

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 17 OF 2022-23

BETWEEN

M/S TINDWA MEDICAL AND HEALTH SERVICES LIMITED.....APPELLANT

AND

NATIONAL HEALTH INSURANCE FUND.....RESPONDENT

DECISION

CORAM

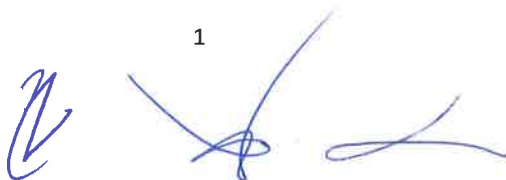
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|-------------------------------------|-----------------|
| 1. Hon. Justice (Rtd) Souda Mjasiri | - Chairperson |
| 2. Ms. Ndeonika Mwaikambo | - Member |
| 3. Dr. William Kazungu | - Member |
| 4. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

- | | | |
|------------------------|-------|------------------------|
| 1. Ms. Violet Limilabo | _____ | - Senior Legal Officer |
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FOR THE APPELLANT

- | | |
|-------------------------|-------------------------------------|
| 1. Mr. Amos Paul | - Advocate - P and W Associates |
| 2. Ms. Victoria Wilbard | - HR and Administration |
| 3. Ms. Lightnes Lyimo | - Procurement Manager |
| 4. Mr. Joseph Sulemani | - Emergency Medical Service Manager |



FOR THE RESPONDENT

1. Mr. Lukelo Samwel - Principal State Attorney - OSG
2. Mr. Daniel Nyakiha - State Attorney- OSG
3. Ms. Ainess Bamanyisa - Senior Legal Officer- NHIF
4. Mr. Charles Misheto - Principal Procurement Officer
5. Mr. Dickson Daniel - Procurement Officer
6. Mr. Baraka Mawole - Senior Procurement Officer
7. Mr. Dominick Kihanda - Procurement Officer
8. Mr. Juliet Chale - Procurement Officer
9. Mr. Denis Muro - Procurement Officer

M/S Tindwa Medical and Health Services Ltd (hereinafter referred to as **"the Appellant"**) lodged this Appeal 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/071/2021-2022/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 3rd June 2022, the Respondent through Tanzania National electronic Procurement System (TANePS) invited eligible tenderers to participate in the Tender. The deadline for submission of tenders was set for 22nd June 2022. On the deadline three tenders were received including that of the Appellant.

The received tenders were then subjected to evaluation. After completion of the evaluation process, the Respondent observed that amongst the tenders received, none of them complied with the requirement of the Tender Document. Thus, it was proposed by the Procurement Management Unit that the Tender be rejected. The proposal for rejection of the Tender was submitted to the Tender Board at its meeting held on 16th August 2022. After deliberations, the Tender Board approved the rejection of the Tender as was recommended.

The Respondent vide a letter reference No. CAC.219/376/01D/14 dated 25th August 2022 informed the Appellant that the Tender has been rejected pursuant to Regulation 16(2)(b) of the Regulations. The letter also informed the Appellant that its tender was found non-responsive as it did not quote the price for services offered outside Tanzania and the quoted prices were partial.

Dissatisfied with the reasons given for its disqualification, on 30th August 2022, the Appellant applied for administrative review to the Respondent. On 13th September 2022, the Respondent issued its decision by dismissing the Appellant's application for administrative review. Aggrieved further, on 20th September 2022, the Appellant filed this Appeal to the Appeals Authority.



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

- 1.0 Whether there was a justifiable ground for rejection of the Tender; and**
- 2.0 What reliefs, is any, are the parties entitled to?**

SUBMISSIONS BY THE APPELLANT

The Appellant was represented by Mr. Amos Paul learned counsel. In relation to the first issue, he commenced his submissions by stating that Clause 14.1 of the Instructions To Tenderers (ITT) requires tenderers to prepare and submit the Form of Tender and Price Activity Schedule as per the format provided under Section V - Tendering Forms in the Tender Document. According to the Appellant Clause 14.1 of the ITT prohibits alterations or substitution of the provided format. Tenderers were only required to fill in the information as per the provided format.

The learned counsel elaborated that the format of the Priced Activity Schedule provided under Section V - Tendering Forms clearly indicates the route description in which prices were to be inserted. The route covered Tanzania mainland and Zanzibar. There was no requirement for providing prices for East African countries.

