

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 4 OF 2022-23

BETWEEN

M/S BAHARI PHARMACY LIMITED.....APPELLANT

AND

REGIONAL ADMINISTRATIVE

SECRETARY- PWANI REGION.....RESPONDENT

DECISION

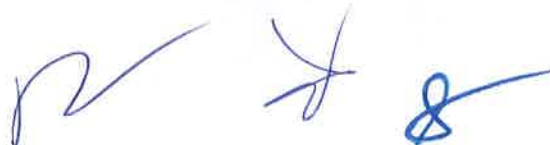
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|---------------------------|-------------------|
| 1. Adv. Rosan Mbwambo | - Ag. Chairperson |
| 2. Mr. Rhoben Nkori | - Member |
| 3. Dr. William Kazungu | - Member |
| 4. Ms. Florida R. Mapunda | - Ag. Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|-----------------------|--|
| 1. Mr. Esaba Manyama | - Procurement Consultant- Ekama
General Supply & Services |
| 2. Mr. Richard Olotu | - Manager - Institutional Business |
| 3. Mr. Zacharia James | - Sales and Marketing Manager |



FOR THE RESPONDENT

1. Ms. Moza Mtete - Regional Legal Officer
2. Mr. Amelchior M. Kulwizila - Head Procurement Management Unit
3. Mr. Obadiah M. Malima - Chief Internal Auditor
4. Ms. Happiness Twakaniki - Senior Supplies Officer
5. Mr. Joseph A. Mally - Head Information and Communication Technology
6. Mr. Swalehe F. Njoma - Legal Officer

Before this Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") M/S Bahari Pharmacy Limited (hereinafter referred to as "**the Appellant**") has preferred an appeal against the Regional Administrative Secretary - Pwani Region (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. RAS/013/2021-2022/G/54 Lot 4 for the Supply of Medical Supplies (Other than Medicine, Diagnostics Medical Supplies) (hereinafter referred to as "**the Tender**"). Its background may be summarized as follows: -

A pre-qualification process was floated on 28th December 2021. Deadline for submission of applications was set for 12th January 2022. Four applicants, the Appellant inclusive submitted their applications. In the course of evaluation, the Evaluation Committee failed to download some attachments to the applications and consequently recommended rejection of the Pre-qualification process. As a result, Procurement Management Unit



(PMU) recommended to the Tender Board rejection of the pre-qualification process and commencement of the Tender process using National Shopping Procurement Method.

The Tender Board through Circular Resolution dated 27th January 2022, approved the recommendations and directed that only applicants whose applications were rejected should be invited for tendering. In compliance with the Tender Board's directives, on 15th February 2022, the Respondent invited the four applicants to submit their tenders. Deadline for submission of tenders was set for 21st February 2022. However, none of them responded to the invitation.

On 22nd February 2022, the Tender Board through a Circular Resolution approved the proposal to reject the Tender and to invite other potential tenderers in addition to the previous four. On 24th February 2022 the Respondent through Tanzania National electronic Procurement System (TANePS), invited eligible tenderers to submit their Tenders. The deadline for submissions was set for 28th February 2022. On the deadline, four tenders were received including that of the Appellant.

The received tenders were evaluated accordingly. After completion of the evaluation process the Evaluation Committee recommended award of the Tender to M/S Kasimwa General Supplies. The Tender Board at its meeting held on 1st June 2022, approved the award as recommended by the Evaluation Committee subject to due diligence. The due diligence was



conducted on 17th June 2022 and the proposed tenderer was found responsive. The Tender Board at its meeting held on 21st June 2022, approved the award of the Tender to M/S Kasimwa General Supplies.

On 11th July 2022, the Respondent issued the Notice of Intention to Award the Tender to all tenderers who participated in the Tender. The Notice informed tenderers that the Respondent intends to award the Tender to M/S Kasimwa General Supplies for a period of three years. The Notice also informed the Appellant that it was disqualified because it failed to submit motor vehicles registration cards or lease agreement to prove ownership of vehicles or leasing authority. The Appellant was also found to have not attached certificates for listed eighty eight (88) key personnel. Further that the Power of Attorney was not legally authorized as required in the Tender Document.

Dissatisfied with reasons given for its disqualification and the proposed award to M/S Kasimwa General Supplies, on 12th July 2022 the Appellant submitted an application for administrative review. On 21st July 2022, the Respondent issued its decision dismissing the Appellant's application for administrative review. Aggrieved further, on 29th July 2022, the Appellant lodged this Appeal. The Respondent accordingly filed a reply to the statement of appeal.

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Two issues were framed for determination namely: -

(i) Whether or not proposed award of the Tender to M/S Kasimwa General Supplies is justified; and

(ii) What reliefs, if any, are the parties entitled to?

