged pursuant to Regulation 105(3) of the Regulations, it goes without saying that there was no decision which

was issued by the 1st Respondent that could form the basis of this Appeal. Therefore, in the absence of such a decision, the Appellant's Appeal has no legs to stand on.

With regard to the third PO the learned counsel for the 2nd Respondent submitted that, the Appellant's Statement of Appeal contained new grounds which were not submitted to the accounting officer for review. The Appellant's act of raising new grounds of appeal which were not earlier on submitted to the 1st Respondent for determination is not proper as the latter would have been denied the right to entertain them. Therefore, the new grounds of appeal raised should not be considered at the appellate level.

In support of his argument the learned counsel cited the case of ***Tungu Ramadhani versus Dora Japher Minja*** Misc. Land Appeal No. 13 of 2022, High Court of Tanzania, Land Division at Dar es salaam (unreported. The court held that:-

> *"The court on several occasions held that a ground of appeal not raised in the first appeal cannot be raised in a second appeal."*

The learned counsel also referred to the case of ***Farida & Another versus Domina Kagaruki***, Civil Appeal No. 136 of 2006, the Court of Appeal of Tanzania at Dar es salaam(unreported), the court held that:-

> *"it is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded and not raised at the lower court."*

Based on the above position, the learned counsel for the 2nd Respondent prayed that the Appeal be dismissed as it is not properly before the Appeals Authority.

SUBMISSIONS BY THE APPELLANT ON THE PO

In response to the first PO, Mr. Kahoza Nicholas the learned counsel for the Appellant submitted that neither of the Respondents' counsels comprehended the Appellant's letter dated 17th June 2022 in relation to the requirements of Regulation 105(3) of the Regulations.

According to the learned counsel, the heading and sub heading of the said letter speaks for itself as it was written in capital letters and bolded. The heading of the letter refers to a specific Tender in dispute and the sub heading refers to a complaint against the intended award of the contract to M/S Bureau Veritas Tanzania Ltd.

The counsel submitted that, the Appellant's letter complied with the requirements of Regulation 105(3) of the Regulations as apart from the heading and sub heading of the letter, the main body provides details of the provisions that have been breached as the letter was based on Clause 36.2 of the ITC modified by Clause 19 of the PDS. The letter contained a detailed explanation indicating how the provisions of the Tender Document were breached. Further, Item 2.2 of the said letter requested information of the qualified tenderer in order to ascertain if it complied with the provisions of the RFP.

The Appellant's counsel stated that he wondered what made the Respondent treat the Appellant's letter as a request for information rather

than an application for administrative review. The contents of the Appellant's letter indicate clearly that the Appellant was challenging the award of contract proposed to M/S Bureau Veritas Tanzania Ltd.

The learned counsel submitted that, if the Appeals Authority would dismiss the Appeal on the ground that there was no complaint lodged to the 1st Respondent, it would open a pandoras' box which would be used by procuring entities to misuse a right accorded to tenderers pursuant to the law.

With regard to the second PO, the learned counsel for the Appellant submitted that PPAA Form No. 1 which is used in filing Appeals before the Appeals Authority provides a clear guidance on who is allowed to sign the said Form. According to PPAA Form No. 1 a Statement of Appeal could be signed by either a tenderer or a legally authorized representative. Further to that, there is nowhere in the Act, Regulations or Appeals Rules where it has been indicated a board resolution authorizing institution of an Appeal has to be attached to the Statement of Appeal.

The counsel elaborated that Rule 24 of the Public Procurement Appeals Rules, Government Notice No. 411 of 2014 as amended in 2017 (hereinafter referred to as "**the Appeals Rules**"), states clearly that proceedings before the Appeals Authority should be conducted with less technicalities. Therefore, the counsel concluded its submissions on the second PO by praying that the PO be rejected as the Appeal is competent before the Appeals Authority since a Board Resolution is not amongst the mandatory requirements for filing an Appeal.

On the third PO, the learned counsel for the Appellant conceded that, the first ground of Appeal was not among the issues raised in the application for administrative review. The ground arose after the 1st Respondent had issued its decision with respect to the Appellant's application for administrative review and proceeded to award the contract prior to expiration of the cool off period. According to the learned counsel, the 1st Respondent after issuing its decision on 21st June 2022 ought to have waited for the seven working days prior to communicating award decision. Since the 1st Respondent awarded the contract prior to expiration of the cool off period, the Appellant has no other avenue than raising this ground at the appellate level.

