

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 10 OF 2022-23

BETWEEN

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

AND

REGIONAL ADMINISTRATIVE

SECRETARY- SINGIDA.....RESPONDENT

RULING

CORAM

- | | |
|-------------------------------------|-----------------|
| 1. Hon. Justice (Rtd) Sauda Mjasiri | - Chairperson |
| 2. Ms. Ndeonika Mwaikambo | - Member |
| 3. Mr. Pius M. Mponzi | - Member |
| 4. Ms. Florida R. Mapunda | - Ag. Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|-------------------------|----------------------|
| 1. Mr. Walter Mushi | - Operations Manager |
| 2. Mr. Philbert Kissima | - Manager |



FOR THE RESPONDENT

1. Ms. Matrider Meckson - Head of Legal Unit (HLU)
2. Mr. Nkuli Nketo - Head Procurement Management Unit (HPMU)

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/HQ/FA/2021/2022/G/8 Lot 1-4 for Supply of Medicine, Medical Supplies, Diagnostics, Laboratory Reagents and Medical Equipment for Public Health Facilities at Singida (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:-

This Tender arose out of the Appeals Authority's decision issued on 1st April 2022 with respect to ***M/S General De Pharmacy Limited and Regional Administrative Secretary Singida***, Appeal Case No. 23 of 2021-22. In the said Appeal, the Appeals Authority having observed procedural irregularities, nullified the entire Tender and ordered the Respondent to re-start the Tender process in accordance with the law.

Following the order of this Appeals Authority, the Respondent commenced the Tender process by inviting eligible tenderers to participate in the pre-



qualification process advertised on 8th April 2022 through Tanzania National electronic Procurement System (TANePS). The deadline for submission of the Application was set for 22nd April 2022. On the deadline, three applications were received from the following firms: - M/S Salama Pharmaceuticals Ltd, M/S Umoja Pharmaceutical Company Ltd and M/S Serengeti Care (T).

The received applications were then evaluated accordingly. After completion of the evaluation process, all three applications were found to have complied with the requirements of the pre-qualification Document and were therefore invited to Tender through invitation letters issued on 9th May 2022. The three invited tenderers collected the Tender Document and submitted their tenders by the deadline which was set for 18th May 2022.

Tenders were then evaluated accordingly, after completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/S Umoja Pharmaceutical Company Ltd for Lots 1 and 4 and M/S Serengeti Care (T) for Lots 2 and 3 subject to negotiations. The Tender Board at its meeting held on 2nd June 2022, approved the award of the contract as recommended by the Evaluation Committee subject to negotiations. Negotiations took place on 13th, 14th and 15th June 2022 and were successful. The Tender Board at its meeting held on 21st June 2022, approved the negotiations report.



On 22nd June 2022, the Respondent issued the Notice of Intention to award the contract to successful tenderers. On 25th July 2022, the Respondent issued letters of award to the successful tenderers. On 17th August 2022 the Respondent signed contracts with the successful tenderers. On 24th August 2022, the Appellant filed this Appeal to the Appeals Authority.

Having reviewed the record of Appeal, the Appeals Authority deemed it proper to analyze if the Appeal is properly before it having learnt that the Appellant did not participate in the disputed Tender. When the matter was called on for hearing the Appeals Authority required the parties to address it on the merits of the Appeal as well as on the point of law raised *suo motu* by the Appeals Authority as to whether or not the Appeal is properly before it. Therefore, the following issues were framed:-

- 1.0 Whether the Appeal is properly before the Appeals Authority;**
- 2.0 Whether the Appellant has been denied access to participate in the Tender by the Respondent; and**
- 3.0 What reliefs, if any, are the parties entitled to?**

SUBMISSIONS BY THE APPELLANT

With regard to the first issue the Appellant submitted that, the Appeal is properly before this Appeals Authority as it was lodged after the Appellant realized that the Respondent floated the Tender and denied the Appellant



a right to participate while it was among the prospective tenderers. The Appellant claimed that the Tender under Appeal was re-advertised following the decision issued by the Appeals Authority with respect to the case of ***M/S General De Pharmacy Limited*** (supra). The Appellant contended that, it instituted the said Appeal which was determined in its favour and the Respondent was ordered to re-start the Tender process afresh in observance of the law.

