IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 23 OF 2020-21

BETWEEN

M/S SICPA, SA JV GFI (T) LIMITED ..... APPELLANT

AND

ENERGY AND WATER REGULATORY AUTHORITY .....1ST RESPONDENT

M/S INTERTEK INTERNATIONAL LIMITED IN CONSORTIUM WITH AUTHENTIX INC ..... 2ND RESPONDENT

DECISION

CORAM

1. Hon. Justice (rtd) Sauda Mjasiri - Chairperson
2. CPA. Fredrick Rumanyika - Member
3. Adv. Rosan Mbwambo - Member
4. Ms. Florida Mapunda - Ag. Secretary

SECRETARIAT

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

FOR THE APPELLANT

1. Mr. Amit Noyman - CEO, GFI (T) Limited
2. Mr. Jeremiah Mtobesya - Advocate, Lawage Consult
3. Mr. Pasience Mlowe - Advocate, Lawage Consult

FOR 1ST THE RESPONDENT

1. Mr. Edwin Kidiffu - Manager Legal Services, EWURA
2. Mr. Absalom D. Nnko - Procurement Manager, EWURA
3. Mr. Kessy Mgonela - Principal Legal Officer, EWURA
4. Mr. Patrick Malogoi - Principal Legal Officer, EWURA

FOR 2ND THE RESPONDENT

1. Mr. Gerald Shita Nangi - Advocate, Clyde & Co
2. Mr. Aliko Simon - Advocate, Clyde & Co
3. Mr. Peter Kassanda - Advocate, Clyde & Co
4. Mr. Valentine James - General Manager, Intertek
5. Mr. Metzger Thierry - Director for Africa, Intertek
6. Mr. Thomas Andrews - Africa Innovations Manager, Intertek

The Appeal was lodged by **M/s SICPA, SA JV GFI (T) Limited** (hereinafter referred to as **"the Appellant"**) against **Energy and Water Utilities Regulatory Authority** commonly known by its acronym EWURA (hereinafter referred to as **"the 1st Respondent"**) and **M/s Intertek International Limited** in consortium with **M/s Authentix Inc** (hereinafter referred to as **"the 2nd Respondent"**).

The Appeal is in respect of Tender No. AE/024/2019-20/HQ/N/26 for Provision of Fuel Marking Services (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 through International Competitive Tendering method as specified in 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**").

The Respondent floated an invitation to Tender on 11th November 2019 through the Daily News newspaper. The deadline for submission of Tenders was set for 2nd December 2019. On the deadline, four tenders were received, including that of the Appellant.

Tenders were then subjected to evaluation which was conducted into three stages namely; preliminary, detailed and financial comparison. During preliminary evaluation two tenders were disqualified for being non responsive to the requirement of the Tender Document. The remaining two tenders including that of the Appellant were subjected to detailed evaluation. In that process both tenders complied with the specified Tender requirements, thus were subjected to financial evaluation. After completion of financial evaluation tenders were ranked and M/s Intertek International Limited in consortium with M/s Authentix Inc (the 2nd Respondent) emerged to be the lowest evaluated tenderer. Thus, the evaluation committee recommended it for award of the

Tender at a contract price of a Unit rate of Three and Twenty Cents United State Dollar per cubic meter (3.20 USD/M^3) VAT inclusive. The Appellant's tender was not considered for award for the reason that its bid price of USD 6.077 VAT inclusive was higher compared to the price quoted by the 2nd Respondent.

The Tender Board at its meeting held on 9th January 2020 approved the award as recommended by the Evaluation Committee. On 12th February 2021, the Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender. The Notice informed the tenderers that award has been proposed to the 2nd Respondent. The Notice also informed the Appellant that its tender was not successful for the reason that its bid price of USD 6.077 VAT inclusive was higher compared with the price quoted by the 2nd Respondent of USD 3.20.

Dissatisfied, on 22nd February 2021, the Appellant applied for administrative review to the Respondent challenging the award proposed to the 2nd Respondent. On 25th February 2021, the Respondent issued a decision dismissing the Appellant's application for administrative review. Aggrieved further, on 5th March 2021, the Appellant filed this Appeal to the Appeals Authority.

