

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 1 OF 2022-23

BETWEEN

M/S MARANATHA PHARMACY LIMITED.....APPELLANT

AND

REGIONAL ADMINISTRATIVE

SECRETARY- MBEYA.....RESPONDENT

DECISION

- |                           |                   |
|---------------------------|-------------------|
| 1. Adv. Rosan S. Mbwambo  | - Ag. Chairperson |
| 2. Eng. Stephen P. Makigo | - Member          |
| 3. Dr. William M. 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 |
| 2. Mr. Joseph Alila   | - Operations             |
| 3. Mr. Hussein Nasib  | - Operations             |
| 4. Mr. Kajembe Mkufya | - Sales Representatives  |

#### FOR THE RESPONDENT

- |                          |                       |
|--------------------------|-----------------------|
| 1. Mr. Rogers Francis    | Senior State Attorney |
| 2. Mr. Victor Mgaya      | Supplies Officer      |
| 3. Ms. Angelica Waungiza | Supplies Officer      |
| 4. Mr. Erick Mrema       | Internal Auditor      |

M/S Maranatha Pharmacy Ltd (hereinafter referred to as "**the Appellant**") has preferred this appeal against Regional Administrative Secretary- Mbeya (hereinafter referred to as "**the Respondent**"). According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") its background may be summarized as follows: -

The Appeal is in respect of Pre-qualification No. RAS.005/2021-2022/G/015 Lots I, II, III, and IV for Supply of Medicine, Diagnostic, Laboratory Reagents, Medical Supplies, Orthopedics and Medical Equipment for Public Health Facilities in Mbeya Region (hereinafter referred to as "**the Pre-qualification**").

The Pre-qualification was conducted through Tanzania National e-Procurement System (TANePS) as specified under the Public Procurement Act, No. 7 of 2011 as amended in 2016 (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 446 of 2013 as amended by GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**").



On 28<sup>th</sup> April 2022, the Respondent through TANEPS invited eligible applicants to participate in the Pre-qualification. Deadline for submission of applications was set for 18<sup>th</sup> May 2022. On the deadline, twenty (20) applications including that of the Appellant were received. The received applications were accordingly evaluated. After completion of the evaluation process, the Evaluation Committee recommended seven applicants to be shortlisted. The shortlisted applicants were M/S Babito Trading Company Ltd, M/S Kissa Pharmacy Ltd, M/S Vasco Pharmaceutical Company Ltd, M/S Heko Pharmacy Ltd, M/S Abacus Pharma (Africa) Ltd, M/S Lifeline Pharmacy Ltd and M/S Tindwa Medical and Health Services Ltd.

The Tender Board at its meeting held on 14<sup>th</sup> June 2022, deliberated and approved the shortlisted seven applicants as proposed by the Evaluation Committee. On 29<sup>th</sup> June 2022, through a Notice of Intention to award the Respondent informed all applicants that it intends to pre-qualify the above applicants. The notice also informed the Appellant that its application was disqualified for attaching unwanted documents.

Dissatisfied with its disqualification, on 30<sup>th</sup> June 2022 the Appellant applied for administrative review to the Respondent. On 5<sup>th</sup> July 2022 the Respondent issued its decision which dismissed the application for administrative review. Aggrieved further, on 13<sup>th</sup> July 2022, the Appellant lodged this Appeal.

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

- 1.0 Whether the disqualification of the Appellant's application is justified; and**
- 2.0 What reliefs, if any, are the parties entitled to.**

### **SUBMISSIONS BY THE APPELLANT**

The Appellant's grounds of Appeal as well as oral submissions may be summarized as follows:-

With regard to the first issue, the Appellant submitted that the Respondent erred in law for disqualifying the Appellant's application basing on single criterion instead of the pre-set minimum pass mark of 75% provided in the Pre-Qualification Document. The Appellant submitted that only an applicant who scored less than the minimum score prescribed in the Pre-Qualification Document should have been disqualified.

The Appellant expounded that Regulation 122(5) of the Regulations prohibits procuring entities from limiting participation of tenderers as all qualified firms should be prequalified for further scrutiny during the tender process. It was the Appellant further submissions that according to Regulation 124 of the Regulations the procuring entity is allowed to verify information submitted by the applicants during pre-qualification process at the post-qualification stage. The Appellant stated that its failure to submit



motor vehicle registration cards would not have rendered to its disqualification as the Respondent could verify the ownership of the listed motor vehicles during post qualification.

According to Regulation 6(2) of the Regulations, procuring entities are prohibited from disqualifying applicants for reasons other than legal capacity, financial capability and experience. The Appellant was disqualified for reasons other than those provided for under Regulation 6(2) of the Regulations as such the disqualification was not justified, the Appellant contended.

