

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL NO. 18 OF 2020-21**

**BETWEEN**

**M/S KANKWI COMPANY LIMITED ..... APPELLANT**

**AND**

**MUHIMBILI NATIONAL HOSPITAL..... RESPONDENT**

**RULING**

**CORAM**

- |                                     |                 |
|-------------------------------------|-----------------|
| 1. Hon. Justice (rtd) Souda 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 | - Legal Officer        |

**FOR THE APPELLANT**

- |                        |                        |
|------------------------|------------------------|
| 1. Mr. Yuda Dominick   | - Senior Legal Officer |
| 2. Mr. Marsha Ismail   | - Director             |
| 3. Ms. Sarah A. Mambea | - Director             |



## FOR THE RESPONDENT

1. Mr. Eneza S. Msuya - Senior Legal Officer
2. Mr. Sospeter M. Kajobi - Chief Supplies Officer
3. Mr. Ian Kachubo - Head Procurement Unit (HPU)

This Appeal was lodged by **M/s Kankwi Company Limited** (hereinafter referred to as "**the Appellant**") against **Muhimbili National Hospital** (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. PA/009/2020-21/HQ/N/29/Lot 1 for Provision of Catering Services to Muhimbili National Hospital (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 using National Competitive Bidding Method through 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 6<sup>th</sup> October 2020 the Respondent through TANePS invited qualified tenderers to submit their tenders. The deadline for submission was set for 21<sup>st</sup> October 2020. Eleven (11) tenderers, the Appellant inclusive,



responded to the invitation by submitting their tenders. Thereafter tenders were opened through TANEPS.

Tenders were then subjected to evaluation which was conducted into three stages namely; preliminary, technical and financial evaluation. During preliminary evaluation eight (8) tenders were disqualified for failure to comply with the requirements of the Tender Document. The remaining three tenders, including that of the Appellant were subjected to technical evaluation. Two tenders were disqualified at this stage including that of the Appellant. Specifically, the Appellant's tender was disqualified due to lack of requisite experience and the attached EFD receipt did not bare the Appellant's name. The tender by M/s Usambara Grocery and Vegetables Supplies Company Ltd was found to be responsive, thus subjected to post-qualification. After completion of the post-qualification, the Evaluation Committee recommended award of the Tender to M/s Usambara Grocery and Vegetables Supplies Company Ltd at the contract price of TZS. 13,500,000/= VAT inclusive.

The Tender Board, at its meeting held on 26<sup>th</sup> November 2020, approved the award as recommended by the Evaluation Committee.

On 11<sup>th</sup> December 2020 the Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender process. The Notice informed them that the Respondent intended to award the Tender to M/s Usambara Grocery and Vegetables Supplies Company Ltd at the contract price of TZS. 13,500,000/= VAT inclusive. The said Notice also

informed the Appellant that its tender was disqualified for the reasons that:-

- The Appellant had less than three years experience on similar assignment, and
- The EFD receipt of TZS. 614,587,867.99 attached as proof of financial capability did not have the Appellant's name.

Dissatisfied, on 19<sup>th</sup> December 2020, the Appellant submitted an application for administrative review to the Respondent through TANePS. On 21<sup>st</sup> December 2020, the Respondent issued its decision which dismissed the Appellant's application for administrative review. Aggrieved further, on 4<sup>th</sup> January 2021 the Appellant lodged its appeal through TANePS. On 7<sup>th</sup> January 2021, the Appellant received a decision which indicated that the Appeal has been rejected and the Respondent was allowed to proceed with award of the Tender. After receipt of such decision and upon reviewing it, the Appellant doubted if the decision was made by the Appeals Authority. Thus, on 11<sup>th</sup> January 2021, the Appellant filed this Appeal.

### **GROUND OF APPEAL**

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

1. That, the Appellant believed that its Appeal submitted through TANePS was not entertained by the Appeals Authority, thus it opted to file this



Appeal. Therefore, the Appeal is valid and can be entertained by the Appeals Authority.