On the date set for hearing of the Appeal, the 2nd Respondent raised a Preliminary Objection (PO) to wit:

> *"The Appellant's Appeal is incompetent and bad in law in that the Appellant did not submit a competent application for administrative review before the procuring entity (EWURA) prior to*

lodging an appeal before this Honourable PPAA in contravention of the requirements of Section 95, 96(3) and (4) of the Act and Regulation 9(10)(d) of the Regulations".

The Appeals Authority deemed it proper to hear both the PO and the Appeal together. In so doing, the Appeals Authority allowed the parties to make submissions on the PO first.

SUBMISSIONS BY THE 2ND RESPONDENT ON THE PO

The Counsel for the 2nd Respondent submitted that the Appellant never applied for administrative review to the accounting officer (the 1st Respondent) before submitting an Appeal to the Appeals Authority. The Appellant's purported application for administrative review to the 1st Respondent was lodged by M/s GFI (T) Limited who is not the lead partner in the Appellant's consortium. Amongst the two firms which form the Appellant's consortium, namely; M/s SICPA SA and M/s GFI (T) Limited, the lead partner is M/s SICPA SA. Thus, the Appellant's application for administrative review ought to have been lodged by M/s SICPA SA. To the contrary, the said application for administrative review was lodged by M/s GFI (T) Limited in contravention with Regulation 9(10) (d) of the Regulations.

The learned counsel added that, since the application for administrative review was incompetent, it goes without saying that, there is no proper Appeal to be determined by the Appeals Authority. For the Appeal to be properly before the Appeals Authority the same must be preceded with a competent application for administrative review to the accounting officer. However, that requirement was also not complied with by the

Appellant. Therefore, the 2nd Respondent prayed that the Appeal be struck out for being improperly before the Appeals Authority.

SUBMISSIONS BY THE 1ST RESPONDENT ON THE PO

The learned counsel for the 1st Respondent supported the 2nd Respondent's argument on the PO. The learned counsel added that, the 1st Respondent's decision issued with respect to the Appellant's application for administrative review pointed out the same anomaly that the application was lodged by M/s GFI (T) Limited who was not a lead partner in the consortium. Thus, the Appellant's application for administrative review was incompetent.

REPLY BY THE APPELLANT ON THE PO

The learned counsel for the Appellant started his submission by indicating that the 2nd Respondent's PO is not on a pure point of law as it is based on facts which need to be ascertained. The learned counsel cited Civil Application No. 49 of 2005 between **Sugar Board of Tanzania versus 21st Century Food & Packaging and two others**, Court of Appeal of Tanzania at Dar es Salaam (Unreported) whereby it was stated that:

> *"A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case but on the stated legal, procedural or technical grounds. Such an objection must be argued without reference to evidence. The fundamental requirement is that any alleged irregularity, defect or default must be apparent on the face of the notice of motion so that the*

objector does not condescend to affidavits or other documents accompanying the motion to support the objection".

The learned counsel submitted further that, according to the letter dated 27th November 2019 addressed to the 1st Respondent, responsibilities of each member of the Appellant's consortium were pointed out. In the said letter it was stated clearly that M/s GFI (T) Limited was responsible for program management and administration. Thus, it was proper for M/s GFI (T) Limited to file an application for administrative review on behalf of the Appellant. Thus, the application for administrative review to the 1st Respondent was competent and this subsequent Appeal is also properly before the Appeals Authority.

The 2nd Respondent on its rejoinder submitted that, it is not disputed who is the lead partner in the Appellant's consortium and therefore there is no need of ascertaining the facts as contended by the Appellant. In support of his proposition the learned counsel cited Civil Appeal No. 84 of 2010 between **Benjamin Masota versus Mrs Esther Maneno,** Court of Appeal of Tanzania at Dar es Salaam (unreported) whereby it was stated that:

"Preliminary objections are in the nature of a legal objection not based on merits or facts of the case, but on stated legal, procedural and or technical grounds. Such an objection must in most cases be argued with reference to only decided cases, rules of procedure and no more."