SUBMISSIONS BY THE APPELLANT

The Appellant submitted that M/S Kasimwa General Supplies was had not been pre-qualified. According to the Appellant, Clause 3.1 of the Instruction To Tenderers (ITT) read together with Item 1 of the Invitation For Tenders, tenderers who were required to participate in this tender should first be pre-qualified. M/S Kasimwa General Supplies did not participate in the pre-qualification process and therefore was not among the pre-qualified tenderers. The Appellant stated that eligible tenderers for this Tender should be a company or firm short-listed in the prequalification process. Therefore, the Respondent's act of inviting a non-prequalified tenderer to participate in the Tender is not justified.

The Appellant submitted further that, the Respondent floated this Tender using National Shopping procurement method. Apparently, the value of the contracts exceeds TZS 120,000,000.00. The Appellant contended further that the contract value indicated in TANePS is TZS 5,000,000.00. Therefore, the Respondent should have used minor value procurement method instead which has a threshold of TZS 10,000,000.00 for goods.



Thus, the Respondent used a procurement method which was not suitable for this Tender.

The Appellant stated further that, the Tender in question is not valid as its bid validity period had expired. The Appellant elaborated that Clause 17 of the ITT modified by Clause 8 of the Tender Data Sheet (TDS) states clearly that the bid validity period for this Tender was 120 days. Counting from 28th February 2022 when the Tender was opened, 120 days expired on 28th June 2022, while the Respondent issued the Notice of intention to award the Tender on 11th July 2022.

Finally, the Appellant prayed for re-evaluation of the Tender.

REPLY BY THE RESPONDENT

The Respondent commenced its submissions stating that the Tender started with a pre-qualification process advertised through TANePS on 28th December 2021. The deadline for submission of applications was on 12th January 2022. Four tenderers duly submitted their respective applications. M/S Kasimwa General Supplies, the proposed successful tenderer was not among them. During evaluation the evaluation committee failed to access some attachments because TANePS had technical problems. It was recommended to reject the prequalification.

The Respondent expounded further that, after obtaining Tender Board's approval the Respondent issued a new Tender Document to tenderers who previously applied for the Pre-qualification. The new Tender Document was



issued on 15th February 2022 using National Shopping Procurement Method. Deadline for submission of tenders was set for 21st February 2022. None of the invited tenderers responded to the invitation.

The Respondent submitted further that having not received responses from the invited tenderers it opted to re-advertise the Tender through TANEPS by inviting more tenderers in addition to those who showed interest in the previous rejected pre-qualification. The invitation was issued on 24th February 2022 using National Shopping Procurement Method. Deadline for submission was set for 28th February 2022. By the deadline four tenders including that of M/S Kasimwa General Supplies and the Appellant were received. After completion of the evaluation process the bid submitted by M/S Kasimwa General Supplies was found responsive.

The Respondent added that, the purpose of this Tender was to award the contract to a tenderer who would supply medicines in case the Medical Stores Department (MSD) fails to supply. Therefore, total quoted prices by the tenderers were not relevant. According to the Respondent prices are normally assessed based on the price cap issued by MSD. The Respondent confirmed that the estimated contract value for this Tender was TZS 5,000,000.00.

On the complaint that the bid validity period had already expired, the Respondent submitted that, this is a new ground as it was not included in the Statement of Appeal. It should therefore, be expunged and or not entertained.



In the alternative the Respondent submitted that the bid validity period for this Tender was 120 days. The said period started to run from 28th February 2022 when tenders were opened. The Respondent expounded that the Tender Board at its meeting held on 21st June 2022 approved award of the Tender to M/S Kasimwa General Supplies. Thus, the award was made within the bid validity period.

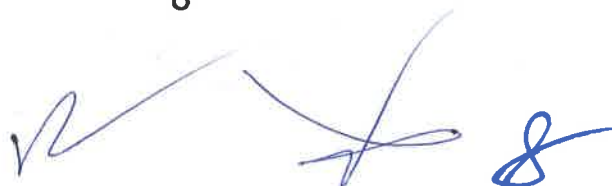
Finally, the Respondent stated that, the Appellant's prayer for re-evaluation is baseless due to the fact that the evaluation process was fair and just as it complied with the set criteria in the Tender Document. Therefore, this appeal should be dismissed.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether or not the proposed award of the Tender to M/S Kasimwa General Supplies is justified

Before determining this issue, the Appeals Authority deems it proper to consider the Appellant's complaint that there is no valid tender because the Bid Validity Period had expired. The Respondent's reaction is that this complaint is not in the statement of appeal. It is a new ground and thus should not be entertained.

