IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 29 OF 2021-22

BETWEEN

M/S GENERAL DE PHARMACY LTD..... APPELLANT

AND

REGIONAL ADMINISTRATIVE

SECRETARY- MANYARA.....RESPONDENT

DECISION

1. Adv. Rosan S. Mbwambo - Ag. Chairperson
2. Dr. William M. Kazungu - Member
3. Mr. Pius M. Mponzi - Member
4. Ms. Florida R. Mapunda - Ag. Secretary

SECRETARIAT

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

FOR THE APPELLANT

1. Mr. Esaba Manyama - Procurement Consultant
2. Mr. Walter Onesmo Mushi - Operations Manager
3. Ms. Farida Geuzye - Sales & Marketing Manager
4. Mr. Victor Onesmo - Sales Executive

FOR THE RESPONDENT

1. Adv. Samara H. Matiko - Head of Legal Department
2. Ms. Anitha Costantine - Procurement Officer
3. Mr. Kisura S. Masunga - Internal Auditor
4. Ms. Neema Zebedayo - Procurement Officer

M/S General De Pharmacy Ltd (hereinafter referred to as **"the Appellant"**) has preferred this Appeal **against** Regional Administrative Secretary- Manyara (hereinafter referred to as "**the Respondent"**). 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 Appeal is in respect of Tender No. RAS/ 021/2021-2022/G/14 Lot 1-4 for Supply of Medicine, Diagnostics, Orthopedics, Medical Supplies and Dental Supplies in Manyara Region (hereinafter referred to as "**the Tender**"). The Tender 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 23rd December 2021, the Respondent invited tenderers to participate in the Tender. Deadline for submission of tenders was set for 12th January 2022. On the deadline, eight (8) tenders including that of the Appellant

were submitted. The tenders were then evaluated and the Evaluation Committee recommended award of the contracts to M/s Umoja Pharmaceutical Company Ltd for Lots 1 and 2 and M/s Kasimwa General Supplies for Lots 3 and 4 subject to successful post qualification and negotiations. The Tender Board at its meeting held on 31st January 2022, approved the recommendations of the Evaluation Committee. Post qualification was conducted on 14th February 2022 and negotiations took place on 23rd & 24th March 2022. In its Circular Resolution dated 4th April 2022 the Tender Board approved the award to M/s Umoja Pharmaceutical Company Ltd and M/s Kasimwa General Supplies.

On 4th April 2022, the Respondent issued a Notice of Intention to award the contract to all tenderers. The said Notice informed the tenderers that the Respondent intends to award the contract to M/s Umoja Pharmaceutical Company Ltd for Lots 1 & 2 and M/s Kasimwa General Supplies for Lots 3 and 4. The notice also informed the Appellant that its tender was disqualified for attaching an uncertified ligation history contrary to the requirement of Clause 4.14 of the Particular Instructions To Applicants (PITA).

Dissatisfied with the Notice of Intention to award the contract, the Appellant applied for administrative review to the Respondent on 11th April 2022. The Respondent on 12th April 2022 issued its decision which dismissed the Appellant's application for administrative review. Aggrieved further, on 14th April 2022, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

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

1. That, the Respondent erred in law by not suspending the procurement process pursuant to Section 100(1) of the Act. According to Section 100(1) a procuring entity is required to suspend a tender process after receipt of a complaint from a tenderer. Further to that, the accounting officer is required to notify all tenderers who participated in the tender about the existence of the complaint and that the tender process has been suspended. The Appellant contended that the Respondent failed to comply with the requirement of Section 100(1) of the Act as after receipt of the Appellant's complaint the tender process was not suspended as required. The Appellant expounded further that, the Respondent on 12th April 2022 issued its decision on the Appellant's complaint and as per the TANePS record printed out on 13th April 2022 the Tender process was still on progress.

2. That, the Appellant's application for administrative review was handled by an unauthorized member of staff that is, Mr. Maarufu Mkwaya instead of the Accounting Officer, Ms. Carolina Mthapula. In support of his proposition the Appellant cited Regulation 47(1) (c) and (d) of the Regulations. This Regulation prohibits the Accounting Officer from delegating its functions. Therefore, the accounting officer's act of

delegating its function of handling the Appellant's complaint contravened the requirement of Regulation 47(1) (c) and (d) of the Regulations.

