

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 03 OF 2021-22

BETWEEN

M/S I.E. MUHANNA & COMPANY LIMITED.....APPELLANT

AND

NATIONAL HEALTH INSURANCE FUND.....RESPONDENT

RULING

CORAM

- | | |
|-------------------------------------|---------------------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Dr. Leonada Mwangike | - Member |
| 3. Mr. Rhoben Nkori | - Member |
| 4. Ms. Florida Mapunda | - Ag. Executive Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|------------------------|---------------------|
| 1. Mr. Ibrahim Muhanna | - Managing Director |
| 2. Ms. Evelyn Barulo | - Principal Officer |

FOR THE RESPONDENT

1. Mr. Stanley Kalokola - State Attorney
2. Mr. Felix Chakila - State Attorney
3. Ms. Leonice A. Masmin - Procurement Unit Manager
4. Ms. Rose Temba - State Attorney Officer
5. Mr. Hanifu Khimji - Procurement Officer
6. Mr. Rams Kaduri - Legal Officer
7. Mr. Jackson Kunambi - Senior Procurement Officer

This Appeal was lodged by **M/S I.E. Muhanna & Company Limited** (hereinafter referred to as "**the Appellant**") against **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/071/2020-2021/C/01 for the Provision of Consultancy Services for Actuarial Valuation (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 Respondent floated a tender way back on 24th April 2020, whereby four (4) consultancy firms participated in the tender process and M/S Zamara Actuaries Administrators and Consultants Ltd was proposed for award of the Tender.



Being dissatisfied by the proposed award of the tender made by the Respondent to M/S Zamara Actuaries Administrators and Consultants Ltd, the Appellant on 21st April 2021 filed an application for administrative review to the Respondent challenging its disqualification. On 6th May 2021, the Respondent issued its decision which dismissed the Appellant's application for administrative review. On 12th May 2021, the Appellant lodged Appeal Case No. 30 of 2020-21 before the Appeals Authority. On 23rd June 2021, the Appeals Authority dismissed the Appeal due to expiry of the bid validity period and the Respondent was ordered to restart the Tender process.

On 1st July 2021, the Respondent re-advertised the Tender vide the Tanzania National e-Procurement System (TANePS) whereby qualified Consultancy firms were invited to submit their Technical and Financial Proposals under the International Competitive Selection procedures specified in 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**").

The deadline for the submission of proposals was set for 2nd August 2021. However, before the deadline, on 5th, 20th and 22nd July 2021 respectively, the Appellant sought for clarifications from the Respondent on three issues namely: -



- i) if the actuarial fellowship requirement is not satisfied by one or more team members will the proposal be rejected;
- ii) if the firm fails to comply with the requirement of having 25 years experience in Africa for a team leader, will the proposal be rejected; and
- iii) whether there is double marking for a fellowship requirement.

On 23rd July 2021 and 27th July 2021 respectively, the Respondent replied to the Appellant's queries by requiring it to comply with the requirements of the Tender and insisted that there was no double marking in relation to the fellowship requirement.

Dissatisfied with the Respondent's replies on the request for clarification, on 3rd August 2021, the Appellant lodged this Appeal before the Appeals Authority.

GROUNDS OF APPEAL

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

1. That, Tender No. PA/071/2020-2021/C/01 for the Provision of Consultancy Services for Actuarial Valuation was issued in response to a cancelled Tender No. PA/071/2019-2020/C/09. Both tenders were for the exact same consultancy services request. In particular, both Requests for Proposal have the same project objectives, scope of work, deliverables and expected outputs. The Appellant stated that



the re-advertised Tender has some differences on the eligibility requirements which were not supported by any change to the project objectives and requirements. Hence, imposed unfair competition to the Tender process.

2. That, before submission of proposals it requested some clarifications from the Respondent on the RFP and the Terms of Reference (ToR). However, the Respondent's answers were vague and not clear. The clarifications sought by the Appellant were to determine whether it should submit its proposal or not.
3. Finally, the Appellant prayed for the following orders: -
 - i. Cancellation of the current tender and to order re-tendering based on the revised terms which would ensure fair competition;
 - ii. Request for revision of 25 years requirement for experience in Africa and to change it to 10 years. This is based on common practice in similar tenders. It is common to request more than 15 years of international experience and 7 to 10 years for a country and/or regional experience; and
 - iii. Request for revision of the requirements for 5 Fellows of the Institute of Actuaries and to change the period from 5 to 3 years. The requirement for 5 Fellow Actuaries is not supported by the size of the project and the specific project requirement.



In addition, Fellow Actuaries should be defined as Fellow Actuaries of any association which is a Full Member of the International Association of Actuaries (IAA).

REPLY BY THE RESPONDENT

The Respondent's reply to the Appellant's grounds of Appeal was preceded with a Preliminary Objection to wit that;

- i) The Appeal is incompetent and bad in law for being brought by a person who has no *locus standi* before the Appeals Authority; and**
- ii) The Appeal is incompetent for violating the provisions of Section 95(1) of the Act and Regulation 105 of the Regulations.**

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

1. That, the Tender was legally advertised having set out the requirements based on the nature of the underlying consultancy. The eligibility requirements were set to meet the required competency and experience.
2. That, the disputed Tender do not relate to any past tenders which had been advertised by the Respondent including the nullified tender



which does not exist in law. The Respondent claimed that, it has been mandated to prepare the ToR based on its requirements pursuant to Regulation 275 of the Regulations. Thus, it has not contravened any law whatsoever.

