

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY**

APPEAL NO. 9 OF 2020-21

BETWEEN

MAILA GLADSON MAKAMBI..... APPELLANT

AND

**GOVERNMENT PROCUREMENT SERVICES
AGENCY RESPONDENT**

DECISION

CORAM

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

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|----------------------------|-------------------------|
| 1. Mr. Eric Ringo | - Advocate, Fin and Law |
| 2. Ms. Veronica Kumbakumba | - Advocate, Fin and Law |
| 3. Mr. Maila G. M. Makambi | - Consultant |



FOR THE RESPONDENT

1. Mr. Allen Kasamala - Head of Legal Unit
2. Mr. David Nganila - Acting Director of Procurement Management
3. Mr. Joseph Mwasaga - Manager Procurement Section
4. Mr. Stephen Muro - Accountant
5. Mr. Jeremiah Mashenenhe - Supplies Officer

The Appeal was lodged by **MAILA GLADSON MAKAMBI** (hereinafter referred to as "**the Appellant**") against the **GOVERNMENT PROCUREMENT SERVICES AGENCY** commonly known by its acronym GPSA (hereinafter referred to as "**the Respondent**").

The Appeal is in respect of Tender No. AE/018/2019-20/HQ/C/3 for provision of Individual Consultancy Services for Carrying Out Procurement Compliance and Value for Money Audits – Lot 2 (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 competitively through National Competitive Selection as per 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 and GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**").

The Respondent issued an Expression of Interest through a letter dated 4th February 2020 whereby interested individual consultants were invited to submit their expression of interest and detailed Curriculum Vitae (CV). The deadline for submission was set for 18th February 2020. Only seventy eight (78) individual consultants, the Appellant inclusive, responded to the invitation by submitting their Expression of Interest and CVs (hereinafter referred to as the proposal). The proposals were publicly opened in the presence of the bidder's representatives who chose to attend.

The proposals were then subjected to evaluation which was conducted into two stages namely; preliminary and detailed. According to the Evaluation Report dated 8th June 2020, during preliminary evaluation five (5) individual consultants were disqualified and seventy three (73) were found to be responsive. The remaining individual consultants were subjected to detailed evaluation. During that process, twenty eight (28) individual consultants, the Appellant inclusive were found to have scored below the minimum required score of 75%.

The Evaluation Committee recommended that the remaining forty five (45) individual consultants be shortlisted as they qualify for the engagement on the assignment. The recommendations of the evaluation committee were submitted to the Tender Board and were approved through Circular Resolution No. 314/2019/2020 dated 23rd June 2020.

The Respondent through a letter dated 6th July 2020 issued the Notice of Intention to award to all individual consultants who participated in the Tender process. The Notice informed them that the Tender is intended to be awarded to forty five (45) individual consultants who scored 75%



and above. The said notice was received by the Appellant on 12th August 2020. The notice informed the Appellant that he was disqualified for scoring 72.4% which was below the minimum required score of 75%.

Dissatisfied with the reason given for his disqualification, on 18th August 2020, the Appellant applied for administrative review to the Respondent pursuant to Section 96 of the Act. On 18th August 2020 the Respondent issued a decision which dismissed the Appellant's application for administrative review for being filed out of time. Aggrieved further, on 27th August 2020, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The grounds of Appeal as stated in the Appellant's Statement of Appeal as well as oral submissions during the hearing are summarized as follows: -

1. That, the Appellant received the notice of intention to award after the lapse of the statutory time allowed for submitting a complaint. Thus, he was denied an opportunity for considering his application for administrative review lodged to the Respondent pursuant to Regulation 105 of the Regulations on merit.

The Appellant added that, the notice of intention to award was issued through a letter dated 6th July 2020. However, the same was received by the Appellant on 12th August 2020. The envelope which carried the letter shows that it was posted on 14th July 2020. According to Regulation 105 of the Regulations, time to file a complaint start to run when a tenderer becomes aware of the circumstances giving rise to a complaint. The Appellant became



aware of the circumstances giving rise to a complaint on 12th August 2020 after receipt of a notice of intention to award. Thus, the seven (7) working days ought to have been counted from 12th August 2020. The Appellant filed his application for administrative review on 18th August 2020 within the stipulated time limit.

2. That, the Respondent erred in law and in fact in calculating the time frame upon which the Appellant ought to have lodged its application for review. The Respondent started counting from 6th July 2020, the date of the letter while it was posted on 14th July 2020 and received by the Appellant on 12th August 2020.

The Appellant added that there was no proper mode of communication which was identified to be used for communication. As a result, the Respondent opted to mail the letter to the Appellant by ordinary mail through the post office. The mode chosen by the Respondent does not provide a record of the communication unlike registered mail. Thus, it was difficult to ascertain if the notice of intention to award was delivered within time.

3. That, the Respondent erred in law and fact for the evaluation criteria used were inconsistent to the requirements of the law. According to Section 78 of the Act read together with Regulation 312 (1) (d), (e) and 312 (6) of the Regulations consultants were to be shortlisted before being invited to submit their proposals. In this Tender individual consultants were not shortlisted but were invited to submit their proposals. The Respondent's act in this regard implies that all invited consultants were presumed to have



already been shortlisted and qualified for further evaluation. According to Regulation 312 (6) of the Regulations all evaluated consultants were to be ranked as per the order of merit.

The Appellant added that, according to Clause 4 of the Instruction to Consultants, proposals were to be evaluated on the basis of the terms of requirement. Since the Appellant was technically evaluated, he ought to be amongst the shortlisted consultants and awarded the contract as at this stage none should be disqualified but rather be ranked as per the order of merit.

