IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 24 OF 2021-22

BETWEEN

M/S KASTIPHARM LIMITED .....APPELLANT

AND

THE PERMANENT SECRETARY
PRESIDENT'S OFFICE REGIONAL ADMINISTRATION
AND LOCAL GOVERNMENT..... RESPONDENT

RULING

CORAM

1. Hon. Justice (rtd) Sauda Mjasiri - Chairperson
2. Eng. Stephen Makigo - Member
3. Adv. Rosan Mbwambo - Member
4. Ms. Florida Mapunda - Ag. Secretary

SECRETARIAT

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

FOR THE APPELLANT

1. Mr. Gratian B. Mali - Advocate, Ardean Law Chambers
2. Mr. J. P Mgaya - Chairman, KPL
3. Mr. Anwar Kachra - Managing Director

FOR THE RESPONDENT

1. Mr. Eustard A. Ngatale - Assistance Director Legal Services
2. Mr. Lucas Malunde - Principal State Attorney

The Appeal was lodged by **M/S Kastipharm Limited** (hereinafter referred to as **"the Appellant"**) against **the Permanent Secretary President's Office Regional Administration and Local Government** (hereinafter referred to as "**the Respondent"**).

The Appeal is in respect of Tender No. ME/022/2021/2022/HQ/G/22 for the Supply, Installation, Commissioning and Maintenance of Medical Equipment for Health Facilities in Tanzania Mainland (ICU, EMD and Digital X-rays) Lot No. I-III (hereinafter referred to as "**the Tender"**). The Appellant's Appeal is in respect of Lot III.

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:-

On 3rd January 2022, the Respondent re-advertised the Tender through Tanzania National e-Procurement System (TANePS) as it was previously cancelled. The Tender was conducted through Restricted International Competitive Tendering procedures 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 and GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**"). The deadline for submission of Tenders was set for 17th January 2022,

whereby ten (10) bidders, the Appellant inclusive, submitted their bids. Bids were open on the date set through TANePS.

Tenders were then subjected to evaluation which was conducted in three stages namely; preliminary, commercial and technical responsiveness. During the preliminary evaluation six (6) tenders including that of the Appellant were disqualified for being found non responsive to the requirements of the Tender Document. The remaining four (4) tenders were subjected to further stages of evaluation.

After the evaluation process was completed, the Evaluation Committee recommended award of the Tender to M/S Hypermed Healthcare Limited for Lot III at a contract price of Tanzania Shillings Ten Billion Nine Hundred Forty Four Million One Hundred Fifty Thousand One Hundred (TZS 10,944,150,100.00) only. The Tender Board at its meeting held on 31st January 2022, deliberated and approved the award as recommended by the Evaluation Committee.

On 2nd February 2022, the Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender process. The Respondent informed them that, it intends to award the contract to M/S Hypermed Healthcare Limited for Lot III. The Notice also informed the Appellant that its tender was disqualified for submitting a Tax Clearance certificate which did not relate to the Tender.

Dissatisfied, on 4th February 2022, the Appellant applied for administrative review to the Respondent challenging the reason given for its disqualification. On 14th February 2022, the Respondent issued its

decision by dismissing the Appellant's application for review. Aggrieved further the Appellant lodged this Appeal on 18th February 2022.

GROUNDS OF APPEAL

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

1. That, the Respondent erred in law and fact for disqualifying the Appellant for the reason that it submitted a Tax Clearance certificate which is not relevant to the Tender. According to the Appellant the said certificate was not amongst the documents which were to be submitted for the Tender. Clauses 34 & 35 of the Tender Data Sheet (TDS) and Clauses 32.4 & 32.4 (c) of the Instruction to Tenderers (ITT) specified the required documents and listed major and minor criteria for tender evaluation. However, the certificate was not amongst them. Thus, the Respondent's act of disqualifying the Appellant in this regard contravened Section 72 of the Act;

2. That, the Respondent's assertion that TANePS requirements were supposedly to be a part of instructions for evaluation is baseless and wrong as it is neither supported by any clauses of the Tender Document, provision of the law or any of its Regulations;

3. That, TANePS is merely a web-based system created to facilitate public procurement in accordance with the Act and its Regulations. It does not, by itself, make part of the Tender Document. The Tender Data Sheet of the main Tender Document should be the basis of evaluation and not otherwise. There should be no

additional requirements and/or instructions through TANePS which are not in the Tender Data sheet of the main Tender Document;

4. That, the Appellant submitted a Tax Clearance certificate, but the Respondent rejected it for the reason that it was not relevant to the Tender as the Tender Document did not provide specifications of the required Tax Clearance certificate, if at all was required. According to the Appellant, the basis of issuing a Tax Clearance certificate by the Tanzania Revenue Authority is to substantiate that the Company has no tax liabilities or issues which disqualify it from engaging in any business. A Tax Clearance certificate, irrespective of the activities mentioned therein serves a purpose that the Company has no tax liabilities or tax issues. Therefore, it was wrong and baseless for the Respondent to disqualify the Appellant for a flimsy reason that a Tax Clearance certificate attached was not relevant to the tender; and

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

    i. A declaration that evaluation proceedings in respect of the Tender in question is null and void for having been made in violation of Section 72 of the Act;

    ii. A declaration that the Appellant was wrongly disqualified from the tender;

    iii. An order quashing the evaluation proceedings of the above mentioned Tender and all subsequent decisions of the Respondent;

iv. An order for evaluation proceedings to commence afresh and the same to be done according to the content and criteria of the Tender Document of the Respondent;

v. An order that the Respondent to pay costs incurred by the Appellant; and

vi. Any other order the Honorable Appeals Authority may deem fit and fair to grant.

