

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 25 OF 2021-22**

BETWEEN

**M/S SGS TANZANIA SUPERINTENDENCE
COMPANY LIMITED.....APPELLANT**

AND

TANZANIA BUREAU OF STANDARDS.....RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|----------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Mr. Rhoben Nkori | - Member |
| 3. Adv. Rosan Mbwambo | - 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. Penningtone Paschal | - Advocate - Aymak Attorney |
| 2. Mr. Crag Wilson | - Contract Manager |
| 3. Mr. Kahoza Nicholas | - Advocate -Aymak Attorney |
| 4. Mr. Godlisten Lyimo | - Lawyer - Aymak Attorney |

FOR THE RESPONDENT

- | | |
|----------------------------------|-----------------------|
| 1. Mr. Ayoub Gervas Sanga | - State Attorney |
| 2. Ms. Lucy Paulo Mallya | - State Attorney |
| 3. Mr. Mtolera Nimrudi Ching'oro | - Procurement Manager |

4. Ms. Pauline Munyera

- Senior Procurement
Manager

5. Mr. David James

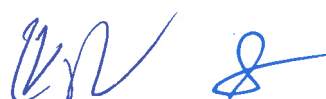
- Legal Intern

The Appeal was lodged by M/s SGS Tanzania Superintendence Company Limited (hereinafter referred to as "**the Appellant**") against the Tanzania Bureau of Standards commonly known by its acronym as "**TBS**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. PA/044/2021-2022/HQ/NC/16 for Provision of Pre-shipment Verification of Conformity to Standard (PVoC) Services for General Goods (hereinafter referred to as "**the Tender**"). The Tender has seventeen (17) Zones and the Appellant participated in all zones.

The Tender was conducted using International Competitive Bidding procedures through the Tanzania National e-Procurement System (TANePS) as per the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 446 of 2013 and GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**").

On 1st October 2021, the Respondent through TANePS invited qualified tenderers to participate in the Tender. The deadline for submission was set for 23rd November 2021. Ten (10) tenders including that of the Appellant were received and were opened immediately thereafter.

The Tenders were then subjected to evaluation which was conducted in three stages namely; preliminary, technical and financial evaluation. After



completion of the evaluation process the Evaluation Committee recommended award of the contract to M/s Intertek International Ltd for Zones 2, 3, 4, 5, 6, 7, 9, 11 and 13 subject to successful negotiations. Furthermore, the Evaluation Committee recommended re-advertisement of the Tender in relation to zones which were not awarded. The Tender Board at its meeting held on 4th January 2022, approved the award as recommended by the Evaluation Committee.

On 7th February 2022, the Respondent issued the Notice of Intention to award the contract to all tenderers who participated in the Tender. The notice informed the tenderers that the Respondent intended to award the contract to M/s Intertek International Ltd for Zones 2, 3, 4, 5, 6, 7, 9, 11 and 13. The Notice also informed the Appellant that its tender was disqualified for failure to submit a Bank Statement of the past six months as required by the Tender Document. The said Notice was received by the Appellant via TANEPS on 8th February 2022.

Dissatisfied with the Notice of Intention to award, the Appellant applied for administrative review to the Respondent on 17th February 2022. The Respondent on 18th February 2022 issued its decision which dismissed the Appellant's Application for administrative review. On 22nd February 2022, the Respondent issued an award letter to the proposed successful tenderer. Aggrieved further, on 1st March 2022, the Appellant lodged this Appeal.



SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal as well as oral submissions during the hearing may be summarised as follows: -

1. That, there is no valid Tender as the Tender validity period of one hundred and twenty (120) days specified under Clause 16 of the Bid Data Sheet had already expired. According to the Appellant the Tender validity period starts to run from the Tender opening date which took place on 23rd November 2021. The Tender validity period of 120 days expired on 23rd March 2022. The Appellant expounded that, at the time the Tender validity period expired the Respondent was yet to finalize the signing of the contract. According to Section 71 of the Act read together with Regulation 191 of the Regulations the Tender has to be valid from the tender opening date up to the moment the contract is signed. In this Tender the Respondent had reached a stage of issuing an award letter; however, the contract is yet to be signed.

According to Regulation 191 (4) of the Regulations, the Respondent is required to extend the Tender validity period for an additional specified time prior to the expiration of the initially stipulated validity period. However, the Respondent did not comply with such requirement as no request for extension of the Tender validity period was issued to tenderers. Thus, since the contract is yet to be signed, the same cannot be done after expiry of the Tender validity period as it would be null and void.



