

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL CASE NO. 07 OF 2023-24**

**BETWEEN**

**M/S DAR ES SALAAM FLYING DOCTORS LIMITED.....APPELLANT**

**AND**

**NATIONAL HEALTH INSURANCE FUND.....RESPONDENT**

**DECISION**

**CORAM**

- |                                     |               |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Ms. Ndeonika Mwaikambo           | - Member      |
| 3. Dr. William Kazungu              | - Member      |
| 4. Mr. James Sando                  | - Secretary   |

**SECRETARIAT**

- |                        |                              |
|------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Agnes Sayi      | - Senior Legal Officer       |
| 3. Ms. Violet Limilabo | - Senior Legal Officer       |

**FOR THE APPELLANT**

- |                        |                                     |
|------------------------|-------------------------------------|
| 1. Mr. Peter Mshikilwa | - Advocate-Blue Strategic Attorneys |
| 2. Mr. Charles Mnasizu | - Director of Operations            |



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## FOR THE RESPONDENT

1. Mr. Ayoub Sanga - State Attorney - OSG
2. Ms. Caroline Lymo - State Attorney – OSG
3. Ms. Ainess Bamanyisa - Senior State Attorney-NHIF
4. Ms. Hanifu Khimji - Procurement Officer - NHIF

The Appeal was lodged by **M/S Dar es Salaam Flying Doctors Ltd** (hereinafter referred to as "**the Appellant**") against the **National Health Insurance Fund** commonly known by its acronym as "**NHIF**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. PA/071/2022-2023/HQ/NC/26 for Provision of Air Evacuation and Ambulance Services to NHIF Beneficiaries (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 through National Competitive Tendering method 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 as amended (hereinafter referred to as "**the Regulations**").

On 24<sup>th</sup> February 2023, the Respondent invited tenderers through the Tanzania National electronic Procurement System (TANePS) to participate in the Tender. The deadline for submission of tenders was on 15<sup>th</sup> March

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2023. On the deadline, five tenders were received including that of the Appellant.

The received tenders were subjected to evaluation which was conducted into three stages, namely; preliminary, technical and financial evaluation. The two tenders including that of the Appellant were disqualified at the preliminary evaluation stage for failure to comply with the requirements of the Tender Document. The remaining three tenders were subjected to technical and thereafter financial evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/S Tindwa Medical and Health Services subject to negotiations.

The Evaluation Committee's recommendations were approved by the Tender Board at its meeting held on 30<sup>th</sup> May 2023. In addition, the Tender Board also through Circular Resolution No. 05 of 2022/2023 dated 8<sup>th</sup> June 2023 approved the negotiation plan. On 16<sup>th</sup> June 2023, negotiations successfully took place between the Respondent and M/S Tindwa Medical and Health Services. On 26<sup>th</sup> June 2023, the Tender Board approved the negotiation report.

On 12<sup>th</sup> July 2023, the Respondent issued the Notice of Intention to award the Tender to all tenderers which participated in the Tender process. The Notice informed the tenderers that the Respondent intends to award the Tender to M/S Tindwa Medical and Health Services. The proposed framework contract was for a total unit price of Tanzanian Shillings One Billion Five Hundred Ninety Six Million Seven Hundred Twenty Six Thousand only (TZS 1,596,726,000.00) VAT inclusive. The Notice also informed the



Appellant that its tender was not successful due to a defective Power of Attorney it submitted.

Dissatisfied with the reason given for its disqualification, on 17<sup>th</sup> July 2023, the Appellant applied for administrative review to the Respondent. The letter was received by the Respondent on 19<sup>th</sup> July 2023. On 31<sup>st</sup> July 2023, the Respondent issued its decision which dismissed the Appellant's application for administrative review. Aggrieved further on 7<sup>th</sup> August 2023, the Appellant lodged this Appeal to the Appeals Authority.

