

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 30 OF 2020-21

BETWEEN

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

AND

NATIONAL HEALTH INSURANCE FUND.....RESPONDENT

DECISION

CORAM

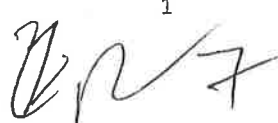
- | | |
|-------------------------------------|-----------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. CPA. Fredrick Rumanyika | - Member |
| 3. Adv. Rosan Mbwambo | - Member |
| 4. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|----------------------|---|
| 1. Ms. Evelyn Barulo | - Principal Officer,
M/S I. E. Muhanna & Co. Ltd |
|----------------------|---|

1


FOR THE RESPONDENT

1. Mr. Stanley Kalokola - State Attorney
2. Ms. Leonia A. Masmin - Procurement Unit Manager
3. Ms. Rose A. Temba - Senior Actuarial Officer
4. Mr. Hanifu Khimji - Procurement Officer
5. Ms. Ainess Bamanyisa - Legal Officer
6. Ms. Lightness Msuya - State Attorney
7. Mr. Safi M. Julius - Investment Officer
8. Ms. Joyce S. Yonazi - State Attorney

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/071/2019-2020/C/09 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: -

On 24th April 2020, the Respondent vide the Tanzania National e-Procurement System (TANePS), invited qualified Consultancy firms to submit their Technical and Financial Proposals for the Tender under the 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**").

Deadline for the submission of proposals was set for 26th May 2020, whereby four (4) proposals were received from the following consultancy firms: -

1. M/S I.E. Muhanna & Company Limited;
2. M/S Xivoni Actuaries and Consultants;
3. M/S Zamara Actuaries Administrators and Consultants Ltd; and
4. M/S Actuarial and Risk Consulting (T) Ltd.

The Technical Proposals were then subjected to evaluation which was conducted in two stages namely; preliminary and detailed evaluation. At the preliminary evaluation stage, the proposals by M/S Xivoni Actuaries and Consultants and M/S Actuarial and Risk Consulting (T) Ltd were found to be non-responsive for failure to comply with the requirements of the Request For Proposal (RFP).

The remaining two (2) proposals were subjected to detailed evaluation. At this stage, the proposal by M/S I.E. Muhanna & Company Limited was disqualified for failure to meet the minimum set technical scores which was 75% as it scored 68.99%. The proposals by M/S Zamara Actuaries Administrators and Consultants Ltd scored 79.20%, above the minimum score. The Tender Board at its meeting held on 23rd October 2020 approved the results of the evaluation of the technical proposal.

3


The Respondent through a letter dated 16th November 2020, informed the Appellant that its Technical Proposal was not successful as it failed to meet the required minimum score. The Appellant failed to attach a certificate evidencing that the Team Leader was a certified Fellow of Institute of Faculty of Actuaries as required in the RFP. The said letter was sent to the Appellant by email on 18th November 2020.

Dissatisfied, on 19th November 2020, the Appellant applied for administrative review to the Respondent challenging the scores as well as the reason given for its disqualification. On 25th November 2020 the Respondent issued its decision which rejected the Appellant's Application for administrative review.

It is on record that after receipt of the Respondent's decision, the Appellant wrote several complaint letters to the Respondent on the same matter. The said letters were dated 26th November 2020, 14th December 2020 and 29th December 2020. All these complaints were responded accordingly by the Respondent.

The opening of Financial Proposal took place on 12th March 2021 and thereafter the proposal was evaluated accordingly. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/S Zamara Actuaries Administrators and Consultants Ltd at the tender price of Tanzanian Shillings Two Hundred Twelve Million Nine Hundred Ninety Seven Thousand Seven Hundred and Nineteen (TZS 212,997,719.00) only VAT inclusive. On 30th March 2021, the Tender Board through Circular Resolution No. 10 of 2020/2021 approved the award as recommended by the Evaluation Committee.

A handwritten signature in black ink, appearing to be a stylized name or set of initials, located at the bottom center of the page.

On 14th April 2021, the Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender. The Notice informed the Appellant that its technical proposal did not pass the technical evaluation stage for failure to attach a certificate indicating that the Team Leader was a certified Fellow of Institute of Faculty of Actuaries as required in the RFP.