2. That, the Appellant disputed the Respondent's claims that the two pages of the scanned EFD receipt did not indicate the Appellant's name. It stated that the submitted receipt indicated its name with the VRN and TIN number. The Appellant stated further that, the attached EFD receipt is a daily Z report which is long and cannot be scanned in one page. The Appellant scanned it into two pages and the first page bares the Appellant's name while the second page is the continuation of the first page. Thus, the Respondent ought to have considered the two pages of EFD receipt as one.
3. That, the Appellant disputes its disqualification on the reason that it lacked three years experience. According to the Appellant the Tender Document did not specify that bidders were required to have work experience of not less than three years. Instead, it required tenderers to submit proof of having experience in similar assignment in the past three years as per Clause 11.1(h) (d) of the Tender Document.
4. Finally, the Appellant prayed for the following orders:-
  - i. Reasons for disqualification be dismissed;
  - ii. The Appellant may be awarded the Tender as the best qualified bidder based on main criteria provided in the Tender Document.

Two handwritten signatures in blue ink are present at the bottom of the page. The first signature is a stylized 'A' followed by 'R', and the second is a stylized 'A' followed by 'S'.

## REPLY BY THE RESPONDENT

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

1. That, the Appeal is time barred as it has been submitted out of seven working days from the date the Appellant received the Respondent's decision on its application for administrative review. According to the Respondent, the Appellant received its decision on 22<sup>nd</sup> December 2020. The Appellant filed this Appeal on 11<sup>th</sup> January 2021 after expiry of 20 days from the date it received the Respondent's decision.
2. That, the Appellant's application for review submitted through TANePS contained a signature which differs with that in the Power of Attorney. The Power of Attorney was granted to one Sarah Mambea whose name also appears in the Appellant's application for administrative review. However, the signature of the same person differs in the aforementioned documents. The Respondent doubted the *locus standi* of the person who filed the application for administrative review. The Appellant was informed about this anomaly; however it did not accept it. Furthermore, the Appellant did not indicate such concern in its Appeal which indicates that the Appellant had acknowledged such a default and intends to hide it before the Appeals Authority.
3. That, on 22<sup>nd</sup> December 2020, the Respondent received the notification of Appeal through TANePS from the Appellant as it was dissatisfied with the Respondent's decision on application for review. The received



notification of Appeal through TANEPS required the Respondent to assign the reviewer and the same was done.

The Respondent added further that, on 4<sup>th</sup> January 2021, it received notification through TANEPS on the outcome of the Appeal which indicated that the same had been rejected and it was allowed to proceed with the award of the Tender. Thus, the Respondent proceeded with the Tender process including issuance of the award notification through TANEPS.

4. That, the Appellant submitted two scanned EFD receipts which were regarded as two different receipts and not one receipt with two pages as alleged by the Appellant. The first receipt did not indicate name, VRN, TIN Number and end of legal receipt at the bottom of the page did not show continuation of the receipt as purported by the Appellant. The second receipt has name, VRN and TIN which indicates that it is a different receipt and no correlation with the first receipt. According to the Respondent the two scanned EFD receipts were unclear to them as to whether they are two pages of one receipt or otherwise.
5. That, the Tender Document required tenderers to indicate their experience of similar assignments in the past three years from 2017, 2018 and 2019. The documents submitted by the Appellant indicated that it has experience from 2018 and 2019 only as per evidence attached namely:-
  - i. Contract with NMB from January 2020 to date;



- ii. Contract with TBS from 28<sup>th</sup> September 2018 to 27<sup>th</sup> August 2019;
- iii. Contract with TAZARA from 20<sup>th</sup> September 2019 to date; and
- iv. Contract with Viable Technologies from 15<sup>th</sup> January 2019 to date.

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

- i. Reasons for the disqualification of the Appellant to be upheld; and
- ii. The Respondent to be allowed to proceed with awarding of the Tender to the successful bidder.

At the hearing of the Appeal and during framing of the issues, the Respondent raised a Preliminary Objection (PO) on a point law to wit; the Appeal is time barred as it has been filed beyond the prescribed time limit. Before proceeding with the main Appeal, the Appeals Authority deemed it proper to first determine the PO so raised. In so doing the Appeals Authority allowed parties to submit on the PO.

