

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL CASE NO. 38 OF 2022-23**

**BETWEEN**

**M/S KASTIPHARM LIMITED.....APPELLANT**

**AND**

**GOVERNMENT CHEMIST**

**LABORATORY AUTHORITY.....RESPONDENT**

**DECISION**

**CORAM**

- |                           |                   |
|---------------------------|-------------------|
| 1. Adv. Rosan Mbwambo     | - Ag. Chairperson |
| 2. Ms. Ndeonika Mwaikambo | - Member          |
| 3. Dr. William Kazungu    | - Member          |
| 4. Mr. James Sando        | - Secretary       |

**SECRETARIAT**

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

**FOR THE APPELLANT**

- |                     |                                 |
|---------------------|---------------------------------|
| 1. Mr. Gratian Mali | - Advocate, Ardean Law Chambers |
| 2. Mr. Anwar Kachra | - Managing Director             |

## FOR THE RESPONDENT

- |                       |                               |
|-----------------------|-------------------------------|
| 1. Mr. Gilbert Nderuo | - Head of Legal Services Unit |
| 2. Mr. Theogen Jerome | - Head of Procurement         |
| 3. Mr. Renatus Thadeo | - Senior Procurement Officer  |
| 4. Mr. Abeid Kafunda  | - Legal Officer               |

This Appeal was lodged by **M/S Kastipharm Limited** (hereinafter referred to as "**the Appellant**") against the **Government Chemist Laboratory Authority** (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. AE/017/2022-23/G/11 for Supply, Installation, Training and Commissioning of LC-MS-MS (hereinafter referred to as "**the Tender**").

The Tender was conducted through Restricted 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**") background of this Appeal may be summarized as follows: -

On 20<sup>th</sup> January 2023, the Respondent floated the Tender through the Tanzania National electronic Procurement System (TANePS). Deadline for submission of Tenders was set for 3<sup>rd</sup> February 2023. On the deadline, the Respondent received five tenders including that of the Appellant.

The received tenders were subjected to evaluation, which was conducted in three stages namely, preliminary, technical and financial. During Preliminary evaluation, two tenders including that of the Appellant were disqualified for failure to comply with the requirements of the Tender Document. The remaining tenders were subjected into technical and financial evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the contract to M/S Africa Biosystems (Tanzania) Limited at a contract price of Tanzanian Shillings Two Billion Nine Hundred Eighty Six Million Six Hundred Five Thousand Nine Hundred Sixty (TZS 2,986,605,960.00) VAT inclusive.

The recommendations of the evaluation committee were tabled before the Tender Board at its meeting held on 27<sup>th</sup> February 2023. After deliberations, the Tender Board approved the award as recommended by the Evaluation Committee subject to negotiations on the specific delivery time and after sales services. Negotiations took place on 15<sup>th</sup> March 2023 and were successful. The negotiations results were accordingly approved by the Tender Board through Circular Resolution No. 2022-2023/G/141.

On 31<sup>st</sup> March 2023 the Respondent issued a Notice of Intention to award the Tender to all tenderers who participated in this Tender. The Notice informed tenderers that the Respondent intends to award the Tender to M/S Africa Biosystems (Tanzania) Limited at the contract price of Tanzanian Shillings Two Billion Nine Hundred Eighty Six Million Six Hundred Five Thousand Nine Hundred Sixty (TZS 2,986,605,960.00) VAT inclusive. The Notice also informed the Appellant that its tender has been disqualified for

failure to attach tender submission letter which would declare that the Appellant has no conflict of interest.

Dissatisfied with the reason given for its disqualification, on 5<sup>th</sup> April 2023, the Appellant applied for administrative review. On 6<sup>th</sup> April 2023, the Respondent issued its decision and dismissed the Appellant's application for administrative review. Aggrieved further, on 14<sup>th</sup> April 2023, 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 was justified; and**

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

#### **SUBMISSIONS BY THE APPELLANT**

In this Appeal the Appellant was represented by Mr. Gratian Mali, learned advocate. He commenced his submissions on the first issue by stating that this tender was initially advertised on 19<sup>th</sup> October 2022 and the deadline for submission was on 10<sup>th</sup> November 2022. The Appellant was among the tenderers who submitted their tenders. However, the tender was rejected on 20<sup>th</sup> January 2023 and no reasons were given. It was then retendered and the Appellant submitted its bid.

