IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 07 OF 2021-22

BETWEEN

M/S NEEM SALHA COMPANY LIMITED..... APPELLANT

AND

OCEAN ROAD CANCER INSTITUTE ..... 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. David Mayanga - Managing Director

FOR THE RESPONDENT

1. Ms. Florence Mkinga - Head of Procurement Management Unit
2. Dr. Crispin Kahesa - Director of Cancer Prevention Services
3. Mr. Hamisi Malima - Procurement Manager

The Appeal was lodged by **M/S Neem Salha Company Limited** (hereinafter referred to as **"the Appellant"**) against the **Ocean Road Cancer Institute** (hereinafter referred to as **"the Respondent"**). The Appeal is in respect of Tender No. PA-010/2021-22/G/18 for Supply of Food for Patients (hereinafter referred to as **"the Tender"**).

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: -

The Tender was conducted using Competitive Quotation (Shopping) through the Tanzania National e-Procurement System (TANePS) as per 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 and GN. No. 333 of 2016 (hereinafter referred to as **"the Regulations"**).

On 9th August 2021 the Respondent issued an Invitation to Tender through TANePS whereby qualified tenderers were invited to submit their quotations. The deadline for submission was set for 16th August 2021 and

the quotations were opened immediately thereafter. According to the online opening record, only thirteen (13) tenderers responded to the invitation and the Appellant was not amongst them.

On 16th August 2021 the Appellant lodged a complaint to the Respondent for not inviting its company to participate in the Tender. The Respondent through a letter dated 18th August 2021 rejected the Appellant's complaint. The said letter was received by the Appellant on 26th August 2021.

On 27th August 2021, the Appellant filed a second complaint to the Respondent raising the same ground of not being invited to partipate in the Tender. The Respondent through a letter dated 31st August 2021 rejected the Appellant's second complaint.

Aggrieved further, on 2nd September 2021, the Appellant filed this Appeal to the Appeals Authority.

GROUNDS OF APPEAL

The grounds of Appeal as stated in the Appellant's Statement of Appeal may be summarized as follows: -

1. That, the Appellant challenged the Respondent's act of denying it an opportunity to participate in the Tender process. According to it, the Respondent invited tenderers through TANePS to participate in the Tender; however, the Appellant was excluded without justifiable reasons while knowing that it was the existing service provider.

2. That, the Respondent deceived the Appellant by purporting to have given the Appellant a contract extension under Tender No. PA-010/2020-21/G/18 for Supply of Food for Patients. The Appellant denied to have received any contract extension letter. The Respondent should substantiate before the Appeals Authority if such an extension was made.

3. Finally, the Appellant prayed for the following orders:-

    i. The Respondent to repeat the tender process so that the Appellant could participate; and

    ii. The Appellant be considered for one year extension of contract so that it could continue with provision of services without re-advertising the tender.

REPLY BY THE RESPONDENT

The Respondent's reply to the Appellant's grounds of Appeal was preceded with a Preliminary Objection (PO) on two points of law to wit: -

i) The Appellant has no *locus standi* to appeal in respect of the matter; and

ii) The Appeals Authority has no jurisdiction to entertain the matter on extension of time for contract execution.

The above notwithstanding, the Respondent's reply to the Appellant's grounds of Appeal may be summarized as follows:-

1. That, the Tender was advertised on 9th August 2021 through TANePS. A total of 150 suppliers were invited to participate in the Tender. However, the Appellant was not amongst them. The invited suppliers were selected randomly by TANePS. TANePS is a system which is under the control of the Public Procurement Regulatory Authority (PPRA) and the Respondent does not have mandate of selecting suppliers through it.

2. That, the Appellant was given extension of contract under Tender No. PA-010/2020-21/G/18 for Supply of Food for Patients. The extension made, was to expire on 30th August 2021. The Appellant was aware of such extension as it continued to supply the food stuff as per the extended contract. The contract in relation to the tender under Appeal was to start on 1st September 2021 with a new supplier after completion of the tendering process.

3. Finally, the Respondent prayed for the following orders:-

    i. The Appellant's remedies sought be declared baseless since it did not participate in the tender process; and

    ii. The Appeal be dismissed with costs.

Having observed that the Respondent raised a PO on the two points of law as indicated hereinabove, the Appeals Authority deemed it proper to

determine them first before considering the substantive merits of the Appeal. Parties were therefore required to submit on the PO so raised.

SUBMISSIONS BY THE RESPONDENT ON THE PO

With regard to the first PO the Respondent submitted that, the Appellant lacks *locus standi* to file this Appeal as it did not participate in the Tender. When floating this Tender the Respondent invited 150 suppliers who were picked randomly through TANePS. The Appellant was not amongst them and therefore, it did not participate in the Tender.

The Respondent submitted further that according to Rule 4 of the Public Procurement Appeals Rules of 2014 as amended (hereinafter referred to as "**the Appeals Rules**") an Appeal to this Appeals Authority has to be filed by a tenderer. Since the Appellant did not participate in this Tender, it is not a tenderer and therefore not eligible to file this Appeal.

