

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

AT DAR ES SALAAM

APPEAL CASE NO. 11 OF 2019-2020

BETWEEN

M/S NATIONAL INSURANCE

CORPORATION (T) LIMITED.....APPELLANT

AND

THE NATIONAL EXAMINATION

COUNCIL OF TANZANIA.....RESPONDENT

RULING

CORAM

- | | |
|----------------------------|-----------------|
| 1. Adv. Rosan Mbwambo | - Ag. Chairman |
| 2. CPA. Fredrick Rumanyika | - Member |
| 3. Dr. Leonada Mwangike | - Member |
| 4. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
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| 1. Mr. Emmanuel Kawishe | - Principal Legal Officer |
| 2. Mr. Christopher Bulendu | - Legal Officer |
| 3. Mr. Ntimba Bunny | - Deputy Director, Non-Life Insurance |

4. Mr. Segeja Mabulla - Branch Manager, Ubungo
5. Ms. Ernestina Kalumuna - Procurement Officer
6. Mr. Robert Mfinanga - Insurance Officer

FOR THE RESPONDENT

1. Mr. Sabath Cazmiry - Legal Officer
2. Mr. Sunday Laurent - Head, Procurement Management Unit
3. Simon Mushi - Legal Officer

This Appeal was lodged by M/s National Insurance Corporation of Tanzania Limited commonly known by its acronym NIC (hereinafter referred to as "**the Appellant**") against the National Examination Council of Tanzania commonly known by its acronym NECTA (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. PA/045/2019/2020/NC/01 for the Provision of Insurance Services (hereinafter referred to as "**the Tender**").

According to the availed documents the Tender was conducted using the Restricted Tendering procedures specified in the Public Procurement Act, 2011 as amended (hereinafter referred to as "**the Act**") as well as the Public Procurement Regulations, Government Notices No. 446 of 2013 and GN. No.333 of 2016 (hereinafter referred to as "**the Regulations**").

After going through the record of appeal submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**"), the background of the Appeal may be summarized as follows:

The Respondent through a letter with Ref. GA.264/434/01-B/97 dated 28th August 2019 invited all registered insurance firms to participate in the Tender. The deadline for submission of the tenders was set for 10th September 2019. Three (3) tenders from M/s Insurance Group of Tanzania, M/s Britam Insurance (T) Limited and the Appellant were received by the deadline. The read out prices of the bids were as follows;

S/N	NAME OF THE BIDDER	PRICES IN TZS
1.	National Insurance Corporation of Tanzania Limited.	406,459,204.91
2.	M/s Insurance Group of Tanzania.	288,934,899.26
3.	M/s Britam Insurance (T) Limited.	356,770,746.97

The tenders were then subjected to evaluation which was conducted into two stages namely; Preliminary and the Detailed Evaluation. The tender by M/s Britam Insurance (T) Limited was disqualified at the preliminary evaluation stage for being non responsive to the requirements of the Tender Document. The remaining two (2) tenders including that of the Appellant were found to be responsive and were therefore, subjected to the detailed evaluation and price comparison. Finally, award of the Tender was recommended to M/s Insurance Group of Tanzania at the contract price of TZS. 288,934,899.26 VAT Inclusive.

The Tender Board at its meeting held on 20th September 2019 approved the award as recommended by the evaluation committee. On 26th September 2019, the Respondent informed all tenderers its intention to award the Tender to M/s Insurance Group of Tanzania. The letter also informed the Appellant that its tender was unsuccessful because its bid

price was higher than the proposed successful bidder. Dissatisfied, the Appellant lodged its application for administrative review to the Respondent's Accounting Officer challenging award of the Tender to the proposed successful tenderer. The reasons for the administrative review were as follows:-

- i. That, the Premium computations for the Tender as provided for under the Insurance (Minimum Premium Rates) Order GN. No. 251 of June 2018 (hereinafter referred to as GN. No. 251/2018) which regulates Insurance Sector was not adhered to by the Respondent.
- ii. That, the Appellant wondered as to how the Premium quotations of the proposed successful Tenderer differed significantly with its bid while Schedules of Assets and Employees to be covered were the same.

Based on the above reasons, the Appellant requested for clarification from the Respondent and also prayed for review of the proposed award.