With regard to the second ground of Appeal, the learned counsel submitted that, it is not a new ground as it was contained on its application for administrative review under Item 2.2 and 2.3.

The learned counsel submitted further that, there is jurisprudence that a new matter which was not raised at the court of first instance cannot be entertained at the appellate stage. However, the third ground of Appeal contained procedural irregularity in relation to the advertisement of the Tender. According to the counsel an international tender has to be advertised in international and local newspapers. To the contrary, the 1st Respondent advertised the Tender locally contrary to the requirements of the law. The counsel added that, from the date the 1st Respondent issued the results of expression of interest it took more than six months for tenderers to be invited in this Tender process. According to the Appellant,

these were among the anomalies of the Tender process and therefore can be raised at any stage.

Finally, the counsel for the Appellant prayed for dismissal of the PO and the Appeal be heard on merits as it is properly before the Appeals Authority.

ANALYSIS BY THE APPEALS AUTHORITY ON THE PO

1.0 Whether the Appeal is properly before the Appeals Authority.

This issue covers the three POs raised by the 1st Respondent which are analysed as hereunder:-

(a) The Appeal is vexatious, frivolous and untenable in law for want of the decision by procuring entity capable of being appealed against

In determining the first PO, 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 17th June 2022 filed a letter to the 1st Respondent titled "*COMPLAINT AGAINST THE INTENTION TO CONTRACT AWARD TO M/S BUREAU VERITAS LTD*". The 1st Respondent replied to the said letter on 21st June 2022. On 30th June 2022 the Appellant lodged this Appeal. In responding to the Appeal, the 1st Respondent raised this PO.

This PO centers on the ascertainment as to whether or not the Appellant's letter dated 17th June 2022 was an application for administrative review/complaint under Regulation 105(3) of the Regulations. The PO also centers on the ascertainment as to whether or not the 1st Respondent's letter dated 21st June 2022 was a decision.

Given the nature of the PO it is evident that in order to make a determination, facts need to be revisited. A PO that calls for ascertainment of facts is not 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, the first PO is hereby overruled.

(b) The Appeal is incompetent for want of authorization to institute this Appeal

In resolving this PO the Appeals Authority considered the 1st Respondent arguments that the Appellant ought to have attached a Board Resolution as proof that the Appellant has been authorized to institute this Appeal. The Appellant on its part submitted that it is not a requirement of the law that a Board Resolution should be attached when filing an appeal. The Appellant submitted in the alternative that there is a board resolution in place authorizing institution of this Appeal.

The Appeals Authority having considered the parties contentions on this point is of the view that, the PO requires the Appeals Authority to ascertain the existence or otherwise of the Board Resolution. Thus, it is the view of the Appeals Authority that the PO does not qualify to be a pure point of law as facts needs to be ascertained as was stated in the case of ***Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd,*** supra. Therefore, the Appeals Authority hereby overrules the second PO.

(c) In the alternative to point number 1 and 2 above, the Appeal is untenable in law for being crafted with grounds which were not raised before the procuring entity.

In resolving the third PO, the Appeals Authority reviewed the record of Appeal, specifically the Appellant's Application for administrative review and observed that, it contained only complaints relating to breakdown of scores of the evaluation criteria and sub criteria of the qualifying parties based on Clause 36.2 of the ITC modified by Clause 19 of the PDS. It further elaborated more about Clause 41.2 of the ITC modified by Clause 23 of the PDS that were dealing with post qualification criteria.

The Appeals Authority further reviewed the Statement of Appeal and observed that, the Appellant has included new grounds. One relating to non advertisement of the Expression of Interest internationally and another on the delay in issuance of the RFP Document after completion of the EoI.

Given the above observations, the Appeals Authority is of the settled view that the third ground of the Statement of Appeal contains two new grounds not raised in the application for administrative review before the 1st Respondent. Thus the same cannot be entertained at this stage of Appeal.

The Appeals Authority agrees with both Respondents that the third ground was a new ground raised at the Appellate stage thus the same cannot be entertained at this juncture as held in the case of ***Farida & Another versus Domina Kagaruki***, supra relied upon by the Respondents.

