IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 03 OF 2021-22

BETWEEN

M/S I.E. MUHANNA & COMPANY LIMITED.....APPELLANT

AND

NATIONAL HEALTH INSURANCE FUND.....RESPONDENT

RULING

CORAM

1. Hon. Justice (rtd) Sauda Mjasiri - Chairperson
2. Dr. Leonada Mwagike - Member
3. Mr. Rhoben Nkori - Member
4. Ms. Florida Mapunda - Ag. Executive Secretary

SECRETARIAT

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

FOR THE APPELLANT

1. Mr. Stanley Kalokola - State Attorney
2. Mr. Felix Chakila - State Attorney

Being dissatisfied by the proposed award of the tender made by the Respondent to M/S Zamara Actuaries Administrators and Consultants Ltd, the Appellant on 21st April 2021 filed an application for administrative review to the Respondent challenging its disqualification. On 6th May 2021, the Respondent issued its decision which dismissed the Appellant's application for administrative review. On 12th May 2021, the Appellant lodged Appeal Case No. 30 of 2020-21 before the Appeals Authority. On 23rd June 2021, the Appeals Authority issued its decision which also dismissed the Appeal due to expiry of the bid validity period and for it being lodge out of time. The Respondent was ordered to restart the Tender process.

On 1st July 2021, the Respondent re-advertised the Tender vide the Tanzania National e-Procurement System (TANePS) whereby qualified Consultancy firms were invited to submit their Technical and Financial Proposals under the International Competitive Selection procedures specified in 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**").

Deadline for the submission of proposals was set for 2nd August 2021. However, before the deadline for submission of proposals, on 5th, 20th and 22nd July 2021 respectively, the Appellant sought for clarifications from the Respondent on three points namely; if the actuarial fellowship requirement

believed that these changes imposed unfair competition on the Tender process.

The Appellant expounded that, before submission of proposals it requested some clarifications from the Respondent on the RFP and the Terms of Reference (ToR). However, the Respondent answers were vague and not clear. The clarifications sought by the Appellant were to determine whether it should submit the proposal or not.

Finally, the Appellant prayed for the following orders: -

i. Cancellation of the current tender and order re-tendering based on the revised terms which would ensure fair competition;

ii. Request for revision of 25 years requirement for experience in Africa and to change it to 10 years. This is based on common practice in similar tenders. It is common to request more than 15 years of international experience and 7 to 10 years for a country and/or regional experience; and

iii. Request for revision of the requirements for 5 Fellows of the Institute of Actuaries and to change from 5 to 3. The requirement for 5 Fellow Actuaries is not supported by the size of the project and the specific project requirement. In addition, Fellow Actuaries should be defined as Fellow Actuaries of any association which is a Full Members of the International Association of Actuaries (IAA).

The Respondent added further that, it decided to strengthen the eligibility criteria of expertise required for a team leader and increase a number of other technical members in the ToR due to the following reasons namely:-

a) Currently the Respondent has been exposed to various alarming risk on financial sustainability. The alarming risks are detrimental to the Respondent as far as implementation of its roles as per Section 39A (1) of the NHIF Act, Cap 395 is concerned. The Respondent also wanted to ensure its sustainability, thus the alarming risks observed made it to require more experienced team leader in the current Tender, hence that requirement.
b) In order to conform to the Government move on health policy which aimed at attaining the Universal Health Coverage, the Respondent expects to increase its coverage in terms of membership and services which called for improvement to be made on the ToR. Therefore, the Respondent improved its TOR so as it would be able to get an experienced actuary who will address the alarming risks and advise the Respondent to ensure its sustainability.

That, the Appellant had an opportunity to seek for clarification on the change of requirements pursuant to the Proposal Data sheet (PDS) and the Respondent could have clarified accordingly, to the contrary the Appellant lodged this Appeal.

