IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 03 OF 2023-24

BETWEEN

M/S AUTHENTIX INC.....APPELLANT

AND

TANZANIA BUREAU OF STANDARDS .....1ST RESPONDENT

M/S SICPA SA .....2ND RESPONDENT

M/S GLOBAL FLUIDS INTERNATIONAL (T) LTD ...3RD RESPONDENT

DECISION

CORAM

1. Hon. Justice (rtd) Sauda Mjasiri - Chairperson
2. Adv. Rosan Mbwambo - Member
3. Mr. Pius Mponzi - Member
4. Mr. James Sando - Secretary

SECRETARIAT

1. Ms. Florida Mapunda - Deputy Executive Secretary
2. Ms. Violet Limilabo - Senior Legal Officer

FOR THE APPELLANT

1. Mr. Audax Vedasto - Aldare Advocates

FOR THE 1ST RESPONDENT

1. Mr. Ayoub Sanga - State Attorney, OSG
2. Mr. Francis Oswald - State Attorney, OSG
3. Ms. Pilly Magongo - Principal State Attorney
4. Ms. Lucy Mallya - Senior State Attorney
5. Mr. Mtolera Nimrodi - Procurement Manager
6. Mr. Yona Lyimo - Procurement Officer

FOR THE 2ND RESPONDENT

1. Mr. Eric Ringo - Advocate, Fin & Law Advocates
2. Ms. Natalie Nyamwilimira - Advocate , Fin & Law advocates
3. Mr. Gianni Santoro - Chief Commercial Officer

M/S Authentix Inc (hereinafter referred to as **"the Appellant"**) has lodged this Appeal against the **Tanzania Bureau of Standards** commonly known by its acronym as "**TBS**" (hereinafter referred to as "**the 1st Respondent"**), **M/S SICPA SA** (hereinafter referred to as the **2nd Respondent**), **M/S Global Fluids International (T) Limited** (hereinafter referred to as the **3rd Respondent**). The Appeal is in respect of Tender No. PA/044/2022-2023/HQ/G/25 for Supply of Fuel Marker (Under Framework Agreement) Plastic Cylinders, Metal Jerricans, Fuel Dosing System and Fuel Marker Detection System for the Tanzania Bureau of Standards (hereinafter referred to as "**the Tender**"). 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 as amended (hereinafter referred 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 24th April 2023, the 1st Respondent floated the Tender through the Tanzania National electronic Procurement System (TANePS). The deadline for submission of tenders was on 25th May 2023. On the deadline, the 1st Respondent received three tenders from the Appellant, the 2nd Respondent and the 3rd Respondent.

The received tenders were subjected to evaluation that was conducted in three stages, namely preliminary, technical and detailed evaluation. During preliminary evaluation all tenders were found to be responsive and were subjected to technical evaluation. At the technical evaluation stage, the tender of the Appellant and that of the 3rd Respondent were found to be non-responsive for failure to comply with Tender requirements and were disqualified. The remaining tender of the 2nd Respondent was subjected to detailed evaluation and after completion, the Evaluation Committee recommended it for award of the Tender. The recommended fixed contract price was Tanzania Shillings Four and fifty five cents only (TZS 4.55) VAT Inclusive per Litre of fuel marked for a period of three years.

The Evaluation Committee's recommendations were approved at the Tender Board meeting held on 7th June 2023. The 1st Respondent contended to have issued the Notice of Intention to award through a letter

dated 7th June 2023 via TANePS. The Notice indicated that the 1st Respondent intended to award the Tender to the 2nd Respondent at a fixed contract price of Tanzania Shillings Four and fifty five cents only (TZS 4.55) VAT Inclusive per Litre of fuel marked for a period of three years. In addition, the Notice indicated that the Appellant's tender was disqualified for failure to indicate the value of its previous performed contracts.

Dissatisfied with the reason given for its disqualification and the 1st Respondent's intention to award the Tender to the 2nd Respondent, on 20th June 2023, the Appellant filed an application for administrative review to the 1st Respondent through a letter dated 17th June 2023. According to the Appellant, the 1st Respondent ought to have issued its decision by 30th June 2023. However, the Appellant contended that there was no decision issued by the 1st Respondent on 30th June 2023. Therefore, on 10th July 2023, the Appellant filed this Appeal.

Upon receiving this Appeal, the Appeals Authority notified all the three Respondents about the existence of the Appeal and required them to file their replies thereof. The 1st and 2nd Respondents filed their reply as required. The 3rd Respondent acknowledged receipt of the Appeals Authority's notification of the Appeal; however, it did not file its reply as required. Furthermore, when the matter was set for hearing, the 3rd Respondent was served with a hearing notice as was done to the 1st and 2nd Respondent. On the hearing date, the 3rd Respondent did not enter appearance.

Rule 19 of the Public Procurement Appeals Rules, GN. No. 411 of 2014 as amended (hereinafter referred to as the "**Appeals Rules**"), provides

general guidance when the Respondent fails to appear on a date set for hearing. Rule 19 of the Appeals Rules reads as follows: -

> "*19. Where the Appellant appears and the Respondent does not appear at the scheduled time on the date fixed for hearing, and if is proved that the notice was duly served but the Respondent fails to appear for no justifiable cause, the Appellant may apply to proceed ex parte*".

From the record of this Appeal it is certain that the 3rd Respondent was notified about the Appeal and it acknowledged receipt of the notification via email. When one of the 3rd Respondent's officers, Mr. Amit Noyman, was contacted by the Appeals Authority through his mobile No. 0658 838388 on 12th July 2023, he responded that having lost the tender, the 3rd Respondent was not interested to pursue the Appeal. Nevertheless, the 3rd Respondent was served with the hearing notice through the same mode that was used to notify it about the existence of the Appeal. However, on the date set for hearing the 3rd Respondent did not enter appearance. Therefore, the Appeals Authority proceeded to hear and determine the Appeal in the absence of the 3rd Respondent under Rule 19 of the Appeals Rules.

The 1st and the 2nd Respondents raised Preliminary Objections (POs) on points of law when submitting their respective Statements of Reply as hereunder:-

i) 1st Respondent's POs

a) "*The Appeal is vexatious, frivolous and untenable in law for want of the decision by Procuring Entity capable of being appealed*

against as the Appellant did not exhaust remedies available by lodging complaint as she lodged the same out of time, contrary to Sections 96 (1) and 60 of the Public Procurement Act, 2011 (as amended).

b) *In alternative to PO No. 1. above, the Appeal before this Honorable Authority is untenable in law for being filed out of time contrary to Section 96 (6), (7) and Section 97 of the Public Procurement Act, 2011 (as amended)*".

ii) 2nd Respondent PO

a) "*The Appeal is bad in law for being hopelessly time barred pursuant to Section 96(4) of the Public Procurement Act, Cap 410 RE 2022 (as amended)*".

When the matter was called on for hearing, the Appeals Authority informed the parties that it would hear both the POs and the merits of the Appeal. Therefore, the following issues were framed: -

1.0 Whether the Appeal is properly before the Appeals Authority;

2.0 Whether the Appellant's disqualification is justified;

3.0 Whether award of the Tender to the 2nd Respondent is proper in law; and

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

SUBMISSIONS BY THE 1ST RESPONDENT ON THE POs

The 1st Respondent's submissions were made by Mr. Ayoub Sanga, learned State Attorney from the Office of the Solicitor General. He argued the two

POs together. He commenced his submissions by stating that an Appeal to this Appeals Authority has to originate from an application for administrative review that has been filed in accordance with Sections 95 and 96 of the Act. The learned State Attorney submitted that the referred provisions require a tenderer who is dissatisfied with the Notice of Intention to award issued pursuant to Section 60(3) of the Act, to file an application for administrative review within seven working days to the accounting officer of the respective procuring entity.