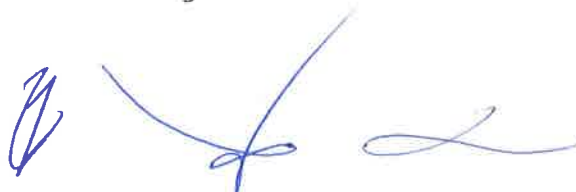
The learned counsel submitted that the wording of Priced Activity Schedule is similar to Item 5.2 of the Activity Schedule provided under Section VII of the Tender Document. The Schedule listed areas to be covered by the services intended to be offered. The learned counsel contended that the Appellant upon being guided by Clause 14.1 of the ITT, the format provided under the Priced Activity Schedule and Activity



Schedule, could not have provided prices for East African countries as they were not part of the itemized routes. The learned counsel stated that the Respondent's act of determining that the Appellant's Tender was non-responsive for failure to indicate prices for East African countries was not justified as such requirement was not provided under the Tender Document.

The learned counsel submitted further that upon receipt of the Respondent's letter dated 25th August 2022 which notified it about the rejection of the Tender, on 30th August 2022 the Appellant filed an application for administrative review to the Respondent. In response to the Appellant's application for administrative review the Respondent through a letter dated 13th September 2022 raised a new issue which was not in the original letter that notified it about the rejection of the Tender. According to the Appellant the Respondent's response indicated that the Appellant failed to submit registration of other East African countries save for Uganda. The learned counsel stated that the Appellant submitted certificates of registration from Tanzania Mainland, Zanzibar and Uganda. According to him there was no requirement of providing registration certificates from all the East African countries. The learned counsel asserted that the submitted registration certificates from Tanzania mainland, Zanzibar and Uganda suffices as the said countries are also East African Countries. The Appellant stated further that since the Respondent waived such a requirement as indicated in its letter dated 13th September 2022, the same could not have been used to disqualify the Appellant.

The learned counsel stated that, much as Clause 8.1 of the ITT allows tenderers to seek clarifications if the requirements provided for in the

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Tender Document are not clear. However, the Appellant did not seek clarifications as the Priced Activity Schedule and Activity Schedule were clear in the areas which were to be covered. Therefore, the learned counsel asserted that, the issue of non-responsiveness or partial quoting does not arise as the Appellant quoted a price based on the information provided in the Tender Document.

The Appellant submitted further that having revisited TANePS it was observed that the Tender was at the evaluation stage and was not rejected as contended by the Respondent. The learned counsel stated that if the Tender had been rejected its status ought to have been seen directly on TANePS. The learned counsel contended that the Respondent deceived tenderers by informing them that the Tender has been rejected while the same is still at the evaluation process. Thus, he concluded that the Tender has not been rejected.

Finally, the Appellant prayed for the following orders:-

- i. The Respondent should proceed to award the Tender as per the evaluation report;
- ii. Re-imburement of the costs incurred by the Appellant to pursue the Appeal; and
- iii. Declaration that the Appellant was a responsive tenderer in this Tender.

REPLY BY THE RESPONDENT


The Respondent's submissions were made by Mr. Daniel Nyakiha learned State Attorney. In relation to the first issue the learned State Attorney submitted that Section 59(1) of the Act read together with



Regulation 16(1) of the Regulations require a Tender Document to contain a Clause which would allow a procuring entity to reject the tender if there are prevailing circumstances. The learned State Attorney submitted that in this Tender rejection of tenders was governed by Clause 37 of the ITT. According to Clause 37 of the ITT the Respondent reserves a right to accept or reject any or all of the submitted tenders. The learned State Attorney elaborated that in this Tender the Respondent rejected all the submitted tenders including that of the Appellant as they were all non-responsive to the requirements provided under the Tender Document.

The learned State Attorney submitted that Clause 1.3 of the Statement of Requirement indicated clearly that the geographical coverage of the Tender would be within and outside the boundaries of the United Republic of Tanzania. Clause 2 of the said Statement of Requirement also indicates that the Respondent was looking for a service provider who would provide both Air and Ground Ambulance services for medical emergency to its beneficiaries within and outside Tanzania. He submitted further that Clause 13 of the Tender Data Sheet (TDS) requires tenderers to submit certificates of registration from Tanzania mainland, Zanzibar and other East African countries. According to the Respondent, registration within Tanzania mainland, Zanzibar and other East African countries was among the crucial requirements for this Tender. Tenderers were not given an option to select any of the East African countries, rather they were required to submit evidence of registration from all East African countries.

The Respondent submitted that during evaluation it was observed that the Appellant submitted evidence of registration from Tanzania



mainland, Zanzibar and Uganda only. The Appellant did not submit evidence of registration on the other remaining East African countries. The Respondent submitted that, the Appellant's non compliance was noted; however, the Respondent opted to treat it as minor deviation. According to the Respondent the waiver of this requirement was based on the assumption that the Appellant would have provided costs for Tanzania mainland, Zanzibar and other East African countries. Having reviewed the Appellant's Priced Activity Schedule it was noted that the quoted price was for Tanzania mainland and Zanzibar only. There was no price quoted by the Appellant for other East African countries including Uganda whose certificate of registration was provided. The Respondent stated that since the Appellant failed to comply with the requirements of the Tender Document, it could not have proceeded to award the Tender to it in the absence of prices which covers the East African countries.