On 16th October 2019 the Respondent's Accounting Officer issued its decision in which it informed the Appellant that its complaint could not be entertained for being filed out of time. Aggrieved further, on 25th October 2019, the Appellant lodged this Appeal.

GROUND OF APPEAL

The Appellant's grounds of Appeal may be summarized as follows:

1. That, the Respondent erred in law by dismissing its complaint while it was filed within time prescribed by the law;
2. That, the Respondent did not adhere to the Minimum Insurance Rates provided by the law in this Tender. Its Tender reflected the most

equitable premium quotations and that any tender below its tender raises doubts as to how the same was computed; and

3. That, Schedules of Assets and Employees to be covered were not considered by the Respondent during evaluation of the Tenders. If all bidders were provided with the same Schedule of Assets and Employees there would have not been such a big difference in the range of Premium quotations between the bidder who quoted the lowest and the one who quoted the highest.

Finally, the Appellant prayed for the following orders:-

- i. That, the decision dismissing its Appeal by the Respondent be set aside;
- ii. That, the decision intending to award the Tender to M/s Insurance Group of Tanzania be suspended pending hearing of this Appeal;
- iii. That, M/s Insurance Group of Tanzania be instructed to elaborate how its premium computations were calculated;
- iv. That, the Respondent be allowed to review premium computation submitted by M/s Insurance Group of Tanzania to satisfy itself as to whether procedures and Regulations were complied with; and
- v. The Respondent may be ordered to re-evaluate the tenders.

REPLY BY THE RESPONDENT

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



1. That, the Appellant's application for administrative review was submitted beyond the seven working days provided under the law. Thus, it was right for Respondent to reject the complaint;
2. That, the guiding law in the public procurement process is the Act and not otherwise. The Respondent wanted to ensure that efficient and optimum utilization of public funds is achieved. It therefore, awarded the Tender to the lowest evaluated tender as per Regulation 232(2) of the Regulations;
3. That, all bidders were given the same Tender Document having the same Schedules of Assets and Employees to be insured. It is from that document all bidders quoted their prices, of which the Appellant was recorded to have quoted the highest price of all bidders;
4. That, the Appeals Authority is not a proper forum for the reliefs sought by the Appellant. It is so because the Minimum Premium Rates provided under GN.No. 251/2018 has nothing to do with the Act. Thus, the Appeals Authority is not bound by the Order; and
5. There was no any irregularity in the whole Tender process. Instead, the Appellant be warned for misuse of the available public procurement resolutions.

Finally, the Respondent prayed for the following:-

- i. Dismissal of the Appeal since the contract between the Respondent and the proposed bidder has already been signed following expiry of the old insurance policy; and
- ii. Costs of the Appeal be borne by the Appellant.

The Appeals Authority observed from the pleadings that there are two points of law that need to be determined first before embarking on merits of this Appeal. These are in respect to; jurisdiction of this Appeals Authority to hear and determine the Appeal and that the Appellant's application for administrative review was filed out of time. The Appeals Authority invited both parties to address it on these points of law first.

SUBMISSIONS BY THE RESPONDENT ON THE POINTS OF LAW

On the point of jurisdiction, the Respondent submitted that one of the Appellant's grounds of Appeal is the successful tenderer's failure to quote the premium rates as provided under GN. No. 251 of 2018. According to the Respondent the Appeals Authority does not have jurisdiction to determine appeals on failure to observe the requirement of GN. No. 251 of 2018. Therefore, the Appellant's act of lodging its Appeal to the Appeals Authority is not proper. It was further submitted that Rule 2(2) of the Public Procurement Appeals Rules, 2014 as amended (hereinafter referred to as "**the Appeals Rules**"), confers powers to the Appeals Authority to handle disputes arising on public procurement and states nothing on issues relating to insurance.

The Respondent rested its submission by arguing that since the whole procurement process, which the Appeals Authority is empowered to oversee was not flawed, issues relating to Premiums ought to have been referred to Tanzania Insurance Regulatory Authority (TIRA) or the Fair Competition Commission (FCC). The Respondent submitted further that, it is not bound by the requirement of GN. No.251 of 2018.