ANALYSIS BY THE APPEALS AUTHORITY ON THE PO

The Appeals Authority is of the view that the main issue for determination on the PO raised is ***whether or not the appeal is properly before this Appeals Authority***. In determining the PO the Appeals Authority considered the Respondents' arguments that M/s GFI (T) Limited lacked mandate to file an application for administrative review on behalf of the Appellant as it was not a lead partner in the Appellant's consortium. The PO so raised requires the Appeals Authority to look into the facts relating to administrative review proceedings and the contents of the consortium agreement. The Appeals Authority finds that the PO raised is not in line with the position of the law as stated in **Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd. (1969) EA 696.** It was stated in this case 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 case of **Benjamin Masota** relied upon by the Counsel for the 2nd Respondent also emphasizes the requirement that a PO has to be based on a pure point of law. Thus, the Appeals Authority finds that the PO raised does not constitute a pure point of law which could be determined without ascertaining the facts. Given the circumstances, the PO raised is hereby dismissed. The Appeals Authority therefore, proceeds to determine the Appeal on its merits.

ISSUES

During the hearing of the Appeal the following issues were agreed upon by the parties and approved by the Members of the Appeals Authority: -

1. **Whether the award of the Tender to the 2nd Respondent was proper in law;**
2. **Whether the Appellant qualifies for award of the Tender; and**
3. **What reliefs, if any, are the parties entitled to.**

SUBMISSIONS BY THE APPELLANT

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

1. That, the Tender process has been marred by allegation of corruption and that the process lacks integrity and probity provided for under Regulation 7 of the Regulations. The 1st Respondent failed to clear the air to the bidders on the raised corruption allegations in the Newspaper against the 1st Respondent's Head of Procurement Management Unit (HPMU) rendering the tender process being untruthful in the supervision of the said HPMU.
2. That, the proposed successful tenderer that is the 2nd Respondent herein, did not meet the criteria specified in the Tender Document with regard to mobilization period. According to Clause 12.2 of the General Conditions of Contract (GCC) read together with Clause 8 of the Special

Conditions of Contract (SCC) the allowed mobilization period is 30 days after signing of the contract. The 2nd Respondent has indicated on its tender that the commencement date would be 90 days after signing of the contract. That directly implies that the mobilization period would be 90 days instead of 30 days specified in the Tender Document. The 1st Respondent ought to have disqualified the 2nd Respondent's tender for non-compliance with the requirements of the Tender Document. To the contrary, the 1st Respondent intends to award the Tender to the 2nd Respondent in contravention of Regulation 204 (2) (e) of the Regulations which requires a non-responsive tender to be rejected.

The Appellant added that the 1st Respondent had contravened the law for negotiating mobilization period with the 2nd Respondent. Regulation 225(1)(e) of the Regulations allows negotiation on mobilization arrangement. However, according to the Appellant, such negotiation does not include mobilization period as it was clearly stipulated in the Tender Document. The Appellant submitted further that, Regulation 225(2)(b) of the Regulations prohibits negotiations which would materially alter the terms and conditions of the contract provided for in the Tender Document. Since mobilization period was stipulated in the Tender Document, the same ought not to have been negotiated; rather the 2nd Respondent's tender ought to have been disqualified for non compliance.

3. That, the Partner to the 2nd Respondent's Consortium, M/s Intertek International Limited lacks the requisite qualifications to be awarded the Tender. The Appellant added that M/s Intertek International Limited attached as a proof of experience certificates of accreditation issued to M/s Intertek Testing Services E.A (PTY) Limited. According to the

Appellant M/s Intertek International Limited and M/s Intertek Testing Services E.A (PTY) Limited are two separate and distinct entities. Thus, the 2nd Respondent erred in claiming that the experience attained by M/s Intertek Testing Services E.A (PTY) Limited also qualifies M/s Intertek International Limited.

Regulation 9(10) (e) of the Regulations requires each firm in the consortium to be evaluated separately with respect to its contribution to the proposed contract to be performed. The Appellant doubted whether this Regulation was complied with.