It was also submitted that proof of ownership of the listed motor vehicles was provided as per the requirements of the Pre-qualification Document. The Appellant attached certificates issued by Tanzania Medicine & Medical Devices Authority (TMDA). According to Section 18(1) of the Tanzania Medicines and Medical Devices Act, Cap 219 R.E 2021 medical vendors are prohibited from supplying or storing medical products using premises which are not registered by TMDA. The Appellant added further that, according to Section 3 of the same Act, the definition of the term premises includes motor vehicles. The Appellant claimed that its act of submitting certificates issued by TMDA as a proof that its vehicles have been registered and authorized to perform the function of supplying medical products was proper. According to the Appellant the submitted TMDA certificates were more relevant to the Pre-qualification than mere registration cards issued by Tanzania Revenue Authority. Thus, the Appellant contended that the

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Respondent's act of disqualifying it contravened Section 72 of the Act and Regulation 6(2) of the Regulations read together with Clause 4.1 of the General Instructions To Applicants (GITA).

Finally, the Appellant prayed for the following orders:-

- i. Re-evaluation of the Appellant's application; and
- ii. Refund of legal consultation fees, transport and accommodation during hearing amounting to TZS. 3,000,000.00.

### **REPLY BY THE RESPONDENT**

The Respondent in reply submitted that, the Appellant was disqualified for failure to comply with requirements of Appendix 13 of the Pre-Qualification Document. Appendix 13 required applicants to submit copies of motor vehicles registration cards as a proof of ownership or copy of contracts for hired vehicles. To the contrary, the Appellant attached TMDA certificates.

The Respondent submitted further that, copies of motor vehicles registration cards and or copies of contracts for hired vehicles was one of the crucial requirements of the Pre-qualification in order to ascertain applicants' capability to transport medical supplies to the destination areas. Thus, the Appellant's failure to comply with such a requirement led to disqualification of its application.



Section 72(1) of the Act read together with Regulation 203(1) of the Regulations require tenders to be evaluated based on the requirements provided for in the Tender Document. The Respondent claimed that it conducted the evaluation process through TANEPS based on the criteria provided for in the Pre-qualification Document. According to the Respondent if a tenderer fails to comply with any of the criteria, the system automatically gives a zero mark. At the end of the evaluation process the system summed up the total scores and disqualified those who failed to comply with the requirements.

Clause 4.1 of GITA provided that for a tenderer to be prequalified it must score a minimum of 75%. However, such a requirement was not adhered to during evaluation process as the TANEPS system which was used during evaluation assessed applicants' scores out of 100%. The Respondent insisted that TANEPS itself contained scores which could not be changed during the evaluation process.

Finally, the Respondent prayed for the following orders:-

- i. The Appeal has no legs to stand on, hence be dismissed with costs; and
- ii. The Respondent be allowed to proceed with the procurement process.

## ANALYSIS BY THE APPEALS AUTHORITY

### 1.0 Whether the disqualification of the Appellant's application is justified

The Appellant contended that it should not have been disqualified just for failure to comply with one criterion, instead, it should have only been disqualified for failure to meet the pre-set minimum pass mark of 75% as provided for under Clause 4.1 of GITA in the Pre-Qualification Document. According to the Appellant, the Respondent contravened Section 72 of the Act. The Appellant also added that the Respondent contravened Regulation 6(2) of the Regulations as failure to provide motor vehicles registration cards or copies of contract for hired vehicles does not fall within the ambits of the aforementioned Regulation.

On its part, the Respondent stated that the Appellant attached document which were not required under Appendix 13 of the Pre-Qualification Document, consequently its application was disqualified.

As it can be observed Clause 4.1 of GITA provides that pre-qualification of tenderers would be based on an applicant earning 75% and above of the total scores. Clause 4.1 reads:-

*Clause 4.1 "Pre-qualification will be based on Applicants meeting minimum-pass-fail criteria (based on points/scores earned by Applicant) in respect of their general capacity and in particular on their supply of Medicines, diagnostic, laboratory reagents*





*and medical supplies, orthopedics and medical equipment experience, financial position, personnel and equipment capabilities, and other relevant information as demonstrated by the Applicant's responses in the Information Forms attached to the Letter of Application. **Applicant earning 75% and above of the total scores shall be short-listed.***

(Emphasis supplied)

The Appeals Authority reviewed further the Pre-qualification Document and observed that there were no details on how the 75% scores would have been arrived at during evaluation process. The evaluation report also did not indicate how the score of 75% was accorded to applicants. The evaluation report simply indicates that the evaluation was conducted through TANEPS and the assessment was made out of 100%.

The evaluation report also shows that applicants marked passed scored 23.20% and 23.15%. Yet, the Appellant scored 23.20% but was marked failed including those scored 23.18 and 23.15. The Appeals Authority failed to comprehend what was actually the basis for tenderers' disqualification and or qualification in this Pre-qualification process.