With regard to limitation of time, the Respondent submitted that, the Notice of Intention to award was issued to all tenderers on 26th September 2019. According to the law, an aggrieved tenderer was required to file its complaint to the Accounting Officer of a respective procuring entity within seven working days from the date of receipt of the Notice. According to the Respondent, the Appellant received the notice on the same day as it was sent via e-mail and hard copy was delivered on 30th September 2019. The Appellant's deadline to lodge the complaint was on 7th October 2019. The Respondent submitted that, the Appellant lodged its complaint on 10th October 2019, three days beyond the time limit set by the law. The Respondent concluded by praying for the dismissal of the Appeal in its entirety.

REPLY BY THE APPELLANT ON THE POINTS OF LAW

On the jurisdiction of the Appeals Authority, the Appellant submitted that none of the provisions cited by the Respondent is relevant. The relevant provision on the Jurisdiction of the Appeals Authority according to the Appellant is Section 88 (5) of the Act. The cited Section 2(1) of the Act and Rule 2 of the Appeals Rules relate to application of the Act and the Appeals Rules, respectively. The Appellant added that since this Appeal is against the Respondent's decision the Appeals Authority has jurisdiction as per Section 88 (5) of the Act.

Regarding the Respondent's proposition that it is not bound by the GN.No. 251 of 2018, the Appellant submitted that this argument is not correct. It is so because the subject matter of the Tender is insurance covers. The Respondent was therefore bound to observe premium rates provided under GN. No. 251 of 2018 in the evaluation of Tenders. Had the Respondent



adhered to the requirement of GN. No. 251 of 2018 it could not have awarded to tender to the proposed successful tenderer.

On the time limit the Appellant submitted that it is true that the Respondent sent an e-mail dated 26th September 2019 with a title "Notice of Intention to Award". However, the e-mail contained no attachment. The Appellant called the Respondent to inquire on the missing attachment in the email and was advised to collect the hard copy from the Respondent's office. On 30th September 2019, the Appellant collected the notice of intention to award.

The Appellant submitted that, it lodged two copies of the application for administrative review letter which were collected by the Respondent's receptionist. The receptionist asked the Appellant's officer to wait for the signed copy while the same is forwarded to the respective officers within the Respondent's office. The Appellant submitted that after a while, the receptionist returned the copy of the complaint letter bearing a signature and the date but without stamp, name and title of a person who had received it. The Appellant added that, it questioned the authenticity of the signature without an official stamp and was informed that it was not necessary.

The Appellant contended further that since its copy was signed and endorsed to have been received on 4th October 2019 by the Respondent, its application for administrative review was lodged within time. The Appellant rested his submissions by submitting that even by counting from 26th September 2019, (the date of the Notice); the seven working days provided by the law lapsed on 4th October, 2019, exactly, the day in which the Appellant filed its complaint. Thus, its Appeal is properly before the Appeals Authority.

In his brief rejoinder, the Respondent conceded that section 88(5) of the Act is the one that confers powers of the Appeals Authority. However, it insisted that the Appeals Authority lacks jurisdiction to entertain premium rates matters, referring to the long title of the Act on matters in which the Act applies. The Respondent argued that what the Appellant appeals against is not about procurement process but rather on charges of the Premium Minimum Rates as contained in the GN No. 251 of 2018.

ANALYSIS BY THE APPEALS AUTHORITY

In resolving the issue of jurisdiction, the Appeals Authority revisited the cited Section 88(5) of the Act and observed that it has been renumbered in the amendment and should now read as section 88(4) of the Act. Section 88(4) of the Act confers original jurisdiction to the Appeals Authority to hear and determine complaints against procuring entities where a procurement or disposal contract has already entered into force. It also confers powers to determine appeals arising from administrative decisions made by the accounting officers in relation to procurement process.

The Appeals Authority also revisited Section 3 of the Act which defines the words "procurement" and "procurement process".

*"Procurement means buying, purchasing, renting, leasing or otherwise acquiring any goods, works, or services by a procuring entity and **includes all functions that pertain to the obtaining of any goods, works or services, including description of requirements, selection and invitation of tenderers, preparation and award of contracts**".*

*"Procurement process means the successive stages in the procurement cycle, including planning, choice of procedures, measures to solicit offers from tenderers, **examination and evaluation of those offers, award of contract and contract management**". (Emphasis supplied)*

From the above definitions, the Appeals Authority is of the firm view that its mandate is wide to include determination on how bidders are awarded public contracts in an event of a dispute to that effect. The Appeals Authority considered the argument by the Respondent that the matter under dispute is on Premium Rates and not the procurement process and finds that the Respondent's argument is misconceived. It is the Appeals Authority's view that, the Appeal before it emanates from a procurement process, involves complaint against procuring entity and is arising from the administrative decisions made by the accounting officer. Therefore, the Appeals Authority finds that it has jurisdiction to entertain this Appeal under Section 88(4) of the Act.