3. That, the Respondent decided to strengthen the eligibility criteria of expertise required for a team leader and increase a number of other technical members in the ToR due to the following reasons namely: -

- i) Currently the Respondent has been exposed to various alarming risk on financial sustainability. The alarming risks are detrimental to the Respondent as far as implementation of its roles as per Section 39A (1) of the NHIF Act, Cap 395 is concerned. The Respondent also wanted to ensure its sustainability, thus the alarming risks compelled it to require a more experienced team leader in the current Tender, hence the requirement.
- ii) In order to conform to the Government move on health policy which aimed at attaining the Universal Health Coverage, the Respondent expects to increase its coverage in terms of membership and services which called for improvement to be made on the ToR. Therefore, the Respondent improved its ToR so as it would be able to get an experienced actuary who will address the alarming risks and advise the Respondent to ensure its sustainability.



4. That, the Appellant had an opportunity to seek for clarification on the change of requirements pursuant to the Proposal Data sheet (PDS) and the Respondent could have clarified the same accordingly. However, on the contrary the Appellant lodged this Appeal.
5. That, the Appellant had an opportunity to form a Joint venture by associating with other firms to complement their respective areas of expertise pursuant to Regulation 278(1) of the Regulations and Clause 4.1 and 4.2 of the Information to Consultants. However, the Appellant did not do so.
6. That, the Appellant in compliance with Regulation 13(1)(a) of the Regulations sought for clarification on whether a mark is earned or a point is dropped if it will not comply with the stated criteria. The Respondent replied by insisting that, the Appellant was required to comply with the RFP and not otherwise. The Respondent's answers in this regard were not vague and were sent to all consultants who purchased the RFP document. The Respondent stated further that, if its replies were unclear there would have been a lot of requests for clarification from various consultants.
7. That, the proposals were opened publicly on 2nd August 2021 whereby three consultants participated by submitting their proposals, however, the Appellant did not submit any proposal. The



Respondent insisted that the criteria provided in the RFP did not impose any unfairness in the procurement process.

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

- i) The Appeal be dismissed with costs; and
- ii) The Respondent be allowed to proceed with the procurement process.

DETERMINATION ON THE PRELIMINARY OBJECTIONS

In view of the preliminary objections raised by the Respondent, the Appeals Authority directed that the said preliminary objections be heard first. The said objections are reproduced as under: -

- 1) The Appeal is incompetent and bad in law for being brought by a person who has no *locus standi* before the Appeals Authority; and**
- 2) The Appeal is incompetent for violating the provisions of Section 95(1) of the Act and Regulation 105 of the Regulations.**

SUBMISSIONS BY THE RESPONDENT ON THE PO

In relation to the first PO, the learned State Attorney submitted that the Appellant lacks *locus standi* to file this appeal as it was not amongst the tenderers who participated in the Tender. The Tender opening took place on 2nd August 2021 and the Appellant was not amongst the tenderers who



submitted their proposals. Thus, the Appellant would not be affected in any way by the Respondent's act or decision which would be reached after the tender process is completed. According to Rule 4 of the Public Procurement Appeals Rules of 2014, as amended in 2017 (hereinafter referred to as "**the Appeals Rules**"), an appeal to this Appeals Authority has to be lodged by a tenderer who is dissatisfied with the decision, act or omission of a procuring entity. Since the Appellant did not participate in this Tender although it purchased the RFP document, its interest ceased on 2nd August 2021 when the tenders were opened as it opted not to submit its proposal. Thus, the Appellant lacks *locus standi* to file this appeal.

With regard to the second PO, the learned state attorney submitted that, a tenderer before lodging an appeal to this Appeals Authority is required to exhaust a review remedy provided under Sections 95, 96 and 97 of the Act. The Appellant after receipt of the Respondent's reply on the request for clarification and being dissatisfied, ought to have filed an application for administrative review to the Respondent. To the contrary, the Appellant lodged this Appeal, before exhausting the available legal remedy.

In support of its argument the learned State Attorney cited this Appeals Authority's decision in Appeal Case No. 15 of 2020-21 between **M/s Creditinfo Tanzania Limited and TPB Bank PLC** where an appeal was dismissed for the appellant's failure to file an application for administrative review before lodging an Appeal.



Based on the requirements of the law and the position of this Appeals Authority in the above cited case, the learned State Attorney concluded his arguments by praying for dismissal of the Appeal with costs.

REPLY BY THE APPELLANT ON THE PO

In relation to the first PO, the Appellant submitted that it was among the tenderers who intended to participate in this Tender as it purchased the RFP document issued by the Respondent through TANePS. However, the Appellant was unable to submit its proposal as it was not satisfied with the ToR issued by the Respondent. The Appellant sought for clarification and thereafter filed an appeal to this Appeals Authority. Thus, the Appellant has a *locus standi* to file this Appeal before the Appeals Authority.