In view of this, rather incomprehensible situation, the Appeals Authority asked the Respondent to clarify on the criteria used to pre-qualify applicants. The Respondent submitted that, since the evaluation was carried out through TANEPS, the system itself selected qualified and



unqualified applicants. The Respondent claimed to have no control of how the system works and therefore did not understand what method was used to qualify and disqualify applicants who had similar or higher scores.

The Appeals Authority revisited TANEPS and observed that the Respondent set the weight scores for each criterion provided for in the Pre-qualification Document. The total inserted weight scores were to be assessed out of 100%. The Evaluation Report indicates that there were three evaluators who assessed and inserted scores against each criterion as complied by each applicant. The TANEPS converted the scores accorded into marks which were assessed out of 100%. It is however, inconceivable that if the marks were assessed out of 100%, how could applicants which scored 23.20% and 23.15% qualify while clause 4.1 of GITA set a minimum score of 75%.

The Appeals Authority also noted with concern that in the TANEPS the Respondent set a threshold for each criterion. This implies that an applicant/tenderer may be disqualified for failure to meet single criterion regardless of the total scores.

The Appellant was disqualified for failure to attach copies of motor vehicles registration cards and or copies of contracts for hired vehicles as it was required under Clause 7 of Particular Instructions To Applicants (PITA) and Appendix 13 of the Pre-Qualification Document. The Appeals Authority noted that M/S Abacus Pharma (Africa) Ltd, just like the Appellant did not attach copies of motor vehicles registration cards and or copies of contracts

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for hired vehicles and was accorded 23.20%. Yet, M/S Abacus Pharma (Africa) Ltd was pre-qualified.

In view of the above observations the Appeals Authority finds that the basis the Respondent applied to pre-qualify and disqualify applicants were contrary to Clause 4.1 of GITA. This act has, in the Appeals Authority considered view, contravened Section 72 of the Act read together with Regulation 122(3) of the Regulations which read as follows: -

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

Reg. 122 (3) "*Upon receiving the application for pre-qualification, the appointed evaluation team shall evaluate **such application using criteria for qualification prescribed in the invitation to qualify** and shall, in addition prepare an evaluation report consisting of a list of firms recommended for consideration to pre-qualify*".

The above quoted provisions state in clear terms that the basis for pre-qualifying applications has to be specifically prescribed in the invitation to prequalify.

The Appeals Authority also revisited Regulation 6(2) of the Regulations which provides as follows:-

Reg. 6(2) *"A procuring entity shall not deny prequalification, if required to a firm for reasons other than legal capacity, financial capability and experience to successfully perform the contract"*

(Emphasis added)

This Regulation sets out three reasons only for which a procuring entity may deny pre-qualifications. Apparently, failure to attach copies of motor vehicles registration cards or copies of contracts for hired vehicles does not, in the Appeals Authority's considered view, fall into any of the three reasons. Therefore, the Appeals Authority declines the Respondent's invitation that the missing criterion falls into financial capability under Regulation 6(2) of the Regulations.

The Appeals Authority also finds the Respondent's act of qualifying and disqualifying applicants to have contravened Section 4A(3) (a, b and c) of the Act which provides as follows:-

(3) *"Procuring entities shall in the execution of their duties, undertake to achieve the highest standard of equity, taking into account-*

*a) equality of opportunities to all tenderers;*

*b) fairness of treatment to all parties; and*

*c) the need to obtain the value for money in terms of price, quality and delivery having regards to*



*prescribed specifications and criteria*". (Emphasis added)

From the above contradictions on how applicants were pre-qualified the Appeals Authority is of the settled view that the Respondent's pre-qualification process was marred with irregularities.

In view of the above conclusion that the pre-qualification process was marred with irregularities, the Appeals Authority concludes that not only the Appellant who was disqualified contrary to the law but even the said shortlisted applicants were not pre-qualified as per the criteria set in the pre-qualification document and the law.

## **2.0 What reliefs, if any, are the parties entitled to.**

Taking cognizance of the findings hereinabove, the Appeal is allowed and the Respondent is ordered to start the Tender process afresh in compliance with the law.

The Appellant asked for costs incurred for legal consultation and other expenses. Apparently, the Appellant was not represented by a counsel. Legal fees are payable to advocates. This item of costs is therefore not awarded. As to other expenses the Appellant has not produced any proof for the same. They are also not granted save for TZS 300,000.00 being fees for filing this Appeal.

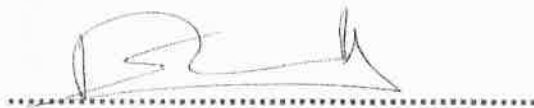
It is so ordered.

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 12<sup>th</sup> day of August 2022.

**ADV. ROSAN MBWAMBO**



**Ag: CHAIRPERSON**

**MEMBERS: -**

**1. ENG. STEPHEN MAKIGO** 

**2. DR. WILLIAM KAZUNGU** 