

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 06 OF 2024 - 2025

BETWEEN

M/S FASTLINK SAFARIS & TOURS LTD APPELLANT

AND

MINISTRY OF CULTURE, ARTS AND SPORTS RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|---------------|
| 1. Hon. Justice (Rtd) Sauda Mjasiri | - Chairperson |
| 2. Ms. Ndeonika Mwaikambo | - Member |
| 3. Mr. Pius Mponzi | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|-------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Agnes Sayi | - Senior Legal Officer |
| 2. Ms. Violet Limilabo | - Senior Legal Officer |
| 3. Mr. Venance Mkonongo | - Legal Officer |

FOR THE APPELLANT

- | | |
|---------------------------|-----------------------------------|
| 1. Mr. Revocatus Ludovick | - Business Development
Manager |
|---------------------------|-----------------------------------|



FOR THE RESPONDENT

1. Mr. Vedastus Shibugulu

- Director of Procurement
Management Unit

M/S Fastlink Safaris & Tours Ltd (hereinafter referred to as "**the Appellant**") lodged this Appeal against the **Ministry of Culture, Arts and Sports** (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. 96/2023/2024/NC/10 for Provision of Air Travel Ticket Services (hereinafter referred to as "**the Tender**").

The Tender was conducted through National 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 as amended (hereinafter referred to as "**the Regulations**").

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: -

On 17th May 2024, the Respondent through National e-Procurement System of Tanzania (NeST) invited eligible tenderers to participate in the Tender. The deadline for submission of tenders was set on 30th May 2024. By the deadline, the Respondent received twelve tenders including the Appellant's.

The received tenders were opened and subjected to evaluation. After completion of the evaluation process, the evaluation committee



recommended award of the Tender to M/S Danade Company Ltd. The recommended contract price was Tanzania Shillings Two Hundred Forty only (TZS 240.00) VAT exclusive subject to successful negotiations. The Tender Board approved the Evaluation Committee's recommendations at its meeting held on 19th June 2024.

Negotiations between the Respondent and M/S Danade Company Ltd successfully took place on 27th June 2024. On 27th July 2024, the Respondent issued the Notice of Intention to award. The Notice informed the Appellant that the Respondent intended to award the Tender to M/S Danade Company Ltd. The approved contract price was Tanzania Shillings Two Hundred Forty (TZS 240.00) VAT exclusive for a completion period of 365 days. In addition, the Notice stated that the Appellant's tender was disqualified for failure to submit current Financial Statements.

Aggrieved with the reason given for its disqualification, the Appellant through a letter dated 24th July 2024, applied for administrative review to the Respondent. The Appellant claimed that the Respondent never replied to the submitted application for administrative review. Thus, on 6th August 2024, the Appellant filed this Appeal before the Appeals Authority.

The Appeals Authority notified the Respondent on the existence of the Appeal. When the Respondent filed its Statement of Reply, it raised a Preliminary Objection (PO) on a point of law to wit: -

"That the Appellant did not file an application for an administrative review to the Respondent's Accounting Officer before filing this Appeal as required by Section 96(1) of the Act".



When the matter was called on for hearing and during framing up of issues, the Appeals Authority informed the parties that from the record of Appeal there is a PO on a point of law that has been raised by the Respondent. In view of this, the following issues were framed for the PO and the substantive merits of the Appeal: -

- 1.0 Whether the Appeal is properly before the Appeals Authority;**
- 2.0 Whether the disqualification of the Appellant's tender was justified; and**
- 3.0 What reliefs if any are the parties entitled to?**

After framing the issues, parties were required to address the first issue that relates to the PO before embarking on the merits of the Appeal.

SUBMISSIONS BY THE RESPONDENT ON THE PO

The Respondent's submissions were made by Mr. Vedastus Shibugulu, Director of Procurement Management Unit (DPMU). He commenced by stating that the Appellant was required to apply for administrative review to the Respondent pursuant to Section 96 of the Act after it received the Notice of Intention to award and being dissatisfied with the reason given for its disqualification.