3. That, the Appellant also disputes the reason for its disqualification that it attached an uncertified litigation history. According to the Appellant a requirement to attach a certified litigation history was not specified in the Tender Document. It was therefore, not justified to disqualify a tenderer based on an evaluation criterion which was not prescribed in the Tender Document.

4. The Appellant submitted that according to Section 72(1) and (2) of the Act, evaluation of tenders should be conducted in accordance with the criteria clearly stipulated in the Tender Document. The Respondent failed to comply with such mandatory requirement of the law as it disqualified the Appellant based on an alien criterion.

   The Appellant expounded further that the Tender Document allowed tenderers to provide supplementary information as deemed necessary. The Appellant attached to its bid a document which indicates that for the past ten (10) years it has not been involved in any litigation. The Appellant could not have used the Information Form No. 8 (Litigation History) as the format provided was applicable only to tenderers which had a litigation history.

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

   i. Re-evaluation of the Appellant's bid; and

ii. Refund of the legal consultation fees, transport and accommodation during hearing amounting to TZS 3,000,000.00.

REPLY BY THE RESPONDENT

The Respondent's reply to the Appellant's grounds of appeal as well as oral submissions during the hearing may be summarized as follows: -

1. The Respondent complied with the requirement of Section 100(1) of the Act as it suspended the Tender process after receipt of the Appellant's complaint. The suspension subsists till this Appeal is determined by the Appeals Authority. Therefore, the Respondent strongly disputes the Appellant's argument in this regard. Additionally, the Respondent submitted that, this argument was not raised when the Appellant submitted its application for administrative review. Therefore, it cannot be raised at the appellate stage.

2. The Appellant's application for administrative review was handled by an acting Regional Administrative Secretary, as the Accounting Officer (RAS) travelled on duty. According to Section 21(2) of the Public Service Act No. 8 of 2002 as amended in 2007 an accounting officer is allowed to delegate its functions to a designated employee. The Accounting Officer's act of delegating its functions was therefore, in accordance with the law.

According to Section 96(2) of the Act upon receipt of an application for administrative review an accounting officer may determine it and or may constitute an independent review panel to investigate the complaint. In the instant case when the Respondent received the application for administrative review on 11th April 2022 it did not form an investigation team. The accounting officer proceeded to determine the application and issued a decision on 12th April 2022.

The Respondent submitted further that, Regulation 47(1) (c) of the Regulations relied upon by the Appellant prohibits accounting officers from delegating their powers of constituting independent investigation/review panel. Since the Appellant's complaint was determined based on the available document and that there was no investigation which was carried out, the relied provision is irrelevant under the circumstances, the Respondent contended.

The Respondent added that, Section 96(6) of the Act requires an Accounting Officer to determine application for administrative review within seven working days of receiving it. If the Accounting Officer would be left to determine all procurement complaint submitted before it, some would not be determined within the prescribed time limit. Thus, it was proper for the Accounting Officer to delegate its functions including determination of complaint.

The Respondent also stated that, this ground was not raised in the application for administrative review, hence, the same cannot be raised at the appellate stage.

3. The Respondent submitted that the Appellant was disqualified for submitting uncertified litigation history contrary to Clause 4.14 of PITA and Information Form No. 8 which required tenderers to submit certified information of their litigation or arbitration history. The Respondent contended that the Appellant attached to its tender a mere paper which does not furnish or provide sufficient proof of existence or none existence of litigation.

   The Respondent added that, litigation history is a legal requirement which requires tenderers to declare existence of any litigation. The said declaration needs to be notarized by commissioner for oaths. In case it was not in the original form a certified copy was required.