The Respondent submitted further that having completed the evaluation process, all the tenderers which participated in this Tender were found to be non-responsive, as a result the Respondent decided to reject this Tender.

Regarding Priced Activity Schedule and the Activity Schedule the Respondent submitted that the same were not supposed to be read in isolation of the other provisions of the Tender Document. According to the Respondent it was obvious that this Tender covers Tanzania mainland, Zanzibar and other East African countries, thus in quoting prices all the geographical areas of coverage were to be included. The Appellant should not have relied on priced Activity Schedule alone when preparing its schedule of prices while it was fully aware of the

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geographical coverage of the areas where the services were to be rendered.

The Respondent submitted further that if the requirements for this Tender were not clear, the Appellant ought to have sought for clarifications as per clause 8 of the ITT. However, the Appellant did not do so. The Appellant's act of not seeking clarifications implies that, it was ready to comply with the requirements of the Tender Document. Thus, non-compliance with the requirements of the Tender Document warrants the disqualification of the Appellant's tender.

The Respondent averred that according to Regulation 206(2) of the Regulations a tender which is not responsive to the requirement of the Tender Document is to be rejected and should not subsequently be made responsive by withdrawal or correction of the deviation. In this Tender all the three tenders were found to be non-responsive. Hence, the Respondent rejected all of them.

The learned State Attorney concluded his submissions by stating that the Respondent's rejection of the Tender was made pursuant to Clause 37 of the ITT and Regulation 16(2)(b) of the Regulations.

Finally, the Respondent prayed that the Appeal be dismissed with costs.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether there was a justifiable ground for rejection of the Tender

From the rival arguments of the parties, it is apparent that the Respondent rejected the Tender for the reason that none of the submitted tenders was found to have complied with the requirements of

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the Tender Document. In ascertaining if the rejection was justified the Appeals Authority reviewed Section 59(1) of the Act and Regulation 16(1)(a) of the Regulations which provide as follows:-

"Sec.59(1) *Tender documents and request for proposals may provide that procuring entities reject all tenders or all proposals.*"

"Reg.16(1) *Subject to approval by the tender board, if so specified in the solicitation document, the procuring entity may, prior to awarding the contract and notwithstanding the stage reached in the proceedings leading to the conclusion of the contract:-*

(a) *Either decide to reject all tenders at any time or annul the tender or selection proceedings in accordance with sub-regulation (2) and order that the proceedings be recommenced, if necessary, using another method.*

(Emphasis added)

The above quoted provisions entail amongst others that, procuring entities are allowed to reject tenders if they have specified in the Tender Document. The Appeals Authority revisited the Tender Document and observed that Clause 37 of the ITT provides the Respondent with a right to accept or reject any tender or all tenders. The Clause reads as follows:-

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"Clause 37.1 Notwithstanding ITT 35 [Criteria for Award], PE reserves the right to accept or reject any Tender, and to cancel the tendering process and reject all tenders, at any time prior to award of contract, without thereby incurring any liability to the affected Tenderer or Tenderer(s).

Clause 37.2 Notice of the rejection of all Tenders shall be given promptly to all Tenderers that have submitted tenders through TANEPS.

Clause 37.3 The PE shall upon request any tenderer communicate the grounds for rejection of its Tender(s) but is not obliged to justify those grounds."

(Emphasis added)

The Appeals Authority reviewed the facts of this Appeal and observed that the Respondent rejected this Tender as all the submitted bids were non-responsive to the requirements of the Tender Document. The record of Appeal indicates that after completion of internal processes it was observed by the Respondent that all the submitted tenders were non-responsive, thus it was recommended that the Tender be rejected. The recommendation for rejection of the Tender was approved by the Tender Board at its meeting held on 16th August 2022.


The Respondent vide a letter with Ref. No. CAC.219/376/01D/14 dated 25th August 2022 informed the Appellant that the Tender has been rejected on the ground of non-responsiveness to the requirements of the Tender Document. The said letter also informed the Appellant that



its tender was found to be non-responsive as it did not quote the price for provision of services outside Tanzania and the quoted prices were partial and incomplete.