REPLY BY THE RESPONDENT

The Respondent's reply to the grounds of appeal may be summarized as follows: -

1. That, the requirement for submission of a Tax Clearance certificate was requested through TANePS as an additional information as it was crucial information for bidders to respond and comply with;

2. That, the use of TANePS as a platform for communication between Procuring Entities and Bidders is mandatory as it is stipulated in the Regulation 342 of the Regulations and *Waraka wa Hazina Na. 4 wa mwaka 2019 kuhusu matumizi ya Mfumo wa Kieletroniki wa ununuzi wa Umma* which instructed all PEs to use TANePS;

3. That, TANePS is a web-based system created to facilitate Public Procurement processes by issuing advertisements, clarifications and modifications information to bidders concerning the Tender

in question. A Tax Clearance certificate was not specified in the Tender Document, however, the same was to be submitted following clarifications issued through TANePS;

4. That, the Appellant although does not accept that TANePS is the official mode of communication for Public Procurement processes, it submitted its bid and attached a Tax Clearance certificate which was irrelevant to the Tender requirements given on TANePS;

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

   i. The tender in question be stayed pending determination of re-evaluation results which is underway following the recommendations given by the special audit conducted by PPRA;
   ii. It would be determined if the Appellant was wrongly disqualified after re-evaluation results are given to the Accounting Officer (AO);
   iii. The order for quashing the evaluation proceedings of the above mentioned tender has been taken care by the AO following the recommendations given by the PPRA that the Tender be re-evaluated; and
   iv. The order that the Respondent pay the costs incurred by the Appellant will be determined in accordance with the laws of Tanzania.

When the Appeal was called on for hearing, the Appeals Authority informed the parties that, after reviewing the record of Appeal it was observed that the Tender has been subjected to a special audit conducted by the Public Procurement Regulatory Authority (PPRA) which recommended re-evaluation of the entire Tender. Given the circumstances, the Appeals Authority asked the parties to address it on the current position of the Tender.

The Respondent informed the Appeals Authority that, after it had issued the notice of intention to award the contract it received several complaints from the tenderers that the Tender was marred with irregularities and there were violations of the Act and its Regulations. On 21st February 2022 the Respondent's Accounting Officer requested PPRA to conduct a Special Procurement Audit. On 17th March 2022 the Respondent received the Special Procurement Audit Report from PPRA through a letter dated 15th March 2022. The Audit report recommended for re-evaluation of all the three Lots. Following the said recommendation, the Respondent's Accounting Officer ordered re-evaluation of the entire Tender. The re-evaluation process is still ongoing and after its completion the Appellant and other tenderers would be notified accordingly.

Before giving the opportunity to the Appellant to respond on the position presented by the Respondent, the Appeals Authority asked the Respondent to state whether the Appellant was informed or is aware of the ongoing process. In response thereof, the Respondent stated that the Appellant has not been informed of the current status, as all

tenderers were to be contacted after the re-evaluation process is completed and the results are out.

Reacting on the Respondent's submissions, the Appellant submitted that it was not aware that there was a special audit conducted by PPRA which had resulted to the re-evaluation of the Tender. In view of the existing position, the Appellant prayed for the withdrawal of the Appeal and the Respondent be ordered to inform the Appellant in writing of the prevailing situation, that is, the award proposed to M/S Hypermed Healthcare Limited for Lot III has been cancelled. As the withdrawal of the Appeal at the date of hearing leads to a penalty, the Appellant prayed for the waiver. The Appellant also prayed for each party be ordered to bear its own costs.

The Respondent on its part did not have any objection to the prayer for the withdrawal of the Appeal and did not press for costs.

Therefore, the Appeals Authority after hearing the parties hereby grants the Appellant's prayer of withdrawing the Appeal. The Appeals Authority orders the Respondent to inform the Appellant and other tenderers that the previous notices of intention to award the contract have been cancelled and that the Tender results would be communicated after completion of the re-evaluation process.

On the request for waiver the Appeals Authority is in agreement with the Appellant that it was not made aware of the cancellation and re-evaluation process before the date of hearing. In view of that position, the Appeals Authority is of the considered view that the waiver is justified under the circumstances.

The Appeal is hereby marked withdrawn. Each party is to bear its own costs.

Order accordingly.

Delivered on the 4th day of April 2022 in the presence of the Respondent and in the absence of the Appellant.

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JUSTICE (rtd) SAUDA MJASIRI
CHAIRPERSON

MEMBERS:

1. ENG. STEPHEN MAKIGO .....

2. ADV. ROSAN MBWAMBO.....