

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM  
APPEAL CASE NO. 23 OF 2021-22**

**BETWEEN  
M/S GENERAL DE PHARMACY LIMITED.....APPELLANT**

**AND**

**REGIONAL ADMINISTRATIVE  
SECRETARY – SINGIDA.....RESPONDENT**

**DECISION**

**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. Esaba Manyama       | - Procurement Consultant |
| 2. Mr. Walter Onesmo Mushi | - Operations Manager     |
| 3. Mr. Richard Olotu       | - Marketing Manager      |
| 4. Ms. Farida George       | - Sales Manager          |

**FOR THE RESPONDENT**

- |                               |                    |
|-------------------------------|--------------------|
| 1. Ms. Matrider S. Meckson    | - Legal Officer    |
| 2. Mr. Nkuli Ngasha Nketo     | - Supplies Officer |
| 3. Mr. Elikama Lubango Isanzu | - Pharmacist       |

The Appeal was lodged by M/s General De Pharmacy Limited (hereinafter referred to as "**the Appellant**") against the Regional Administrative Secretary - Singida (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. RAS/012/2021/2022/G/8 Lot 1-4 for Supply of Medicine, Medical Supplies, Medical Equipment, Laboratory Reagent, Diagnostics Supplies and Orthopaedics Supplies at Public Health Facilities in Singida Region (hereinafter referred to as "**the Tender**").

The Tender was conducted using National Competitive Bidding procedures 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 8<sup>th</sup> October 2021 the Respondent through TANePS invited qualified tenderers to submit their tenders. The deadline for submission was set for 29<sup>th</sup> October 2021 and the tenders were opened immediately thereafter. Nine (9) tenders were submitted for all Lots and the Appellant participated in Lot 1, 3 and 4.

The Tenders were then subjected to evaluation and after completion the Evaluation Committee recommended award of the contract to M/s Umoja Pharmaceutical Company Ltd for Lot 1 and 3 and M/s Anudha Limited for Lot 2 and 4 subject to successful negotiations.

The Tender Board at its meeting held on 15<sup>th</sup> December 2021, approved the award as recommended by the Evaluation Committee. On 27<sup>th</sup> December 2021, negotiations took place and were successful.

On 25<sup>th</sup> January 2022, the Respondent issued the Notice of Intention to award the contract to all tenderers who participated in the Tender. The said notice informed the tenderers that the Respondent intends to award the contract to M/s Umoja Pharmaceutical Company Ltd for Lot 1 & 3 and to M/s Anudha Ltd for Lot 2 and 4. The Notice also informed the Appellant that its tender was disqualified for the reasons that:-

*"A copy of certificate for premises and business permit issued by TMDA, Tax Clearance and evidence of possession of an EFD machine were not certified."*

Dissatisfied with the decision, the Appellant applied for administrative review to the Respondent on 30<sup>th</sup> January 2022. The Respondent did not respond to the Appellant's application for administrative review. Aggrieved further, on 16<sup>th</sup> February 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 summarised as follows: -

1. That, the Respondent erred in law for disqualifying the Appellant on the ground that copies of certificate for premises and business permit issued by TMDA, Tax Clearance Certificate and evidence of possession of an

EFD machine were not certified. According to the Appellant, the listed criteria for its disqualification were not defined in the Tender Document contrary to Regulation 203(1) of the Regulations. The Appellant expounded further that, the requirement to submit certified documents was not provided for in the Tender Document instead the same was indicated on TANEPS. According to Regulation 203(1) of the Regulations all requirements of the Tender have to be specified in the Tender Document, thus even the uploaded requirements on TANEPS are to be from the floated Tender Document. The tenderers were only required to submit copies of the documents as prescribed in the Tender Document. The requirement of certifying them which led to the Appellant's disqualification was only provided in the TANEPS.

2. That, the wording of the Invitation to Tender issued by the Respondent was ambiguous as under Item 6 tenderers were not allowed to apply for more than two Lots while under Item 5 of the Tender Notice for Goods tenderers were allowed to apply for more than one Lot.
3. That, the Respondent erred in law by not entertaining the Appellant's application for administrative review submitted on 30<sup>th</sup> January 2022 via TANEPS and email.
4. Finally, the Appellant prayed for the following orders: -
  - i. Re-evaluation of the Appellant's tender; and

- ii. Refund of legal consultation fee, transport and accommodation during the hearing amounting to TZS. 3,000,000/-.