DETERMINATION OF THE PRELIMINARY OBJECTIONS

In view of the following preliminary objections raised by Respondent which are reproduced hereunder:-

1) **The Appeal is incompetent and bad in law for being brought by a person who has no *locus standi* before the Appeals Authority; and**

2) **The Appeal is incompetent for violating the provisions of section 95(1) of the Act and Regulation 105 of the Regulations.**

The Appeals Authority directed that the preliminary objections raised be heard first.

SUBMISSIONS BY THE RESPONDENT ON THE PO

In relation to the first PO, the learned State Attorney submitted that the Appellant lacks *locus standi* to file this appeal as was not amongst the tenderers who participated in the Tender. The Tender opening took place on 2nd August 2021 and the Appellant was not amongst the tenderers who submitted their proposals. Thus, by whatever circumstances, the Appellant would not be affected by the Respondent's act or decision which would be reached after the tender process is completed. According to Rule 4 of the Public Procurement Appeals Rules of 2014, as amended in 2017 (hereinafter referred to as "**the Appeals Rules**"), an appeal to this Appeals Authority has to be lodged by a tenderer who is dissatisfied with

Based on the requirements of the law and the position of this Appeals Authority in the above cited cases, the learned state Attorney concluded its argument by praying for dismissal of the Appeal with costs.

REPLY BY THE APPELLANT ON THE PO

In relation to the first PO, the Appellant submitted that it was among the tenderers who intended to participate in this Tender as it purchased the RFP document issued by the Respondent through TANePS. However, the Appellant was unable to submit its proposal as it was not satisfied with the ToR issued by the Respondent. The Appellant contested the issued ToR to the Respondent by way of seeking clarification and thereafter appealing to this Appeals Authority. Thus, the Appellant has a *locus standi* to file this Appeal before the Appeals Authority.

On the second PO, the Appellant conceded that it had not applied for administrative review to the Respondent as it could not access the TANePS portal. The Appellant opted to file this Appeal as it was dissatisfied with the vague responses given by the Respondent in relation to the clarification sought. The Appellant therefore stated that the Appeal is properly before this Appeals Authority and should be heard on merit.

ANALYSIS BY THE APPEALS AUTHORITY

In determining the POs raised, the main issue for consideration is ***whether or not the appeal is properly before this Appeals Authority***.

Section 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"

Regulation 104 "A tenderer who claims to have suffered or who may suffer any loss or injury as a result of breach of a duty imposed on a procuring entity or an approving authority by the Act or these Regulations may apply for a review in accordance with sections 95 of the Act."

Regulation 105 (1) "Any application for administrative review shall be submitted in writing or electronically to the accounting officer of a procuring entity and a copy shall be served to the Authority within seven working days of the tenderer becoming or should have become aware of the circumstances giving rise to the complaint or dispute".

Regulation 106 (9) "Where the complainant is not satisfied with the decision of the accounting officer or, where the accounting officer does not issue a decision within the specified time, the complainant shall submit his

According to the sequence of events, on 5th, 20th and 22nd July 2021 respectively, the Appellant sought for clarifications from the Respondent about the ToR. The responses thereof were sent to the Appellant on 23rd July 2021 and 27th July 2021 respectively through email. The record of Appeal indicates that, the Appellant was still aggrieved with the Respondent's responses. At that stage the Appellant ought to have applied for administrative review to the Respondent within seven (7) working days. That is to say, the Appellant ought to have filed its application for administrative review to the Respondent on/by 5th August 2021. To the contrary, the Appellant did not do so. Instead, it filed an Appeal directly to this Appeals Authority on 3rd August 2021.

Given the above facts and the requirement of the law, it is obvious that the Appeal has been filed prematurely as the Appellant ought to have exhausted the administrative review remedy before filing this Appeal.

The Appeals Authority considered the Appellant's argument that, it could have not filed an application for administrative review as it was unable to access the TANePS portal and observes that as of now applications for administrative review can be lodged through TANePS or manually. Tenderers are not confined to submit their applications for review through TANePS. Since the Appellant was communicating with the Respondent through email it ought to have sent its application for administrative review through the same means.