Mr. Shibugulu stated that the Appellant was required to apply for administrative review to the Respondent's Accounting Officer as per the law before filing this Appeal. To the contrary, the Appellant directly filed this Appeal to the Appeals Authority. Mr. Shibugulu submitted that, had



the Appellant adhered to the procedure for submission of an application for administrative review as required by the law, the same would have been determined accordingly.

Mr. Shibugulu denied the Respondent to have received the application for administrative review on 24th July 2024 as claimed by the Appellant. Thus, this Appeal is not properly before the Appeals Authority for the Appellant's failure to comply with the dispute resolution procedures.

REPLY BY THE APPELLANT ON THE PO

The Appellant's submissions were made by Mr. Revocatus Ludovick, Business Development Manager. He submitted that after receipt of the Notice of Intention to award and being dissatisfied with the reason for its disqualification, the Appellant applied for administrative review to the Respondent. Mr. Ludovick contended that the application for administrative review was submitted to the Respondent on 24th July 2024, through the emails of hpmu@michezo.go.tz and Gerson.msigwa@michezo.go.tz. There was no notification that the said email was not delivered.

Mr. Ludovick stated that after it submitted its application for administrative review through the Respondent's official email addresses and within the time stipulated under the law, the Appellant waited for the Respondent's decision. To the contrary, the Respondent did not issue its decision within seven working days as required by the law. Hence, the Appellant filed this Appeal. Mr. Ludovick contended that the Appeal was filed in accordance



with the requirements of the law, thus he prayed that the PO be overruled and the Appeal be heard on the merits.

RESPONDENT'S REJOINDER ON THE PO

On his brief rejoinder, Mr. Shibugulu submitted that the Appellant used incorrect email address: hpmu@michezo.go.tz to apply for administrative review. The proper email address is dpmu@michezo.go.tz. However, Mr. Shibugulu conceded that the email of Gerson.msigwa@michezo.go.tz is the correct email address of the Respondent's Accounting Officer. Mr. Shibugulu reiterated his earlier submission that the Appeal is not properly before the Appeals Authority as the Appellant did not submit its application for administrative review before filing this Appeal.

ANALYSIS BY THE APPEALS AUTHORITY ON THE PO

1.0 Whether the Appeal is properly before the Appeals Authority

In determining this issue, the Appeals Authority considered the parties' contentious arguments whereby on one hand the Respondent contended that the Appeal is improperly before the Appeals Authority as the Appellant had not applied for administrative review before filing this Appeal. On the other hand, the Appellant contended to have applied for administrative review to the Respondent through email on 24th July 2024. However, the Respondent did not determine the same.

In ascertaining the validity of the parties' contentious arguments, the Appeals Authority reviewed Sections 60(3), 96(1), (4) and (6) and 97(1) and (2) (a) and (b) of the Act which read as follows: -



"60(3) Upon receipt of notification, the accounting officer shall, immediately thereafter, issue a notice of intention to award the contract to all tenderers who participated in the tender in question **giving them seven working days within which to submit complaints thereof**, if any.

96(1) Any complaints or disputes 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.

(6) **The accounting officer shall, within seven working days after the submission of the complaint or dispute deliver a written decision** which shall: -

(a) State the reason for the decision; and

(b) If the complaint or dispute is upheld in whole or in part indicate the corrective measures to be taken.



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;

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

the tenderer may make the 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".

(Emphasis supplied)

The above quoted provisions provide a clear guidance on the submission of an application for administrative review and an Appeal before the Appeals Authority. That is, a tenderer who is dissatisfied with the reason given for its disqualification as contained in the Notice of Intention to award is allowed to file a complaint to the accounting officer of the respective procuring entity within seven working days of becoming aware of the circumstances giving rise to the complaint. The accounting officer is required to issue its decision within seven working days. If the accounting officer issues a decision and a tenderer is still dissatisfied or if the accounting officer fails to issue its decision within seven working days as



required, a tenderer may lodge an appeal to the Appeals Authority within seven working days.