The learned State Attorney submitted that, the Appellant did not file its application for administrative review in accordance with Sections 60(3) and 96(4) of the Act. He contended that, the Notice of Intention to award was issued on 7th June 2023 through TANePS. All tenderers received the said Notice on the same day. The learned State Attorney elaborated that, the time for filing of an application for administrative review started to run from 7th June 2023. Counting from 7th June 2023 when the Notice of Intention to award was issued, the deadline for submission of the application for administrative review was on 16th June 2023. The Appellant stated in paragraph 2(c) of its Statement of Appeal that it applied for administrative review on 21st June 2023. On the basis of the requirements of Sections 60(3) and 96(4) of the Act, the Appellant's application for administrative review was lodged beyond the stipulated seven working days. Thus, the Appellant's application for administrative review was lodged out of time.

The learned State Attorney cited the case of ***Moto Matiko Mabanga versus Ophir Energy and Six Others***, Civil Appeal No. 119 of 2021, Court of Appeal of Tanzania at Dar es Salaam, (unreported). In this case

the court made reference to the case of ***Ali Shabani and 48 others versus Tanzania National Roads Agency and the Attorney General***, Civil Appeal No. 261 of 2020, where it was held that:-

> *"it is clear that an objection as it were on account of time bar is one of the preliminary objection which courts have held to be based on a pure point of law whose determination does not require ascertainment of facts or evidence. At any rate we hold the view that no preliminary objection will be taken from the abstract without reference to some facts plain on pleadings which must be looked at without reference examination of any other evidence".*

The learned State Attorney submitted that, the cited case laid down a principle that much as a preliminary objection had to be on a pure point of law, the same could not be determined from the abstract without reviewing some plain facts on the pleadings. Following the position of the Court of Appeal in the above cited case, the learned State Attorney urged the Appeals Authority to review TANePS so as to ascertain as to when the Notice of Intention to award was communicated to tenderers. This would indicate when the time for filing an application for administrative review by the Appellant started to run.

The learned State Attorney submitted that when the Appellant's application for administrative review was received, the 1st Respondent issued its decision thereof stating that the Application was lodged out of time. The 1st Respondent further contended to have communicated its decision on the Appellant's application for administrative review through email. However, it

was later on realized that the email did not go through. Therefore, the decision was subsequently sent through ordinary mail.

The learned State Attorney submitted that since the Appellant's application for administrative review was lodged out of time, it was obvious that under the law, it was as if the same was not lodged. Thus, this Appeal lacks any leg to stand on as the same had to originate from the application for administrative review that had been filed in accordance with the requirement of the law. The learned State Attorney therefore prayed for dismissal of the Appeal for being improperly before the Appeals Authority.

SUBMISSIONS BY THE 2ND RESPONDENT ON THE POs

The 2nd Respondent's submissions were made by Ms. Natalie Nyamwilimira, learned advocate for the Appellant. She commenced her submissions by stating that the Notice of Intention to award which is the cause of action for this Appeal was issued on 7th June 2023 through TANePS. The learned counsel submitted that the Notice of Intention to award was issued pursuant to Section 60(3) of the Act and all tenderers were accorded seven working days to file an application for administrative review to the Respondent's Accounting officer.

The learned counsel stated that Section 96(4) of the Act provides guidance on the circumstances for filing an application for administrative review to the accounting officer and the time limit to do so. One of the circumstances is a tenderer's dissatisfaction with the Notice of Intention to award.

The learned counsel contended that from the record of this Appeal, the Notice of Intention to award was issued on 7th June 2023 through TANePS.

The said notice was received by all the tenderers on the same date. The learned counsel stated that had the Appellant been dissatisfied, it ought to have lodged its application for administrative review within seven working days from the date of receipt of the Notice of Intention to award. Counting from 7th June 2023, the Appellant ought to have lodged its application for administrative review by 16th June 2023. To the contrary, the Appellant lodged its application for administrative review on 21st June 2023, thus out of time.

The learned counsel submitted that since the application for administrative review is the basis of this Appeal and the same was lodged beyond the stipulated time limit, it goes without saying that this Appeal is not properly before the Appeals Authority. Therefore, the same should be dismissed.

REPLY BY THE APPELLANT ON THE POs

The Appellant's submissions were made by Mr. Audax Vedasto, learned advocate. He commenced his submissions by requesting to amend paragraph 2(c) of the Appellant's Statement of Appeal which indicated 21st June 2023 as the date of filing an application for administrative review instead of 20th June 2023. The amendment was not objected by the 1st and 2nd Respondents. The learned counsel submitted that the Appellant's application for administrative review was physically filed to the Respondent's office on 20th June 2023. A copy of a dispatch book was attached to the Appellant's Statement of Appeal as a proof of service.

The learned counsel contended that the Appellant received the Notice of Intention to award on 9th June 2023 through email. The Appellant denied

to have received the Notice that was sent on 7th June 2023 via TANePS. The learned counsel submitted that, had the 1st Respondent sent the Notice of Intention to award on 7th June 2023 as alleged, it would not have resent the same through email on 9th June 2023. Further that the 1st Respondent would not have resent the notice to all tenderers via email if it was only the 3rd Respondent who failed to receive the Notice through TANePS. Thus, the 1st Respondent's assertion for re-sending the Notice through email does not hold water. The learned counsel contended that the 1st Respondent's act of resending the Notice through email on 9th June 2023 implied that the 1st Respondent doubted the mode of service used to communicate the Notice. Hence, it opted to resend the same through email. Therefore, it is evident that the Notice of Intention to award was officially communicated on 9th June 2023.

The learned counsel submitted that, if the counting had started from 9th June 2023, the seven working days within which the Appellant was required to file its application for administrative review ought to have lapsed on 20th June 2023. The Appellant filed its application for administrative review on 20th June 2023 before the expiry of the deadline for submission of complaints. Therefore, the Appellant's application for administrative review was filed within seven working days as stipulated by the law.

The learned counsel submitted further that, the filing of an Appeal before the Appeals Authority is governed by Section 97 of the Act. According to the said provision, an appeal before the Appeals Authority can be filed if a tenderer is dissatisfied with the accounting officer's decision on the

application for administrative review or if the accounting officer fails to issue its decision within the specified time limit. In addition, the provision requires an Appeal to be filed within seven working days from the date a tenderer becomes aware of the circumstances giving rise to a complaint.

Counting from 20th June 2023 when the Appellant filed its application for administrative review, the 1st Respondent ought to have issued its decision by 30th June 2023. However, the 1st Respondent failed to issue the said decision as required by the law. The learned counsel on counting the days from 30th June 2023 when the 1st Respondent ought to have issued its decision, the seven working days for filing an appeal ought to have ended on 12th July 2023. Before the expiry of the seven working days for filing of an appeal, the Appellant lodged this Appeal on 10th July 2023. Thus, the Appeal was lodged within time.

In relation to the 1st Respondent's argument that it issued its decision with respect to the Appellant's application for administrative review and the same was served to the Appellant on 23rd June 2023; the learned counsel submitted that the 1st Respondent's decision was not served to the Appellant on the alleged date, but on the date of the hearing of this Appeal by the Appeals Authority.

The learned counsel contended that the 1st Respondent had failed to substantiate the means of communication used to effect the service. During the hearing the 1st Respondent alleged to have done the service through ordinary mail. However, a proof of service was not furnished. The learned counsel expounded that, the mailing address of the Appellant is in the United States. Thus, if the 1st Respondent had effected the service through

ordinary mail as alleged, it may have taken months to be delivered. The learned counsel submitted that according to Section 82(1) of the Interpretation of Laws Act, Cap 1 R.E 2002, service is deemed to have been effected when it is delivered to the intended person. Thus, since the 1st Respondent's decision was not served to the Appellant within the time stipulated under the law, it is evident that the service was not done.

