

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 19 OF 2024-2025

BETWEEN

M/S ELIGHT COMPANY LIMITED.....APPELLANT

AND

JUDICIARY OF TANZANIA..... RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Ms. Ndeonika Mwaikambo | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|-------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Agnes Sayi | - Principal Legal Officer |
| 3. Ms. Violet Limilabo | - Senior Legal Officer |
| 4. Mr. Venance Mkonongo | - Legal Officer |

FOR THE APPELLANT

- | | |
|-------------------------|--------------------------------|
| 1. Mr. David Mayanga | - Managing Director |
| 2. Mr. Samuel Mwantingo | - Business Development Manager |



FOR THE RESPONDENT

- | | |
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| 1. Ms. Netiwe Mhando | - Principal Legal Officer |
| 2. Mr. Charles Challe | - Head of Procurement Management Unit (HPMU) |
| 3. Ms. Catherine Komba | - Legal Officer |
| 4. Lazaro Sanga | - Information Communication Technology Officer |
| 5. Mr. Edmund Limihagati | - Supplies Officer |

This Appeal was lodged by **M/S Elight Company Limited** (hereinafter referred to as "**the Appellant**") against **Judiciary of Tanzania** (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. 40/2024/2025/NC/07 for Leasing of Canteen and Running of Catering Services at the Judiciary of Tanzania (Dodoma and Dar es Salaam) (hereinafter referred to as "**the Tender**").

The background of this Appeal may be summarized from the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") as follows: -

The Tender was conducted using the National Competitive Tendering method as specified in the Public Procurement Act, No. 10 of 2023 (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 518 of 2024 (hereinafter referred to as "**the Regulations**").

On 15th October 2024, the Respondent through National e-Procurement System of Tanzania (NeST) invited eligible tenderers to submit their tenders. The deadline for submission of tenders was set on 28th October 2024. On the deadline, the Respondent received seven tenders including that of the Appellant.

The received tenders were subjected to evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to Bony Raphael Mmanda. The proposed contract price was Tanzania Shillings One Million only (TZS 1,000,000.00) VAT exclusive.

On 5th November 2024, the Respondent issued the Notice of Intention to award the Tender. The Notice informed the Appellant that the Respondent intended to award the Tender to Bony Raphael Mmanda. In addition, the Notice stated that the Appellant's tender was disqualified for submitting a Power of Attorney that was not stamped with the official seal of the company on the part of the donee.

Dissatisfied with the reason given for its disqualification, on 6th November 2024, the Appellant applied for administrative review to the Respondent. The Respondent through a letter dated 11th November 2024, informed the Appellant that the Tender has been suspended to allow the process of reviewing the Tender. The record of Appeal indicates that the Respondent did not issue its decision on the Appellant's application for administrative review within the specified time limit. Thus, on 19th November 2024, the Appellant filed this Appeal to the Appeals Authority.

When the matter was called on for hearing, the following issues were framed, namely: -

1.0 Whether the disqualification of the Appellant's tender was justified; and

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

SUBMISSIONS BY THE APPELLANT

The Appellant's submissions were made by Mr. David Mayanga, Managing Director. He commenced on the first issue by stating that the Appellant was among the tenderers which participated in the Tender. On 5th November 2024, the Appellant received the Notice of Intention to award the Tender from the Respondent. The Notice stated that the Appellant's tender was disqualified because of submitting a Power of Attorney which was not stamped with the official seal on the part of the donee. Mr. Mayanga stated that the Appellant was dissatisfied with the reason given for its disqualification. Thus, on 6th November 2024, the Appellant applied for administrative review to the Respondent.

Mr. Mayanga elaborated that, the Respondent through a letter dated 11th November 2024, informed the Appellant that the Tender had been suspended and the Respondent was still reviewing the Tender process. He added that the Respondent did not issue its decision on the Appellant's application for administrative review within the time specified under the law. Thus, on 19th November 2024, the Appellant lodged this Appeal. Mr. Mayanga submitted that on 20th November 2024 after the Appellant had

filed this Appeal, it received a letter from the Respondent dated 18th November 2024. The letter contained the Respondent's decision on the Appellant's application for administrative review. It stated that the Respondent had waived the anomaly regarding the Appellant's Power of Attorney. In addition, the said letter stated that the Appellant's tender was disqualified for failure to demonstrate its experience of serving food to leaders. Hence, it failed to comply with the specific experience criterion.