The Appeals Authority reviewed the record of Appeal and observed that the Respondent issued the Notice of Intention to award on 24th July 2024. The Notice was received by the Appellant on the same date. Upon being dissatisfied with the reason given for its disqualification, the Appellant through a letter dated 24th July 2024, applied for administrative review to the Respondent. The record of Appeal indicates that the Appellant's application for administrative review was submitted to the Respondent through the email of hpmu@michezo.go.tz and Gerson.msigwa@michezo.go.tz.

Section 96(1) of the Act requires an application for administrative review to be submitted to the accounting officer of the respective procuring entity. As per the record of Appeal, the Respondent's Accounting Officer is the Permanent Secretary who also issued the Notice of Intention to award. The Permanent Secretary signed the issued Notice using his official email address which is Gerson.msigwa@michezo.go.tz. The same email was used by the Appellant to submit its application for administrative review.

During the hearing, Mr. Shibugulu, the Respondent's representative also confirmed the existence of the referred e-mail address. Having reviewed the Appellant's email to the Respondent, the Appeals Authority observed that it attached the Notice of Intention to award and the complaint letter. The Appeals Authority also noted that there was no notification that the said email was not delivered.



The Appeals Authority revisited Section 22(1) of the Electronic Transactions Act, Cap 442 R.E 2022 which reads as follows: -

"22(1) *Information in electronic form is dispatched when it enters a computer system outside the control of the originator or of the person who sent the electronic communication on behalf of the originator*".

(Emphasis supplied)

The above quoted provision clearly entails that information in an electronic form would be deemed to have been communicated when it enters the computer system outside the computer of the originator.

The Appeals Authority related the above quoted provision to the facts of this Appeal and finds that the Appellant's application for administrative review was duly submitted to the Respondent through email on 24th July 2024. Consequently, the Respondent was required to issue its decision thereof in accordance with the law.

According to Section 96(6) of the Act, the Respondent was required to issue its decision within seven working days from the date the Appellant submitted its application for administrative review. Counting from 24th July 2024, the Respondent ought to have issued its decision by 2nd August 2024. However, according to the record of Appeal, the Respondent did not issue a decision thereof.

Section 97(2)(a) of the Act allows a tenderer who has not received the procuring entity's decision within the stipulated time limit, to file an appeal

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to the Appeals Authority within seven working days from the date the decision ought to have been issued. Counting from 2nd August 2024, the Appellant ought to have filed its Appeal by 14th August 2024. The Appellant filed this Appeal on 6th August 2024.

The Appeals Authority considered the Respondent's argument that the Appellant's application for administrative review was also to be directed to the email of the DPMU which is dpmu@michezo.go.tz. The Respondent denied the existence of the email hpmu@michezo.go.tz which was used by the Appellant in submitting its application for administrative review. In view of Section 96(1) of the Act which requires the application for administrative review to be submitted to the Accounting Officer, the Appeals Authority rejects the Respondent's contention in this regard. The Appellant's act of not including the email of DPMU when submitting its application for administrative review did not invalidate the email sent to the Respondent's Accounting Officer.

In view of the above observations, the Appeals Authority finds the Appellant's Appeal to be properly before the Appeals Authority as it was filed in accordance with the requirements of the law.

Under the circumstances, the Appeals Authority overrules the raised PO and proceeds to determine the Appeal on the merits.

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SUBMISSIONS BY THE APPELLANT ON THE MERITS OF THE APPEAL

The Appellant's submissions on the second issue were made by Mr. Revocatus Ludovick. He commenced by stating that according to the Notice of Intention to award, the Appellant's tender was disqualified for failure to submit current Financial Statements. Mr. Ludovick stated that the Tender Document was silent on the submission of the current Financial Statements. That is to say, the Respondent introduced a new criterion during evaluation of tenders. Mr. Ludovick submitted that the Respondent's act of introducing a new criterion after the deadline for submission of tenders and applying the same during evaluation led to injustice as it was an unfair procurement practice.