### **SUBMISSIONS BY THE RESPONDENT**

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

1. That, the evaluation criteria were provided for in the Tender Document as well as on the TANEPS. The Respondent submitted further that the Tender Document includes several sections and some of the requirements were introduced through TANEPS. According to the Respondent, since the tender was floated through TANEPS and tenderers were required to submit their bids through it, they were also required to comply with all the requirements on the TANEPS as being part of the Tender document.
2. That, apart from the requirement to submit certified copies of certificates establishing legal status, bidders were also required to attach Tax Clearance certificates which indicate that they are wholesalers. To the contrary, the Appellant attached Tax Clearance Certificate which indicates that it has a retail business and not wholesale.
3. That, the Application for administrative review was contrary to Regulation 105(2) of the Regulations which provide that an application for administrative review shall not apply to complaints submitted in

response to the notice of intention to award the contract issued to tenderers pursuant to Section 60(3) of the Act. The Respondent added that after issuing the Notice of Intention to award it could not have entertained the Appellant's application for administrative review as Regulation 105(2) of the Regulations prohibits such a review.

4. The Respondent's replies to the Appellant's prayers were as follows: -
  - i. Re-evaluation should not be carried out, since the Appellant did not comply with the evaluation criteria; and
  - ii. Refund of legal consultation fee, transport and accommodation during hearing amounting to TZS. 3,000,000/- should not be ordered because the Respondent did not contravene any laws or regulations.
5. Finally, the Respondent prayed for dismissal of the Appeal and for each party to bear its own costs.

### **ANALYSIS BY THE APPEALS AUTHORITY**

During the hearing the following issues were framed by the Appeals Authority in agreement with the parties: -

- 1.0 Whether the disqualification of the Appellant's tender was justified; and**
- 2.0 What reliefs, if any, are the parties entitled to.**

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

**1.0 Whether the disqualification of the Appellant's tender was justified.**

In resolving this issue, the Appeals Authority reviewed the Notice of Intention to award issued by the Respondent and observed that, the Appellant was disqualified for the reason that copies of certificates for premises and business permit issued by TMDA, Tax Clearance certificate and evidence of possession of an EFD machine were not certified.

The Appeals Authority reviewed the reasons for the Appellant's disqualification in the Evaluation Report and observed that there are more reasons in addition to those stated in the notice of intention to award. These reasons were failure to attach a list of geographical reach of the applicant services and model of information system between company and customer.

In order to substantiate if the reasons for the Appellant's disqualification were justified, the Appeals Authority revisited the Tender Document and observed that Clause 11.1 (g) of the Instructions To Tenderers (ITT) modified by Clause 6 of the Tender Data Sheet (TDS) listed the documents which were to be submitted by tenderers. The Clauses read as follows: -

*"11.1 The Tender prepared by the Tenderer shall constitute the following components:*



(g) Any other document required in the **Tender Data Sheet** (TDS 6)."

"6. In addition to the documents stated in ITT Clause 11, the following documents must be included with the Tender

1. Form of Tender

2. Schedule of prices and product specification

3. Tender securing Declaration

4. Power of Attorney

5. **Legal status documents (registration, current business permit, current license, tax clearance certificate)** – (do not submit – these were submitted and evaluated in the prequalification tender)."

In order to ascertain whether the Appellant complied with the above requirements, the Appeals Authority reviewed its tender which was submitted on TANePS and observed that, it had attached certified copies of Tax Clearance Certificate, certificate for business premises and business permit issued by TMDA, and evidence of possession of EFD machine.

Furthermore, the Appeals Authority noted from the record of the Tender proceedings that M/s Anudha Ltd attached uncertified copies of the same documents and yet was proposed for award for Lots 2 and 4.



With regard to the Respondent's argument that Tax Clearance certificate was to indicate if the Appellant was a wholesaler, the Appeals Authority reviewed the Tender Document and observed that, there was no requirement for tenderers to submit a Tax Clearance certificate indicating a wholesale business as claimed by the Respondent.

The Appeals Authority reviewed the Tax Clearance certificates of the proposed successful tenderers in order to substantiate if they had attached Tax Clearance certificates for wholesale business. In the course of reviewing their documents submitted on TANEPS, the Appeals Authority observed that, both proposed successful tenderers, M/s Anudha Ltd and Umoja Pharmaceutical Company Ltd had attached Tax Clearance certificates for retail business.

Regarding the Appellant's disqualification for failure to submit information relating to a list of geographical reach and a model of information system between company and customer, the Appeals Authority reviewed the Tender Document and observed that such a requirement was not included therein.

The Respondent submitted that the Appellant bid for all Lots while the Tender Document required tenderers to bid for not more than two Lots. In response to this argument the Appellant stated that the Respondent issued Clarification No. 7 which allowed tenderers to bid for more than two Lots.