On the second PO, the Appellant conceded that it had not applied for administrative review to the Respondent as it could not access the TANePS portal. The Appellant opted to file this Appeal as it was dissatisfied with the vague responses given by the Respondent in relation to the clarification sought. The Appellant therefore stated that the Appeal is properly before this Appeals Authority and should be heard on merit.

ANALYSIS BY THE APPEALS AUTHORITY

In determining the POs raised, the main issue for consideration is ***whether or not the appeal is properly before this Appeals Authority.***

In resolving the second preliminary objection, the Appeals Authority took cognizance of the fact that the Appellant conceded not to have applied for



administrative review to the Respondent, before lodging this Appeal. The Appeals Authority deemed it prudent to enlighten the Appellant on the procedural requirement for filing an application for administrative review before lodging an appeal to this Appeals Authority. In so doing the Appeals Authority revisited Sections 96 (1) and (4) and 97 (1) and (2) of the Act read together with Regulations 104, 105 (1), 106 (9) and 107 (1) of the Regulations. The said provisions read as follows: -

Section 95 (1) "Any tenderer who claims to have suffered or who may suffer any loss or injury as a result of a breach of a duty imposed on a procuring entity or an approving authority by this Act may seek a review in accordance with sections 96 and 97."

Section 96 (1) "Any complaints or dispute between procuring entities and tenderers which arise in respect of procurement proceedings, disposal of public assets by tender and awards of contracts shall be reviewed and decided upon a written decision of the accounting officer of a procuring entity and give reasons for his decision."

Section 96 (4) "The accounting officer shall not entertain a complaint or dispute unless it is submitted within seven working days from the date the tenderer submitting it became aware of the circumstances giving rise to the complaint or dispute or when that tenderer should have become aware of those circumstances, whichever is earlier".

Section 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-

(a) the accounting officer does not make a decision within the period specified under this Act; or

(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"

Regulation 104 "A tenderer who claims to have suffered or who may suffer any loss or injury as a result of breach of a duty imposed on a procuring entity or an approving authority by the Act or these Regulations may apply for a review in accordance with section 95 of the Act."

Regulation 105 (1) "Any application for administrative review shall be submitted in writing or electronically to the accounting officer of a procuring entity and a copy shall be served to the Authority within seven working days of the tenderer becoming or should have become aware of the circumstances giving rise to the complaint or dispute".

Regulation 106 (9) "Where the complainant is not satisfied with the decision of the accounting officer or, where the accounting officer does not issue a decision within the specified time, the complainant shall submit his complaint or appeal to the Appeals Authority within seven working



days from the date of communication of the decision by the accounting officer or from such date the decision ought to be issued."

Regulation 107 (1) "Complaints or disputes which-

(a) are not settled within the specified period under regulation 106 (6);

(b) arise after the procurement contract has entered into force pursuant to section 60 (11) of the Act,

shall be referred to the Appeals Authority within seven working days from the date when the tenderer received the decision of the accounting officer or, in case no decision is rendered after expiry of the time stipulated under regulation 106 (5) or when the tenderer becomes aware or ought to have become aware of the circumstances giving rise to the complaint or dispute pursuant to section 97 (3) of the Act."

The above quoted provisions entail that a tenderer who claims to have suffered or that may suffer any loss or injury as a result of a breach of a duty imposed to a procuring entity may submit a complaint to the accounting officer within seven (7) working days of becoming aware of the circumstances giving rise to a complaint. If the accounting officer fails to issue a decision within the stipulated time or if a tenderer is dissatisfied with the decision of the accounting officer, it may submit an appeal to the Appeals Authority pursuant to Section 97 of the Act read together with Regulation 107 of the Regulations.



According to the sequence of events, on 5th, 20th and 22nd July 2021 respectively, the Appellant sought for clarifications from the Respondent about the ToR. The responses thereof were sent to the Appellant on 23rd July 2021 and 27th July 2021 respectively through email. The record of Appeal indicates that, the Appellant was still not satisfied with the Respondent's replies. At that stage the Appellant ought to have applied for administrative review to the Respondent within seven (7) working days. That is to say, the Appellant ought to have filed its application for administrative review to the Respondent on/by 5th August 2021. To the contrary, the Appellant did not do so. Instead, it filed an Appeal directly to this Appeals Authority on 3rd August 2021.

Given the above position and the requirement of the law, it is evident that the Appeal has been filed prematurely as the Appellant ought to have exhausted the administrative review remedy before filing this Appeal.

In view of the above, the Appeals Authority agrees with the Respondent that the appeal was filed prematurely, and thus it is not properly before it.

As the second PO herein above suffices to dispose of the appeal; the Appeals Authority will not delve on the first PO in relation to *locus standi*.

Consequently, the Appeals Authority hereby dismiss the Appeal and makes no order as to costs.

It is so ordered.



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 Appellant and the Respondent this 26th day of August 2021.

HON. JUSTICE (RTD) SAUDA MJASIRI



CHAIRPERSON

MEMBERS:

1. DR. LEONADA MWAGIKE



2. MR. RHOBEN NKORI