The learned counsel therefore concluded his submissions by stating that the Appeal is properly before the Appeals Authority as it has been filed within the time stipulated under the law. Thus, the raised POs should be overruled.

In his brief rejoinder the learned State Attorney for the 1st Respondent insisted that the Notice of Intention to award was served on 7th June 2023. However, following the 3rd Respondent's request that it was unable to access the said Notice of Intention through TANePS, the 1st Respondent sent an email on 9th June 2023 to all tenderers who participated in the Tender for purposes of being equitable to all tenderers. Therefore, the learned counsel asserted that, the 1st Respondent's act in this regard did not imply that the Notice of Intention to award was not communicated on 7th June 2023 via TANePS.

The learned State Attorney contended further that, if the 3rd Respondent faced challenges in receipt of the Notice of Intention to award, the same challenge may not have been encountered by all tenderers. He added that, had the Appellant faced some challenges in relation to receipt of the Notice of Intention to award through TANePS, it ought to have raised such a

concern as was the case with the 3rd Respondent. Therefore, the Appellant's act of not raising any queries in relation to the service of the Notice of Intention through TANePS suggested that it received the notification on 7th June 2023. Since the Notice was issued on 7th June 2023, the Appellant's application for administrative review ought to have been filed by 16th June 2023. Instead, the Appellant lodged its application on 20th June 2023, thus out of time.

ANALYSIS BY THE APPEALS AUTHORITY ON THE POs

1.0 Whether the Appeal is properly before the Appeals Authority

In resolving this issue the Appeals Authority revisited Sections 95(1), 96(1) & (4) and 97(1), (2) and (3) of the Act which provide guidance on filing of an application for administrative review to the accounting officer and an Appeal to the Appeals Authority. The provisions read as follows:-

> *"95(1) Any tenderer who claims to have suffered or that may suffer any loss or injury as a result of a breach of a duty imposed on a procuring entity by this Act may seek a review in accordance with sections 96 and 97.*
>
> *96(1) Any complaints or dispute between procuring entities and tenderers which arise in respect of procurement proceedings, disposal of public assets by tender and awards of contracts shall be reviewed and decided upon a written decision of the accounting officer of a procuring entity and give reasons for his decision.*

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

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.

(3) A tenderer may submit a complaint or dispute directly to the Appeals Authority if the complaint or dispute cannot be entertained under section 96 because of entry into force of the procurement or disposal contract, and provided that the complaint or dispute is submitted within seven working days from the date when the tenderer submitting it became aware of the circumstances giving rise to the complaint or dispute

or the time when that tenderer should have become aware of those circumstances."

The above quoted provisions indicate clearly that if a tenderer is not satisfied with the procuring entity's acts or omissions, it is required to file an application for administrative review to the respective procuring entity within seven working days of becoming aware of the circumstances giving rise to a complaint. The procuring entity is required to issue its decision within seven working days. If a decision is issued and a tenderer is still dissatisfied or if the accounting officer fails to issue such a decision within a prescribed time limit; a tenderer may file an Appeal to the Appeals Authority within seven working days. In addition, a tenderer may file an Appeal to the Appeals Authority where the procurement contract has entered into force.

In this Appeal, particularly on the POs, parties' contentions center on the service of the Notice of Intention to award so as to establish the deadline for filing of an application for administrative review. On one hand, the 1st and 2nd Respondents contended that the service of the Notice of Intention to award was made through TANePS on 7th June 2023. On the other hand, the Appellant asserted that the Notice of Intention to award was issued on 9th June 2023 through email.

In ascertaining the validity of the parties' contentions, the Appeals Authority with the assistance of the Public Procurement Regulatory Authority (PPRA), reviewed the audit trail on TANePS and observed that on 7th June 2023, the 1st Respondent issued the Tender evaluation results. It is indicated on TANePS that the Tender evaluation results were sent.

However, the system does not indicate who were the recipients of the sent information and what were the contents thereof. During the hearing the 1st Respondent insisted that the sent information on TANePS was the Notice of Intention to award and the same was sent to all tenderers who participated in the Tender.

The Appeals Authority reviewed the record of Appeal and observed that on 9th June 2023, the 3rd Respondent wrote a letter to the 1st Respondent seeking to be availed with the information posted on TANePS that led the cool off period window to be open. The 3rd Respondent indicated not to have received any information that would have opened the cool off period window. In response to the 3rd Respondent's concern, the 1st Respondent through an email dated 9th June 2023 sent to all tenderers who participated in the Tender, the Notice of Intention to award.

It is evident that on 7th June 2023 the Tender evaluation results were sent via TANePS and that the system does not indicate who were the recipients and what were the contents of the sent information. In view of the above observations, the Appeals Authority is unable to ascertain the service of the 1st Respondent's Notice of Intention to award on 7th June 2023 through TANePS. In the absence of sufficient proof that the Tender evaluation results sent on 7th June 2023 via TANePS was the Notice of Intention to award and that the same was sent to all tenderers, the Appeals Authority concludes that the proper service of the Notice of Intention to award was done on 9th June 2023.

Having established that the Notice of Intention to award was issued on 9th June 2023, upon being dissatisfied the Appellant was required to file its application for administrative review within seven working days pursuant to Section 96(4) of the Act quoted above. Counting from 9th June 2023, the Appellant's application for administrative review, ought to have been filed by 20th June 2023. Upon review of the record of Appeal, the Appeals Authority observed that the Appellant filed its application for administrative review to the 1st Respondent on 20th June 2023. Thus, the Appellant's application for administrative review was filed within time.

According to Section 96(6) of the Act, the 1st Respondent was required to issue its decision within seven working days. The record of Appeal indicates that the 1st Respondent's decision was issued through a letter dated 23rd June 2023. However, there was no proof that the same was served to the Appellant. During the hearing the 1st Respondent alleged to have sent the said letter to the Appellant through ordinary mail. The Appeals Authority observed that since the record of this Appeal indicates that the Appellant's mailing address is in the United States, it is obvious that the 1st Respondent's decision that has been sent through ordinary mail would not have been received by the Appellant within seven working days as required by the law.

Following the above observations, it goes without saying that the 1st Respondent did not issue its decision within the specified seven working days. According to Section 97(1) and (2)(a) of the Act, if the accounting officer fails to issue its decision within seven working days, a tenderer who

is aggrieved, is required to file its Appeal to the Appeals Authority within seven working days.

In this Appeal the 1st Respondent was required to issue its decision by 30th June 2023. Since the 1st Respondent's decision was not issued within the specified time limit, an Appeal to this Appeals Authority ought to have been filed by 12th July 2023. The record of Appeal indicates that the Appeal was filed on 10th July 2023, thus the same was filed within the time limit as prescribed under the law.

Given the above findings, the Appeals Authority hereby overrules the raised POs by the 1st and 2nd Respondents and proceeds to determine the merits of the Appeal as hereunder.

SUBMISSIONS BY THE APPELLANT ON THE MERITS OF THE APPEAL

Mr. Audax Vedasto, the learned counsel for the Appellant commenced his submissions on the second issue by conceding that the Appellant did not disclose the values for the previously performed contracts. However, it is the Appellant's submission that non-disclosure of the previous contracts' values could not have called for such a harsh decision of disqualifying the Appellant from the Tender process. According to the learned counsel, the 1st Respondent could have simply requested the Appellant to rectify the anomaly by submitting the missing information.