The learned counsel submitted that the Appellant was disqualified from the Tender for failure to attach a document which declares that the Appellant has no conflict of interest. The learned counsel submitted that according to Section IV - Qualification and Evaluation Criteria, Table 1, Item 1.2 of the

Tender Document the tenderers were required to declare that they have no conflict of interest by submitting a tender submission letter. According to Section IV - Qualification and Evaluation Criteria the tenderers were required to provide all the information requested through the forms under Section V - Tendering Forms. However, the referred section V did not provide the format of the tender submission letter. This implied that the tenderers were required to write letters based on their own format.

The learned counsel submitted that the name of the document, tender submission letter, that was to be submitted for complying with a conflict of interest requirement does not portray if it relates to conflict interest. The tender submission letter is a mere covering letter for submission of the tenders and not for a declaration of conflict of interest. The learned counsel contended that, in the absence of a prescribed format of the tender submission letter, the Respondent could only evaluate compliance of the conflict of interest requirement by looking at the contents of the submitted document.

The learned counsel expounded that in complying with the conflict of interest requirement the Appellant attached the Form of Tender. The last paragraph of the said Form contains a declaration that a tenderer complies with the requirement of Clause 3 of the Instruction To Tenderers (ITT) which also covers Clause 3.7 of the ITT where the requirement of conflict of interest was provided. Thus, in assessing the Appellant's compliance with conflict of interest requirement, the Respondent should have read the contents of the Form of Tender attached. Had the Respondent read the

contents of the Form of Tender it would have realised that Clause 3 of the ITT also covered Clause 3.7 of the ITT on conflict of interest. Hence, the Respondent would not have disqualified the Appellant on this ground.

The learned counsel submitted that in complying with conflict of interest requirement tenderers were required to respond to the questions by indicating "YES" or "NO" in the provided slot. Tenderers were also required to attach a document which declares to have no conflict of interest. In complying with this requirement the Appellant indicated the word "YES" which means it does not have a conflict of interest.

According to the **Evaluation Criteria for Use in the TANEPS Based on PPRA's Standard Tender Document for Health Sector Goods Without Pre-qualification** issued by the Public Procurement Regulatory Authority (PPRA) on February 2022 (hereinafter referred to as "**the Evaluation Guideline for Health Sector Goods**") criteria that are to be attached with a file data (document) were identified like the Power of Attorney, the learned counsel contended. The criteria which do not need to be supported with a file data like conflict of interest were also identified. Therefore, as per the Evaluation Guideline for Health Sector Goods conflict of interest was not to be substantiated by any document as the answer of either "YES" or "NO" sufficed to indicate that the tenderer complied or did not comply with the said requirement. The Respondent's act of requiring tenderers to submit a document in compliance with conflict of interest requirement contravenes the Evaluation Guideline for Health Sector Goods.

The learned counsel added that since the Evaluation Guideline for Health Sector Goods did not provide specific guidance of evaluating documents under the criterion of conflict of interest, the Respondent would not be able to evaluate it. The Respondent contravened Section 72 of the Act in disqualifying the Appellant based on the criterion which ought not to be part of the Tender Document.

The learned counsel concluded his submissions by stating that evaluation process and the result thereof were null and void for being carried out contrary to the requirements of the Tender Document, the Act and its Regulations. Consequently, the Appellant's disqualification is unjustified.

Finally, the learned counsel prayed for the following reliefs: -

- i) A declaration that evaluation process in respect of the Tender is null and void for having been made in violation of the provisions of the Act and its Regulations;
- ii) A declaration that the Appellant was wrongly disqualified from the Tender process;
- iii) An order to reinstate the Appellant in the remaining tender evaluation process (financial evaluation) and declare its bid technically responsive;
- iv) An order that the Respondent pay costs incurred by the Appellant; and
- v) Any other relief that the Appeals Authority may deem fit to grant.