In support of his argument counsel for the Appellant cited Appeal Case No. 23 of 2019-2020 between **M/S Salema Enterprises Limited and Ministry of Finance and Planning**, whereby the Appeals Authority stated that: -

"In view of the above mentioned provisions, it is evident that a procuring entity is required to finalize its proceedings including the award and signing of the contract within the bid validity period specified in the quotation document."

Therefore, the Appellant was of the view that anything done after the expiry of the Bid validity period is a nullity.

2. That, the Notice of Intention to award the Tender, informed the Appellant that its tender was disqualified for failure to attach a Bank Statement for the past six months. According to the Appellant, the requirement to attach a Bank Statement was provided for in the Tender Document. The Respondent's reason for demanding a Bank Statement was to ascertain the liquidity of a tenderer. The Appellant argued that the financial liquidity of a tenderer could be assessed not only through a Bank Statement but also through a confirmation letter from the bank. The confirmation letter from the bank attached to the Appellant's bid indicated its current financial position. Thus, the Appellant's failure to attach the required Bank Statement ought to have been treated as a minor deviation and not a reason for its disqualification.
3. That, the Respondent's act of awarding Zone 11 to M/s Intertek International Ltd is not justified as the firm lacks a physical office and



laboratory in Finland. According to the Tender Document in Zone 11 (Nordic Countries) tenderers were required to have offices in Sweden, Finland, Denmark and Norway. However, M/S Intertek International Ltd does not have a physical office and laboratory in Finland. Therefore, such an anomaly invalidates the award made to it.

4. That, the Tender is for inspection of goods before being shipped to Tanzania. The Respondent divided the Tender into zones and one of the zones is China which every tenderer would like to have. According to the Tender Document (Distribution of Zones under this Tender) a maximum number of players required for China zone was three. However, the Respondent awarded the whole China zone to M/S Intertek International Ltd. The Respondent ought to have awarded the China Zone to three players. Therefore, the Respondent's act of awarding the whole China zone to M/S Intertek International Ltd is in contravention of its own Tender Document and thus a nullity.
5. That, the Respondent's award of the contract was done prematurely, that is before the lapse of the cool off period. The Appellant elaborated that, the Notice of Intention to award the contract was issued on 7th February 2022. The Appellant applied for administrative review on 17th February 2022 and the Respondent issued its decision on 18th February 2022 which dismissed the application for administrative review. The Appellant had a right to appeal to the Appeals Authority pursuant to Section 97(2)(b) of the Act and Regulation 106 of the Regulations. However, on 22nd February 2022, the Respondent



proceeded to issue an award letter to M/S Intertek International Ltd prior to the lapse of the time within which the Appellant is allowed to file an appeal to this Appeals Authority. The Respondent contravened the requirement of Section 100(1) of the Act which requires the Accounting Officer to suspend the procurement process pending determination of the complaint or an Appeal. The suspension imposed under Section 100(1) applies from the application for administrative review to the appeal level.

6. That, the Respondent's award of contract is contrary to Section 4(1)(u) of the Standards Act No. 2 of 2009 read together with Regulation 17(1) and (2) of the Standards (Imports Registration and Batch Certification) Regulation, Government Notice No. 681 of 2021. The provisions impose a mandatory function to the Respondent of undertaking a pre-shipment verification of conformity (PVoC) to standards. The provisions also impose a mandatory duty on any importer to inspect, test commodities and products from government accredited laboratory of the country of export recognised by the bureau.

The Appellant expounded its argument by stating that, the provisions of the law imposes a mandatory obligation on any importer to ascertain the goods sought to be imported into Tanzania are on the list approved by the Minister. Further to that, an importer has to conduct testing and inspection of the goods from a government accredited laboratory of the country of export recognised by the bureau.



The Appellant contended that, the Respondent's act of awarding the contract solely to M/s Intertek International Ltd for Zones 2, 3, 4, 5, 6, 7, 9, 11 and 13 in exclusion of Zones 1, 8, 10, 12, 14, 15, 16 and 17 contravene the above requirement of the law. The importers of the regulated goods from countries forming part of the zones not awarded to M/S Intertek International Ltd would not comply with the mandatory requirements of the law.