The Appellant claimed that, it became aware that this Tender exists after logging in on TANEPS on 21st August 2022 and observed that the Tender was at the evaluation stage. Since the Appellant had no other avenue of lodging its complaint other than this Appeals Authority, it lodged this Appeal on 24th August 2022. According to the Appellant, its acts demonstrate its intention to participate in this Tender. Thus, the Appeal is properly before the Appeals Authority.

With regard to the wrong Tender number cited, the Appellant claimed that it was a mere typographical error and should not be the basis for not entertaining the Appellant's Appeal on merits.

In relation to the second issue the Appellant submitted that the Respondent denied it a right to participate in the Tender process which was re-advertised following the order issued by this Appeals Authority in the case of ***M/S General De Pharmacy Limited*** (supra). According to the Appellant, the Respondent deliberately denied it access to participate in the re-advertised Tender as it was not invited. The Appellant asserted



that it became aware that the Tender has been re-advertised after opening the TANEPS window and realized that the Tender was at the evaluation stage. The Appellant stated that, it was always logging into its account on TANEPS and the advertisement in respect of this Tender was not seen. The Appellant claimed that even on 8th April 2022 when the Respondent purported to have floated this Tender, the Appellant logged into its TANEPS account and managed to see tenders advertised by Manyara Regional Referral Hospital and the Ministry of Health. According to the Appellant it is unusual for a Tender to be advertised on TANEPS and the same not to be seen by the relevant tenderers.

The Appellant submitted further that the simple search made on TANEPS through the Appellant's account revealed that the deadline for submission of this Tender was 22nd April 2022 and it was at the evaluation stage. The search results did not indicate as to when this Tender was advertised unlike in other tenders where the date of advertisement, deadline for submission and status of the tender are all displayed in one window. The noted anomalies in this regard led the Appellant to suspect that it was deliberately denied access to participate in this Tender process. As a result the Appellant filed this Appeal.

Finally, the Appellant prayed for the following orders:-

- i. Cancellation of the Tender process and the Tender be re-advertised accordingly;



- ii. Refund of filing fees, transport and accommodation costs during the hearing amounting to Tanzanian Shillings One Million (TZS 1,000,000.00); and
- iii. Any other penalty that the Appeals Authority may wish to grant.

REPLY BY THE RESPONDENT

In relation to the first issue the Respondent submitted that the Appellant's Appeal is not properly before the Appeals Authority for having contravened the requirements of Sections 95, 96 and 97 of the Public Procurement Act, No. 7 of 2011, as amended in 2016 (hereinafter referred to as "**the Act**") and Regulations 104 - 107 of the Public Procurement Regulations, Government Notice No. 446 of 2013, as amended by G.N. No. 333 of 2016 (hereinafter referred to as "**the Regulations**"). The referred provisions provide guidance on the proper procedures to be followed when submitting an Appeal to this Appeals Authority. The Respondent also cited Rule 3 of the Public Procurement Appeals Rules, G.N. No. 411 of 2014 as amended (hereinafter referred to as the "**Appeals Rules**") and Section 3 of the Act which defines the term 'tenderer' to mean any natural or legal person or group of persons participating or intending to participate in a procurement proceeding with a view to submit a tender. The Respondent submitted that the Appellant was not a tenderer as it neither participated nor showed any intention to participate in the Tender. Thus, since the Appellant was not a tenderer, it is not entitled to file this Appeal.



In support of its argument the Respondent cited the case of **M/S China Gezhouba Group Company Limited versus Dar es Salaam Water and Sewerage Authority**, Appeal Case No. 36 of 2018/2019 whereby this Appeals Authority stated in clear terms that a person or firm which is allowed to lodge an Appeal before this Appeals Authority ought to have participated in a challenged tender.

The Respondent submitted further that, the Appellant's Appeal is in relation to Tender Number RAS/012/2021/2022/G/04 for Supply of Medicines, Diagnostics, Orthopedics and Medical Supplies for Public facilities in Singida Region. The Respondent denied having floated such a Tender and stated that the same was not the subject of Appeal in the case of **M/S General De Pharmacy Limited** (supra). The Respondent submitted that in the referred Appeal, the challenged Tender was No. RAS/012/2021/2022/G/8 Lot 1-4 for Supply of Medicine, Medical Supplies, Medical equipment, Laboratory Reagent, Diagnostic Supplies and Orthopaedics Supplies at Public Health facilities in Singida Region. The Respondent submitted further that the Tender cited by the Appellant in this Appeal is for supplies of cleaning materials and was not challenged previously before this Appeals Authority. The Tender which was re-advertised following the order issued by this Appeals Authority is Tender No. RAS/012/HQ/FA/2021/2022/G/8 Lot 1-4 for Supply of Medicine, Medical Supplies, Diagnostics, Laboratory Reagents and Medical Equipment for Public Health Facilities at Singida. The Respondent



therefore stated that the Appellant is challenging a tender which was not the subject of Appeal before the Appeals Authority.