In support of his arguments the learned counsel cited the case of ***Shear Illusions Limited versus Christina Ulawe Umiro***, Civil Appeal No. 114 of 2014, Court of Appeal of Tanzania at Dar es Salaam (unreported). In this

case the court accorded the Appellant an opportunity to rectify the record of appeal as it was attached with an unsigned notice of Appeal. The learned counsel further cited the case of ***Dar Express Co. Ltd versus Mathew Paulo Mbaruku***, Civil Appeal No. 132 of 2021, Court of Appeal of Tanzania at Tanga (unreported). In this case the court concluded that the Appellant ought to have been heard on the missing letters or ought to have been given the benefit of doubt on the missing information.

The learned counsel submitted that from the position of the Court of Appeal in the above referred cases whereby rectification of minor omissions was allowed, the 1st Respondent ought to have cured the Appellant's non-disclosure of the previous contracts values by directing it to disclose the same. The learned counsel contended that the 1st Respondent could have cured the non-disclosure anomaly by submitting to the Tender Board Form EXP-1 attached to the Appellant's tender which indicated prices for the previously executed contracts. The learned counsel asserted that, since non-disclosure of the previous contracts prices does not go to the root of the matter, the 1st Respondent could have easily cured the anomaly.

The learned counsel contended that the Appellant's anomaly could be cured even at this stage by it being asked to supply the missing information as it is ready to do so. The learned counsel asserted that the previous contracts prices were not disclosed earlier on due to its confidentiality. However, the Appellant is ready to disclose the same at this point with a strict request that the same should not be disclosed elsewhere apart from the 1st Respondent's office.

In relation to the awarded contract price, the learned counsel submitted that the 1st Respondent had awarded the Tender to the 2nd Respondent whose price is higher compared to that of the Appellant. The learned counsel elaborated that the 2nd Respondent's price was TZS 4.55 VAT inclusive per litre while the Appellant's price was TZS 4.44 VAT inclusive per litre. According to the Appellant, there was a difference of TZS. 0.11 cents between the 2nd Respondent's tender price and the Appellant's price. The learned counsel contended that the impact of a difference in price may look negligible if one litre was to be considered. However, if the estimated volume of 12,000,000,000 litres for a period of three years would be considered, the 1st Respondent would incur a loss of TZS 1,320,000,000.00 while such amount would have been saved if the Tender was awarded to the Appellant.

On the third issue the learned counsel submitted that, the 2nd Respondent has been convicted for corrupt practices of its employees by the Office of the Attorney General of Switzerland. According to the *Prince's Release* posted in the portal of the Swiss Government, on 27th April 2023 the Office of the Attorney General of Switzerland announced that the 2nd Respondent was ordered to pay a fine of CHF 81 million (equivalent to TZS 216,027,000,000.00 at the exchange rate of 1 CHF: 2,667 TZS). The conviction order against the 2nd Respondent was made due to its failure to take precautionary measures against its employees who were involved in corrupting foreign public officials. The 2nd Respondent's conviction was widely reported via public sources and media outlets, including a number of local newspapers, such as Majira, Taifa Tanzania and MwanaHalisi.

According to the learned counsel, the 2nd Respondent's conviction was a long–standing litigation. Therefore, the 2nd Respondent ought to have disclosed it as one of its litigation history as per Item 2.4 and 5 of Section IV: Qualification and Evaluation Criteria.

The learned counsel submitted that the 2nd Respondent had not disputed in its Statement of Reply the existence of the said conviction. However, it challenges if the same could be considered as a court judgement or an arbitral award. According to Article 352 and 354 of the Swiss Criminal Code, once an order of the Attorney General has been issued and if the same has not been challenged, the order becomes binding as a final judgment. Since the 2nd Respondent had not challenged the Attorney General's Order, the same remains to be binding as a court order.

The learned counsel submitted that as per the *Prince's Release*, the Attorney General's order was issued on 27th April 2023. Thus, by the deadline for submission of the tenders, the 2nd Respondent was aware of the existence of the order and ought to have declared it as one of its litigation history. The learned counsel submitted that since the conviction of the 2nd Respondent was published in international and local media, the 1st Respondent being aware of the facts ought to have disqualified the 2nd Respondent for failure to disclose its litigation history.

The learned counsel submitted that, according to the Tender opening record there were three tenderers which participated in this Tender and these were the Appellant, the 2nd Respondent and the 3rd Respondent. The learned counsel contended that, the 2nd and 3rd Respondents are related

companies as both are 100 percent owned by SICPA HOLDINGS SA. The learned counsel elaborated that the 3rd Respondent was incorporated in Tanzania on 4th May 2010 with Registration No. 76186. The record from Business Registration and Licensing Agency (BRELA) indicates that the company has two shareholders in the names of Global Fluids International (GFI) Global Projects Ltd and Global Fluids International (GFI) SA which is another company belonging to SICPA SA Group.

The learned counsel contended that the second shareholder, namely Global Fluids International (GFI) SA has changed its name twice, the first time being on 1st February 2016 where the name was changed to SICPA Global Fluids International SA. The second time was on 25th February 2016 where the name was changed to SICPA Global Fluids Integrity SA. The learned counsel submitted that, the letter dated 20th October 2016 written by the 2nd Respondent to Energy and Water Utilities Regulatory Authority (EWURA) indicates clearly the relationship that exists between the 2nd and 3rd Respondents that both companies are owned by SICPA SA Group.

The learned counsel submitted that the Appellant on 15th June 2023 conducted an official search to BRELA and observed that despite the changes that have taken place, up to this moment, the names of the 2nd Respondent's two shareholders still read as GFI Global Projects Ltd and Global Fluids International (GFI) SA while the name of the second shareholder has already changed to SICPA Global Fluids Integrity SA. The 2nd Respondent's act of not disclosing the change of the name of its second shareholder to BRELA implies that it intended to conceal some material

information that would have resulted into a different decision in relation to its award.

The learned counsel expounded that the 2nd and 3rd Respondents have been executing some projects jointly, including Tender No. AE/024/2016-17/HQ/N/21 for Provision of Fuel Services to EWURA in 2017 and also Tender No. SMZ/FO118/ICB/2019/20/17 for Provision of Fuel Marking Services to the Zanzibar Utilities Regulatory Authority (ZURA). The learned counsel stated that had the 1st Respondent adhered to the requirement of Clauses 3.7, 3.8 and 3.9 of the Instruction to Tenderers (ITT), it would have declared the tenders of the 2nd and 3rd Respondents non-responsive.

The learned counsel asserted that the 1st and 2nd Respondents in their Statements of Reply did not specifically deny the existence of a relationship between the 2nd and 3rd Respondents. The learned counsel relied on Order VIII Rule 3 of the Civil Procedure Code, Cap 33 RE 2019 which requires a denial to be specific while the 1st and 2nd Respondents made a general denial.

The learned counsel submitted that in conducting this Tender process the 1st Respondent contravened the requirement of Section 60(3) of the Act for issuing an award prior to the expiry of the cool off period. According to Section 60(3) of the Act, procuring entities are required to issue the notice of intention to award and accord tenderers a cool off period of seven working days for submitting complaints, if any. In this Tender the Notice of Intention to award was issued on 9th June 2023 and the cool off period ended on 20th June 2023. Prior to the expiry of the cool off period, on 16th

June 2023 the 1st Respondent awarded the Tender to the 2nd Respondent. Thus, the award made to the 2nd Respondent is invalid.

Finally, the Appellant prayed for the following orders:-

a) An order revising the decision of the 1st Respondent of intending to award the Tender to the 2nd Respondent and replacing the same with a decision awarding of the Tender to the Appellant;

b) An order directing the 1st Respondent to sign with the Appellant a formal contract and to execute its duties in it, including paying for it and giving the Appellant all the cooperation needed;

c) An order compelling the 1st Respondent to pay costs of the dispute to the Appellant;

d) An order for payment of damages to the Appellant at a sum that the Authority shall see fit and reasonable; and

e) An order granting any other relief the Appeals Authority may deem fit to award.