7. That, the Respondent's Intention to award the contract is contrary to Clause 1.1 of Section II of the Information to Tenderers (ITT) which sets out the scope of the Tender. The Appellant submitted that, the Respondent's act in this regard contravened Section 4A (1) and (2) of the Act which sets the general principles and standards of procurement and disposal by tender.

The referred provision requires procuring entities to conduct procurement proceedings in a manner which maximizes adherence to the basic procurement principles, particularly competition and efficiency.

The Appellant submitted that, the Respondent's act of awarding the contract solely to M/S Intertek International Ltd in exclusion of others undermines the principle of competition, taking into consideration that Clause 1.1 of the Tender Data Sheet (TDS) provides clearly the number of bidders who ought to be allocated to each zone.

The Appellant added further that, the Respondent's act of awarding zones 2, 3, 4, 5, 6, 7, 9, 11 and 13 in exclusion of zones number



1, 8, 10, 12, 14, 15, 16, and 17 undermine the principle of efficiency since the Tender had 17 zones. One bidder cannot deliver efficiency service for nine zones.

Furthermore, the Appellant submitted that, from the moment the Tender had started, the Respondent demonstrated lack of integrity. As the Notice of Intention dated 7th February 2022, was received by the Appellant through TANEPS on 8th February 2022. Counting from the date it received the Notice, the seven (7) working days within which the Appellant ought to have lodged a complaint to the Accounting Officer lapsed on 18th February 2022. On 16th February 2022, the Appellant attempted to submit its complaint through TANEPS, unfortunately the system was unavailable. It then decided to submit it physically to the Respondent on the same date. However, the Respondent stamped the date of receipt as 17th February 2022 in order to indicate that the application for review was submitted beyond the seven working days period. Although the Appellant considered that it was a human error, but the Respondent raised it in its statement of reply.

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

- i. A declaration that the prospective award of tender is contrary to the law;
- ii. A declaration that, the prospective award of tender is contrary to the provisions of Clause 1.1 of the ITT;



- iii. Nullification of the proposed award of tender to M/S Intertek International Ltd;
- iv. Costs;
- v. An order to re-tender for Tender No. PA/044/2021-2022/HQ/NC/16 for the provision of pre-shipment of verification of conformity to standard (PVoC) services for general goods.

SUBMISSIONS BY THE RESPONDENT

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

1. That, regarding the Appellant's argument on the Tender validity period the Respondent submitted that according to Clause 14 of the BDS the specified Tender validity period was one hundred and twenty (120) days. The Appellant has misdirected itself as to when the Tender validity period begins to count and where it ends. Section 71 of the Act read together with Regulation 191 of the Regulations provide a clear guidance on the applicability of the Tender validity period. The Respondent submitted further that, the Tender validity period started to run from the Tender opening date on 23rd November 2021, and expired on 23rd March 2022. Prior to the expiration of the Tender validity period the Respondent had already issued the Notice of Intention to award on 7th February 2022. It entertained the Appellant's complaint and issued a decision on 18th February 2022. The award letter to a successful tenderer was issued on 22nd February 2022. The



draft contract was then submitted to the Office of the Attorney General for vetting.

The Respondent expounded further that, while waiting for the contract from the Office of the Attorney General, on 3rd March 2022, received a letter from the Appeals Authority informing it about the Appeal. The letter also directed the Respondent to suspend the Tender process pending determination of the Appeal. When the Respondent received a letter from the Appeals Authority, the Tender was still valid.

2. That, the Appellant has conceded that, it has not complied with the requirement of the Tender Document for its failure to attach a Bank Statement for the past six months. The Appellant attached to its bid a confirmation letter from the bank and audited financial statements. The Appellant was mandatorily required to submit the Bank Statement for the past six months as the same would have assisted the Respondent to determine its current financial position. Therefore, the Appellant's failure in this regard could not have been treated as a minor deviation.
3. That, the Respondent opposes the Appellant's argument that M/S Intertek International Ltd lacked a physical office and laboratory in Finland. The Respondent stated that, before issuing an award letter it conducted a due diligence to M/S Intertek International Ltd and was satisfied that the firm has complied with the requirement of having physical offices and laboratories on each zone awarded to it including Nordic Countries (Zone 11). The Respondent stated further that, this argument is a new issue which has been raised at the hearing of the



Appeal as it was neither mentioned in the application for administrative review nor in the Statement of Appeal.