Mr. Ludovick contended that the Appellant's tender was disqualified for failure to show access to financial resources. According to the Respondent, tenderers' access to financial resources was to be shown by submission of current Financial Statements for the year ending 31st December 2023. Mr. Ludovick submitted that it is an undisputed fact that the Tender Document required tenderers to demonstrate access to financial resources. However, the documents for substantiating compliance with such a criterion were not specified. Thus, in complying with access to financial resources criterion the Appellant attached a letter of credit from CRDB Bank. The attached letter indicated that the Appellant was able to get a line of credit to a tune of TZS 1,000,000,000.00. Mr. Ludovick submitted that the letter of credit from CRDB Bank was sufficient to substantiate access to financial



resources. Thus, the Respondent should not have disqualified the Appellant for this criterion.

Mr. Ludovick stated that the Respondent's act of introducing a new criterion during evaluation of tenders indicated that it disregarded the primary evaluation criteria for the Tender. That is, the lowest evaluated bid in terms of financial evaluation. He contended that the Appellant had a lowest bidding price of TZS 0.01 inclusive of 99.99% discount than the price quoted by the proposed successful tenderer of TZS 240.00 VAT exclusive. Had the Respondent conducted the evaluation process in accordance with the requirements provided in the Tender Document, it would not have disqualified the Appellant's tender. And since the Appellant's Tender had the lowest price, it should have been considered for award of the Tender.

Mr. Ludovick submitted that the Respondent's act of introducing a non-existent criterion and overlooking the most economically advantageous tender, violated the principles of fairness, transparency and obtaining the best value for money as per section 4A (3) (b) and (c) of the Act.

Finally, the Appellant prayed for the following reliefs: -

1. Annulment of the Respondent's decision to award the tender to M/S Danade Company Ltd.
2. The Respondent should be ordered to re-evaluate the tenders based on the criteria explicitly provided in the original Tender Document.
3. The Tender be awarded to the Appellant as its quoted price offered the best value for money to the Respondent.



REPLY BY THE RESPONDENT ON THE MERITS OF THE APPEAL

The Respondent's reply was made by Mr. Vedastus Shibugulu. He commenced by stating that the Appellant was fairly disqualified from the Tender process for failure to attach current Financial Statements for the year ending 31st December 2023 to its tender. He submitted that Item 3 of Section IV-Qualification and Evaluation Criteria required tenderers to demonstrate their access to financial resources. In complying with such a requirement, tenderers were required to submit current Financial Statements for the year ending 31st December 2023. However, the Appellant attached Financial Statements for the year ending 31st December 2022.

Mr. Shibugulu contended that much as the criterion to submit current Financial Statements was not explicitly stated in the Tender Document, the Appellant ought to have submitted the current Financial Statements as it is the only document which would demonstrate access to financial resources.

Mr. Shibugulu submitted that the evaluation process was conducted in accordance with the requirements of the law. After completion of the said process, the proposed successful tenderer was the only firm that was found to be responsive to the Tender. The firm was therefore subjected to negotiations. He contended further that negotiations were successfully conducted and the proposed successful tenderer was to be awarded the Tender for a proposed price of TZS 240.00 VAT exclusive for 240 tickets expected for the period of twelve (12) months.

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Mr. Shibugulu concluded his submissions by stating that the Appellant's disqualification was fair and in accordance with the requirements of the law. He therefore prayed that the Respondent should be allowed to proceed with the Tender process.

ANALYSIS BY THE APPEALS AUTHORITY ON THE MERITS

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

In resolving this issue, the Appeals Authority reviewed the record of Appeal and observed that the Appellant was disqualified from the Tender process for failure to submit current Financial Statements. On the one part, the Appellant contended that the requirement to submit current Financial Statements was not provided in the Tender Document and was introduced by the Respondent during evaluation of tenders.

On the other part, the Respondent stated that tenderers were required to submit current Financial Statements for the year ending 31st December 2023 in compliance with the access to financial resources criterion. The Respondent contended that much as such a requirement was implicitly stated in the Tender Document, tenderers including the Appellant were required to submit current Financial Statements as it was the only document which could prove tenderer's access to financial resources.