4. The Respondent submitted that it floated the Tender for medical supplies. In the course of issuing the Tender Document, it mistakenly issued a pre-qualification tender document. The Respondent contended that through using the same pre-qualification document it managed to obtain successful tenderers. The Respondent claimed that, after the Tender Board had approved award of the contracts it received directives from the President's Office Regional Administration and Local Governments (PO-RALG) which requires them to prepare a shortlist of prime vendors. Since the Tender process had reached advanced stage

PO-RALG allowed it to proceed despite of such anomaly. Thus, the Tendering process was conducted in accordance with the law.

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

   i. Dismissal of the Appeal;

   ii. The Appellant to pay costs of this Appeal to the Respondent; and

   iii. Any other reliefs, as the Appeals Authority deems fit and just to grant.

ANALYSIS BY THE APPEALS AUTHORITY

The following issues were framed, namely: -

1.0 Whether the Tendering process complied with the requirements of the law;

2.0 Whether the disqualification of the Appellant's tender is justified;

3.0 Whether the Application for administrative review was handled in accordance with the law; and

4.0 What reliefs, if any, are the parties entitled to.

Having identified the issues, the Appeals Authority proceeds to resolve them as follows: -

1.0 Whether the Tendering process complied with the requirements of the law

This issue was raised *suo moto* by the Appeals Authority after observing that, much as the Respondent conducted the Tender process, the Tender Document issued to tenderers related to Pre-qualification process. During the hearing parties were informed about the Appeals Authority's observation and were directed to address it on this point.

The Appellant took the floor first and with regard to this point it submitted that, the Tender process was conducted in contravention of the law as there were several irregularities resulted out of the Respondent's none adherence to the requirement of the law. The Respondent on its side conceded that, the Tender Document used in this Tender was for Pre-qualification and not a tender document for medical supplies.

The Appeals Authority reviewed the Tender Document as uploaded on TANePS and observed that the document was for Prequalification of tenderers. It is also indicated that the same document was used for evaluation which was conducted into four stages namely, preliminary, technical, financial and post qualification.

It turned out also that during evaluation, tenders were evaluated basing on criteria which were not stipulated in the Tender Document but on TANePS. Some of these criteria include requirement to attach a copy of permit certificate to operate business for pharmacist and a copy of valid and certified premises registration permit. Section VII – Annex 2, provides general guidance on how tenders were to be completed and evaluated.

Reading the guidance, it is apparent that mostly it related to construction industry.

Furthermore, Item 3 of Part 2 of the Evaluation Submissions (Section VII- Annex 2) provides guidance on how assessment of financial soundness was to be carried out. However, the evaluation report indicates that financial evaluation did not adhere to the guidance provided. Item 7 of Part 2 of the Evaluation Submission (Section VII- Annex 2) which modified Clause 9 of GITA requires the Respondent to communicate the pre-qualification results after completion of evaluation. In the pre-qualification results the Respondent was required to inform the unsuccessful tenderers reasons for being unsuccessful. For those who qualified the Respondent was required to inform them the mode of obtaining the Tender Document.

Apparently, this requirement was not adhered to by the Respondent. Following completion of the evaluation and obtaining approval of the Tender Board, the Respondent communicated the notice of intention to award the tender instead of issuing lists of pre-qualified tenderers.

The Appeals Authority is of the view that, if the Respondent intended to have a shortlist of prime vendors it ought to have adhered to the requirements of Regulations 116-123 of the Regulations.

The Appeals Authority is of the further firm view that, if the Respondent intended to conduct the tender process, it ought to have adhered to Regulation 184 of the Regulations which provides general guidance on the

contents of the Tender Document. Regulation 184 (1) itemizes basic information which are to be included in the Tender Document.

Further that, Section 70(1) and (2) read together with Regulation 184 (3), (4) and (5) of the Regulations require procuring entities to use appropriate standard tender document which addresses specific issues of a project. These provisions read as follows: -

Sec. 70 (1) ***"The procuring entity shall use the appropriate standard model tender documents specified in the Regulations for the procurement in question."***

(2) ***"The Tender Documents shall be worded so as to permit and encourage competition and such documents shall set forth clearly and precisely all information necessary for a prospective tenderer to prepare tender for the goods, services and works to be provided."***

Reg. 184(3) ***" A procuring entity shall use the appropriate standard tender documents issued by the Authority to address specific issues of a project in accordance with guidelines issued by the Authority.***

(4) Any changes to the standard tender documents shall be introduced only through tender data sheet, or through special conditions of contract.

