

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL CASE NO. 42 OF 2017-18

BETWEEN

M/S PHILIPS MEDICAL SYSTEMS NEDERLAND B.V. ... APPELLANT

AND

MUHIMBILI NATIONAL HOSPITAL RESPONDENT

DECISION

CORAM

- | | |
|--------------------------|-------------------|
| 1. Ms. Monica P. Otaru | - Ag. Chairperson |
| 2. Eng. Francis T. Marmo | - Member |
| 3. Mr. Louis P. Accaro | - Member |
| 4. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

- | | |
|---------------------------|-----------------|
| 1. Ms. Violet S. Limilabo | - Legal Officer |
| 2. Mr. Hamisi O. Tika | - Legal Officer |

FOR THE APPELLANT

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| 1. Mr. Erick Ringo | - Advocate, Fin and Law |
| 2. Ms. Monica Joseph | - Chief Executive Officer,
Appellant's Representative |

FOR THE RESPONDENT

- | | |
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| 1. Prof. Lawrence Museru | - Executive Director |
| 2. Mr. Sospeter Kajobi | - Ag. Head PMU |
| 3. Ms. Veronica Hellar | - Head Legal Unit |

This Appeal was lodged by M/s Philips Medical Systems Nederland B.V. (hereinafter referred to as "the Appellant") against Muhimbili National Hospital (hereinafter referred to as "the Respondent"), in respect of

Tender No. PA/009/2017-18/HQ/G/07 for Supply, Installation, Testing, Training and Commissioning of one Magnetic Resonance Imaging (MRI) Machine - Lot 1 (hereinafter referred to as "the Tender"). The Tender was conducted through International Competitive Bidding method specified in the Public Procurement Regulations, Government Notice No.446 of 2013 as amended (hereinafter referred to as "the Regulations").

The facts of the Appeal may be summarized as follows:

The Respondent through Daily News, Daily Nation and Mwananchi newspapers dated 11th and 12th December 2017, invited tenderers to participate in the Tender. The deadline for submission was initially set for 2nd January 2018; however, it was extended to 16th January 2018; whereby four firms submitted their tenders.

The tenders were subject to evaluation which was conducted in three stages, namely; Preliminary, Detailed and Post-qualification. After completion of the evaluation process in February 2018, the Evaluation Committee recommended the award of the Tender to M/s Pacific Diagnostics Ltd. On 9th March 2018, the Tender Board approved the recommendations subject to successful negotiations, which followed thereafter.

Having received no results, on 7th May 2018 the Appellant inquired from the Respondent about the status of the Tender. On 15th May 2018, the Respondent replied that they are finalizing the evaluation process and requested the Appellant to extend the bid validity period for further 90 days. In response, on 18th May 2018, the Appellant informed the Respondent that, as the period had already expired, extension of the same cannot be done since it ought to have been sought prior to its expiry and any subsequent acts done are null and void.

On 22nd May 2018, the Respondent informed the Appellant that they had discretion to request for extension of time or otherwise, thus as they chose not to request for it, the process cannot be rendered null and void.

Dissatisfied with the response given, on 25th May 2018, the Appellant applied for administrative review. On 30th May 2018, the Respondent issued a decision which dismissed the application, on the reason that the same was submitted beyond prescribed time limit of seven working days specified under Section 96(4) of the Public Procurement Act of 2011 as amended (hereinafter referred to as "the Act"), then on 4th June 2018, the Appellant filed this Appeal.

The Parties further submitted on the bid validity period as follows:-

SUBMISSIONS BY THE APPELLANT

The Appellant submitted that, the Respondent contravened the requirements of Section 71 of the Act read together with Regulation 191(3) and (4) of the Regulations. The said provisions require the Respondent to finalize the tender process within the bid validity period stated in the Tender Document. The Appellant argued further that if the Respondent thought that they could not complete the process on time; they ought to have sought for extension.

The Appellant insisted that the Respondent's failure to comply with the law invalidates every process done thereafter. He made reference to the Appeals Authority's Appeal Case No.71 of 2017-18 between *Professional Cleaners Ltd against Muhimbili University of Health and Allied Sciences*, whereby the Appeals Authority held that "*all the Respondent's subsequent acts conducted after the expiry of the Tender Validity Period are a nullity in the eyes of the law and therefore; even the award made to the proposed successful tenderer is null and void*".