## REPLY BY THE RESPONDENT

The Respondent was represented by Mr. Gilbert Nderuo, Head of Legal Services Unit, Mr. Theogen Jerome, Head of Procurement Unit, Mr. Renatus Thadeo, Senior Procurement Officer and Mr. Abeid Kafunda, Legal Officer. The Respondent adopted its written Statement of Reply and went on submitting that the Tender emanated from a tender that was rejected on the ground that all the submitted tenders were non-responsive. All tenderers including the Appellant were accordingly informed the reasons that led to the rejection of the said tender through TANePS and did not challenge the rejection.

The Respondent floated the Tender on 20<sup>th</sup> January 2023 through TANePS and the Appellant dully participated. The Appellant was disqualified from the Tender for failure to attach a letter which declares that there is no conflict of interest situation. The Appellant instead attached a Form of Tender contrary to the requirement of Clause 3.7 of the ITT and Section IV - Qualification and Evaluation Criteria, Table 1, Item 1.2 of the Tender Document.

The Respondent expounded that according to Section IV - Qualification and Evaluation Criteria, Table 1, Item 1.2 of the Tender Document tenderers were required to submit tender submission letter specifically stating that they have no conflict of interest. Apparently, the Form of Tender attached by the Appellant does not state anything in relation to conflict of interest, the Respondent contended.

The Respondent stated that much as the last paragraph of the Form of Tender indicates tenderers' confirmation to comply with eligibility requirements as per Clause 3 of the ITT, the same does not specifically demonstrate that a tenderer has complied with all requirements under Clause 3.7 of the ITT and its sub-clauses. The Respondent added that, if the Appellant was not certain on the contents of the tender submission letter that was required to be submitted in compliance with conflict of interest requirement, it should have sought for clarification prior to the deadline for submission of tenders.

The Respondent submitted further that the evaluation process was carried out based on the criteria provided for in the Tender Document and that the Appellant was rightly disqualified at the preliminary evaluation stage.

Finally, the Respondent prayed for the following reliefs:-

- i) Dismissal of the Appeal in its entirety;
- ii) An order that the Appellant was lawfully disqualified in accordance with the Act and its Regulations;
- iii) A declaration that evaluation of the Tender was done in compliance with the Act and its Regulations;
- iv) An order that the Appellant to pay costs incurred by the Respondent; and
- v) Any other relief(s) the Appeals Authority may deem fit and just to grant.

## ANALYSIS BY THE APPEALS AUTHORITY

### 1.0 Whether the disqualification of the Appellant was justified

The Notice of Intention to award and the decision on the application for administrative review indicate that the Appellant was disqualified for failure to attach a letter which declares that the Appellant has no conflict of interest. This is the requirement of Clause 3.7 of the ITT and Section IV - Qualification and Evaluation Criteria, Table 1, Item 1.2 of the Tender Document. Clause 3.7 of the ITT reads as follows:

*"Clause 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) Are associated or have been associated in the past directly or indirectly with a firm or any of its affiliates which have been engaged by the PE to provide consulting services for the preparation of the design, specifications and or other documents to be used for the procurement of the goods to be purchased under this invitation for tenders; or*
- b) Have controlling shareholders in common; or*
- c) Receive or have received any direct or indirect subsidy from any of them; or*
- d) Have the same legal representative for purposes of this tender; or*

- e) *Have a relationship with each other, directly or through common third parties, that puts them in a position to have access to information about or influence on the tender of another tenderer, or influence the decisions of the PE regarding this tendering process; or*
- f) *Submit more than one tender in this tendering process or as tenderers and subcontractors simultaneously. However, this does not limit the participation of subcontractors in more than one tender; or*
- g) *Participated as a consultant in the preparation of the design or technical specifications of the goods and related services that are the subject of the tender "*

The Appeals Authority further revisited Section IV - Qualification and Evaluation Criteria, Table 1 Item 1.2 and observed that tenderers were required to indicate if they have conflict of interest by attaching "tender submission letter" in compliance with Clause 3.7 of the ITT.