REPLY BY THE 1ST RESPONDENT ON THE MERITS OF THE APPEAL

The 1st Respondent's submissions were made by Mr. Ayoub Sanga, the learned State Attorney. He commenced his submissions by adopting the 1st Respondent's Statement of Reply. On the second issue, he submitted that the Appellant was among the three tenderers which participated in this Tender. The Appellant's tender was disqualified at the technical evaluation stage for failure to state the value of the previously performed contracts in its letters of reference and the three copies of contracts attached to its tender as a proof of its experience.

The learned State Attorney expounded that in complying with the experience requirement, the Appellant submitted copies of three contracts and three letters of reference. Copies of the submitted contracts had no value. In addition, out of the three submitted reference letters only one letter from National Petroleum Authority of Ghana had a contract value of more than USD 4 million per annum for the period of 36 months. The other two reference letters from the Ministry of Mining and Energy of the Republic of Serbia and that from the Energy Regulatory Board of Zambia did not disclose the contract value.

The learned State Attorney contended that according to Clause 11.1(h) of the ITT, Clause 15 of Tender Data Sheet (TDS) and Item 4.1 of Section IV – Qualification and Evaluation Criteria, tenderers were required to submit at least two (2) recent performed contracts of similar nature from 2010 to date, each with a value of not less than USD 10,000,000.00. The attached contracts were to be supported by letters of reference from previous clients that would confirm the Appellant's engagement with them. Letters of reference were to provide details of the nature of contracts executed, tenure and value. Tenderers were also required to fill and submit Form EXP-1. The learned counsel stated that the rationale of this requirement was to determine the capacity and capability of the expected successful tenderer to execute the contract of similar magnitude. Thus, the Appellant's failure to disclose previous contracts value contravened Clause 11.1(h) of the ITT, Clause 15 of the TDS and Item 4.1 of Section IV – Qualification and Evaluation Criteria. Hence, its tender was disqualified for being non-responsive to the Tender requirements.

In relation to the Appellant's assertion that Form EXP-1 that was among the documents attached to the Appellant's tender would have cured the anomaly, the learned State Attorney stated that the said Form was a stand-alone criterion as defined in TANePS. Hence, it aimed at providing information regarding the name and address of the client, date of execution and value of the projects that were to be verified from the contracts and letters of reference submitted. Therefore, the information provided by the Appellant in Form EXP – 1 could not have cured the anomaly of not complying with the requirements provided under Clause 11.1(h) of the ITT, Clause 15 of the TDS and Item 4.1 of Section IV – Qualification and Evaluation Criteria.

The learned State Attorney further disputed the Appellant's assertion that the contract price could not have been disclosed during tendering due to its confidentiality. The learned State Attorney averred that, if there was an issue of confidentiality on disclosure of some of the information, the Appellant should have sought for clarification as per Regulation 13 of the Regulations before the deadline for submission of tenders. This would have ascertained the possibility of waiving such a criterion if it would have been found to be cumbersome. To the contrary, the Appellant did not raise any concern on the issue of confidentiality in disclosing the contract value during tendering.

The learned State Attorney submitted further that, the Appellant is protected by Section 46(1) of the Act which requires a person trusted with tendering documents to deal with all documents and information relating to

tenders in confidence. Therefore, the allegation that the disclosure of contracts value was confidential is an afterthought and unfounded as the Appellant has disclosed the same information at this stage.

The learned State Attorney submitted that in this Tender, the evaluation process was conducted in accordance with Sections 40 and 72 of the Act and Regulations 202, 203, 204(1) & (2)(k) and 206(2) of the Regulations. Sections 40 and 72 of the Act require the basis for tender evaluation and selection of the successful tenderer to be clearly specified in the Tender Document. Thus, a tenderer who departs from the tender requirements deserve to be disqualified from the Tender process.

In addition, Regulations 202, 203, 204(1) & (2)(k) and 206(2) of the Regulations require evaluation of tenders to be in accordance with terms and conditions provided for in the Tender Document. Hence, a tender that fails to comply with the provided requirement is to be rejected and should not be made responsive by correction or withdrawal of the deviations. Therefore, since the Appellant failed to comply with experience requirement and conceded to the said omission, the 1st Respondent could not rectify the noted shortfalls based on the current supplied missing information or documents that were not submitted prior to the deadline for submission of tenders. The learned State Attorney contended that, if the 1st Respondent would accept the re-submitted information, such an act would affect the competitive position of other tenderers who presented substantially responsive tenders.

Regarding the ***Shear Illusions and Dar Express cases*** (supra) cited by the Appellant, the learned State Attorney submitted that the same are distinguishable to the circumstances at hand for the reasons that the Court of Appeal Rules allow such flexibility. The Tender under Appeal is guided by the issued Tender Document and procurement laws which do not allow rectification of the anomalies noted during tendering, unless the procuring entity waives the criterion equally to all tenderers. Thus, the Appellant's non disclosure of prices for the previously executed contracts was considered to be a material deviation and therefore, the Appellant's tender was disqualified.

In support of his argument the learned State Attorney cited the case *of* ***M/S English Press Limited versus Tanzania Institute of Education***, Appeal Case No. 42 of 2022-23 whereby this Appeals Authority upheld the decision of the procuring entity of disqualifying a tenderer for failure to submit major supporting documents. The learned State Attorney urged the Appeals Authority to apply the same principle that was applied in the cited case, in this Appeal.

In relation to the Appellant's lower price, the learned State Attorney submitted that, since the Appellant's tender was disqualified at the technical evaluation stage for being non-responsive to the Tender requirements, its price could not have been compared with that of the 2nd Respondent which reached the financial evaluation stage. The learned State Attorney stated that the tender price is always considered for comparison if a tenderer met the eligibility, technical and financial requirements specified in the Tender Document. Thus, if a tenderer fails to

comply with any of the criteria provided in the Tender Document, its quoted price would not be considered.

The learned State Attorney submitted that Regulations 206, 211 and 212(a) of the Regulations require a declared successful tenderer to have complied with tender requirements. A tenderer who has quoted a lower price may not necessarily be considered for an award of the contract. In the Tender under Appeal, the Appellant was not the lowest evaluated tenderer despite the fact that it quoted the lowest price. After completion of the evaluation process, the 2nd Respondent was found to be the lowest evaluated tenderer as per Clause 34.1 of ITT. Therefore it was capable of being awarded the contract.

On the Appellant's complaint that the 2nd Respondent has a litigation history after being convicted by the Office of Attorney General of Switzerland, the learned State Attorney submitted that the allegation related to the Summary Punishment Order was issued pursuant to article 102 of the Swiss Criminal Code (Corporate Liability). The penalty was about the assessed incidences of bribes and corruption committed by the former employees and advisors of the 2nd Respondent between 2008 and 2015. According to the 1st Respondent, the alleged crimes were not committed by the 2nd Respondent as a company. However, its responsibility arose from corporate liability for failure to take necessary and reasonable organizational measures to prevent breaches of the law by its employees. The learned State Attorney added that, Section IV Item 2.4 of Eligibility and Qualification Criteria requires a tenderer to state pending litigation against

it. The 2nd Respondent did not disclose the said purported pending litigation as the same was not against it as a company rather its former employees.

The learned State Attorney submitted further that much as the Appellant insisted on the existence of the litigation and conviction against the 2nd Respondent, it had not produced official documents which substantiate the raised allegations. The Appellant's assertions were based on information from the website and newspapers which cannot be relied upon in making an official decision. The counsel submitted that the alleged litigation was a mere investigation and were not court proceedings.