The Appellant was dissatisfied and on 21st April 2021 it filed an application for administrative review to the Respondent challenging its disqualification. On 6th May 2021, the Respondent issued the decision by dismissing the Appellant's application for administrative review. On 12th May 2021, the Appellant lodged this Appeal before the Appeals Authority.

When the matter was called on for hearing, the Appeals Authority observed *suo motu* that there were two points of law which were to be considered in determination of this Appeal. These were whether there is a valid Tender for consideration and whether the Appeal is properly before the Appeals Authority. The Appeals Authority directed that the parties should address it on the points of law as well as the merits of the Appeal. Therefore, the following issues were framed as agreed by both parties: -

- 1. Whether there is a valid tender for consideration;**
- 2. Whether the Appeal is properly before the Appeals Authority;**
- 3. Whether the disqualification of the Appellant was justified; and**
- 4. What reliefs, if any, are the parties entitled to.**



SUBMISSIONS BY THE APPELLANT

The Appellant's submissions on the above framed issues may be summarized as follows: -

On the first issue the Appellant submitted that, the Tender validity period for this Tender was one hundred and twenty (120) days. Counting from the deadline for submission of proposals, the Tender validity period expired in August 2020. There was no request for extension of the Tender validity period. The Tender process went on until April 2021 when the Respondent issued the Notice of Intention to award. Since the Tender validity period had expired way back in August 2020, there is no valid Tender in place.

With regard to the second issue the Appellant submitted that, this Appeal has been filed within time as the cause of action emanated from the Notice of Intention to award dated 16th April 2021. After receipt of the Notice of Intention to award, the Appellant filed an application for administrative review on 19th April 2021. The Respondent issued its decision on 06th May 2021. Aggrieved further, the Appellant lodged this Appeal on 12th May 2021. Thus, the Appeal was lodged within time.

In relation to the third issue the Appellant submitted that, it has been unfairly disqualified from the Tender process as it was given an unfair score on its technical proposal by the Respondent. According to the results of Technical Proposal, the Appellant was disqualified for failure to attach a Certificate of Fellowship from one of the two specific actuarial organizations namely the US Society of Actuaries (SoA) and the UK Institute and Faculty of Actuaries (IFoA). Such an anomaly led the



Respondent to award zero mark to the Appellant on this requirement. The Appellant disputed the Respondent's act in this regard.

The Appellant submitted that the Tender under Appeal relates to healthcare actuarial services and not life insurance actuarial services. The US Society of Actuaries and the UK Institute and Faculty of Actuaries both deal with life insurance actuarial services and not healthcare actuarial services. The Respondent ought not to have confined its requirement to the two fellowship actuaries. It was supposed to recognize other certificates issued by other actuarial fellowship particularly those dealing with health care.

The Appellant expounded its argument by indicating that, the Respondent ought to have considered the mutual recognition agreements among the European Actuarial Associations such as the Swiss Association of Actuaries and the Cyprus Association of Actuaries which deal with, amongst others, health care actuarial services. However, the Respondent confined its requirement of key personnel to a certified fellow of US Society of Actuaries or the UK Institute and Faculty of Actuaries.

The Appellant added that, it has technical personnel who are actuaries and possess the specified required qualifications of Fellows of the SoA and IFoA. However, the Appellant did not deem it necessary to appoint any among them as team leader since Mr. Muhanna (the team leader) is a renowned International Actuary and has received several awards including one issued by the International Actuarial Consulting Association (IACA). The award issued by IACA is globally recognized and it was issued to Mr. Muhanna as recognition of a lifetime outstanding

A handwritten signature in black ink, appearing to be 'J. N. 7', located at the bottom center of the page.

work in actuarial professional and promotion of actuaries consulting business globally.