4. That, with regard to the Appellant's argument that the Respondent erred in law for awarding the whole China zone (zone 2) to M/S Intertek International Ltd, the Respondent submitted that the award was made after it was satisfied that the firm complied with the requirement of the Tender Document. The requirement that the award could be made to a maximum of three players in zone 2, does not mean that an award could not be made to a single firm. The said zone was awarded to M/S Intertek International Ltd after having complied with the Tender requirements. Thus China was not considered in the re-advertised Tender.
5. That, on the complaint that the award was made prematurely in contravention of the law, the Respondent stated that the award was properly made. According to the Respondent, the Notice of Intention to award the contract was issued on 7th February 2022 to the successful and unsuccessful bidders. Section 60(3) of the Act allows a dissatisfied bidder to lodge a complaint within seven (7) working days. The Appellant was dissatisfied with the Tender results and therefore it lodged its complaint on 17th February 2022. The Respondent issued its decision on 18th February 2022 which dismissed the Appellant's complaint. After issuance of the decision, the Respondent on 22nd February 2022 issued an award letter as there was no Appeal which



could have precluded it from awarding the Tender. Therefore, the award was not made prematurely as contended by the Appellant.

6. That, the Respondent as a Government institution is required under Section 4 of the Standards Act to control quality and safety of the imported products. The Respondent has set out a mechanism for re-advertisement of the tender to ensure that all zones get qualified agents to undertake pre-shipment verification of conformity to standards (PVoC) services for general goods. Thus, the Appellant's argument that goods from un awarded zones would be shipped to Tanzania in contravention of Section 4 of the Standards Act is not true.
7. That, the Respondent complied with the requirement of Clause 1.1 of the ITT as well as Section 4A (1) and (2) of the Act as it advertised the Tender and the awarded contract was made in compliance with the principles of integrity, competition, accountability, economy, efficiency, transparency and achieving value for money.

The Respondent submitted further that, the Tender process was conducted in compliance with the law, as ten tenderers participated in the Tender and an award of contract was made to a bidder who complied with the requirements of the Tender Document. The remaining nine tenderers were disqualified for various reasons. In complying with the principles of integrity, transparency, and competition M/S Intertek International Ltd was also disqualified for zones which it failed to comply with Tender requirements. Therefore, it



is not true that the Tender process was not transparent or lacked competition as contended by the Appellant.

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

- i. Dismissal of the Appellant's Appeal in its entirety with costs;
- ii. The Respondent be allowed to proceed with the procurement process of awarding the Tender to the respective bidder M/S Intertek International Ltd; and
- iii. Any other relief deemed fit by the Appeals Authority.

ANALYSIS BY THE APPEALS AUTHORITY

During the hearing the following issues were framed by the Appeals Authority in agreement with the parties: -

1.0 Whether there is a valid Tender for determination;

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

3.0 Whether the award of the contract to the successful tenderer was justified and was in accordance with the law; and

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

Having identified the issues, the Appeals Authority proceeded to resolve them as follows: -



1.0 Whether there is a valid Tender for determination

In resolving this issue the Appeals Authority revisited the Tender Document and observed that Clause 16.1 of the ITT modified by Clause 14 of the BDS, specified the Tender validity period of one hundred and twenty (120) days as clearly agreed by both parties. It was further observed from the record of Appeal that, the Tender opening took place on 23rd November 2021. Counting from 23rd November 2021, the bid validity period of one hundred and twenty (120) days expired on 23rd March 2022.

To ascertain if there is a valid Tender for determination, the Appeals Authority revisited Section 71 of the Act which provides guidance on the validity of tenders. The provision reads as follows: -

*Sec.71 "The procuring entity shall require tenderers to make **their tenders** and tender securities including tender securing declaration **valid for periods specified in the tendering documents, sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders and for the appropriate tender board to review the recommendations and approve the contract or contracts to be awarded whilst the tenders are still valid.**"*

(Emphasis Added)

The above quoted provision states clearly that tenderers are required to make their tenders valid for a period specified in the Tender Document.



The Tender validity period should be sufficient to enable a procuring entity to complete the evaluation of tenders and for the appropriate Tender Board to review the recommendation and approve the contract or contracts to be awarded whilst the tenders are still valid.

According to the record of Appeal, the Appeals Authority observed that, after the evaluation process was completed the Tender Board approved the award on 4th February 2022. By this date the Tender was still valid.