In ascertaining the validity of the parties' contentious argument in this regard, the Appeals Authority reviewed the Tender Document. It observed that Item 3 – Financial Situation and Performance, Section IV



Qualification and Evaluation Criteria provides guidance on two sub criteria namely, annual turnover and access to financial resources. Since the Appellant was disqualified on the access to financial resources criterion, the same is reproduced as follows: -

"Access to Financial Resources (Sources of Fund)(SCORE: N/A)

Tenderers are required to demonstrate details of their source of finance that show their ability to access adequate finances to meet cash flow requirements of the current and future contracts. (In the case of Joint Venture, compliance requirements are all parties combined – Must meet requirements).

Average fund amount from all sources (any freely convertible currency proposed by bidder)	30,000,000"
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The above quoted provision required tenderers to demonstrate their ability to access financial resources. However, the provision does not point out explicitly the documents required to demonstrate tenderer's ability to access financial resources.

The Appeals Authority reviewed the evaluation criteria in NeST and observed that under the Item access to financial resources the Appellant had indicated to have access to lines of credit, cash and banks and shares. A letter substantiating a line of credit from CRDB and statement of financial position for the year ending 31st December 2022 were attached as a proof of access to financial resources. However, the Evaluation Committee found

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the Appellant to have not complied with such a criterion as it did not attach current Financial Statements for the year ending 31st December 2023.

The Appeals Authority reviewed the tender submitted by the proposed successful tenderer in NeST. It observed that under the item access to financial resources; it attached audited Financial Statements for the year ending 31st December 2023. The Evaluation Committee found the tenderer to have complied with this criterion.

During the hearing of this Appeal, Members of the Appeals Authority required the Respondent to clarify the basis of considering current Financial Statements as the only document for substantiating tenderer's access to financial resources since the same was not explicitly stated in the Tender Document. In response thereof, the Respondent conceded that a requirement to submit current Financial Statements as a proof of tenderer's access to financial resources was implicitly provided in the Tender Document. However, tenderers were required to submit the same as it was the only document which substantiates access to financial resources.

The Appeals Authority revisited Section 70(2) of the Act and Regulation 203(1) of the Regulations which read as follows: -

*"70(2) **The tender documents** shall be worded so as to permit and encourage competition and such documents **shall set forth clearly and precisely all the information necessary for a prospective tenderer to prepare***



tender for the goods, services and works to be provided.

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

(Emphasis supplied)

The above quoted provisions require procuring entities to state clearly in the tender documents all information necessary for a prospective tenderer to prepare a responsive tender. In addition, the provisions require evaluation of tenders to be conducted on the basis of the terms and conditions prescribed in the Tender Document.

In view of the Respondent's admission during the hearing that a requirement to submit current Financial Statements was not clearly provided in the Tender Document, the Appeals Authority failed to comprehend the Respondent's basis of determining tenderers' compliance in relation to access to financial resources criterion.

Given the circumstances, the Appeals Authority finds the Respondent's act of disqualifying the Appellant's tender based on the criterion which was not provided in the Tender Document to have contravened Section 70(2) of the Act and Regulation 203(1) of the Regulations quoted hereinabove. Had the Respondent required current Financial Statements to be submitted by

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tenderers as a proof of access to financial resources, it ought to have clearly specified such a requirement in the Tender Document.

In view of the above findings, the Appeals Authority finds the Respondent's Tender process to have been marred with irregularities. Thus, the Appellant's disqualification and the award proposed to the successful tenderer were not proper in the eyes of the law.

Under the circumstances the Appeals Authority concludes the second issue in the negative that the disqualification of the Appellant's tender was not justified.

2.0 What relief, if any, are the parties entitled to?

In view of the above findings, the Appeals Authority hereby allows the Appeal and orders the Respondent to re-start the Tender process in observance of the law. 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 5th day of September 2024.

HON. JUSTICE (rtd) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS: -

1. MS. NDEONIKA MWAIKAMBO.....



2. MR. PIUS MPONZI