The Appeals Authority observed from the record of Appeal that Item 6 of the Invitation for Tenders dated 8<sup>th</sup> October 2021, required bidders to bid



for not more than two lots, while Item 5 of the Tender Notice for Goods also dated 8<sup>th</sup> October 2021, required bidders to bid for one or more Lots but the award would be made on Lot by Lot basis. Having reviewed item 5 and 6, the Appeals Authority is of the view that while Item 5 of the Tender Notice for Goods allowed tenderers to bid for more than one Lot, Item 6 of the Invitation to Tender restricted such a bidding to two Lots only. Thus, tenderers were required to bid for not more than two Lots. Clarification No. 7 relied by the Appellant only related to grouping Lots 2 and 3.

Having reviewed the Evaluation Report, the Appeals Authority observed that, the Appellant and the proposed successful tenderer for Lots 2 and 4 M/s Anudha Ltd bid for three Lots instead of two Lots. However, neither the Appellant nor the proposed successful tenderer was disqualified for that reason.

Section 72 of the Act read together with Regulation 301(1) of the Regulations provide 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***".

The above quoted provisions require the procuring entity to conduct evaluation process in observance of the terms and conditions prescribed in the Tender Document. In this Tender the Respondent added more requirements in the TANePS which were not in the Tender Document. TANePS is a web-based, collaborative system developed in accordance with requirement of Public Procurement Laws, to facilitate public procurement process in Tanzania. TANePS is not a part of the Tender Document. The Appeals Authority declines the Respondent invitation to consider that TANePS forms part of the Tender Document. Therefore, the Respondent's act of disqualifying the Appellant and qualifying others that is, M/s Umoja Pharmaceutical Company Ltd for Lot 1 and 3 and M/s Anudha Limited for Lot 2 and 4 based on the criteria not provided in the Tender Document contravened the requirements of Section 72(1) of the Act read together with Regulation 203(1) of the Regulations.

Section 4A(3) (a), (b) and (c) of the Act provides as follows:-

(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 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 treat all tenderers fairly. As observed in the above analysis that while the Appellant was disqualified for attaching uncertified certificates yet M/s Anudha Ltd was proposed for award despite attaching uncertified certificates.

The Appeals Authority noted with concern the Respondent's act of adding new reasons during the hearing for the disqualification of the Appellant other than those stated in the Notice of intention to award which also did not include all reasons contained in the evaluation report. The Appeals Authority wishes to emphasise on the requirement of Regulation 231 of the Regulations which reads as follows: -

Reg. 231 (4) *"The notice referred to in sub-regulation (2) shall contain-*

*(a) Name of the successful tenderer;*

*(b) The contract sum and completion or delivery period; and*

***(c) Reasons as to why the tenderers were not successful."***

*(Emphasis supplied)*

The above quoted provision clearly provides that the Notice of Intention to award should indicate the name of the proposed successful tenderer,



contract sum and the reasons as to why other tenderers were unsuccessful.

In relation to the Appellant's contention that the Respondent has not responded to its application for administrative review, the Appeals Authority observed from the record of Appeal that the Notice of Intention to award was issued on 25<sup>th</sup> January, 2022 and the Appellant applied for administrative review on 30<sup>th</sup> January 2022. However, the Respondent did not respond to the Appellant's application. On 16<sup>th</sup> February 2022 the Appellant lodged this Appeal.

During the hearing the Respondent submitted that, according to Regulation 105(2) of the Regulations, a tenderer is not allowed to apply for an administrative review after issuance of the Notice of the intention to award. Having reviewed Regulation 105(2) relied by the Respondent together with Sections 60(3), 95 and 96 of the Act, the Appeals Authority is of the settled view that a tenderer is allowed to file an application for administrative review after being dissatisfied with the notice of intention to award. The wording and the provisions of the Act supersedes the Regulations.

The Appeals Authority is of the view that, despite the fact that the Respondent refused to entertain the Appellant's application for review, such anomaly did not prejudice the Appellant's rights as it utilized the available remedy pursuant to Sections 96(7) and 97(2) of the Act by filing this Appeal.



Given the findings hereinabove, the Appeals Authority concludes the first issue in the affirmative that the disqualification of the Appellant's tender was not justified.

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

Taking cognizance of the findings hereinabove, the Appeals Authority nullifies the entire Tender process under Section 97(5) (d) of the Act. The Appeal is hereby allowed, and the Respondent is ordered to restart the entire Tender process in compliance with the law. We make no order as to costs.

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 parties this 1<sup>st</sup> day of April 2022.

**HON. JUSTICE (RTD) SAUDA MJASIRI**



.....  
**CHAIRPERSON**

**MEMBERS: -**

**1. ENG. STEPHEN MAKIGO**.....

**2. ADVOCATE ROSAN MBWAMBO**.....