Furthermore, Mr. Muhanna had led his team in executing several actuarial valuations for the Ministry of Health, SSRA, NHIF, PSPF, GEPF ZSSF and most recently the actuarial valuation of PSSSF and currently that of NSSF. Thus, Mr. Muhanna is the most qualified technical personnel in the field of actuaries. Therefore, the Appellant should not have been disqualified on a reason that Mr. Muhanna's certificate of a certified actuarial fellow attached was not from SoA and IFoA. The Appellant disagreed with the Respondent's act of placing more importance on such requirement.

The Appellant conceded that it had not attached a certificate of a certified actuarial fellow from SoA and IFoA and consequently, lost three points on this requirement. However, the zero mark attained on this requirement should not have led to its disqualification. The Appellant doubted the accuracy of the evaluation process.

Finally, the Appellant prayed before the Appeals Authority that the Appellant's Technical proposal be reinstated into the Tender process and scores be accorded fairly. The Appellant also prayed that since its financial proposal was not returned the same be opened and evaluated accordingly. The Appellant added that, since the Tender validity period had expired, the Tender proceedings be nullified and the Respondent be ordered to restart the Tender process.

REPLY BY THE RESPONDENT

The Respondent's reply to the Appellant's submissions may be summarized as follows: -

On the first issue, the learned State Attorney submitted that the Tender Validity period was one hundred and twenty (120) days from the deadline for submission of Tenders which was 26th May 2020. The said period was not extended as according to Regulation 191(4) of the Regulations, extension of the Tender validity period is optional and may be done in exceptional circumstances. Therefore, it was not necessary for the Respondent to extend the Tender validity period. The Respondent added that, the law is silent with regard to the legal effect of expiry of the Tender Validity period. Thus, it is the Respondent's view that expiry of the Tender validity period cannot affect the Tender process.

In relation to the second issue, the Respondent submitted that, the Appellant's Appeal emanated from the results of Technical proposals which were communicated to it through a letter dated 16th November 2020. After receipt of the results, the Appellant was dissatisfied and on 19th November 2020 filed an application for administrative review. The decision thereof was issued by the Respondent on 25th November 2020. After receipt of the Respondent's decision, the Appellant ought to have lodged its Appeal to this Appeals Authority within seven (7) working days. Counting from 25th November 2020, the Appellant ought to have lodged its Appeal on or by 3rd December 2020. To the contrary, the Appellant lodged its Appeal on 12th May 2021. The Appellant had not



sought for extension of time to file an Appeal out of time. Thus, the Appeal is incompetent for being filed out of time.

In relation to the third issue the Respondent submitted that, the Appellant's Technical proposal was disqualified for failure to comply with a mandatory requirement set in the RFP. In particular, the Appellant failed to attach a certificate that its Team Leader is a Fellow of the Institute of the Faculty of Actuaries in contravention with Clause 19 of the Proposal Data Sheet (PDS). The Appellant in its statement of Appeal clearly admitted to have not attached such a certificate as was required. However, it claimed that such an omission should not have led to the disqualification of its technical proposal.

The Appellant contended to have included in its technical proposal particulars of the team leader who is a renowned and recognized actuary. According to the Appellant, Mr. Muhanna is the most qualified technical personnel in the field of actuaries globally and has conducted actuarial assignments in Tanzania before and most recently the actuarial valuation of PSSSF and NSSF. The Respondent disagrees with the Appellant's assertion in this regard, as the Appellant ought to have complied with the requirement of the RFP despite the renowned qualifications of the proposed team leader. The experience of the team leader attained in other projects executed with PSSSF and NSSF does not exempt the Appellant from complying with the requirement of the RFP.



The Respondent expounded its argument by indicating that, before the deadline for submission of proposals, the Appellant sought for clarification on the qualification of a team leader. The Respondent issued the clarification which was circulated to all tenderers. In the said clarification the Respondent maintained its position as was in the RFP. The Respondent added that, if the Appellant was not satisfied with the clarification so provided, it ought to have challenged it through an application for administrative review and subsequently an appeal pursuant to Rule 6(c) of the Public Procurement Appeals Rules of 2014 as amended. The Appellant did not do so, thus it was required to comply with requirements of the RFP as were provided.