The learned State Attorney contended that Regulation 206(2) of the Regulations prohibits evaluation of tenders based on extrinsic evidence. Since the issue of investigation in Switzerland was not included or disclosed in the 2nd Respondent's tender, the same could not have been considered during evaluation as such an act would amount to considering extrinsic evidence. He submitted further that, if it could be assumed that the alleged investigation and the findings thereof could be considered as a binding court decision, the penalty issued would not have prevented the 2nd Respondent from executing the intended assignment in the awarded contract.

On the Appellant's complaint that the 2nd and 3rd Respondents are related companies the learned State Attorney submitted that the two firms applied for this Tender as separate and distinct legal entities. The details of registration of the 3rd Respondent from BRELA do not indicate that the 2nd Respondent and 3rd Respondent have common controlling shareholders as contended by the Appellant. In addition, the Appellant has not submitted

any evidence which substantiate that the two companies are related. Thus, the two companies are separate legal entities.

In support of his argument the learned State Attorney cited the case of ***Yusuf Manji versus Edward Masanja and another***, Civil Appeal No. 78 of 2002, Court of Appeal of Tanzania at Dar es Salaam (unreported). In this case the court cited the principle laid down in the case of ***Salomon & Salomon Co. Ltd*** (1897) A.C 22 where the act of shareholders and directors were distinguished from the act of the company.

With regard to the Appellant's argument that a letter dated 20th October 2016 from the 2nd Respondent to EWURA indicated the relationship of the 2nd and 3rd Respondents, the learned State Attorney submitted that EWURA denied to have received such a letter from the 2nd Respondent. In addition, the said letter did not indicate if the 2nd and 3rd Respondents are related.

The learned State Attorney submitted that Sections 30 and 31 of the Companies Act, Cap 212 RE 2019 require a change of name of a company or a shareholder to be registered with BRELA. In this Appeal the alleged change of the name of one of the shareholders of the 3rd Respondent's company is not reflected in the BRELA's information. Thus, the Appellant's allegation in this regard is unsubstantiated. The learned State Attorney relied on Section 110 of the Evidence Act, Cap 6, RE 2019 contending that the Appellant has not discharged the burden of proof on the existence of the relationship between the 2nd and 3rd Respondents.

Finally, the 1st Respondent prayed for the following reliefs:-

i) The Appeal be dismissed in its entirety with costs;

ii) The 1st Respondent be ordered to proceed with performance of the contract between it and the 2nd Respondent which was signed on 26th June 2023; and

iii) Any other relief deemed fit by the Appeals Authority.

REPLY BY THE 2nd RESPONDENT ON THE MERITS OF THE APPEAL

The 2nd Respondent's submissions were made by Mr. Eric Ringo, learned counsel. He commenced his submissions by adopting the 2nd Respondent's Statement of Reply and submissions made by the 1st Respondent. On the second issue he submitted that the Appellant was fairly disqualified from the Tender process for failure to comply with experience requirements as provided for in the Tender Document. He contended that Section 72 of the Act read together with Regulations 203 and 204 of the Regulations require evaluation of tenders to be in accordance with the criteria provided for in the Tender Document. Hence, a tender that would be found to have not complied with the specified requirements the same should be rejected. The learned counsel submitted that, since the Appellant failed to comply with the experience requirement, the 1st Respondent was right in disqualifying its tender. In addition, the 1st Respondent is astute, organized and observed high standard, thus, the decision not to accept the Appellant's tender was legally and financially justified as per the evaluation criteria provided in the Tender Document.

The learned counsel expounded that the 1st Respondent's role was to evaluate the tenders in accordance with the criteria provided in the Tender Document. The 1st Respondent's role was not to cure or correct the

anomaly or shortfall of a tenderer. The anomaly or shortfalls were cornerstones of the difference and purpose of evaluating a best tenderer who was the 2nd Respondent in this Tender.

The learned counsel distinguished the ***Shear Illusions and Dar Express cases*** (supra) cited by the Appellant in that the oxygen principle that was applied in the referred cases was introduced by the Court of Appeal to cure specific anomalies in exceptional circumstances. In this Appeal the disputed Tender process was governed by the Tender Document. Tenderers were required to comply with the requirements provided for in the Tender Document. Thus, non-compliance renders a tender to be non-responsive and the deviation cannot be corrected.

In relation to the Appellant's proposition that it quoted a lower price and therefore eligible for award, the learned counsel submitted that price was not the only factor that was considered for award of the Tender. In order for a tenderer to be awarded the tender it was required to comply with other requirements provided for in the Tender Document. Since the Appellant's tender was non-responsive, it could not have been considered for award. The learned counsel asserted that the 2nd Respondent was considered for award after it was found to have complied with all the requirements of the Tender Document.

With regard to the Appellant's complaint that the proposed successful tenderer did not disclose the litigation history, the learned counsel submitted that the 2nd Respondent disclosed all the material information as required by the Tender Document. He submitted that, the 2nd Respondent

has not sued or been sued in any court or in any arbitration proceedings. The alleged litigation that the Appellant insisted that it was against the 2nd Respondent was not a litigation but an investigation that was conducted against the 2nd Respondent's employees.

The learned counsel stated that there was no litigation in a court of law preceding the decision of the Office of the Attorney General in Switzerland. The matter that led the 2nd Respondent to be ordered to pay a penalty arose out of the investigation procedure that was undertaken between 2008 and 2015 by the Swiss authorities. There was no judgment that was rendered by any court in Switzerland against the 2nd Respondent. The counsel contended further that, the Office of the Attorney General through the official report from Federal Prosecutor's Office stated that its decision against the 2nd Respondent did not imply any admission of guilt.

The learned counsel submitted that according to **Black's Law dictionary** litigation means "*a contest in a court of justice for purposes of enforcing a right*". The learned counsel stated that the litigation that has been referred by the Appellant does not fall within the definition of litigation. In addition, the learned counsel contended that the availed documents do not indicate that after completion of the investigation, court proceedings were instituted against the 2nd Respondent. Thus, the penalty issued against it cannot be used to conclude that the firm has a litigation history.

The learned counsel submitted further that Item 2.3 of Section IV-Qualification and Evaluation Criteria, requires tenderers to show no consistence history of court or arbitral award decision since 1st January

2018. The alleged litigation that has been referred by the Appellant arose between 2008 to 2015, thus it is beyond the time stipulated in the Tender Document. The learned counsel added that, the penalty that has been imposed against the 2nd Respondent following the outcome of the said investigation did not affect the 2nd Respondent's capacity to execute the awarded contract.

In addition, the learned counsel submitted that the information that has been relied upon by the Appellant to prove the existence of the litigation against the 2nd Respondent has been obtained from unreliable sources. The Appellant had not presented any official communication to substantiate the raised allegations. The learned counsel therefore urged the Appeals Authority to disregard the Appellant's assertions in this regard.

In relation to the Appellant's complaint that the 2nd and 3rd Respondents are related, the learned counsel submitted that, the 2nd and 3rd Respondents are distinct and separate legal entities. According to the learned counsel the 2nd Respondent is a company that has been registered in Switzerland and governed under the laws of Switzerland while the 3rd Respondent is a company registered in Tanzania and governed under the laws of Tanzania.

The learned counsel submitted that the company's search conducted by the Appellant on 15th June 2023 from BRELA does not indicate if the 2nd Respondent is a director or a shareholder or member of the 2nd Respondent's company. In addition, a copy of the 3rd Respondent's Memorandum of Association attached to the Appellant's Statement of Appeal does not indicate the alleged relationship between the 2nd and the

3rd Respondents. The learned counsel contended further that the fact that the 2nd and 3rd Respondents had previously collaborated to execute other contracts, cannot lead to a conclusion that the two companies are legally related entities.