4. That, according to the Act and its Regulations award is to be made to the lowest evaluated tenderer and not the lowest quoted price. The Appellant was the only qualifying tenderer as it complied with all tender requirements, thus it ought to have been proposed for award of the Tender. The 1st Respondent's basis of award in this Tender was the lowest costs without due consideration to the criteria set in the Tender Document as well as the requirements of the Act and its Regulations.

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

   i. The 1st Respondent to suspend the award process of this tender pending determination of this appeal as the law dictates;

   ii. The Appeals Authority halt the decision to award the tenders to the 2nd Respondent M/s Intertek International Limited in consortium with M/s Authentix Inc as communicated, since the JV partner does not meet the criteria stated in the Tender Document;

iii. The Appeals Authority review the evaluation process of the tender as conducted by the 1st Respondent and test its legitimacy in terms of the powers vested unto you under Section 97 (5) of the Act;

iv. The Appeals Authority award the tender to the Appellant under powers provided under Section 97 (5) (e) of the Act since the Appellant complied with the requirements set in the Tender document;

v. Alternatively based on lack of probity and transparency, nullify the whole process and re-start it afresh in observance of the law; and

vi. Any other order the Honorable Appeals Authority may deem fit and fair to grant.

REPLY BY THE 1ST RESPONDENT

The 1st Respondent's reply to the grounds of appeal and submissions by the Appellant may be summarized as follows: -

1. That, information relating to corruption allegation which indicates that the Head of Procurement Management Unit (HPMU) misled the Tender Board was reported in the midst of the then ongoing Tender process. Therefore, it was not prudent for the 1st Respondent to respond to such informal report publicly. By virtue of Regulation 240 of the Regulations it is prohibited to disclose tender information after it has been opened and prior to the notice of intention to award.

The 1st Respondent added further that, it satisfied itself that the 1st Respondent's HPMU did not mislead the Tender Board as reported in the referred newspaper. The 1st Respondent affirms that, the HPMU acted professionally and in the best public interest. Further, since corruption allegations relate to criminal offences, the Appellant was duty bound to report it to the relevant authority, namely; Prevention and Combating of Corruption Bureau (PCCB) for further action.

2. That, with regard to mobilization period of 30 days, the 1st Respondent submitted that, the Appellant's claim that the 2nd Respondent did not comply with mobilization period lacks merit as it relied on the information obtained from the newspapers which were incorrect. Clause 8 of the SCC provides that the contract commencement date is 30 days from the signing date. The tender submitted by the 2nd Respondent indicated that the timeline of key activities (mobilization) would be within 90 days from the contract signing date.

   The 1st Respondent expounded that, much as the 2nd Respondent had indicated that execution of the contract would commence within 90 days from the contract signing date that does not necessarily mean that it would use 90 days for mobilization. The 2nd Respondent might use a shorter period for mobilization than what is stated in its tender. The 1st Respondent added that, since mobilization period is not established by a tenderer rather it is set by the procuring entity, there is a room for discussion as the period stated by a tenderer is not static or fixed.

The 1st Respondent submitted further that, since Clause 36 of the Instruction to Tenderers (ITT) allows minor amendment to the special conditions of contract, mobilization period of 90 days quoted by the 2nd Respondent was treated as a minor deviation and it was modified through negotiations which were conducted pursuant to Regulation 225(1)(e) of the Regulations. The cited regulation as well as Clause 36.1(f) of the ITT allow negotiations on mobilization arrangement. Since the 2nd Respondent was the lowest evaluated tenderer, it was invited for negotiations and agreed to have a mobilization period of 30 days instead of 90 days quoted in its bid.

The 1st Respondent added that, after completion of the evaluation process and before proceeding with post qualification and negotiation, the 1st Respondent pursuant to Section 9 (1) (a) of the Act and Regulation 51 (b) of the Regulations sought for independent review of the procurement process of the Tender from the Public Procurement Regulatory Authority (PPRA). Having reviewed the process, PPRA allowed the 1st Respondent to proceed with the Tender process as it confirmed that the evaluation process was conducted as per the requirement of the law. The 1st Respondent proceeded with the Tender process which included Post-qualification conducted pursuant to Regulation 9 (10) (e) of the Regulations. Therefore, Regulation 204 (2) (e) of the Regulations relied upon by the Appellant is not applicable under the circumstances.