With regard to the second issue, the Respondent submitted that, the Appellant has not been denied access to participate in the Tender as it was open to all tenderers. The Respondent stated that the Tender was advertised through national competitive tendering procedures on TANEPS and all eligible tenderers were invited to participate. According to the Respondent the Tender commenced with a pre-qualification process which was conducted in accordance with Regulations 120-123 of the Regulations. After completion of the pre-qualification process the shortlisted tenderers were issued with the Tender Document and were required to submit their tenders. The Respondent contended that after receipt of tenders from all the shortlisted tenderers, it subjected them to an evaluation process which was conducted in accordance with the law. After completion of all internal processes the Respondent awarded and signed the contracts with the successful tenderers. The Respondent stated further that the Appellant was not among the tenderers who participated in the pre-qualification process and subsequently in the tendering process despite the fact that the Tender was open to all eligible tenderers.

Finally, the Respondent prayed for the following orders:-

- i. Due to urgent public interest the Appeal be dismissed with costs;
- ii. The Respondent be allowed to proceed with the Tender; and
- iii. Any other relief the Appeals Authority may deem fit to grant.



ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the Appeal is properly before the Appeals Authority

In analyzing this issue the Appeals Authority considered the rival arguments by parties and deems it proper to establish if the Appellant has a *locus standi* to lodge this Appeal. In so doing the Appeals Authority revisited Rule 4 of the Appeals Rules which provides guidance as to who is allowed to lodge an Appeal before this Appeals Authority. 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)

The Appeals Authority also revisited Section 3 of the Act which is *mutatis mutandis* with Rule 3 of the Appeals Rules. The provisions have defined 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)



From the record of Appeal and the Appellant's own submissions it is crystal clear that the Appellant had not participated in this Tender. The Appellant claimed that despite the fact the Respondent denied it a right to participate in this Tender, it is a prospective tenderer as it initially challenged this Tender by way of Appeal before this Appeals Authority. This act led to the re-advertisement of this Tender. Therefore, the Appellant claimed to be a prospective tenderer and had intention to participate in this Tender save that it was denied such access.

The Appeals Authority revisited the record of Appeal and observed that the Tender was conducted through national competitive tendering method via TANEPS. The Appeals Authority observed further that the Tender was commenced with a pre-qualification process which was floated on 8th April 2022. The deadline for submission of applications was on 22nd April 2022. Three tenderers submitted their applications. The Appellant was not amongst them. It was observed further that, the Tender Document for the main Tender was issued to tenderers who were pre-qualified in the pre-qualification process which the Appellant did not participate.

Given the above findings, it is evident that the Appellant did not participate in this Tender. Taking cognizance of the requirements of Rule 4 of the Appeals Rules and the definition of the word 'tenderer' as per Section 3 of the Act, the Appeals Authority is of the settled view that the Appellant is not a tenderer as it has not participated in this Tender.



The Appeals Authority considered the Appellant's argument that it previously challenged the irregularities of this Tender by way of Appeal and was successful. The Appellant also filed this Appeal. According to the Appellant, the two acts indicate its intention to participate in this Tender. The Appeals Authority rejects the Appellant's argument in this regard as the intention to participate in a Tender is not shown by participating in a tender which was previously nullified by the Appeals Authority or by filing a new Appeal. Therefore, the intention has to be established in relation to the current disputed Tender which the Appellant had not participated.

In view of the above findings, the Appeals Authority concludes the first issue in the negative that the Appeal is not properly before it as the Appellant was not a tenderer and therefore not entitled to lodge this Appeal.

Having so found and given that the first issue is sufficient to dispose the Appeal on a point of law, the Appeals Authority need not delve into the other issues which relates to the merits of the Appeal.

Therefore, the Appeals Authority hereby dismiss the Appeal for being improperly before it. 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 Respondent and in the absence of the Appellant this 28th day of September 2022.

HON.JUSTICE (RTD) SAUDA MJASIRI


.....
CHAIRPERSON

MEMBERS: -

1. MS. NDEONIKA MWAIKAMBO.....


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