Finally the Appellant prayed for the following orders, that:-

1. Nullification of the Tender process and order for retendering.
2. Declare the requested extension of time of the tender validity period from bidders as unlawful and therefore null and void;

3. The Respondent to proceed with the tender process in compliance with the Act;
4. The Respondent to treat them fairly without victimization in this Tender and in future tenders in which they may participate because of exercising their rights of submitting this Appeal;
5. Compensation of costs incurred in this Tender process amounting to TZS. 29,950,000.00 as per the following breakdown:-
 - Cost of the Tender Document: TZS. 225,000.00;
 - Cost of preparation and submission of the tender: TZS. 27,125,000.00;
 - Cost of preparation and filing of this Appeal TZS. 2,600,000.00;

SUBMISSIONS BY THE RESPONDENT

In reply to the Appellant's argument, the Respondent submitted as follows:-

The Respondent submitted that, by 16th April 2018, when the bid validity period expired, they were yet to finalize internal process relating to the Tender. So, on 15th May 2018 they requested tenderers for extension, however the Appellant refused.

The Respondent did not dispute the fact that the bid validity period had expired, they however argued that, the purpose of the bid validity period is to limit tenderers from changing their price or conditions of the Tender as provided under Regulation 3 of the Regulations, thus the Tender is still valid despite the expiry of its validity period.

Finally, the Respondent prayed for the following orders:-

1. The Tender process and extension of time of the Tender validity period was done in good faith, therefore the Appeals Authority to declare the requested extension of the Tender Validity Period from the bidders as lawful and not null and void;

2. To allow the Respondent to proceed with the Tender process as it was fair and treated equally all bidders;
3. To assure the Appellant that the Respondent treated them like any other bidders without any victimization in this Tender and future tenders in which they may participate; and
4. To dismiss the Appellant's claim for compensation as the Tender process was done fairly and all tenderers were treated equally without discrimination and no loss has been incurred by the Appellant.

ANALYSIS BY THE APPEALS AUTHORITY

Based on written and oral submissions of both parties, the Appeals Authority confirms that the sole question to be determined is the consequence of expiry of the bid validity period. Therefore, the following issues were framed:-

- 1.0 Whether the Tender is valid after expiry of the bid validity period; and
- 2.0 What reliefs, if any, are the parties entitled to.

Having identified these issues we proceeded to determine them as follows:-

- 1.0 Whether the Tender is valid after expiry of the bid validity period;

The Appeals Authority noted that, it is not disputed that the bids were opened on 16th January 2018 and the bid validity period of the Tender was 90 days therefrom, which expired on 16th April 2018.

On the bid validity period, the Appeals Authority revisited Clause 18.2 of the Instruction To Bidders (ITB), read together with Clause 14 of the Bid Data Sheet (BDS) and observed that this bid was valid for 90 days.

We also revisited Regulation 191(4) of the Regulations and observed that extension of bid validity period, if any, is to be done prior to expiry of the original period. The Regulation read as follows:-

Reg. 191(4) "In exceptional circumstances, prior to expiry of the original period of effectiveness of the tenders, a procuring entity may request tenderers to extend the period for an additional specified period of time". (Emphasis added)

Contrary to the above provision, the Respondent's request for extension of bid validity was made about thirty days after expiry of the original period. We agree with the Appellant's argument on the consequences of expiry of the bid validity period as held in the Appeals Authority's Case No. 17 of 2017-18 between *Professional Cleaners Ltd and Muhimbili University of Health and Allied Sciences*, that all subsequent acts done after expiry of the Tender Validity Period are a nullity.

In view of the above, the Appeals Authority's conclusion is that a lapse of bid validity period invalidates the Tender together with all subsequent actions. Accordingly, the first issue is answered in the negative, that there is no valid Tender after expiry of the bid validity period.

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

Taking cognizance of the findings above, the Appeals Authority accepts the Appellant's argument in relation to the expiration of the Tender validity period and hereby declares the tender process after expiry of the Tender validity period to be null and void. The Respondent is ordered to do the following:-

- Compensate the Appellant a sum of reasonable amount of TZS. 2,300,000/- as per the following breakdown:-
 - i. Appeal filing fee TZS. 300,000/-
 - ii. Legal fee TZS. 2,000,000/-

This Decision is binding on the Parties and can be enforced in accordance with Section 97(8) of the Act.

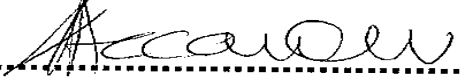
The Right of Judicial Review as per Section 101 of the Act is explained to the Parties.

This Decision is delivered in the presence of the Parties, this 13th July 2018.


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Ms. MONICA P. OTARU
Ag. CHAIRPERSON

MEMBERS:

1. ENG. FRANCIS MARMO 
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2. MR. LOUIS ACCARO 
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