3. With regard to the experience of M/s Intertek International Limited the 1st Respondent submitted that, the firm has the requisite experience as required in the Tender document. During evaluation

the 1st Respondent evaluated both firms forming the 2nd Respondent's consortium and was satisfied that it complied with the requirement of the Tender document. Thus, after completion of all internal processes the 2nd Respondent was proposed for award of the Tender.

4. That, the Appellant was disqualified for having quoted the highest price of USD 6.077 VAT inclusive to mark one cubic meter of fuel compared with the price quoted by the 2nd Respondent of USD 3.20 VAT inclusive to mark one cubic meter of fuel. The 1st Respondent submitted further that, annual consumption of fuel in Tanzania is 3,000,000 cubic meters. The contract is expected to be for three years from the contract signing date. The Appellant's total contract price for three years would be USD 54,630,000 which is equivalent to TZS 125.6 Billion (at an exchange rate of 1 USD = TZS 2,300/=) while the total contract price for the 2nd Respondent is USD 28,800,000 which is equivalent to TZS 66.2 Billion (at an exchange rate of 1 USD = TZS 2,300/=). The difference between the price quoted by the Appellant and that of the 2nd Respondent is TZS 59.4 Billion which is a substantial amount of money and can be saved or the burden being reduced to the final consumers (Tanzanians). In view of the above, the Appellant does not qualify to be awarded the tender due to its price being higher above the price offered by the 2nd Respondent.

5. Finally, the 1st Respondent prayed to the Honorable Appeals Authority that all prayers claimed by the Appellant be dismissed with costs.

REPLY BY THE 2nd RESPONDENT

The 2nd Respondent's reply to the grounds of appeal and submissions by the Appellant may be summarized as follows: -

1. That, the Tender process complied with principles of integrity and probity as provided for under Regulation 7 of the Regulations. The 1st Respondent was right in progressing with the Tender process after the publication of unproved allegations of corruption in the newspaper. The 2nd Respondent submitted further that the 2nd Respondent and its employees abided to the highest level of ethical standards of integrity, honesty and respect which are embedded in the 2nd Respondent's Code of Conduct. The 2nd Respondent has not been engaged in corruption and its success in the Tender process is solely based on merit.

2. That, the 2nd Respondent did not breach the requirements of Regulation 204 (2) of the Regulations as it complied with criteria specified in the Tender document. The 1st and 2nd Respondent's negotiation on the mobilization period complied with Clause 36.1 (f) of the ITT and Regulation 225 (1) (e) of the Regulations which allows negotiations on mobilization arrangement to be undertaken with the lowest evaluated tenderer. The 2nd Respondent added that, as long as negotiation on mobilization arrangement is allowed, it cannot be argued that such negotiation should not include time. Thus, the 2nd Respondent complied with the requirement of the Tender document.

3. That, M/s Intertek International Limited, a party to the 2nd Respondent's consortium has the requisite experience in fuel marking services as properly demonstrated in its bid. The 1st Respondent

evaluated M/s Intertek International Limited independently and was satisfied that the firm complied with the requirement of the Tender document.

In addition, the 2nd Respondent stated that:-

a) M/s Intertek International Limited was incorporated in England and Wales on 14th February 1906 and is part of the M/s Intertek Group which is a leading provider of quality and safety solutions services such as fuel marking, auditing, inspection and quality assurance.

b) M/s Intertek Group has access to a pool of 44,000 employees in more than 100 countries who can provide support to it when and as required.

c) In East Africa, M/s Intertek International Limited is identified as market leader in Petroleum Quality Assurance with extensive experience working with all the key stakeholders in the industry.

d) In Tanzania, M/s Intertek International Limited's petroleum laboratory is accredited to 17025 for key routine analysis and the 2nd Respondent has worked with the 1st Respondent for more than 7 years on retail sampling and testing of petroleum products.

e) M/s Intertek International Limited has a Certificate of Compliance issued by BRELA which indicates that the firm has been operating in Tanzania

f) Both M/s Intertek International Limited and its consortium partner, M/s Authentix Inc have extensive experience in petroleum marking as specifically set out in the 2nd Respondent's Tender.