When the matter was called on for hearing the following issues were framed: -

- 1.0 Whether the disqualification of the Appellant was justified;**
- 2.0 Whether the Respondent's decision was issued within time;**
- 3.0 Whether the request for extension of bid validity period complied with the law; and**
- 4.0 What reliefs, if any, are the parties entitled to?**

#### **SUBMISSIONS BY THE APPELLANT**

In this Appeal the Appellant's submissions were made by Mr. Peter Mshikilwa, learned advocate. He commenced his submissions on the first issue by stating that the Appellant was dissatisfied with the reason given for its disqualification as contained in the Notice of Intention to award. According to the Notice of Intention to award the Appellant's tender was disqualified for submitting a defective Power of Attorney as the person who was given the Power of Attorney signed the document as the donor instead of the donee. The learned counsel contended that upon being dissatisfied

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with the reason given for its disqualification, on 17<sup>th</sup> July 2023 the Appellant filed an application for administrative review to the Respondent. The said application was copied to the Registrar of Titles so that it could be verified if the Appellant's Power of Attorney was defective. The learned counsel asserted that after making a follow up with the Registrar of Titles, it was informed that the status of its Power of Attorney was communicated to the Respondent who inquired officially about its authenticity. Thus, the Appellant had not received any official communication from the Registrar of Titles on the validity of its Power of Attorney.

The learned counsel submitted that the Appellant's Power of Attorney had minor errors. The place where a donor (Ester Magoke) ought to have signed on behalf of the Appellant's company, it was signed by the donee, one Cyprian Charles Mnasizu. The learned counsel added that the place where the donee was to sign, was signed by an advocate. The learned counsel asserted that the noted errors could not have led the Appellant's Power of Attorney to be considered as defective. In addition, the said Power of Attorney was registered by the Registrar of Titles. Thus, its defects could be cured. Therefore, the Appellant's Power of Attorney was proper despite the minor irregularities, the learned counsel contended.

On the second issue, the learned counsel submitted that upon being dissatisfied with the reason given for its disqualification, on 17<sup>th</sup> July 2023, the Appellant filed its application for administrative review to the Respondent. The Respondent issued its decision thereof on 31<sup>st</sup> July 2023. Having counted the days within which the Respondent was required to



issue its decision, it was observed that the decision was issued within the required time limit.

On the third issue, the learned counsel submitted that the Respondent contravened the requirements of the Tender Document by requesting the extension of the bid validity period through email instead of TANePS. Clause 18.2 of the Instruction to Tenderers (ITT) required a request for extension of the bid validity period to be made through TANePS. To the contrary, the Respondent issued the said request through email. The learned counsel challenged the Respondent's proposition as contained in its Statement of Reply that it failed to issue the said request through TANePS due to a network problem. The learned counsel asserted that if there was a network problem, the Respondent would also fail to send the request for extension of the bid validity period through email.

The learned counsel stated that since the request for extension of the bid validity period was issued via email contrary to the mandatory requirement of Clause 18.2 of the ITT, the said request was invalid. The learned counsel added that, much as the Appellant received the Respondent's request for extension of the bid validity period, it did not accept the request as it contravened the requirements of the Tender Document. The learned counsel asserted further that, the same is as if it was not issued. Therefore, there was no valid Tender as it had already expired.

The learned counsel contended further that the Respondent's act of using a different communication mode other than what was specified in the Tender Document contravened Section 4A of the Act. Thus, it infringed the principle of transparency, fairness and openness. Furthermore, the

Respondent's act in this regard also contravened part XI of the Regulations. Therefore, the Respondent's intention to award the Tender to the proposed successful tenderer is invalid, the learned counsel contended.

Finally, the Appellant prayed for the following orders:-

- i. The Tender process be re-advertised and the Appellant be given an opportunity to participate in the re-advertised Tender;
- ii. The Respondent be ordered to pay costs of this Appeal; and
- iii. Any other reliefs, the Appeals Authority may deem fit to grant.

### **REPLY BY THE RESPONDENT**

The Respondent's submissions were made by Mr. Ayoub Sanga, learned State Attorney, from the Office of the Solicitor General. He commenced his submissions by adopting the Respondent's Statement of reply and went on stating that in conducting this Tender the Respondent complied with Section 40 of the Act read together with Regulations 202, 203 and 204 of the Regulations.

The learned State Attorney submitted that the Appellant's tender was disqualified for submitting a defective Power of Attorney. According to Clause 11.1(e), (h) and (i) of the ITT, tenderers were required to submit a notarized Power of Attorney indicating donor and donee. In addition, Clause 20.2 of the ITT read together with Clause 25 of the Tender Data Sheet (TDS) required tenderers to submit a duly notarized Power of Attorney as per the format provided for under Section V - Tendering Forms. The learned counsel submitted that the format of the Power of Attorney indicated clearly that it should have two components, namely donor and



donee. The donor who grants the powers on one part while the donee who accepts the granted powers on the other part. The said Power of Attorney had to be notarized by the Commissioner for Oaths.