Mr. Mayanga submitted that the reason for disqualification of the Appellant's tender was failure to comply with the specific experience criterion on serving food to leaders. This is a new reason that was not contained in the Notice of Intention to award. He contended that a reason which disqualifies a tenderer must be stated in the evaluation report and the same should be communicated to a tenderer through the Notice of Intention to award. The reason communicated to the Appellant for its disqualification was the defective Power of Attorney. Therefore, since the said reason was waived by the Respondent, the Appellant urged the Appeals Authority to disregard the newly introduced reason for the Appellant's disqualification.

Regarding the defective Power of Attorney, Mr. Mayanga submitted that the Appellant's Power of Attorney complied with the format provided in NeST. He expounded that the sample format of the Power of Attorney provided in NeST did not require a company seal to be stamped at the donee's place. The company seal was to be stamped at the donor's place and the Appellant complied with such a requirement. Hence, the

Respondent's finding that the Appellant's Power of Attorney was defective for not being stamped with the company seal on the part of the donee was wrong and contrary to the sample format provided in NeST, Mr. Mayanga contended.

Mr. Mayanga submitted that since the Tender under Appeal was for revenue collection, award was to be made to the highest evaluated tenderer. He contended that the Appellant complied with the requirements of the Tender and its quoted price was higher than the proposed successful tenderer. In view of this position, the Respondent ought to have proposed award of the Tender to the Appellant as it could generate more revenue by paying higher rent than the proposed successful tenderer.

Finally, the Appellant prayed for the following orders: -

- i. The Respondent be ordered to award the Tender to the Appellant as it had the highest quoted price compared to other tenderers; and
- ii. A declaration that the Power of Attorney submitted by the Appellant complied with the sample format provided in the NeST.

REPLY BY THE RESPONDENT

The Respondent's submissions were led by Ms. Netiwe Mhando, Principal Legal Officer assisted by Mr. Charles Challe, Head of Procurement Management Unit. The Respondent submitted that the Appellant was one of the tenderers which participated in this Tender. During evaluation, the Appellant's tender was found to be non-responsive as its Power of Attorney was not stamped with an official seal on the part of the donee. The

Respondent through a Notice of Intention to award issued on 5th November 2024, notified the Appellant that its tender was found non-responsive for failure to comply with the requirements of the Power of Attorney. Dissatisfied with the reason given for its disqualification, on 6th November 2024, the Appellant applied for administrative review to the Respondent.

The Respondent submitted that after receipt of the Appellant's application for administrative review, it reviewed the Tender process and waived the anomaly in the Power of Attorney. During the review process the Respondent observed that the Appellant failed to comply with the specific experience criterion as it failed to demonstrate experience of serving food to leaders. Hence, its tender was non-responsive.

The Respondent stated further that for a tenderer to be considered to have complied with specific experience criterion, it was required to demonstrate experience of serving leaders particularly of the institutions with Presidential appointees. The Appellant failed to demonstrate such experience as it attached contracts which demonstrated experience of providing catering services to hospitals. Thus, the Appellant lacked the requisite experience and was fairly disqualified.

However, after being required by the Appeals Authority to explain how the Respondent assessed the compliance with the specific experience criterion on serving food to leaders, particularly those who are presidential appointees, the Respondent stated that consideration was given to institutions which had presidential appointees. The Respondent identified Judiciary of Tanzania as one of the said institutions.

A handwritten signature in dark ink, appearing to be 'J. S. S.', is located at the bottom center of the page.

The Appeals Authority further required the Respondent to elaborate if the specific experience criterion was complied with by other tenderers, especially the proposed successful tenderer. In response thereof the Respondent submitted that most of the tenderers failed to comply with the specific experience criterion. However, the proposed successful tenderer submitted one contract which sufficed the requirements of the Tender. Thus, it was considered responsive and proposed for award.