(5) Where the relevant standard tender documents are not issued, the procuring entity shall use standard tender documents acceptable to the Authority."

In this Tender the Respondent instead of using the relevant Tender Document, issued to tenderers a pre-qualification document relating to construction industry. Further to that, when conducting evaluation of tenders the Respondent failed to adhere to the criteria and guidance provided for in the issued Document. Instead, tenders were evaluated based on the criteria provided on TANePS of which some of them were alien. When evaluating tenders the Respondent failed to adhere to the requirements of Section 72(1) and (2) of the Act read together with Regulation 203 (1) 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. 203 (1) "***The tender evaluation shall be consistent with 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 added)

Based on the above we are of the firm view that the Tendering process was marred with irregularities and was not conducted in accordance with the law. Therefore, the first issue is answered in the negative. This issue suffices to dispose of the Appeal. However, the Appeals Authority finds it necessary to also determine the remaining issues for the purpose of enlightening the parties on the points involved therein.

2.0 Whether the disqualification of the Appellant's tender is Justified;

The Appellant was disqualified for attaching an uncertified litigation history. Clause 4.14 of PITA read together with Information Form 8 required tenderers to provide accurate information about any litigation or arbitration. The Clause reads: -

> Clause 4.14 *"The Applicant shall provide accurate information on the related Application Form about any litigation or arbitration resulting from contracts completed or ongoing under its execution over the last five years (unless otherwise stated in PITA). A consistency history of awards against the Applicant or any partner of a joint venture may result in failure of the application."*

The Appellant submitted that it has attached to its tender a document which indicates that it does not have any litigation history for the past ten (10) years. The said document was stamped with official seal. The

Appellant expounded further that the document stating that it does not have any litigation history was not certified because such a requirement was not provided for in the Tender Document.

The Respondent on its part contended that the requirement to submit certified litigation history was clearly specified in the Information Form 8. Since litigation history is a legal document the same ought to have been notarized or certified by the commissioner for oaths even if such a requirement was not clearly stipulated in the Tender Document, the Respondent insisted.

The Appeals Authority reviewed the Tender Document available on the TANePS and observed that, the word certify was not provided for in the Information Form 8 as alleged by the Respondent. It transpired that a document similar to the Information Form 8 containing the words "*certified information on any history of litigation...*" was attached as part of Tender Document submitted by the Respondent to this Appeal Authority. That is to say, the Tender Document submitted before the Appeals Authority and the one uploaded on TANePS contained different information regarding litigation history. Based on the above facts, the Appeals Authority is of the settled view that the requirement to certify litigation history was not included in the Tender Document and therefore it ought not to have been used for evaluation. The Appeals Authority finds the Respondent's act of evaluating tenders using criteria which was not provided for in the Tender Document to have contravened Section 72(1) of the Act read together with

Regulation 203(1) of the Regulations quoted herein above. These provisions require criteria for evaluation to be specified in the Tender Document and adhered to during evaluation of tenders.

The Appeals Authority reviewed the tenders submitted by the proposed successful tenderers, M/s Umoja Pharmaceutical Company Ltd for Lots 1 & 2 and M/s Kasimwa General Supplies for Lots 3 and 4 and observed that they attached litigation history to their respective tenders which were notarized. According to Clause 4.14 of PITA read together with Information Form 8, tenderers were mandatorily required to submit accurate information about their litigation history in the prescribed form. Neither the proposed successful tenderers nor the Appellant complied with this requirements in the prescribed form.

The Appeals Authority finds the Respondent's act in this regard to have contravened the requirements of Section 4A (3) (a), (b) and (c) of the Act, which provides as follows:-

> Sec. 4A (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 best value for money in terms of price, quality and delivery having regards to prescribed specifications and criteria".