Based on the findings hereinabove, the Appeals Authority upholds the third PO that issues relating to non advertisement of the EoI internationally and the delay in issuance of the RFP Document was not raised in the application for administrative review to the 1st Respondent thus the same would not be considered by this Appeals Authority and they are accordingly expunged.

Therefore, the first issue as to whether the Appeal is properly before the Appeals Authority is answered in the affirmative in relation to the first and second PO and in the negative in relation to the third PO.

Under the circumstances, the Appeals Authority overrules the Respondent's first and second POs and proceeds to determine the Appeal on merits on the remaining grounds.

SUBMISSIONS BY THE APPELLANT ON THE MERITS OF THE APPEAL

The Appellant's grounds of Appeal stated in the Statement of Appeal as well as oral submissions during the hearing may be summarized as follows:

1. In relation to the seconf issue that, the contract was awarded prematurely, the Appellant stated that the 1st Respondent's decision to the Appellant's application for administrative review was issued on 21st June 2022. According to Section 97(2)(b) of the Act read together with Clause 54.1 of the ITC, the Appellant had seven working days of lodging Appeal to the Appeals Authority, if any, prior to the award of the contract. Based on that requirement of the law, the seven working days would have expired on 30th

June 2022. However, before expiry of that period the Respondent on 29th June 2022 awarded the contract to M/S Bureau Veritas Tanzania Ltd.

The counsel for the Appellant submitted further that, the 1st Respondent awarded the contract contrary to the requirement of Section 60(3) and (5) of the Act read together with Regulation 231(6) of the Regulations. In support of his proposition the counsel relied on the case of ***M/S SGS Superintendence Company Ltd and Tanzania Communications Regulatory Authority***, Appeal Case No. 21 of 2020-21.

2. On the third issue, it was submitted that the 1st Respondent's award of contract contravened Clause 36.2 of the ITC modified by Clause 19 of the PDS. The Appellant stated that according to those clauses evaluation of the technical proposals would have been scored out of 100. Further that for a tenderer to qualify for opening of financial proposal needed to score a minimum point of 70 out of 100. Clause 36.2 of the ITC reads as follows:-

> *"Clause 36.2 'Technical proposal shall be evaluated and ranked applying the evaluation criteria, sub criteria, and point system specified in the PDS. Each responsive Technical proposal will be given a technical score (ST). A technical proposal* ***shall be rejected*** *if it does not respond to important aspects of the RFP, and particularly the Terms of Reference or* ***if it fails to achieve the minimum technical score indicated in the PDS."***

The Appellant stated further that, for a tenderer to score 98.29 of the technical proposal was required to have complied with Clause 19(iii) (a) (b) and (c) of the PDS which provide for scores attributed to experience,

qualifications and expertise. This accounts for a total of 50% of the entire technical evaluation. The Appellant submitted that M/S Bureau Veritas Tanzania Ltd was unfairly favoured in the evaluation when compared with other eligible tenderers. Had the evaluation of the technical proposals been fairly conducted in accordance with the set parameters M/S Bureau Veritas Tanzania Ltd would not have scored 98.29 as evaluated by the 1st Respondent.

3. Finally, the Appellant prayed for the following orders:-
   i. A declaration that the award of the Tender to M/S Bureau Veritas Tanzania Ltd was done prematurely;
   ii. Nullify the award of the contract to M/S Bureau Veritas Tanzania Ltd;
   iii. Verification of work experience possessed by M/S Bureau Veritas Tanzania Ltd under the evaluation criteria as set forth under Clause 19 of the PDS and Clause 36.2 of the TDS;
   iv. To compel the 1st Respondent to restart the Tender process.

REPLY BY THE 1ST RESPONDENT

The 1st Respondent's reply to the grounds of Appeal as well as oral submissions may be summarized as follows:-

1. In relation to the second issue, the 1st Respondent submitted that it did not award the contract prematurely as claimed by the Appellant. The counsel for the 1st Respondent submitted that the Notice of Intention to award was issued on 10th June 2022. The Appellant on 17th June, 2022 requested

information relating to examination, evaluation and comparison of tenders. On 21st June 2022 the 1st Respondent responded to the Appellant's letter. On 29th June 2022 the 1st Respondent awarded the contract. Thus, the contract was awarded eight days after expiry of the cool off period.