The learned counsel therefore concluded his submissions by stating that the Appellant's allegations against the 2nd Respondent are hopeless and frivolous since the same cannot be substantiated as contended.

Finally, the 2nd Respondent prayed for the following remedies:-

i) An order confirming the 1st Respondent's decision to award the contract to the 2nd Respondent;
ii) An order allowing the 1st and 2nd Respondents to continue with the performance of the contract which was signed on 26th June 2023;
iii) An order compelling the Appellant to pay costs of this Appeal to the 2nd Respondent;
iv) An order for payment of damages to the 2nd Respondent at the sum the Appeals Authority shall see fair and reasonable; and
v) Any other relief this Appeals Authority may deem fit and just.

On his brief rejoinder the learned counsel for the Appellant insisted on the existence of the 2nd Respondent's litigation history and the relationship between the 2nd and 3rd Respondents. The 2nd Respondent admitted on the existence of the Summary Penalty Order. On burden of proof the learned counsel for the Appellant submitted that Section 115 of the Evidence Act, Cap 6 RE 2019 shifts the burden of proof to the Respondents who have the

knowledge of the facts relating to litigation history as well as the relationship between 2nd and 3rd Respondents. The learned counsel further insisted that the Court of Appeal decisions in the ***Shear Illusions and Dar Express cases*** (supra) on the oxygen principle were based on Article 107 of the Constitution of the United Republic of Tanzania, 1977 as amended and are relevant in the instant Appeal.

ANALYSIS BY THE APPEALS AUTHORITY ON THE MERITS OF THE APPEAL

2.0 Whether the Appellant's disqualification is justified

The record of this Appeal indicates that the Appellant was disqualified for failure to disclose previous contracts value for substantiating its experience as required by Clause 11.1(h) of the ITT which was modified by Clause 15 of the TDS read together with Item 4.1 of Section IV – Qualification and Evaluation Criteria. Item 4.1 of Section IV – Qualification and Evaluation Criteria reads as follows:-

> "***4.1 Specific Experience***
>
> ***Experience in supply of the relevant goods, submit at least two (2) recent performed contracts of similar nature from 2010 to date of the amount not less than USD 10,000,000.00, where all elements of the technology were integrated for the period of three (3) years. In each assignment performed the bidder shall provide the name and address of the client, date of execution and value of the project; and attach letters of reference to support the above".*** (Emphasis supplied)

The above quoted provision states clearly that specific experience for this Tender was to be proved by submission of at least two recent performed contracts with a value of not less than USD 10,000,000.00. In each performed contract tenderers were required to provide name and address of a client, date of execution and value of the project. Tenderers were required to submit letters of reference to support the contents of the submitted contracts. In addition, in complying with experience requirements, Clause 4.1 of Section IV – Qualification and Evaluation Criteria required tenderers to fill in Form EXP-1. The said Form required tenderers to indicate the name of the purchaser, value, year, goods/service supplied and country of destination.

In order to ascertain if the Appellant complied with experience requirement the Appeals Authority reviewed its tender on TANePS and observed that in proving the required experience, the Appellant attached copies of three contracts it executed with National Petroleum Authority (Ghana), Ministry of Mining and Energy (Republic of Serbia) and Energy Regulatory Board (Zambia). In all the three contracts, contract values were not disclosed. The Appeals Authority observed further that the Appellant attached to its tender three letters of reference from its previous clients. Among the attached letters only one from the National Petroleum Authority (Ghana) indicated the contract value of USD Four Million per annum. The remaining two letters did not indicate the contract value. It was further observed that the Appellant submitted Form EXP-1 which listed the name of the client, value, year, good/services supplied and country of destination.

Having reviewed the documents attached to the Appellant's tender as a proof of its experience, the Appeals Authority observed that the Appellant did not disclose the contract value in the submitted copies of contracts as per the requirements of Item 4.1 of Section IV – Qualification and Evaluation Criteria. The Appellant indicated the contracts prices in Form EXP-1. However, the prices in Form EXP-1 could not be verified from the attached contracts. In addition, only one letter of reference from National Petroleum Authority (Ghana) indicated the contract price which could be verified from Form EXP-1. The remaining two letters of reference did not disclose the contract value.

Item 4.1 of Section IV – Qualification and Evaluation Criteria required tenderers to submit as a proof of their experience at least two contracts with a value of not less than USD 10,000,000.00. It also required tenderers to submit letters of reference that indicate the name of the client, date of execution and the contract value. The Appeals Authority is of the considered view that the Appellant's failure to indicate the contract value in at least two contracts and letters of reference contravened the requirements of the Tender Document.

The Appeals Authority considered the Appellant's proposition that Form EXP-1 sufficed to cure the noted anomaly. Having considered the requirements of Item 4.1 of Section IV – Qualification and Evaluation Criteria, the Appeals Authority is of the firm view that Form EXP-1 alone was not sufficient to ascertain the contract value without it being supported by letters of reference and copies of contracts. Thus, the Appellant's assertion in this regard is rejected.

The Appeals Authority further considered the Appellant's proposition that the noted omission could be cured at this juncture as it is ready to disclose the previous contract prices. In the Appeals Authority's view such an act would amount to making a non-responsive tender responsive contrary to the requirements of Regulation 206(1) of the Regulations which reads as follows: -

> *"206(1)* ***The procuring entity's determination of a tender's responsiveness shall be based on the contents of the tender itself without recourse to extrinsic evidence***".
>
> Emphasis added

In relation to the Appellant's contention that it quoted a lower price and therefore it should have been considered for award, the Appeals Authority observed that since the Appellant was disqualified at the technical evaluation stage for failure to comply with experience requirement, its tender could not have been subjected to financial comparison. According to Regulation 212 of the Regulations, a successful tender shall be the tender with the lowest evaluated tender price for goods, works or services or the highest evaluated tender in case of revenue collection. A lowest submitted tender may not necessarily be awarded the contract. Regulation 212 of the Regulations reads as follows: -

> *"Reg. 212* ***The successful tenderer shall be -***
>
> *(a)* ***the tender with the lowest evaluated tender price in case of goods, works, or services,*** *or the highest evaluated tender price in case of revenue*

collection ***but not necessarily the lowest or highest submitted price****, subject to any margin of preference applied."*

(Emphasis supplied)

In view of the above, the Appeals Authority finds the Respondent's act of disqualifying the Appellant to be proper and in accordance with Regulation 206(2) of the Regulations which reads as follows: -

"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 supplied

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

3.0 Whether award of the Tender to the 2nd Respondent was proper in law

In resolving this issue the Appeals Authority considered the parties' rival submissions with regard to the alleged relationship that exists between the 2nd and 3rd Respondents. On one hand, the Appellant submitted that the 2nd and 3rd Respondents are related companies as both are owned by 100 percent by SICPA Holding SA. Thus, the two companies ought not to have participated in this Tender. On the other hand, the 1st and 2nd Respondents denied the existence of the alleged relationship and submitted that the two

companies are distinct legal entities and are not related as alleged by the Appellant.

In order to ascertain the validity of the parties' argument in this regard, the Appeals Authority sought clarification from BRELA. BRELA informed this Appeals Authority that the shareholders of the 3rd Respondent are GFI Global Projects Ltd with 999 shares and Global Fluids International (GFI) S.A which owns one share. The Appeals Authority noted from Annexture "N 129" and "O 130" (certificates for change of names) attached to the Appellant's Statement of Appeal that Global Fluid International (GFI) S.A which is one of the shareholders of the 3rd Respondent had changed its name to SICPA Global Fluids International SA on 1st February 2016. On 25th February 2016, the company again changed its name from SICPA Global Fluids International SA to SICPA Global Fluids Integrity SA.