#### **SUBMISSIONS BY THE RESPONDENT ON THE PO**

The Respondent submitted that, according to Sections 96(6) and (7) and 97(2)(b) of the Act, tenderers who are dissatisfied with the decision of the procuring entity on administrative review are required to file an Appeal as per the procedures set out by the law. According to the Respondent, it issued the Notice of Intention to award on 18<sup>th</sup> December 2020. Upon being dissatisfied with the tender result, the Appellant filed an application for administrative review to the Respondent on 19<sup>th</sup> December 2020. The





Respondent issued its decision on 21<sup>st</sup> December 2020. Upon receipt of the Respondent's decision, the Appellant ought to have filed its Appeal to the Appeals Authority within seven working days. To the contrary, the Appeal was filed on 11<sup>th</sup> January 2021; almost after a lapse of 20 days from the date the Appellant ought to have lodged its Appeal. The Respondent cited ***Appeal Case No. 14 of 2020-21 between M/s Galileo Limited vs The Bank of Tanzania***, whereby the Appeals Authority dismissed the Appeal for being filed out of time. Therefore, the Respondent prayed that the Appeal be dismissed as was done in the above cited Appeal. The Respondent also pressed for costs.

### **SUBMISSIONS BY THE APPELLANT ON THE PO**

The Appellant readily conceded to the PO so raised. It further made reference to Rules 9 and 10 of the Public Procurement Appeals Rules of 2014, as amended (hereinafter referred to as "**the Appeals Rules**") which provide guidance on procedures for filing an appeal to the Appeals Authority. The Appellant prayed that it should not be penalized with costs.

### **REJOINDER**

The Respondent took cognizance of the Appellant's admission on the PO raised, thus it did not press for costs.

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

According to Section 97(1) and (2) (b) of the Act an appeal to the Appeals Authority has to be lodged within seven (7) working days of becoming



aware of the circumstances giving rise to the Appeal. For purposes of clarity, the said provision is reproduced as follows: -

***Sec. 97(1) "A tenderer who is aggrieved by the decision of the accounting officer may refer the matter to the Appeals Authority for review and administrative decision.***

***(2) Where-***

***(b) the tenderer is not satisfied with the decision of the accounting officer,***

***the tenderer may make a complaint to the Appeals Authority within seven working days from the date of communication of the decision by the accounting officer or upon the expiry of the period within which the accounting officer ought to have made a decision."*** (Emphasis Added)

The above quoted provision indicates clearly that the Appellant was required to submit its Appeal to the Appeals Authority within seven (7) working days from the date it received the Respondent's decision on administrative review. The Respondent's decision was issued on 21<sup>st</sup> December 2020. Counting from 21<sup>st</sup> December 2020, the Appellant ought to have lodged its appeal by or on 31<sup>st</sup> December 2020. To the contrary, the Appellant filed this Appeal on 11<sup>th</sup> January 2021, after a lapse of 10 days.



The Appeals Authority observed further that, the Appellant claimed to have lodged its appeal on 22<sup>nd</sup> December 2020 through TANEPS. However after reviewing it we noted that the same did not comply with the requirements of Rules 9(1) & (2), 10(1) and 14 (1) & (2) of the Appeals Rules. According to these Rules an appeal to the Appeals Authority has to be lodged to the Executive Secretary after filing through PPAA Form No. 1 and after payment of the requisite filing fees. The provision read as follows:-

*Rule 9(1) "A person who is dissatisfied with the matter or decision giving rise to a complaint or dispute may lodge an appeal with the Appeals Authority within seven working days from the date when he became aware of the circumstances giving rise to the complaint or dispute or when the tenderer should have become aware of those circumstances, whichever is earlier.*

*(2) An appeal shall be in writing or in an electronic form and shall be filed with the Executive Secretary.*

*Rule 10(1) "The appeal under Rule 9 shall be in writing or in electronic form and shall be filed in accordance with PPAA Form No. 1 as set out in the First Schedule of these Rules."*

*Rule 14 (1) "The Appellant shall, at the time of filing his appeal, pay fees as set out in the Second Schedule of these Rules.*



*(2) The Appeals Authority shall not entertain any appeal unless the appropriate fees have been paid."*

Since it is undisputed that, this Appeal was lodged beyond the stipulated time limit, the Appeal is hereby dismissed. Each party to bear its own costs.

It is so ordered.

This Ruling 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 Ruling is delivered in the presence of the parties this 19<sup>th</sup> day of February 2021.

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

  
.....

**CHAIRPERSON**

**MEMBERS:**

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


**2. ADV. ROSAN MBWAMBO**.....  