(Emphasis added)

The above quoted section requires procuring entities when conducting procurement process to adhere to the highest standard of equity by allowing equal opportunity to all tenderers and treating all tenderers fairly. The facts herein above indicate that, there was no equal treatment of tenderers in the disputed tendering process.

Under the circumstances the Appeals Authority concludes the second issue in the negative that the Appellant's disqualification from the Tender process was not justified.

3.0 Whether the Application for administrative review was handled in accordance with the law

Section 100 (1) of the Act read together with Regulation 106(1) of the Regulations provide as follows:-

Sec. 100(1)"***upon receipt of the complaint or dispute, the Accounting officer shall subject to subsection (2), suspend the procurement process pending determination of a complaint or an appeal.***"

Reg. 106 (1) ***"An accounting officer shall, upon receipt of an application for administrative review, suspend the procurement or disposal proceedings of the tender in dispute, until he delivers a written decision of the complaint."*** *(Emphasis added)*

The above quoted provisions indicate clearly that procuring entities are required to suspend the tender process after receipt of an application for administrative review.

According to the record of Appeal the Respondent received the Appellant's application for administrative review on 11th April 2022 and issued a decision on 12th April 2022. The Respondent was required to suspend the procurement process immediately upon receipt of the Appellant's complaint. The Respondent has not provided any evidence that it did suspend the Tendering process as required by Section 100(1) of the Act and Regulation 106(1) of the Regulations.

Under the circumstances, the Appeals Authority is of the settled view that, the Respondent contravened the requirement of Section 100(1) of the Act and Regulation 106(1) of the Regulations.

Regarding the Appellant's contention that the application for administrative review was determined by the Acting Regional Administrative Secretary (RAS), the Appeals Authority revisited Regulation 47(1) (a), (b) and (c) of the Regulations, which reads as follows:-

Reg. 47(1) "An accounting officer may delegate in writing his function to a member of staff of the procuring entity except for the following functions:

(a) establishment of and appointment of members of a tender board;

(b) establishment of a procurement management unit;

(c) ***investigation of a complaint by tenderer****; and*

(d) submission of reports of findings in respect complaints to the Authority.

(Emphasis added)

The above quoted provision stipulates, amongst others, that the accounting officer is prohibited from delegating a function relating to investigation of a complaint by a tenderer. The Appeals Authority reviewed Section 96(2) of the Act, which provides guidance on handling of complaints by the Accounting Officer. The provision reads as follows:-

*Sec.96(2) "****On receiving a complaint under this section the accounting officer may, depending on the nature of the complaint, constitute an independent review panel*** *from within or outside his organization which shall review the complaint and advise him on the appropriate actions to be taken."*

(Emphasis added)

This provision, in the Appeals Authority's view, does not mandatorily require the accounting officer to form independent review panel to investigate the complaint submitted by a tenderer. The accounting officer may or may not form such a committee depending on the nature of the complaint.

According to the record of Appeal and the Respondent's own submissions immediately after receipt of the Appellant's application for review on 11th April 2022, it issued a decision on 12th April 2022 without forming an investigation team. Since Regulation 47(1) (c) of the Act only prohibits the Accounting Officer from delegating its function in relation to investigation of a complaint and since there was no investigation which was conducted in relation to the Appellant's complaint, the Appeals Authority is of the settled view that the acting Accounting Officer did not contravene any requirement of the law in dealing with the application for administrative review.

4.0 What reliefs, if any, are the parties entitled to.

Taking cognizance of the findings on the first and second issues, the Appeals Authority hereby allow the Appeal and nullifies the entire procurement process pursuant to Section 97(5) (d) of the Act. The Respondent is ordered to restart the procurement process in compliance with the law.

As regards to the costs of TZS 3,000,000/-, the Appellant is awarded TZS 300,000/- only being Appeal filing fees. The remaining costs are declined because the Appellant did not produce any evidence in support thereof.

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 this 24th day of May 2022.

ADVOCATE ROSAN S. MBWAMBO

.....

Ag. CHAIRPERSON

MEMBERS: -

1. Dr. WILLIAM M. KAZUNGU.....

2. MR. PIUS M. MPONZI.....