The Respondent submitted further that, the importance of the requirements of the Tender is determined by the procuring entity in accordance with the procurement laws, RFP and nature of the assignment. The requirement of the Tender cannot be a tenderer's wish. Thus, when conducting evaluation of the disputed Tender, the Respondent adhered to the requirement of Regulations 203(1) and 206(1) of the Regulations.

Finally, the Respondent prayed for the following orders: -

- i. The Appeal be dismissed with costs; and
- ii. A declaration that the Appellant was fairly disqualified and the Respondent be allowed to proceed with the Tender process.



ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority commenced its analysis by determining the first issue, that is "***whether there is a valid Tender for consideration***". In the course of so doing, the Appeals Authority revisited the record of Appeal and observed that Clause 16 of PDS specified the Tender validity period for this Tender to be one hundred and twenty (120) days. The deadline for submission of proposals was 26th May 2020. The technical proposals were opened on the same day. Counting from the deadline for submission, the Tender validity period of 120 days lapsed on 23rd September 2020. The record of Appeal indicates further that, the Respondent proceeded with the tender process even after the lapse of the Tender validity period. Amongst the activities which were done include; approval of the technical evaluation report by the Tender Board on 23rd October 2020, communication of technical proposals results which was done through a letter dated 16th November 2020, opening of the Financial proposals on 12th March 2021, approval of financial evaluation report and recommendation of award to M/S Zamara Actuaries Administrators and Consultants Ltd on 30th March 2021 and communication of the Notice of Intention to award the Tender on 14th April 2021.

Section 71 of the Act read together with Regulation 231(2) of the Regulations state as follows: -

*Sec.71 "The procuring entity shall require tenderers to make their tenders and tender securities including tender securing declaration **valid for periods specified in the tendering documents,***



sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders and for the appropriate tender board to review the recommendations and approve the contract or contracts to be awarded whilst the tenders are still valid."

Reg. 232(2) *"The award shall be made within the period of tender validity to the tenderer whose tender has been determined to be the lowest evaluated or the highest evaluated, as the case may be, and meets the required financial and managerial capability, legal capability, experience and resources to carry out the contract effectively."*

[Emphasis provided]

We further revisited Clause 25.1 of the Information To Consultants (ITC) modified by Clause 16 of the PDS which provide as follows: -

ITC 25.1 *"Proposal shall remain valid for the period specified in the PDS after the proposal submission deadline date prescribed by the PE."*

PDS 16 *"Proposal must remain valid for 120 days after the submission date."*

Under the above quoted provisions it is a mandatory requirement that the recommendations and approval of award are to be done whilst the tender is still valid. The record of Appeal as summarized herein above



clearly indicates that the Tender validity period for the Tender was 120 days and the same expired on 23rd September 2020. However, the Respondent went on with the Tender process.

The Appeals Authority observed from the appeal record and the Respondent's admission during the hearing that, there was no extension of the Tender validity period. According to Regulation 191(4) of the Regulations procuring entities are allowed to extend the Tender Validity period before the initial stipulated period had expired. Regulation 191(4) of the Regulations reads as follows:-

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

[Emphasis provided]

Based on the above findings, it is crystal clear that the Tender validity period for this Tender had expired before the approval of the award was made and no extension was sought. The Appeals Authority therefore finds the Respondent's act of proceeding with the Tender process after expiry of the bid validity period on 23rd September 2020 to be improper.

The Appeals Authority rejects the Respondent's argument that the law is silent with regard to the legal effect of the expiry of the Tender validity period. Section 71 of the Act read together with Regulation 232(2) of the Regulations clearly require approval of award by the tender board to



be made whilst the Tender validity period is still valid. Thus, anything done to the contrary, contravenes the law.

Therefore, the Appeals Authority concludes the first issue in the negative that there is no valid Tender for consideration after the expiry of the Tender validity period.

The finding herein above is sufficient to dispose of this Appeal as there is no valid Tender upon which an Appeal can lie. However, for the purpose of enlightening the parties with regard to the limitation of time for lodging an Appeal, the second issue, that is "**Whether the Appeal is properly before the Appeals Authority**" would be determined as well.