The learned State Attorney submitted that the Power of Attorney is governed by part X of the Law of Contract Act, Cap 345 R.E 2019 which provides guidance on the obligations and powers in a principal and agent relationship. The learned State Attorney contended that the scope of the Power of Attorney is determined by the powers that the principal donates to the agent. The agent cannot exercise more powers than what was donated.

He contended further that according to Section 96 of the Land Registration Act, the Power of Attorney is one of the documents that is to be registered to the Registrar of Titles. However, the registration does not validate an invalid Power of Attorney. In this Tender the Respondent had all the mandate to determine that the power of attorney is valid and proper.

The learned counsel stated that the Appellant's Power of Attorney was defective as one Charles Cyprian Mnasizu who was given the powers as a donee signed on the part where a donor ought to have signed. On the part where the donee was to sign, the advocate signed as a donee and also attested the document as a Commissioner for Oaths. The learned State Attorney contended that the irregularities on the Power of Attorney contravened the requirements of the Circular issued by the Public Procurement Regulatory Authority (PPRA) dated 9<sup>th</sup> June 2017 with Ref. No. PPRA/IE/029/"A". It also contravened the Oaths and Statutory





Declarations Act, Cap 34 R.E of 2019 and Clauses 11.1 (e), (h) and (i) of the ITT and 25 of the TDS.

In support of his argument the learned State Attorney cited the case of ***Barreto Hauliers (T) Ltd and another versus Mohamood Mohamed Duale***, Civil Appeal No. 7 of 2018, Court of Appeal of Tanzania, at Dar es Salaam (unreported). In this case the court relied on the definition of Power of Attorney from **Black's Law Dictionary**, 9<sup>th</sup> Edition. The "Power of Attorney" was defined as *an act of granting someone an authority to act as an agent or attorney for the grantor*. The court stated that by a deed of Power of Attorney an agent is appointed to do all acts and deeds as specified on behalf of the principal. The court also indicated that according to Section 96(1) of the Land Registration Act, the Power of Attorney had to be registered by the Registrar of Titles.

The learned State Attorney submitted that from the principles established in the above cited case, the Appellant's Power of Attorney lacked the mandatory components, despite being registered with the Registrar of Titles. Thus, the Appellant's Power of Attorney was defective.

In relation to the second issue the learned State Attorney submitted that the Respondent received the Appellant's application for administrative review on 19<sup>th</sup> July 2023. According to Section 96(6) of the Act, the Respondent was required to issue its decision within seven working days. Counting from 19<sup>th</sup> July 2023, the Respondent ought to have issued its decision by 28<sup>th</sup> July 2023. However, the Respondent's decision was issued on 31<sup>st</sup> July 2023, beyond the stipulated seven working days. The learned

State Attorney contended that the delay in issuing the decision was caused by the Respondent's internal arrangements.

The learned State Attorney contended that, much as the Respondent did not issue its decision within the stipulated time limit, the delay is curable and did not prejudice the Appellant's rights. According to Section 97(2)(a) of the Act, a tenderer is allowed to file its Appeal to this Appeals Authority if the procuring entity fails to issue its decision within the stipulated time. The learned State Attorney stated that the Appellant filed its Appeal within the stipulated time limit. Therefore, no injustice was suffered by the Appellant.

On the third issue, the learned State Attorney submitted that, the bid validity period for the Tender was 120 days. It was supposed to expire on 13<sup>th</sup> July 2023. Prior to the expiration of the bid validity period, the Respondent invoked Section 71 of the Act read together with Regulation 191 of the Regulations. The provisions confer powers to the procuring entity to extend the validity of the tender in exceptional circumstances, prior to the expiry of the original period of effectiveness of the tenders. Based on that requirement of the law, on 12<sup>th</sup> July 2023, the Respondent through email requested tenderers to extend their bid validity period for the Tender.