Regarding the second PO the Respondent submitted that, the Appeals Authority lacks jurisdiction to entertain a ground of Appeal relating to extension of contract. The extension of contract referred by the Appellant relates to last year's Tender No. PA-010/2020-21/G/18 for Supply of Food for Patients. The extension of contract had nothing to do with the current Tender. The Appellant wanted to mislead the Appeals Authority by referring to the Tender which is not relevant to the Appeal. Therefore, the Respondent concluded by stating that, the Appeals Authority lacks jurisdiction to entertain a ground of Appeal relating to extension of contract for the previous tender.

REPLY BY THE APPELLANT ON THE PO

With regard to the first PO, the Appellant submitted that, it did not participate in this Tender as it was not invited by the Respondent while it was among the active suppliers for the provision of services for the Tender under Appeal. However, having been informed by the Appeals Authority that, the TANePS records indicated that it paid the Framework Agreement Fee (annual fee) on 11th August 2021 while the Tender was advertised on 9th August 2021. The Appellant conceded that it was not a registered supplier at the time the Tender was floated. Thus, it was not an eligible tenderer in respect of the Tender which is the subject of this appeal.

With regard to the second PO, the Appellant submitted that it was not given extension of contract as the Respondent purports, although it went on supplying the food as was required up to 31st August 2021.

ANALYSIS BY THE APPEALS AUTHORITY

In determining the POs raised, the Appeals Authority framed the following issues:-

i. **Whether the Appellant has *locus standi* to Appeal; and**
ii. **Whether the Appeals Authority has jurisdiction to entertain a ground of Appeal relating to extension of contract;**

Having framed the issues the Appeals Authority proceeded to determine them as hereunder:-

Whether the Appellant has *locus standi* to Appeal

In resolving this issue, the Appeals Authority revisited the record of Appeal and observed that, the Respondent floated this Tender on 9th August 2021 through TANePS. The TANePS records indicate that on a slot where a number of participants were to be specified, the Respondent inserted 150, implying that 150 suppliers were invited to participate in the Tender. The Tender opening took place on 16th August 2021. Only thirteen (13) suppliers responded to the invitation and the Appellant was not amongst them.

The Appeals Authority reviewed the TANePS system and observed that, selection of suppliers required to participate in the Tender was randomly done by the system. It was further noted that, in order for a supplier to have a chance of being randomly selected by the system, the supplier ought to have paid the Framework Agreement Fee (annual fee) for the particular financial year.

In order to establish if the Appellant was among the suppliers who paid the Framework Agreement Fee at the time the Tender was floated, the Appeals Authority observed from TANePS that, the Appellant paid the Framework Agreement Fee on 11th August 2021 through Control Number 995450170146. However the Tender was advertised on 9th August 2021.

In view of the above, the Appeals Authority is of the settled view that, at the time the Tender was floated the Appellant was not a registered supplier and therefore was not eligible to participate in the Tender process.

Even though TANePS select suppliers randomly amongst those who are registered, the Appellant had no chances of being selected at all. Given the circumstances, the Appellant was not eligible to participate in this Tender.

According to Rule 4 of the Appeals Rules an appeal to the Appeals Authority has to be lodged by a tenderer who had participated in a tender process and being dissatisfied with the procuring entity's decision, act or ommision. The said Rule states as follows:-

> Rule 4 ***"Any person being a tenderer who is dissatisfied with the decision, matter, act or omission of a procuring entity or the Authority may lodge an appeal to the Appeals Authority."***
>
> (Emphasis made)

Section 3 of the Act read together with Rule 3 of the Appeals Rules defines the word *tenderer* as follows:-

> Sec 3 *"tenderer" means any natural or legal person or group of such persons* ***participating or intending to participate in procurement proceeding with a view to submitting a tender in order to conclude a contract and includes a supplier, contractor, service provider or asset buyer."***
>
> (Emphasis made)

Having related the above quoted provisions to the facts of this Appeal, the Appeals Authority is of the firm view that, the Appellant was not a tenderer as it did not participate in this Tender. Therefore, the Appellant has no *locus standi* to file an appeal before the Appeals Authority.

As the first PO herein above suffices to dispose of the Appeal; the Appeals Authority will not delve on the second PO in relation to its jurisdiction to entertain matters relating to extension of contracts.

Consequently, the Appeals Authority hereby dismiss the Appeal and makes no order as to costs.

It is so ordered.

The Right of Judicial Review as per Section 101 of the Act is explained to the Parties.

This Ruling is delivered in the presence of the Respondent and in the absence of the Appellant this 29th day of September 2021.

HON. JUSTICE (RTD) SAUDA MJASIRI

.....

CHAIRPERSON

MEMBERS:

1. **DR. LEONADA MWAGIKE** .....
2. **MR. RHOBEN NKORI** .....