According to the Appeal record, this Appeal emanated from the results of technical proposals which were communicated to the Appellant through a letter dated 16th November 2020. The said letter indicated that the Appellant's technical proposal was disqualified for failure to attach a certificate evidencing that the Appellant's Team Leader is a certified Fellow of the Institute of Faculty of Actuaries as required in the RFP. Being dissatisfied by the decision, on 19th November 2020, the Appellant applied for administrative review to the Respondent. The decision in respect of the said application was issued by the Respondent on 25th November 2020. The Appellant made further complaints to the Respondent through its letters dated 26th November 2020, 14th December 2020 and 29th December 2020.

It was observed further that, the Respondent after completion of its internal processes issued the Notice of Intention to award dated



14th April 2021 to the Appellant. The said Notice informed the Appellant that its tender was found to be unsuccessful due to reason communicated to it vide the Respondent's letter of 16th November 2020 which notified the Appellant the results of its technical proposal. After receipt of the Notice of Intention to award, the Appellant made another application for administrative review to the Respondent disputing disqualification of its technical proposal.

According to Section 96(4) of the Act, a tenderer who is dissatisfied with a tender process is required to lodge a complaint to the accounting officer of the procuring entity within seven (7) working days of becoming aware of the circumstances giving rise to a complaint. The accounting officer is required to issue a written decision within seven (7) working days from the date the complaint is lodged pursuant to Section 96(6) of the Act. A tenderer dissatisfied with the decision issued by the Accounting Officer, can lodge an appeal to the Appeals Authority within seven (7) working days from the date of communication of the decision pursuant to Section 97 of the Act.

The record of Appeal indicates that, the Appellant became aware of the reason which led to its disqualification from the Tender process on 18th November 2020 when it received the results of its technical proposal. It is crystal clear that the Appellant was dissatisfied with disqualification of its technical proposal and therefore applied for administrative review to the Respondent on 19th November 2020. The Respondent issued its decision on 25th November 2020. Having received the Respondent's decision and being dissatisfied, the Appellant ought to have lodged its Appeal to the Appeals Authority within seven (7) working days.

A handwritten signature in black ink, appearing to be 'J. N. A.', is located at the bottom center of the page.

Counting from 25th November 2020, the Appellant ought to have lodged its Appeal on or by 4th December 2020. To the contrary, the Appellant wrote several complaint letters to the Respondent. It did not prefer an Appeal to this Appeals Authority.

The Appeals Authority finds the Appellant's act in this regard to have contravened Section 97(1) and (2)(b) of the Act which read 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-

(a) N/A

(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".

[Emphasis provided]

During the hearing the Appellant was asked to clarify why it failed to lodge its Appeal in accordance with the requirement of the law. In response thereof, the Appellant insisted to have lodged this Appeal

within time as according to it, the cause of action arose after it received the Notice of Intention to award on 14th April 2021.

From the facts of this Appeal it is clear that, the Appellant's cause of action arose after it received the results of the technical proposal. The Notice of Intention to award relied by the Appellant as a root cause for this Appeal did not introduce a new reason for its disqualification. The said notice just reiterated the reason for the Appellant's disqualification to be the one contained in a letter dated 16th November 2020.

Therefore, it is the considered view of the Appeals Authority that, the reason which led the Appellant to lodge this Appeal was known from 18th November 2020. Thus, after receipt of the Respondent's decision regarding its application for administrative review on 25th November 2020 and being dissatisfied, the Appellant ought to have lodged its Appeal to this Appeals Authority within seven working days. The Appeals Authority therefore rejects the Appellant's assertion that the cause of action arose after it received the Notice of Intention to award.

Under the circumstances the Appeals Authority concludes the second issue in the negative that the Appeal is not properly before it as it is hopelessly time barred.

In view of our findings on the first and second issues we need not delve on the third issue. Consequently, the appeal is hereby dismissed and the Respondent is ordered to restart the tender process. Since the points of law were raised *suo motu* by the Appeals Authority we make no order as to costs.

Order accordingly.



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

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

The Decision is delivered in the presence of the parties this 23rd day of June 2021.

HON. JUSTICE (rtd) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS:

1. CPA. FREDRICK RUMANYIKA.....



2. ADV. ROSAN MBWAMBO.....