4. That, the Tender should not be awarded to the Appellant as the 1st Respondent rightly awarded the tender to the 2nd Respondent after confirming that it is the most responsive tenderer and lowest evaluated bidder. The 1st Respondent complied with the requirements of the Act and its Regulations in awarding the tender to the 2nd Respondent.

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

   a. Dismissal of the Appeal in its entirety with costs;

   b. Rejection of the Appellant's reliefs number 5 (a), (b), (c), (d) and (e); and

   c. Any other relief(s) that this Honorable Appeals Authority may deem equitable to grant.

ANALYSIS BY THE APPEALS AUTHORITY

Before proceeding with analysis of the merits of the Appeal, the Appeals Authority deems it prudent to point out that in the Appellant's statement of appeal there are allegations of corruption against the 1st and 2nd Respondents. The Respondents totally denied the allegations. We have also noted that the corruption allegations have been placed before PCCB for investigation. Therefore this being the criminal allegations, the Appeals Authority lacks the mandate to entertain it.

Without prejudice to the above, the Appeals Authority proceeds to resolve the first issue namely; **whether award of the Tender to the 2nd Respondent was proper in law.** In the course of so doing the Appeals Authority confined its analysis on the two sub-issues as agreed upon by the parties, namely:-

i. **Whether the 2nd Respondent complied with the mobilization period requirement as stipulated in the Tender Document; and**

ii. **Whether M/s Intertek International Limited has the requisite experience of fuel marking as required in the Tender Document.**

In considering the first sub-issue, the Appeals Authority revisited Clauses 28.1 of the ITT, 12.2 of the GCC and 8 of the SCC. These Clauses provide as follows:-

ITT 28.1 "The Procuring Entity shall examine the Tender to confirm that all terms and conditions specified in the General Conditions of Contract and the SCC have been accepted by the Tenderer without any material deviations and reservation."

GCC 12.2 "The Service Provider shall start carrying out the Service within thirty (30) days after the date the contract becomes effective, or at such other date as may be specified in the SCC."

SCC 8 "The date for the commencement of Services is One Month after signing the contract."

The above provisions entail in clear terms that, tenderers were required to comply with the GCC and SCC without any material deviation or reservation. Furthermore, the provisions specified that the contract commencement date to be one month or 30 days after the contract signing date. It means that the successful tenderer would be having one month period for mobilization after the signing of the contract.

To ascertain if the 2nd Respondent complied with Clause 12.2 of the GCC and Clause 8 of the SCC, the Appeals Authority reviewed the tender submitted by the 2nd Respondent and observed that, it had indicated at page 163 of its tender that it expected to commence marking operations within 90 days. In view of this fact, it is obvious that the 2nd Respondent contravened the requirement of Clause 12.2 of the GCC and Clause 8 of the SCC.

The Appeals Authority further considered the arguments raised by the 1st and 2nd Respondents regarding negotiations of mobilization period as was conducted pursuant to Clause 36.1 (c) and (f) of the ITT and Regulations 225 (1) (c) and (e) of the Regulations. The relevant provisions read as follows:-

Clause 36.1 "Negotiations may be undertaken with the lowest evaluated Tenderer relating to the following areas:

(c) a minor amendment to the SCC;

(f) Mobilization arrangements."

Regulation 225 (1) "Negotiations may be undertaken with the lowest evaluated tenderer relating to-

(c) a minor amendment to the special conditions of contract;

(e) Mobilization arrangements."