The Appeals Authority considered the Appellant's argument which was based on Regulation 191(3) of the Regulations and the decision of this Appeals Authority on Appeal Case No. 23 of 2019-2020 (supra). Regulation 191(3) of the Regulations provides as follows: -

*Reg. 191(3) "The period fixed by a procuring entity shall be sufficient to permit **evaluation and comparison of tenders, for obtaining all necessary clearances and approvals, and for the notification of the award of contracts and finalise a contract** but the period shall not exceed one hundred and twenty days from the final date fixed for submission of tenders."*

(Emphasis supplied)

The Appeals Authority having read the above quoted provision together with Section 71 of the Act observed that, the two provisions cover different scope of the Tender validity period. Section 71 of the Act requires, among other things, that the Tender Boards approval of the award has to be made



within the bid validity period. Regulation 191(3) requires tenders to be valid up to notification of award and finalization of the contract. The two provisions contradict each other on the validity period.

The Appeals Authority revisited Section 36 (1) of the Interpretation of Laws Act, Cap 1 which provides as follows: -

Section 36 (1) "*subsidiary legislation shall not be inconsistent with the provisions of the written law under which it is made, or of any Act, and subsidiary legislation shall be void to the extent of any such inconsistency*".

From the wording of the above quoted provision, it is crystal clear that if there is a contradiction between the main Act and its Regulations, the Act prevails. Under the circumstances, Section 71 of the Act prevails over Regulation 191(3) of the Regulations.

The Appeals Authority took cognizance of its findings in Appeal Case No. 23 of 2019-20 (Supra) relied upon by the Appellant. However, the Appeals Authority's position with regard to the bid validity period was changed in Appeal Case No. 27 of 2020-21 between **M/s Nandhra Engineering & Construction Company Ltd and Ministry of Education, Science and Technology and CRJE (EAST AFRICA) Limited**. In this Case the Appeals Authority noted that there was a conflict between Section 71 of the Act and Regulation 191(3) of the Regulations and therefore as per Section 36 (1) of the Interpretation of Laws Act, when there is a conflict between the main Act and its Regulations made under it, the Act prevails.

The Appeals Authority stand with its current position as stated in Appeal Case No. 27 of 2020-21 (Supra) that the Tender Board's approval of the award has to be made within the bid validity period. The Appeals Authority's position is supported by the decision of the Court of Appeal between **Ardhi University Versus Kiundo Enterprises (T) Ltd**, Civil Appeal No. 58 of 2018 (unreported) at page 8 where it was stated that: -

"where the court is faced with the conflicting decision of its own, the better practice is to follow the more recent of conflicting decisions unless it can be shown that it should not be followed for any of the reasons discussed above."

The Appeals Authority further distinguishes Appeal Case No. 23 of 2019-20 (supra) relied upon by the Appellant. In Appeal Case No. 23 of 2019-20 the bid validity period expired before the award was approved by the Tender Board. Therefore, the said decision is not applicable under the circumstances.

Therefore, in this Tender the award was approved by the Tender Board while the Tender was still valid. Based on the above observations the Appeals Authority concludes the first issue in the affirmative that there is a valid tender for consideration.

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

The record of Appeal indicates that the Appellant was disqualified for failure to attach a Bank Statement for the past six months. In order to



substantiate the validity of the Appellant's disqualification, the Appeals Authority revisited the Tender Document and observed that Clause 11.1 (h) of the ITT modified by Clause 10 (vi) of the BDS listed several documents which were to be attached to the tenderers' bids. The Clauses read as follows:-

ITT 11.1 "The Tender prepared by the Tenderer shall constitute the following components:


(h) any other documents required in the TDS.

BDS 10 "In addition to the documents stated in ITT Clause 11, the following documents must be included with the Tender;

(vi) Audited Financial Statement for the past three (3) years and a Bank Statement for the past six months."

(Emphasis Added)

In order to ascertain the Appellant's compliance with Clause 10(vi) of the BDS, the Appeals Authority reviewed its tender on TANePS and observed that, it had attached a confirmation letter from Credit Suisse Bank instead of the Bank Statement for the past six months. During the hearing the Appellant conceded to have not attached the Bank Statement as required. The Appellant added that, its failure to attach the required Bank Statement should have been treated as a minor deviation since the current financial position was shown in the bank confirmation letter.