According to Rule 6 (h) of the Public Procurement Appeals Rules, GN. No 411 of 2014 as amended in 2017 (hereinafter referred to as the **Appeals**



Rules) the Appeals Authority is vested with powers to determine any matter which, in its view, deems appealable.

It is not disputed that complaint as to bid validity period is not one of the grounds of appeal set out in the statement of appeal. It was raised during the hearing. Section 71 of the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") provides that bid validity period is a period within which tenders and their securities are required to remain valid.

According to Section 71 of the Act the bid validity period starts to run from the tender opening date up to the date award of the tender is approved by the Tender Board. Compliance with a bid validity period is, in the Appeals Authority's considered view, one of the important requirements in any tender. Therefore, the Appeals Authority deems it to be among the matters which are capable of being appealed against, the fact that it was not set out in the Statement of Appeal, notwithstanding.

Clause 17.1 of the ITT modified by Clause 8 of the TDS specified the bid validity period for this Tender to be one hundred and twenty (120) days. This fact was not disputed by either of the parties. Opening of the tenders took place on 28th February 2022. Counting from 28th February 2022, the 120 days expired on 28th June 2022. Section 71 of the Act reads: -

Sec.71 "The procuring entity shall require tenderers to make their tenders and tender securities including tender



securing declaration valid for periods specified in the tendering documents, sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders and for the appropriate tender board to review the recommendations and approve the contract or contracts to be awarded whilst the tenders are still valid."

(Emphasis Added)

The above quoted provision provides clearly that tenderers are required to make their tenders valid for a period specified in the Tender Document. The Tender validity period should be sufficient to enable a procuring entity to complete the evaluation of tenders and for the appropriate Tender Board to review the recommendations and approve award of the contract.

According to the record of Appeal the Tender Board approved the award of the Tender to M/S Kasimwa General Supplies on 21st June 2022. It is clear that award of the contract was approved by the Tender Board while the Tender was still valid. Therefore, there is a valid tender before the Appeals Authority.

The Appeals Authority now proceeds to determine the issue whether or not award of the tender to M/S Kasimwa General Supplies was justified. The Appellant's contention is that M/S Kasimwa General Supplies did not participate in the pre-qualification process. It therefore, was not among the

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pre-qualified firms eligible to participate in this Tender as per the requirements of the Tender Document.

Item 1 of the Invitation For Tenders indicates that invited tenderers have been pre-qualified. Clause 3.1 of the ITT also states that an eligible tenderer shall be a company or firm that has been short-listed in the pre-qualification process. The said clauses read as follows: -

"Item 1 We hereby inform you that you are pre-qualified for tendering for the above cited tender."

"Clause 3.1 A Tenderer shall be a company or firm short-listed in the pre-qualification tender."

During the hearing the Respondent was asked to clarify whether the above quoted provisions of the Tender Document were adhered to. The Respondent readily conceded that they were not. The Respondent was quick to point out that these requirements were mistakenly included in the Tender Document.

According to Section 72(1) of the Act the basis for evaluation of tenders should be specifically prescribed in the Tender Document. Section 72(1) of the Act reads as follows: -

Sec. 72 (1) *"The basis for tender evaluation and selection of the successful tenderer shall be clearly specified in the tender document".*




Based on the above quoted provision, the Respondent has specified through Clause 3.1 of the ITT that eligible tenderers "*...shall be a company or firm shortlisted in the pre-qualification tender*". The said requirement ought to have been adhered to during evaluation process. However, the record of Appeal indicates that the pre-qualification process was rejected through Circular Resolution dated 27th January 2022. Following the rejection of the pre-qualification process, the Respondent was not required to include in the Tender Document a requirement that eligible tenderers were those who have been pre-qualified. The inclusion of such requirement through Clause 3.1 of the ITT renders the participation of M/S Kasimwa General Supplies and other tenderers including the Appellant invalid, since all were not pre-qualified. Therefore, the proposed Tender award to M/S Kasimwa General Supplies is not justified.

Under the circumstances, the Appeals Authority concludes the first issue in the negative.

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

Taking cognizance of the findings hereinabove, the Appeals Authority hereby allow the Appeal with no order as to costs. The Respondent is ordered to start the Tender process with respect to Lot 4 afresh in compliance with the law.

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 24th day of August 2022.

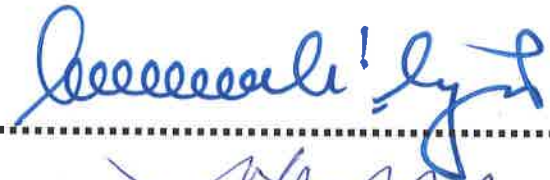
ADV. ROSAN MBWAMBO



Ag: CHAIRPERSON

MEMBERS: -

1. MR. RHOBEN NKORI



2. DR. WILLIAM KAZUNGU