Having reviewed the above quoted provisions, the Appeals Authority observed that, both provisions require negotiations to be conducted with a tenderer who is the lowest evaluated. According to Clause 33.1 of the ITT, the lowest evaluated tenderer is the one with the lowest evaluated price from among those who are eligible, compliant and substantially responsive to the Tender document. The 2nd Respondent was not responsive to the requirement of the Tender as it failed to comply with Clause 12.2 of the GCC and Clause 8 of the SCC as pointed out herein above.

Regulation 206 (2) of the Regulations requires a tender which is not responsive to the requirements provided for in the Tender document to be rejected. The provision reads as follows:-

> "***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 supplied)

The Appeals Authority having related the requirement of the law and the Tender Document to the record of the Appeal is of the settled view that, the 1st Respondent erred in law for negotiating with the 2nd Respondent while it was crystal clear that the 2nd Respondent's tender was not responsive in as much as mobilization period is concerned. The Appeals

Authority is of the view that, much as Clause 36.1 (c) and (f) of the ITT and Regulations 225 (1) (c) and (e) of the Regulations allows negotiations on mobilization arrangement and minor amendment to the Special Conditions of Contract, the same should be availed to a tenderer whose Tender is responsive.

Based on the above, the Appeals Authority is of the firm view that the 1st Respondent ought to have rejected the 2nd Respondent's tender for failure to comply with the requirement of the Tender document. Accordingly, the Appeals Authority concludes the first sub-issue in the negative that the 2nd Respondent failed to comply with the mobilization period requirement.

With regard to the second sub issue, the Appellant contended that M/s Intertek International Limited, a partner in the 2nd Respondent's consortium lacked the requisite experience in fuel marking. Therefore, it ought to have been disqualified during the evaluation process. The 1st and 2nd Respondents on their part submitted that M/s Intertek International Limited has the requisite experience.

In determining the opposing arguments by the parties, the Appeals Authority revisited Section VI - Performance Specifications, Item 4.0 which deals with qualification and experience of the service provider. The provision read as follows: -

> "*The service provider shall be a firm with expertise in marking petroleum products.*
>
> *(a) To exhibit experience, the service provider shall:*

(i) ***Provide proof of undertaking similar assignment for the period of at least five (5) years within year 2005 to date;***

(ii) ***Provide the evidence of at least two (2) similar assignments in different countries. In each assignment performed the service provider shall provide the name and address of the client, date of execution and value of the project".***

(Emphasis Added)

The 2nd Respondent participated in this Tender as a consortium of two firms namely; M/s Intertek International Limited and M/s Authentix Inc. The Appeals Authority revisited Regulation 9 (10) (e) of the Regulations and Clause 3.3 of the ITT so as to satisfy itself if the evaluation of tenders in a consortium were conducted in accordance with the laid down procedures. The provisions read as follows: -

Regulation 9(10)"*Where a solicitation document allows a tenderer to submit a tender as part of joint venture, consortium, or association, the solicitation document shall require, where appropriate, that-*

(e)any tender from a joint venture, consortium, or association shall indicate the part of proposed contract to be performed by each party and each party shall be evaluated or pre-qualified or post qualified with respect to its contribution only"

Clause 3.3 "***Any Tender from a joint venture, consortium, or association shall indicate the part of proposed contract to be performed by each party and each party shall be evaluated or post qualified with respect to its contribution only and the responsibilities of each party and shall not be substantially altered without prior written approval of the Procuring Entity***".

(Emphasis Added)

The above quoted provisions entail clearly that as a proof of experience tenderers were required to exhibit five years experience in works of a similar nature and at least works performed in two different countries. Furthermore, the provisions require each member of the consortium to be evaluated with respect to its contribution in the intended contract.

The Appeals Authority revisited the tender submitted by the 2nd Respondent and observed that at page 215 it attached a letter dated 2nd December 2019. This letter itemized the responsibilities of each partner to the consortium that would be performed during contract execution. According to the said letter M/s Intertek International Limited would provide "*program management, marking services and additional services to fulfill the provision of Fuel Marking Services*". Since M/s Intertek International Limited's experience is challenged, the Appeals Authority deemed it proper to find out whether it has exhibited proof of experience as required.