From the Appellant's own admission that it failed to comply with Clause 10(vi) of the BDS, the Appeals Authority finds that the Respondent's act of disqualifying the Appellant was in accordance with Regulations 204(2)(k) and 206 (2) of the Regulations which read as follows: -

Reg. 204 "Material deviations to commercial terms and conditions, which justify rejection of a tender shall include the following:

(k) failure to submit major supporting documents required by the tendering documents to determine substantial responsiveness of a tender"

Reg. 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."

(Emphasis Added)

The Appeals Authority further disagrees with the Appellant's argument that, its failure to submit a Bank Statement should have been treated as minor deviation.

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

3.0 Whether the award of the contract to the successful tenderer was justified and was in accordance with the law

In resolving this issue, the Appeals Authority considered the Appellant's contention that, the Respondent awarded the whole of China Zone (Zone 2) to M/S Intertek International Ltd in contravention of the Tender requirement. The Tender Document required the maximum number of players for China Zone to be three.

In order to substantiate the validity of the Appellant's argument the Appeals Authority revisited Section VI Part B of the Tender Document and observed that a maximum number of players were identified for each zone. For the China Zone the identified maximum number of players was three. The Appeals Authority observed further that, the closing phrase of the same Section VI Part B at Page 101 states that:-

"THE ALLOCATION OF MAXIMUM NUMBER OF PLAYERS IN THE ZONE/REGION AS INDICATED ABOVE APART FROM QUALIFICATION/COMPLIANCE ON OTHER ALREADY MENTIONED CRITERIONS WILL BASE ON MAXIMUM NUMBER OF OWNED TESTING CENTRES AND COUNTRIES WHERE TENDERERS ARE PHYSICALLY PRESENT REGISTERED OFFICES IN DESCENDING ORDER."

Having read together the requirement of maximum players and the above quoted part, the Appeals Authority is of the view that, in order for a zone

to be awarded a maximum number of players, the players are required to comply with the requirement of the Tender Document.

Having reviewed the evaluation report, the Appeals Authority observed that, M/S Intertek International Ltd was the only qualifying tenderer for China Zone. Therefore, the award could not have been made to other players while none of them complied with the Tender requirements. Furthermore, the requirement of maximum players does not prohibit an award to be made to a single player as long as it complies with the requirement of the Tender Document.

Thus, the Appeals Authority finds the Respondent's act of awarding the China zone to a single player M/S Intertek International Ltd to be proper as it was the only qualifying firm under the circumstances.

The Appellant contended that the Respondent's act of awarding Zone 11 (Nordic Countries) to M/S Intertek International Ltd is not justified as the firm lacks a physical office and laboratory in Finland. The Appeals Authority rejects the Appellant's contention in this regard as the same was neither raised in the application for administrative review nor in the Statement of Appeal.

In relation to the Appellant's contention that the award of the contract was made prematurely, the Appeals Authority reviewed the Appeal record and observed the following sequence of events: -

- i. The Respondent issued the notice of Intention to award the contract on 8th February 2022.



- ii. The Appellant submitted application for administrative review to the Respondent on 17th February 2022.
- iii. The Respondent issued its decision on 18th February 2022; and
- iv. The Respondent proceeded to issue an award letter on 22nd February 2022.

Given the circumstances, it is crystal clear that the award was issued after the Respondent had entertained the Appellant's application for review. The Appeals Authority revisited Sections 97(1) & (2) and 100(1) of the Act read together with Regulation 106 (1) of the Regulations relied upon by the Appellant. The provisions read as follows: -

S. 97 (1) "A tenderer who is aggrieved by the decision of the accounting officer may refer the matter to the Appeals Authority for review and administrative decision.

(2) Where-

(a) the accounting officer does not make a decision within the period specified under this Act, or

(b) the tenderer is not satisfied with the decision of the accounting officer,

the tenderer may make a complaint to the Appeals Authority within seven working days from the date of communication of the decision by the accounting officer or upon the expiry of the period



within which the accounting officer ought to have made a decision."

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 above quoted provisions do not indicate that procuring entities are prohibited from proceeding with the Tender process after entertaining the tenderer's complaint. Procuring entities are prohibited to proceed with the tender process when a complaint is lodged to them or there is an appeal to the Appeals Authority.