The counsel for the 1st Respondent made reference to Sections 96(6), 97(1) and (2) and 100(1) of the Act read together with Regulations 106(1) of the Regulations. The said provisions prohibit the procuring entity from awarding the contract where there are complaints raised during the cool off period.

The counsel submitted further that Appeal Case No. 21 of 2020-21 relied upon by the Appellant is distinguishable. In the said Appeal the Respondent awarded the contract during the cool off period while in the present Appeal the contract was awarded after expiry of the cool off period. According to the 1st Respondent, the relevant Appeal to be relied upon is Appeal Case No. 25 of 2021-22 between ***M/S SGS Superintendence Company Ltd and Tanzania Bureau of Standards,*** *where the Appeals Authority held that:-*

> *"Given the circumstances, it is crystal clear that award was issued after the Respondent had entertained the Appellant's application for review."*

2. With regard to the third issue, the 1st Respondent submitted that technical proposals were evaluated based on the criteria stated in the RFP and information submitted by the tenderers in response to the set criteria. Therefore, none of the tenderers was favoured against the other as

claimed by the Appellant. The 2nd Respondent was awarded the contract after being found to have complied with the requirements of the RFP.

The counsel stated that, the Appellant should understand that apart from the technical evaluation, tenderers were evaluated on the financial proposals. Thus, after combining both the technical and financial evaluations, the Appellant scored lower points compared to the 2nd Respondent.

3. Finally, the 1st Respondent prayed for the following orders:-

   i. Appeal be dismissed with costs; and
   ii. Any other relief that the Appeals Authority may deem fit and just to grant.

REPLY BY THE 2ND RESPONDENT

The 2nd Respondent's reply to the grounds of Appeal as well as oral submissions during the hearing may be summarized as follows:-

1. Responding on the second issue, counsel for the 2nd Respondent submitted that, the award of the contract has not been made prematurely as contended by the Appellant. The counsel stated further that Section 60(3) and (5) of the Act relied upon by the Appellant require a procuring entity not to proceed with the Tender process within the cool off period or where complaints have been lodged within that period and not after expiry of the cool off period as stated by the Appellant's counsel.

According to the facts of the Appeal, the Notice of Intention to award was issued on 10th June 2022 and the Appellant submitted its purported complaint on 17th June 2022. On 21st June 2022 the 1st Respondent responded to the Appellant's letter. The cool off period expired on 21st June 2022 while the contract was awarded on 29th June 2022. Thus, the Appellant's contention that the award was made prematurely is not correct.

2. On the third issue the 2nd Respondent submitted that it complied with the requirements of the RFP, as it has extensive experience, technical capabilities and is financially capable to perform the contract. The award to the 2nd Respondent was based on merits and not favoritism as stated by the Appellant. Furthermore, the fact that the Appellant introduced the 2nd Respondent to the 1st Respondent is of no consequence.

3. Finally the 2nd Respondent prayed for the following orders:-

   i. The Appeals Authority be pleased to declare that, there was no application for administrative review;

   ii. The Appeal be dismissed in its entirety for lack of merit;

   iii. The Appeals Authority be pleased to declare and confirm the award of contract;

   iv. Costs of the Appeal be borne by the Appellant;

   v. Any other relief as the Appeals Authority may deem fit and just to grant.

ANALYSIS BY THE APPEALS AUTHORITY

2.0 Whether the award of contract was made pre-maturely;

In resolving this issue, the Appeals Authority reviewed the record of Appeal and observed that on 10th June 2022 the Notice of Intention to award was issued by the 1st Respondent; on 17th June 2022 the Appellant applied for administrative review; on 21st June 2022 the 1st Respondent responded to the Application for review; and on 29th June 2022 the 1st Respondent awarded the contract to the 2nd Respondent.

The Appeals Authority reviewed Section 100 (1) of the Act read together with Regulation 106 (1) of the Regulations. The provisions read as follows:

> *S. 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."***
>
> *R. 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 quoted provisions do not indicate that procuring entities are prohibited from proceeding with the Tender process after entertaining the tenderer's complaint.