The Appellant challenged the reasons given for its non-responsiveness to the Respondent and subsequently filed this Appeal. In establishing if the reasons given for the Appellant's non-responsiveness were valid, the Appeals Authority reviewed the Evaluation Report and observed that at the preliminary evaluation stage the Appellant's tender was found to have not complied with Item 1.3 of the Statement of Requirement (Section VII - Activity Schedule) and Item (ix) of Section IV(a) – Qualification and Evaluation Criteria. The Appeals Authority revisited the Tender Document and observed that Item 1.3 of the Statement of requirements described the coverage of the Tender. Furthermore, Item (ix) of Section IV(a) – Qualification and Evaluation Criteria required tenderers to submit evidence which proves their registration in Tanzania mainland, Zanzibar and other East African countries. The Appeals Authority observed further that Item (ix) of Section IV(a) – Qualification and Evaluation Criteria is similar to Clause 13 (i) of the Tender Data Sheet (TDS). Item 1.3 of the Statement of Requirement and Clause 13(i) of the TDS are reproduced as follows:-

Item 1.3 NHIF has established its offices in all regions in the Tanzania Mainland and an office in Unguja Island to serve members who are under the Union Government. The Geographical coverage of the



service shall be within and outside the boundaries of the United Republic of Tanzania.

"Clause 13(i) 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:-

Preliminary Criteria

(i) Attach evidence showing you are registered by the Revolutionary Government of Zanzibar and other East African Countries. (attach certificates of registration)"

The above quoted provisions indicate clearly that the geographical coverage of the Tender is within and outside the boundaries of the United Republic of Tanzania. The provisions also indicate that tenderers were mandatorily required to submit proof of their registration with Tanzania mainland, Zanzibar and East African countries.

Having read Item 1.3 of the Statement of Requirement (Section VII - Activity Schedule) together with Item (ix) of Section IV(a) – Qualification and Evaluation Criteria which is in *parimateria* with Clause 13 of the TDS, the Appeals Authority observes that tenderers were mandatorily required to submit proof of registration with Tanzania mainland, Zanzibar and East African countries.

The Appeals Authority reviewed the Appellant's tender and observed that it submitted proof of registration for Tanzania mainland, Zanzibar



and Uganda. The Appellant did not submit proof of registration for other East African countries. During the hearing the Appellant conceded not to have submitted proof of registration in respect of other East African countries save for Uganda.

The Respondent's evaluation report indicates that the said anomaly was observed on the Appellant's tender, however, the Respondent opted to treat the same as a minor deviation. The Appeals Authority is of the considered view that since proof of registration in East African countries was one of the mandatory requirements as per Item (ix) of Section IV(a) - Qualification and Evaluation Criteria and Clause 13 of the TDS, the Respondent ought to have disqualified the Appellant's tender for this reason.

The Appeals Authority finds the Respondent's act of not disqualifying the Appellant's tender for failure to comply with the requirements of the Tender Document to have contravened Regulation 206 of the Regulations which reads as follows:-

*"Reg. 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"***

Given the above findings, the Appeals Authority is of the settled view that since the Appellant failed to submit proof of registration in other East African countries, such an omission was sufficient to disqualify the Appellant from the Tender process as it failed to comply with mandatory



requirement of the Tender. Under the circumstances the Appeals Authority will not delve into other grounds which disqualified the Appellant's tender.

The Appeals Authority also observed that the two other tenderers which participated in this Tender were also disqualified for various reasons and therefore there was no responsive tender.

In view of the above, the Appeals Authority finds the Respondent's act of rejecting the Tender to be proper and in accordance with Regulation 16(2)(b) of the Regulations which reads as follows: -

"Reg. 16(2) Rejection of a tender or selection proceeding may take place where:-

(b) no tender or proposal satisfies the criteria for award of the contract as set out in the tender documents or request for proposal".

(Emphasis Added)

The Appeals Authority would like to state in passing that according to TANePS the Tender status is indicated to be on the evaluation stage. The Appeals Authority having found that there were no responsive tenders and the Tender has been rejected, the Respondent is required to update the position on TANePS so as to reflect the current status.

Under the circumstances, the Appeals Authority concludes the first issue in the affirmative that the rejection of the Tender was justified.



2.0 What reliefs, if any, are the parties entitled to?

Taking cognizance of the findings in the first issue hereinabove, the Appeals Authority hereby dismiss the Appeal in its entirety. We make no order as to costs.

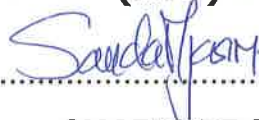
It is so ordered.

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 19th day of October 2022.

HON.JUSTICE (RTD) SAUDA MJASIRI



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CHAIRPERSON

MEMBERS :-

1. MS. NDEONIKA MWAIKAMBO.....

2. DR. WILLIAM KAZUNGU.....