From the documents attached to the 2nd Respondent's tender, the experience of M/s Intertek International Limited was listed on page 91 to 92. Amongst the listed previous performed contracts only one undertaken with Chevron Fuel Marker in the Philippines can be termed to be of a similar nature to the Tender in question as it related to Fuel Marker Testing and Moisture Monitoring.

The Appeals Authority observed further that, the 2nd Respondent attached several letters from page 189 to 196 of its bid as a proof of the performed contracts. Having reviewed them it was observed that, the attached letters were confirming contracts performed by M/s Intertek Testing Services (EA) (PTY) Limited while a party to the 2nd Respondent's consortium is M/s Intertek International Limited. Furthermore, there was no certificate/letter of confirmation attached as proof of contract undertaken with Chevron Fuel Marker in Philippines.

During the hearing the 2nd Respondent was asked to clarify as to why it attached experience of M/s Intertek Testing Services (EA) (PTY) Limited instead of M/s Intertek International Limited. In response thereof, the 2nd Respondent clarified that, M/s Intertek Testing Services (EA) (PTY) Limited is a branch of M/s Intertek International Limited, a company incorporated in the United Kingdom and Wales. In Tanzania M/s Intertek International Limited has been issued with a Certificate of Compliance by the Business Registration and Licensing Agency (BRELA).

The Appeals Authority reviewed Sections 433 to 435 of the Companies Act Cap 212 RE 2002 and observed that a foreign company can be issued with the certificate of compliance after complying with all the stipulated conditions. The Record of Appeal indicates that M/s Intertek

International Limited was issued with the Certificate of Compliance on 4th September 2018 by BRELA. The Certificate of Compliance bear the same name with the one used in this Tender, namely; M/s Intertek International Limited. The Appeals Authority is of the view that the Certificate of Compliance does not establish in any way that M/s Intertek International Limited has the required experience.

The Appeals Authority also finds that M/s Intertek Testing Services (EA) (PTY) Limited and M/s Intertek International Limited are two different entities, thus it was not proper for the latter to use the experience of the former to justify its qualification.

Given the above findings the Appeals Authority is of the settled view that, the 1st Respondent ought to have disqualified the 2nd Respondent for failure to comply with the experience requirements pursuant to Regulations 204 (2) (f) & (k) and 206 (2) of the Regulations. Regulations 204 (2) (f) & (k) read as follows: -

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

The Appeals Authority further reviewed the Evaluation Report and observed that the evaluation of consortium firms was not conducted as per Regulation 9 (10) (e) of the Regulations and Clause 3.3 of the ITT. That is to say, each firm in the consortium was not evaluated as per its contributions in the contract to be performed. The Evaluation Report indicates that evaluation was conducted generally without due consideration that some of the tenderers participated in this Tender as a consortium or in association of more than one firm. This anomaly was not only in relation to the 2nd Respondent's tender but also to the Appellant's tender as these two tenderers participated in the tender as a consortium.

From the above observations, the Appeals Authority concludes the second sub-issue in the negative that the 2nd Respondent did not comply with the requisite experience provided in the Tender Document.

Based on the above findings and observations, the Appeals Authority concludes the first issue in the negative that the proposed award of the Tender to the 2nd Respondent was not proper in law.

In view of our above findings that the evaluation process was conducted contrary to Regulation 9 (10) (e) of the Regulations and Clause 3.3 of the ITT, the Appeals Authority will not delve with the second issue namely; whether the Appellant qualifies for award of the Tender. Given the circumstances surrounding the whole evaluation process which was marred by irregularities, there cannot be a justifiable award to any of the Tenderers including the Appellant.

Therefore, the Appeal is allowed to that extent. The Appeals Authority hereby nullifies the whole Tender process and the award proposed to the 2nd Respondent. The 1st Respondent is hereby ordered to restart the Tender process in strict observation 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 8th day of April 2021.

HON. JUSTICE (rtd) SAUDA MJASIRI

.....

CHAIRPERSON

MEMBERS:

1. **CPA. FREDRICK RUMANYIKA**.....
2. **ADV. ROSAN MBWAMBO** .....