Section 100(4) of the Act requires the Appeals Authority to order for suspension of a tender after it has received an appeal. In this matter an award letter was issued on 22nd February 2022, while the Appeal was filed on 1st March 2022.



Under the circumstances, the Appeals Authority is of the settled view that, the award of the Tender was not made prematurely as contended by the Appellant.

The Appeals Authority further considered the Appellant's contention that the Respondent's award of the contract contravened Section 4(1)(u) of the Standards Act No. 2 of 2009 read together with Regulation 17(1) and (2) of the Standards (Imports Registration and Batch Certification) Regulations, GN. No. 681 of 2021. Regulation 17(1) and (2) reads as follows: -

R.17(1) "An importer shall before shipment of commodities and products, ensure the commodities and products are in the list approved by the Minister under regulation 16.

(2) subject to sub regulation (1), the importer shall inspect and test commodities and products from government accredited laboratory of the country of export recognized by the Bureau."

The Appellant was of the view that, the Respondent's act of awarding the contract solely to M/s Intertek International Ltd, specifically for Zones 2, 3, 4, 5, 6, 7, 9, 11 and 13 in exclusion of Zones 1, 8, 10, 12, 14, 15, 16 and 17 contravened the above provision of the law. According to the Appellant importers of regulated goods from countries forming part of the zones not awarded to M/S Intertek International Ltd would not comply with the mandatory requirements of the law.



In order to address the Appellant's contention, the Appeals Authority reviewed the record of Appeal and observed that, the Tender was advertised under the International Competitive Bidding procedures and ten bidders participated. The record of Appeal indicates that, after completion of the evaluation process, M/S Intertek International Ltd was recommended for award for nine zones out of 17 zones. The remaining eight zones were not awarded as none of the tenderers was found to be responsive to the requirements of the Tender Document. Thus, the Evaluation Committee recommended that the remaining zones be re-advertised. On 4th January 2022 the Tender Board approved the re-advertisement.

According to Section 72(1) of the Act read together with Regulation 203(1) of the Regulations the basis for tender evaluation shall be set out in the Tender Document and evaluation shall be conducted in compliance with the criteria therein. A bidder who fails to comply with the requirements of the Tender Document should be disqualified pursuant to Regulation 206 (2) of the Regulations. 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".

Reg. 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."

(Empasis Added)

In view of the above quoted provisions, the Appeals Authority finds that the Respondent's act of awarding a contract to M/S Intertek International Ltd to have not contravened the law as the firm complied with the requirements of the Tender Document.

Furthermore, it is not true that importation of goods from zones that were not awarded would contravene Section 4(1)(u) of the Standards Act, (Supra) and Regulation 17(1) and (2) of the Standards (Imports Registration and Batch Certification) (Supra), as the Respondent had already re- advertised the Tender for un awarded zones.

In relation to the Appellant's contention that, the Respondent's act of awarding the contract to M/s Intertek International Ltd contravened Clause 1.1 of the ITT as the clause states the number of bidders which ought to be allocated each zone.



The Appeals Authority having reviewed Clause 1.1 of the ITT relied upon by the Appellant observed that there was no requirement which limits the number of zones to be awarded to each tenderer.

Regarding the Appellant's argument that the Tender process lacked competition and efficiency, the Appeals Authority reviewed Section 4A (1) and (2) of the Act which read as follows: -

4A (1) "All public procurement and disposal by tender shall be conducted in accordance with the basic principles set out in this Act.

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

(Emphasis Added)

The Appeals Authority further reviewed the Appeal record and observed that ten tenderers participated in the tender. The award was made to a tenderer who complied with the requirements of the Tender Document.

Regarding the Appellant's argument on lack of integrity on the Respondent's side, the Appeals Authority is of the view that the Appellant has exercised its right as it applied for administrative review and its application was entertained by the Respondent. Therefore, the Appellant has not been denied any of its rights.



Given the above findings the Appeals Authority is of the firm view that the award of the contract to the successful tenderer was justified and in accordance with the law. Therefore, the third issue is answered in the affirmative.

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

Taking cognizance of the findings hereinabove, the Appeals Authority hereby dismiss the Appeal for lack of merits. The Respondent is allowed to proceed with the Tender process accordingly. We make 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 14th day of April 2022.

HON. JUSTICE (RTD) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS: -

1. MR. RHOBEN NKORI.....



2. ADVOCATE ROSAN MBWAMBO.....