The Appeals Authority reviewed annexture "L 125" attached to the Appellant's Statement of Appeal and observed that it was a letter written by the 2nd Respondent addressed to EWURA which stated that the 2nd Respondent owns 100 percent SICPA Finance SA and SICPA Finance SA owns SICPA Global Fluids Integrity SA who is a shareholder of the 3rd Respondent that has changed its name as detailed above. SICPA Global Fluids Integrity SA which was initially known as Global Fluids International (GFI) SA owns one ordinary share in the 3rd Respondent's company.

The Appeals Authority observed further that Annexture "L 125" that was relied upon by the Appellant does not show how GFI Global Projects Ltd which owns 999 shares of the 3rd Respondent's company relates to the 2nd Respondent. In addition, the documents availed before the Appeals

Authority do not indicate how SICPA Holdings SA owns both the 2nd and 3rd Respondents neither does it indicate which owns GFI Global Projects Ltd, a major shareholder of the 3rd Respondent's company.

Clause 3.7 of the ITT provides guidance on the circumstances that might render a tenderer to be considered to have conflict of interest and therefore not eligible to tender. Clause 3.7(b) of the ITT reads as follows:-

> "3.7 ***A tenderer shall not have a conflict of interest. All tenderers found to have conflict of interest shall be disqualified. A tenderer may be considered to have a conflict of interest with one or more parties in this tendering process, if they: -***
>
> ***a) .....***
>
> ***b) Have controlling shareholders in common;"***
>
> (Emphasis supplied)

Given the above observations, the Appeals Authority finds the Appellant to have failed to establish that the 2nd and the 3rd Respondents have got controlling shareholders in common that could have made them ineligible to participate in this Tender as per clause 3.7 of the ITT.

The Appeals Authority considered the Appellant's complaint that the 2nd Respondent did not disclose its litigation history as required by the Tender Document. According to the Appellant the 2nd Respondent was convicted by the Office of the Attorney General of Switzerland and ordered to pay a fine of CHF 81 million as a corporate liability for its employees being involved in corrupt practices with foreign public officials. The 1st and the 2nd

Respondents on the their part submitted that the order issued by the Office of the Attorney General of Switzerland was not a court order or an arbitral award that would have rendered the 2nd Respondent to be considered to have a litigation history. In addition, the said order was issued as a result of the conduct of the 2nd Respondent's employees and not an act that was committed by the 2nd Respondent's company.

In resolving the contentious arguments by the parties on this point, the Appeals Authority reviewed the Tender Document and observed that the requirement for disclosure of litigation history was under Item 2.4 of Section IV Qualification and Evaluation Criteria and Form PER-1. Item 2.4 of Section IV Qualification and Evaluation Criteria reads as follows: -

> *"2.4 Litigation History*
>
> ***No consistent history of court/arbitral award decisions against a tenderer since 1st January 2018".*** (Emphasis supplied)

According to the record of Appeal, on 27th April 2023 the Office of the Attorney General of Switzerland issued a Summary Penalty Order which required the 2nd Respondent to pay CHF 81 Million being a penalty for its employees involvement in corrupt practices with foreign public officials. The Appeals Authority observed further that the 2nd Respondent did not dispute the existence of the said penalty rather it stated that the said penalty could not be considered as a court order or an arbitral award for it to be considered as a litigation history.

The Appeals Authority reviewed the Swiss Criminal Procedure Code and observed that Article 354 allows an accused or any other person who has

been affected by the issuance of the Summary Penalty Order to file a written rejection. Article 354(3) of the same Swiss Criminal Procedure Code states clearly that if a Summary Penalty Order is not challenged as per the provided procedures, the order becomes a final judgment.

Having reviewed the record of Appeal the Appeals Authority observed that the 2nd Respondent had accepted the Summary Penalty Order and no valid rejection has been filed. The Appeals Authority is of the firm view that since the Summary Penalty Order was not challenged, the same became a final enforceable criminal judgment.

Clause 3.8 of the ITT provides for circumstances that may render a tenderer ineligible to participate in a tender. Clause 3.8 (d) of the ITT reads as follows: -

> "***3.8 A tenderer may be ineligible if-***
>
> d) ***The tenderer is convicted, by a final judgment of any offence involving professional conduct;***"

In the Appeals Authority's view Summary Penalty Order that has been issued against the 2nd Respondent due to corrupt practices falls under the category of professional conduct. Given the requirements of Clause 3.8(d) of the ITT, the conviction of the 2nd Respondent through the Summary Penalty Order issued by the Office of the Attorney General of Switzerland makes it ineligible to participate in this the Tender.

The Appeals Authority considered the 2nd Respondent's proposition that the Summary Penalty Order related to investigation conducted between 2008 to 2015 and therefore does not fall within the disclosure period provided under the Tender Document. The Appeals Authority rejects the proposition

since the Summary Penalty Order has been issued on 27th April 2023 and therefore the duty of disclosure by the 2nd Respondent still remains. Equally the Appeals Authority rejects the 2nd Respondent's proposition that Summary Penalty Order concern its employees and not the company itself on the reason that the company is vicariously liable for the acts of its employees.

The Appeals Authority observed further that the Summary Penalty Order was issued on 27th April 2023. The deadline for submission of tenders was on 25th May 2023. In the circumstances the Appeals Authority finds that the 2nd Respondent should have disclosed the existence of this final judgment.

Therefore, the 2nd Respondent's failure to disclose the existence of this judgment as a litigation history contravened Item 2.4 of Section IV Qualification and Evaluation Criteria.

In view of the above findings the Appeals Authority concludes the third issue in the negative that award of the Tender to the 2nd Respondent was not proper in the eyes of the law for want of disclosure of litigation history.

The Appeals Authority also considered the Appellant's complaint that the 1st Respondent had awarded the Tender prior to the expiration of the cool off period. It was observed that this was a new ground raised during the hearing of this Appeal as it was not contained in the Appellant's Statement of Appeal. However, in paragraph 2 (f) and (g) of the 1st Respondent's Statement of reply it was stated that on 16th June 2023, the 1st Respondent issued an award letter to the 2nd Respondent and the contract was signed on 26th June 2023. The Appeals Authority proceeded to determine this

point pursuant to Rule 13(5) of the Appeals Rules. This Rule allows the Appeals Authority to determine new issues which were not in the original written submissions but were raised in the Respondent's reply.

Section 60(3) of the Act requires procuring entities when issuing a notice of intention to award to accord tenderers seven working days as a cool off period for filing complaints, if any prior to proceeding with award of the Tender. Section 60(3) reads as follows:-

> "S.*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.***"
> Emphasis supplied

According to the record of Appeal, the Notice of intention to award was issued on 9th June 2023. The seven working days for filing complaints expired on 20th June 2023. On 16th June 2023 prior to the expiry of the cool off period, the 1st Respondent awarded the Tender to the 2nd Respondent. Based on the requirement of Section 60(3) of the Act, the Appeals Authority finds the 1st Respondent to have erred in law for awarding the Tender prior to the expiration of the cool off period. The Appeals Authority finds the 1st Respondent's act in this regard to be highly irregular.

Given the fact that we have already found that the award of the Tender to the 2nd Respondent was not proper in law, the letter of award and the signed contract are therefore a nullity.

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

Taking cognizance of the above findings, the Appeal is hereby allowed to that extent. The Appeals Authority hereby nullifies the 1st Respondent's award made to the 2nd Respondent. The 1st Respondent is ordered 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 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 11th day of August 2023.

HON. JUSTICE (rtd) SAUDA MJASIRI

.....

CHAIRPERSON

MEMBERS: -

1. ADV. ROSAN MBWAMBO.....

2. MR. PIUS MPONZI .....