Coming to the complaint that the application for administrative review was time barred, the Appeals Authority reviewed the notice of intention to award dated 26th September 2019; the email sent to the Appellant on 26th September 2019; and the application for administrative review dated 4th October 2019 mistakenly dated 4th September 2019. The Appeals Authority observed that the Notice of Intention to award was officially communicated to the Appellant on 30th September 2019 and not 26th September 2019 as alleged by the Respondent. It is so because despite the fact that the Respondent sent an e-mail to the Appellant on that particular date the indicated attachment could not be accessed.

According to Section 60(3) of the Act read together with Regulation 105(1) of the Regulations, an aggrieved bidder is required to lodge its complaint to the respective accounting officer within seven working days from the date it became aware of the circumstances giving rise to a complaint.

The Appellant was therefore obliged to lodge its complaint to the Respondent's Accounting Officer by or on 9th October 2019. While the Appellant contended that it lodged its application for administrative review on 4th October 2019, the Respondent insisted that it received the application on 10th October 2019.

A point for determination, given the parties' respective stances in the Appeals Authority's view, is when the Appellant lodged its application for administrative review. The Appeals Authority, in determining this issue critically, reviewed the copies of the application for administrative review letter. Apparently, each party produced its copy of the letter. The Appeals Authority observed that a copy submitted by the Appellant has a free hand writing showing that it was received on 4th October 2019. It also bears a signature. It does not show the name of the signatory. Neither does it bear official stamp of the Respondent.

In this Appeal the Appellant asserts that on 4th October 2019 its officer presented two copies of an application for administrative review letter in the Respondent office. A receptionist took the two copies and went inside of one of the Respondent's offices. After a while a copy was returned indicating in a free hand that it has been received on 4th October 2019 with a signature on it. When the Appellant's officer inquired why it is not stamped the receptionist said that only signature and the endorsement are sufficient.

The Respondent on its part has disowned this signature and the free hand endorsement of a date of receipt appearing in the Appellant's copy. A copy submitted by the Respondent bears its official stamp and a date indicating that it was received on 10th October 2019. Like the Appellant's copy no name of the person receiving it is given. Unlike the Appellant's copy, it is not signed by whoever received it. The Respondent insisted that it received the application for administrative review on 10th October 2019.

It is the Appeals Authority's view that in the circumstances, the onus of proofs that it is the Respondent who endorsed and signed the Appellant's copy lies on the Appellant. This is according to section 110 of the Evidence Act, Cap 6 R.E. 2002. It reads thus:

*"110(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts **must prove that those facts exist.***

*(2) **When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.***
(emphasis added)

The question before the Appeals Authority is: has the Appellant discharged the burden of proof? From the documents submitted and the submissions by the Appellant the name of the receptionist who collected the copies in the first place is not divulged. Neither is the name of the officer who endorsed the receipt date and signature. In the absence of these key information it is the Appeals Authority view that the Appellant has failed to prove the fact that its application for administrative review was received by the Respondent on 4th October 2019.

The Appeals Authority curiously, looked at the way the Notice of Intention to award was received by the Appellant. It was observed that only a stamp indicating receipt and a date was endorsed. No signature and a name of a person receiving it was inserted. This is the same procedure that was used by the Respondent in receiving the application for administrative review letter on 10th October, 2019.

In the circumstances, it is the Appeals Authority finding that given the evidence available, the application for administrative review letter was received on 10th October, 2019. On this date it was a day late.

Based on our above findings, the Appeal Authority confirms the Respondent's decision that application for administrative review was time barred. Consequently, the Appeal is hereby dismissed. None of the parties pressed for costs and we make no orders as to costs.

Order accordingly.

This Ruling is binding on the Parties and may be executed in terms of Section 97 (8) of the Act.

The Right to 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
on this 25th day of November 2019.



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ADV. ROSAN MBWAMBO

Ag: CHAIRMAN

MEMBERS:

1. CPA. FREDRICK RUMANYIKA.....

2. DR. LEONADA MWAGIKE.....