The Respondent submitted that in order for a Tender to be considered to have been fairly conducted, a successful tenderer was required to comply with the requirements provided in the Tender Document. In the Tender under Appeal, it is obvious that none of the tenderers complied with the specific experience criterion. The Respondent elaborated that non-compliance by the tenderers may be due to the ambiguity on the provided criteria. Thus, the Respondent requested the Appeals Authority to issue a fair and a just decision in this regard.

Finally, the Respondent prayed that the Appeals Authority issue an order for re-tendering as the specifications provided in the Tender Document did not allow a responsive tenderer to be obtained.

ANALYSIS BY THE APPEALS AUTHORITY

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

In resolving this issue, the Appeals Authority considered contentious arguments by the parties whereby the Appellant stated that as per the

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Notice of Intention to award its tender was disqualified for submitting a Power of Attorney that was not stamped with official seal on the part of donee. The Appellant challenged the said reason by applying for administrative review to the Respondent. However, the Respondent did not issue its decision within the specified time under the law. By the time the Respondent issued its decision, the Appellant had already filed this Appeal.

The Appellant stated that in the decision on the application for administrative review and reply to the Statement of Appeal, the Respondent waived the reason for its disqualification which was stated in the Notice of Intention to Award. It then introduced a completely new reason that the Appellant was disqualified for failure to comply with specific experience criterion. The Appellant argued that since the second reason for its disqualification was not contained in the Notice of Intention to award, it urged the Appeals Authority to disregard it as it was an afterthought. Consequently, the Respondent should re-instate the Appellant in the Tender process and award it the Tender.

The Respondent on its part insisted that the Appellant's tender was fairly disqualified for failure to meet the required specific experience criterion. Therefore, the Appellant was not eligible for award as contended.

Before analyzing whether the Appellant's disqualification is justified, the Appeals Authority considered the Appellant's contention that the second reason for its disqualification for lacking the requisite experience should not be considered in this Appeal. The Appeals Authority finds it proper to

review the record of Appeal before ascertaining the validity of the Appellant's contention in this regard.

In so doing, the Appeals Authority reviewed the record of Appeal and observed that the Respondent through the Notice of Intention to award dated 5th November 2024 informed the Appellant that its tender was disqualified for submitting a Power of Attorney that was not stamped with the official seal on the part of the donee. The Appellant was dissatisfied with the reason given for its disqualification. Hence, it applied for administrative review to the Respondent. After receipt of the Appellant's application for administrative review, the Respondent through a letter dated 11th November 2024 informed the Appellant that the Tender process has been suspended to allow a review of the Tender.

After the review, the Respondent issued a decision which stated that the Appellant's reason for disqualification on the anomaly of the Power of Attorney was waived. The decision stated further that during the review the Appellant's tender was found to have failed to comply with the specific experience criterion of serving food, particularly to leaders. The record of Appeal indicates that this finding was communicated to the Appellant through a letter dated 18th November 2024. The Respondent's position was also stated in the reply to the Statement of Appeal. The report on the review of the tender process relied upon by the Respondent was not available in the Record of Appeal nor was it made available to the Appeals Authority during the hearing of the Appeal.

Having observed that the newly introduced reason for the Appellant's disqualification emanated from the review of the Tender process by the Respondent when handling the Appellant's application for administrative review, the Appeals Authority finds it proper to determine if the disqualification of the Appellant's tender for lack of requisite experience was justified.

In ascertaining if the disqualification of the Appellant's tender was justified, the Appeals Authority reviewed Item 1 of Section IV – Qualification and Evaluation Criteria. It observed that the referred provision provides guidance on the required specific experience for the Tender. Tenderers were required to demonstrate specific experience of working in various institutions serving food particularly to leaders. In substantiating specific experience, tenderers were required to submit three contracts which were entered between 1st January 2021 to 30th September 2024, each with a value of not less than Tanzania Shillings Thirty Million (TZS 30,000,000). Item 1 of Section IV - Qualification and Evaluation Criteria reads as follows:

"1. Experience

<i>Specific Experience</i>	<i>Experience to work in various offices serving food especially Leaders</i>
<i>Specific Experience Start Year</i>	<i>2021-01-01</i>
<i>Specific Experience End Year</i>	<i>2024 - 09 - 30</i>
<i>Number of Specific Experience</i>	<i>3</i>



Contracts

<i>Value of each specific experience contracts in the specified tender currency</i>	<i>30,000,000/=</i>
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The Appeals Authority reviewed the Appellant's tender submitted in NeST to ascertain if it complied with the specific experience criterion quoted hereinabove. It observed that the Appellant had attached various contracts which demonstrated its experience in provision of catering services. The attached contracts were as follows: -

- i) A contract for provision of catering services to patients and staff signed on 31st June 2021 between the Appellant and Mawenzi Regional Referral Hospital with a value of Tanzania Shillings Eleven Million Eight Hundred Sixty-Two Thousand (TZS 11,862,000.00) per month, starting from 31st June 2021 ending on 30th May 2023.
- ii) A contract for provision of catering services to patients and staff signed on 15th March 2022 between the Appellant and Mount Meru Regional Hospital-Arusha with a value of Tanzania Shillings One Hundred Seventy-Four Million (TZS 174,000,000.00) per year. The contract period started from 15th March 2022 up to 14th March 2024.
- iii) A contract between the Appellant and ELCT North and Central Diocese of Tanzania for provision of catering services to the Hydom Lutheran Hospital at Manyara for a contract value of

Tanzania Shillings Sixteen Million Eight Hundred Seventy Thousand only (TZS 16,870,000.00) per Month. The contract was signed on 1st January 2022 and it was to end on 31st December 2023.

- iv) A contract entered between the Appellant and KCMC valued at Tanzania Shillings Four Hundred Seventeen Million Six Hundred Thousand (TZS 417,600,000.00) per year. A contract was for two years starting from 15th January 2022 up to 14th January 2024.

After reviewing the four attached contracts, the Appeals Authority observed that they were within the period of 1st January 2021 to 30th September 2024. In addition, their values exceeded the minimum amount specified in the Tender Document. However, the Appeals Authority was unable to establish if the contracts met the requirements of serving food especially to leaders.

During the hearing, the Appeals Authority required the Respondent to explain how the criterion of serving food especially to leaders was assessed. In response thereof, the Respondent stated that in order for a tenderer to comply with the criterion of serving food especially to leaders, it was required to attach contracts for provision of catering services to public institutions which had presidential appointees. The Respondent cited the example of the Judiciary of Tanzania.

The Appeals Authority found it proper to review tenders submitted by other tenderers which participated in the Tender to establish if they complied with the specific experience criterion of serving food especially to leaders.

In the course of so doing, the Appeals Authority reviewed the Tender submitted by the proposed successful tenderer, Bony Raphael Mmanda. It was observed that in complying with the specific experience criterion, the successful tenderer had attached the following contracts: -

- i) A contract for provision of catering services entered between Bony Raphael Mmanda and the High Court of Tanzania Commercial Division with a value of Tanzania Shillings Twenty-Three Million Seven Hundred Sixty Thousand only (TZS 23,760,000.00) per year. The contract was for the financial year 2022/2023.
- ii) A contract for provision of catering services entered between Bony Raphael Mmanda and Judicial Service Commission with a value of Tanzania Shillings Fifty Million Four Hundred Thousand only (50,400,000.00) per year. The contract was signed on 2nd January 2023 and was to end on 31st December 2023.
- iii) A contract for leasing of canteen for catering services between Bony Raphael Mmanda and the Judiciary of Tanzania with a value of Tanzania Shilling One Million only (TZS 1,000,000.00) per month. The contract was signed on 5th August 2023. The contract period was one year.
- iv) A contract for provision catering services between Bony Raphael Mmanda and the Judiciary of Tanzania-High Court of Dar es Salaam Center with a value of Tanzania Shilling Forty-Three Million Two Hundred Thousand only (TZS 43,200,000.00) per month. The

contract period started from 15th October 2024 and was to end on 31st October 2024.

- v) A contract for provision catering services between Bony Raphael Mmanda and the Judiciary of Tanzania - High Court of Dodoma Center with a value of Tanzania Shilling Thirty - One Million only (TZS 31,000,000.00). The contract start date was 10th October 2024 and was to end on 24th October 2024.