The Appeals Authority considered Appeal Case No. 21 of 2020-21 between ***M/S SGS Superintendence Company Ltd and Tanzania Communications Regulatory Authority***, supra, relied upon by the Appellant. Upon review of the said Appeal the Appeal Authority is of the view that, the procuring entity issued the Notice of Intention on 8th January 2021. The seven working days within which tenderers were required to submit complaints expired on 21st January 2021. However, before the expiry of such period on 18th January 2021 the Respondent awarded the contract to the proposed tenderer. The Appeals Authority held that the award of contract was made pre-maturely before expiry of the cool off period of seven working days within which tenderers were supposed to submit complaints to the procuring entity and not to Appeal to the Appeals Authority as contended by the Appellant.

The Appeals Authority is of the firm view that the Appeal cited by the Appellant is distinguishable with the Appeal at hand. In this Appeal the 1st Respondent issued a decision on 21st June 2022 and the award of the contract was issued on 29th June 2022. According to the facts of this Appeal, the cool off period started to run from 10th June 2022 when the notice of intention to award was issued to 21st June 2022. Based on the above observations, the Appeals Authority does not agree with the Appellant's contention that the award of contract was made pre-maturely.

Under the circumstances, the second issue is answered in the negative that award of the contract was not made prematurely.

3.0 Whether the award of the contract to M/S Bureau Veritas Tanzania Ltd is proper in law

In resolving this issue, the Appeals Authority reviewed the record of Appeal and observed that on 22nd March 2022 the 1st Respondent informed the Appellant about the technical evaluation results which indicated scores of each tenderer. M/S SGS Tanzania Superintendence Co. Ltd scored 98.40%, M/S Bureau Veritas Tanzania Ltd scored 98.20% and M/S Intertek Caleb Brett TZN Ltd scored 96.87%. Further to that, the said letter informed bidders that financial proposals would be opened on 4th April 2022.

The Appeals Authority is of the firm view that, the Appellant became aware of the technical evaluation results from 22nd March 2022. If the Appellant was dissatisfied with the score points given to the 2nd Respondent, the Appellant ought to have complained to the 1st Respondent within seven working days pursuant to Sections 95(1), 96(1) and (4) of the Act which read as follows:

> *"Sec.95(1) Any tenderer who claims to have suffered or that may suffer any loss or injury as a result of a breach of a duty imposed on a procuring entity by this Act may seek a review in accordance with Sections 96 and 97."*

Sec. 96(1) Any complaints or dispute between procuring entities

and tenderers which arise in respect of procurement proceedings, disposal of public assets by tender and awards of contracts shall be reviewed and ***decided upon a written decision of the accounting officer of a procuring entity and give reasons for his decision."***

(4) The accounting officer shall not entertain a complaint or dispute unless it is submitted within seven working days from the date the tenderer submitting it became aware of the circumstances giving rise to the complaint or dispute or when that tenderer should have become aware of those circumstances, whichever is earlier.

The above quoted provisions indicate that any bidder who claims to have suffered or that may suffer loss or injury due to breach of duty imposed on the procuring entity may seek review to the accounting officer within seven working days from the date of becoming aware of the circumstances giving rise to a complaint or dispute.

According to the record of Appeal, there is no doubt that the Appellant became aware of the Technical evaluation results on 22nd March 2022. Pursuant to Section 96(4) of the Act the Appellant should have submitted a complaint to the 1st Respondent within seven working days that is by or on 1st April 2022. In the circumstances, the Appeals Authority finds that, the Appellant's complaint relating to technical scores of the 2nd Respondent has

been brought contrary to the above cited provisions. Thus, the same cannot be entertained at this juncture.

Therefore, the third issue is answered in the affirmative that the award of the contract to M/S Bureau Veritas Tanzania Ltd is proper in law.

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

Taking cognizance of the findings hereinabove, the Appeals Authority hereby dismiss the Appeal in its entirety. No order as to costs.

It is so ordered.

This decision is binding and can be enforced in accordance with Section 97(8) of the Act.

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

This decision is delivered in the presence of the parties this 29th day of July 2022

HON.JUSTICE (RTD) SAUDA MJASIRI

.....

CHAIRPERSON

MEMBERS:-

1. ENG. STEPHEN MAKIGO.....

2. ADV. ROSAN MBWAMBO.....

3. MR. RHOBEN NKORI.....