The Appeals Authority also reviewed the tenders on TANePS and noted that at a slot where conflict of interest was to be declared contained the following:-

*"Do you declare that you have no Conflict of Interest in accordance with ITT 3.7 in compliance with Item 1.2 of Section IV - Qualification and Evaluation Criteria?" YES/NO*



*"Attach information to Declare that you have no conflict of interest in Accordance with ITT 3.7 in compliance with Item 1.2 of Section IV- Qualification and Evaluation Criteria".*

Looking at the Appellant's Tender on TANEPS, the Appeals Authority observed that in complying with first part of this requirement the Appellant answered "YES" and in complying with the second part the Appellant attached the Form of Tender.

The Appeals Authority reviewed Section IV - Qualification and Evaluation Criteria, Table 1, Item 1.2 of the Tender Document and observed that it mandatorily required tenderers to declare their conflict of interest status by submitting a tender submission letter. The said criterion is based on Clause 3.7 of the ITT quoted herein above. Having reviewed Clause 3.7 of the ITT, the Appeals Authority noted that it required tenderers to make a declaration on conflict of interest and circumstances that may render a tenderer to be considered to have a conflict of interest were provided. It is also stated categorically that tenderers found to have conflict of interest should be disqualified.

The Appeals Authority has considered the requirement of Clause 3.7 of the ITT and Section IV - Qualification and Evaluation Criteria, Table 1, Item 1.2 of the Tender Document and the Form of Tender submitted by the Appellant in compliance with the conflict of interest requirement, particularly the last paragraph. The said paragraph reads as follows: -

*"We certify/confirm that we comply with the eligibility requirements as per ITT 3 of the Tendering Documents".*

(Emphasis supplied)

Having reviewed the above quoted last paragraph of the Appellant's Form of Tender, the Appeals Authority finds that the said paragraph is general as its contents do not make any specific declaration that the Appellant has no conflict of interest as per Clause 3.7 of the ITT.

The Appeals Authority agrees with the Appellant's contention that there was no specific format of the tender submission letter. However, if the absence of such a format was termed to be a challenge in the Appellant's view, it ought to have sought for clarifications in accordance with Regulation 13 of the Regulations.

The Appeals Authority considered the Appellant's proposition that according to the Evaluation Guidelines for Health Sector Goods, conflict of interest was to be declared by answering "YES" or "NO". Therefore, there was no need of attaching any document as the Respondent would not be able to evaluate it. The Appeals Authority reviewed the Evaluation Guidelines for Health Sector Goods and observed that they provide general guidance on the requirement to be considered during evaluation. The Evaluation Guidelines for Health Sector Goods, however, do not prohibit procuring entities from adding any criterion which would assist in obtaining a responsive tender. In the circumstances, the Appeals Authority cannot fault the Respondent for requiring tenderers, in the Tender Document, to submit a document which specifically makes a declaration on conflict of interest.

A handwritten signature in dark ink, consisting of a stylized 'N' followed by a large loop and a final flourish.

According to Regulation 203(1) of the Regulations, evaluation of tenders is to be based on the criteria specified in the Tender Document. Regulation 203(1) of the Regulations reads as follows:-

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

(Emphasis supplied)

The Appeals Authority finds that evaluation of the Appellant's tender was carried out using criteria specified in the Tender Document.

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:-

*"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."*

Given the above findings, the Appeals authority concludes the first issue in the affirmative that the disqualification of the Appellant was justified.

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

In view of the findings that the Appellant's disqualification is justified, the Appeals Authority hereby dismiss the Appeal and orders the Respondent to



proceed with the Tender process. We make no order as to costs since no evidence was provided.


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 Appellant and in the absence of the Respondent though duly notified, this 18<sup>th</sup> day of May 2023.

**ADV. ROSAN MBWAMBO**

  
.....

**AG: CHAIRPERSON**

**MEMBERS: -**

**1. MS. NDEONIKA MWAIKAMBO** .....

**2. DR. WILLIAM KAZUNGU** .....