The learned State Attorney submitted that Clause 18.2 of the ITT required a request for extension of the bid validity period to be made through TANEPS. However, the Respondent failed to do so due to a network problem in accessing TANEPS. Therefore, the Respondent opted to send the request for extension of the bid validity period to all tenderers through




email. The learned State Attorney asserted that on the same date (12<sup>th</sup> July 2023), the proposed successful tenderer responded to the request by extending the bid validity period as required.

The learned State Attorney contended further that the Appellant through a letter dated 13<sup>th</sup> July 2023 acknowledged receipt of the request for extension of the bid validity period. However, it did not accept the request for extension of the bid validity period for the reason that the request was not sought through TANEPS as required by Clause 18.2 of the ITT. The learned State Attorney submitted that Clause 18.2 of the ITT required a request for extension of the bid validity period to be made through TANEPS. However, Regulation 191(6) of the Regulations requires the service of the said request to be made through any other means which provide a record.

Having encountered network challenges with TANEPS the Respondent opted to send the request for extension of the bid validity period through email. According to the Respondent, email provides record. Therefore, it is an acceptable means of communicating the request for extension of the bid validity period as per Regulation 191(6) of the Regulations. The learned State Attorney stated further that the Law and the Tender Document have to be read together and not in isolation. Therefore, the Respondent's act of requesting the extension of the bid validity period via email was proper, the learned State Attorney contended.

The learned State Attorney submitted further that according to Regulation 191(5) of the Regulations, a tenderer who refuses the request for extension of the bid validity period automatically disqualifies itself from the




Tender process. In the disputed Tender, the Appellant rejected to extend the bid validity period. Thus it is not a tenderer.

The learned State Attorney stated further that despite the fact that the Appellant disputes the Respondent's act of requesting extension of the bid validity period through email, its application for administrative review was submitted via email to the Respondent. This was in contravention with Clause 47.1 of the ITT which requires such an application to be submitted through TANEPS. The learned State Attorney contended that, before challenging the Respondent's act of sending the request for extension of the validity period through email, it ought to have considered the validity of its application for administrative review that was sent via email instead of TANEPS.

In support of his argument the learned State Attorney cited the case of ***M/S Ascerics Limited versus Dar es Salaam City Council and another***, Appeal Case No. 45 of 2022-2023, whereby this Appeals Authority provided a general guidance on the extension of the bid validity period.

Finally, the learned State Attorney prayed for the following orders:-

- i. The Appeal be dismissed with costs as the Appellant has instituted a malicious case despite knowing that its Power of Attorney was defective; and
- ii. The Respondent to be allowed to proceed with the procurement process.



## ANALYSIS BY THE APPEALS AUTHORITY

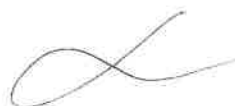
### 1.0 Whether the disqualification of the Appellant was justified

In resolving this issue, the Appeals Authority reviewed the record of Appeal, particularly the evaluation report and the Notice of Intention to award. It observed that the Appellant was disqualified for submitting a defective Power of Attorney. In ascertaining the validity of the Appellant's disqualification, the Appeals Authority reviewed the Tender Document and observed that Clause 11.1 (e) of the ITT listed a Power of Attorney as one of the key components that constitute the tender. Clause 11.1 (i) of the ITT as modified by Clause 13(vii) of the TDS listed a Power of Attorney as one of the documents that would be assessed during preliminary evaluation. In addition, Clause 20.2 of the ITT as modified by Clause 25 of the TDS required the Power of Attorney to be duly notarized and in the format provided under Section V – Tendering Forms. The referred Clauses read as follows:-

*"ITT 11.1 The tender prepared by the Tenderer shall constitute the following components:-*

*(e) **Duly Notarized Power of Attorney authorizing the signatory of the Tender to commit the Tenderer in accordance with ITT 20 [Format and Signing of Tender]; and***

*(i) any information other than the documents under ITT 11.1(a)-(h) above required to be completed and submitted by Tenderers, as specified in the **TDS**.*



*TDS 13 The Tenderer shall submit the following additional documents in its Tender [list any additional document not already listed in ITB 11.1 that must be submitted with the Bid]. The list of additional documents may include the following:-*

***(vii) Power of Attorney indicating Donor and Donee signatures.***

*ITT 20.2 The tender shall be signed by a person or persons duly authorized to sign on behalf of the Tenderer and the authorization documents shall be submitted together with the tender indicating the names and positions held by each signatory as specified in the TDS.*