After reviewing the attached contracts by the proposed successful tenderer, the Appeals Authority observed that amongst the five reviewed contracts only one was entered within 1st January 2021 to 30th September 2024 and had a contract value which exceeded TZS 30,000,000.00 specified in the Tender Document. Two contracts were entered within the specified period of 1st January 2021 to 30th September 2024. However, the contracts values were less than TZS 30,000,000.00 specified in the Tender Document. The Appeals Authority observed further that the other two contracts attached by the proposed successful tenderer were entered beyond the period specified in the Tender Document, thus were not to be considered. In addition, the attached contracts did not indicate if the proposed successful tenderer was serving food to leaders.

In view of the above observations, the Appeals Authority is of the settled view that even the proposed successful tenderer did not comply with the specific experience criterion of serving food especially to leaders. The Appeals Authority is of the firm view that the specific experience criterion in the Tender Document was ambiguous and difficult to assess. The

Appeals Authority finds the Respondent's act of using such a criterion to have contravened Section 85(2) of the Act read together with Regulation 194(2) of the Regulations which read as follows: -

"85(2) Nyaraka za zabuni zitakuwa na maelezo yanayojitosheleza ili kuruhusu na kuhamasisha ushindani na nyaraka hizo zitaeleza bayana na kwa usahihi taarifa zote muhimu zinazohitajika kwa mzabuni anayetarajiwa kwa ajili ya kuandaa zabuni ya bidhaa, huduma na kazi za ujenzi zitakazotolewa.

194 (2) Nyaraka za zabuni zitawekwa kwa namna inayoruhusu na kuhimiza ushindani na nyaraka hizo zitaweka bayana na kwa ufasaha taarifa zote muhimu kwa mzabuni mtarajiwa kuandaa zabuni".

(Emphasis supplied)

The above quoted provisions state clearly that when floating tenders procuring entities are required to ensure that the requirements which are provided in the tender document are clear for tenderers to submit responsive tenders and encourage competition.

Having reviewed the specific experience criterion, the Appeals Authority observed that the same was not clear on how tenderers should demonstrate their experience of serving food to leaders. As a result, tenderers failed to comply with such a criterion.

The Appeals Authority further reviewed Regulation 213 of the Regulations which reads as follows: -

"213. (1) Uamuzi wa taasisi nunuzi wa ukidhi wa zabuni utazingatia yaliyomo kwenye zabuni bila kutegemea ushahidi wa nje ya nyaraka zilizowasilishwa.

(2) **Pale ambapo zabuni haikidhi masharti ya nyaraka ya zabuni itakataliwa na taasisi nunuzi, na haitaweza kukidhi masharti kwa kufanyiwa marekebisho au kusahihisha ukiukwaji huo**".

(Emphasis supplied)

The above quoted provision states clearly that evaluation of tenders should be based on the contents of the Tender itself without recourse to extrinsic evidence. In addition, if a tender fails to comply with the criterion specified in the tender document, the same should be rejected. In view of this position of the law, the Respondent was also required to disqualify the tender of the proposed successful tenderer as it failed to comply with specific experience criterion.

Under the circumstances, the Appeals Authority finds the Respondent's Tender process to have not complied with the requirements of the law. Consequently, the Appeals Authority concludes the first issue in the negative that the disqualification of the Appellant's tender was not justified.

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

Taking cognizance of the above findings, the Appeals Authority hereby allows the Appeal and nullifies the Tender process and the subsequent award made to the proposed successful tenderer. Therefore, the Appeals



Authority hereby orders the Respondent to re-start the Tender process in accordance with 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 121(7) of the Act.

The Right of Judicial Review as per Section 125 of the Act is explained to the parties.

This decision is delivered in the presence of the Respondent and in the absence of the Appellant though duly notified this 13th day of December 2024.

HON. JUSTICE (rtd) SAUDA MJASIRI



CHAIRPERSON

MEMBERS: -

1. ENG. STEPHEN MAKIGO



2. MS. NDEONIKA MWAIKAMBO