***TDS 25 Authorization document (s) shall be duly notarized Power of Attorney in the format provided in Section V: Tendering Forms.”***

(Emphasis added)

In ascertaining if the Appellant's Power of Attorney complied with the above quoted provisions, the Appeals Authority reviewed its tender on TANePS. The Appeals Authority observed that, it attached a Power of Attorney at the relevant slot. Having reviewed the attached Power of Attorney, the Appeals Authority noted that the Appellant's company through Ester Magoke appointed one Charles Cyprian Mnasizu to be the Appellant's lawful attorney and agent for this Tender. The said Power of Attorney indicated further that Mr. Charles Cyprian Mnasizu who was a

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donee signed as a donor and Ester Magoke signed as a witness instead of a donor. In addition, one Methuselah B. Mafwele, an advocate signed as a donee who acknowledged the granted powers and at the same time as the Commissioner for Oaths who attested the said Power of Attorney.

The Appeals Authority observed further that the Appellant's Power of Attorney was submitted in the provided format as specified under Section V - Tendering Forms. However, the same was altered and was not signed by the donor and the donee as per the format provided. In the Appeals Authority's view, the Power of Attorney is defective and cannot serve the purpose intended.

The Appeals Authority considered the Appellant's proposition that much as it admitted that its Power of Attorney has minor irregularities; but it insisted that the same could not have rendered it to be considered as defective. The Appellant contended that if the irregularities on its Power of Attorney were major and went to the root of the matter, it could not have been registered by the Registrar of Titles. The Respondent on its part contended that the Appellant's Power of Attorney contravened the requirements provided for in the Tender Document and is therefore defective.

Having reviewed the provided format of the Power of Attorney under Section V-Tendering Forms and the Appellant's Power of Attorney, the Appeals Authority is of the considered view that the Appellant's Power of Attorney did not meet the legal requirements and is evidently defective. It is executed by the wrong donor and donee and is attested by the



Commissioner for Oaths who also signed as donee. A person cannot be a donee and a Commissioner for Oaths in same Power of Attorney.

The Appeals Authority is of the firm view that since the PPRA Circular issued on 9<sup>th</sup> June 2017 states clearly that the registration of Power of Attorney at the tendering stage is not compulsory, the registration of the Appellant's Power of Attorney at this stage was not relevant. In addition, the fact that the Appellant's Power of Attorney was already registered does not make a difference as the registration process could not and cannot validate the existing irregularities. Therefore, it is the considered view of the Appeals Authority that the Appellant's Power of Attorney ought to have complied with the format of the Power of Attorney, including the signing arrangement as provided under Section V –Tendering Forms.

The Appeals Authority revisited Regulations 204(2)(b) and 206(2) of the Regulations which read as follows: -

*"204(2) Material deviations to commercial terms and conditions, which justify rejection of a tender shall include the following:-*

*(b) failure to satisfy eligibility requirements;*

*206(2) Where a tender is not responsive to the tender document, it shall be rejected by the procuring entity, and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation."*





The above quoted provisions indicate clearly that where a tenderer fails to comply with eligibility requirements, it should be rejected and it may not be made responsive by correction or withdrawal of the deviations. Since it has already been pointed out hereinabove that the Appellant's Power of Attorney has irregularities and that the Appellant concedes the same, the Appeals Authority finds the Respondent's act of disqualifying the Appellant's tender to be proper and in compliance with the requirements of the law and its Regulations.

In view of the above findings, the Appeals Authority concludes the first issue in the affirmative that the disqualification of the Appellant was justified.

Given our findings on issue number one, the Appeals Authority is of the firm view that the same suffices to dispose of this Appeal. The Appeals Authority would therefore not delve into issue number two and three.




#### **4.0 What reliefs, if any, are the parties entitled to?**

Taking cognizance of the findings hereinabove, the Appeals Authority hereby dismiss the Appeal and allows the Respondent to proceed with the Tender process.

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.

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This decision is delivered in the presence of the parties this 31<sup>st</sup> day of August 2023.

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

  
.....  
**CHAIRPERSON**

**MEMBERS: -**

**1. MS. NDEONIKA MWAIKAMBO**.....  


**2. DR. WILLIAM KAZUNGU**.....  