4. That, the Respondent's evaluation process was marred with irregularities as there was a wide disparity of the scores arrived by the evaluation committee in respect of the Appellant. The Appellant cited Clause 10 and 11.4 of the Guidelines on the Selection and Employment of Consultants issued by PPRA on May 2014 (hereinafter referred to as PPRA's Evaluation Guideline). According to the Appellant, the PPRA's Evaluation Guideline provides guidance as to how marks are to be awarded during evaluation. The Evaluators ought to have a consensus on how marks are accorded to each consultant. Since the evaluators did not adhere to the PPRA's Evaluation Guideline, the scores awarded to the Appellant were unfair as with all his qualifications he ought to have been awarded the contract.

5. That, the Respondent erred in law by indicating on its letter dated 6th July 2020 that the Appellant's proposal was not responsive. According to Regulation 312 (6) of the Regulations, a procuring entity when selecting an individual consultant does not look for

responsiveness, instead it assess the qualification of consultants and arrange them according to the order of merit. Thus, the Respondent erred in law by stating in the notice of intention to award that the Appellant's tender was non responsive as for individual consultants minimum score is not the basis for selection.

6. Finally, the Appellant prayed for the following orders: -

- i. A declaration that evaluation process conducted by the Respondent was done in bad faith and contrary to the law;
- ii. The Respondent be compelled to adhere to the law as provided for under Regulations 310, 312 (1) and (6) of the Regulations;
- iii. The Respondent to fairly and appropriately evaluate the Appellant based on qualifications and shortlist him as he qualifies as an individual consultant for Tender;
- iv. The Respondent be compelled to pay the Appellant specific damages amounting to TZS 5, 500,000/= being cost incurred by the Appellant for filing fees on this appeal, legal fees and other out of pocket expenses; and
- v. Any other reliefs this Honourable Authority may deem just and fit to grant the Appellant.

SUBMISSIONS BY THE RESPONDENT

The Respondent's reply to the Appellant's grounds of Appeal as well as oral submissions during the hearing are summarized as follows: -



1. That, it should be noted that the Respondent did not issue a notification letter awarding the tender to the Appellant. The Respondent only sent a notice of intention to award to the Appellant on 6th July, 2020 pursuant to Section 60 (3) of the Act. Further, the Respondent gave the Appellant seven (7) working days which ended on 14th July, 2020 to submit his application for review if any.
2. That, Regulation 105 of the Regulations states in clear terms that, the Consultant, Supplier or Contractor will be provided with seven (7) working days for submitting an application for review if any. The Appellant was given that right by a letter dated 6th July 2020, therefore, there was no mis-calculation of the time frame as claimed.
3. Regulation 310 (1) (c) and 310 (4) of the Regulations set out fundamental criteria for selection of individual consultants. Amongst the criteria were experience and qualifications. The evaluation committee conducted the evaluation based on the set criteria in the Request for Proposal (Terms of Reference).
4. The Appellant failed to identify the Procurement Evaluation Guideline which guided the evaluation committee on disparity of scores. This shows that the claims of the Appellant have no legal grounds. However, scores were given according to the criteria set out in the Request for Proposal document (Terms of Reference) and the Appellant did not comply with the minimum score requirement.

5. The Respondent adhered to section 78 of the Act as evidenced by the supporting documents. Further, the RFP was prepared according to the standard bidding documents and the selection process was carried out in accordance with Regulation 312 of the Regulations.
6. Finally, the Respondent prayed for the following orders: -
 - i. A declaration that evaluation process was conducted in accordance with the Act, the Regulations and the PPRA's Evaluation Guideline, therefore there was no bad faith as claimed by the Appellant;
 - ii. The individual consultants selection process adhered to the requirement of the Act and the Regulations;
 - iii. The evaluation process was done not only to the Appellant but to all individual consultants according to the Act, the Regulations and the PPRA's Evaluation Guideline; and
 - iv. Since the Procurement Process was done according to the Act, the Regulations and the PPRA's Evaluation Guideline, the Respondent is not ready to pay the claimed damages amounting to TZS 5,500,000.00.

ANALYSIS BY THE APPEALS AUTHORITY

During the hearing parties agreed on the following issues which were approved by the Members of the Appeals Authority: -

- 1. Whether the Appellant's application for review was filed within the prescribed time;**



2. Whether the disqualification of the Appellant's tender is justified; and

3. What reliefs if any are the parties entitled to.

The Appeals Authority proceeded to resolve the above mentioned issues as follows: -

1. Whether the Appellant's application for review was filed within the prescribed time.

In analyzing this issue, the Appeals Authority revisited the Appeal record and observed that, the Respondent through a letter dated 6th July 2020 issued the notice of intention to award the Tender to all individual consultants who participated in the Tender process. The said notice was posted on 14th July 2020 and received by the Appellant on 12th August 2020. Dissatisfied with the reason given for its disqualification, on 18th August 2020 the Appellant applied for administrative review to the Respondent. On 18th August 2020 the Respondent issued a decision which dismissed the Appellant's application for administrative review for being lodged out of the prescribed time limit.

During the hearing the Respondent was asked to clarify as to when the Appellant was served with the notice of intention to award. In response thereof the Respondent submitted that the notice was issued on 6th July 2020 and was posted on 14th July 2020. The Respondent was not certain as to when the said letter was received by the Appellant. On his part the Appellant claimed to have received the said letter on 12th August 2020.

The Appeals Authority revisited Section 96(1) and (4) of the Act which provide as follows: -

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.*

(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**".*

(Emphasis provided)

The above quoted provisions clearly stipulate that, a dissatisfied tenderer is required to lodge a complaint if any to the accounting officer within seven (7) working days of becoming aware of the circumstances giving rise to the complaint. According to the Appellant he became aware of the circumstances giving rise to the complaint on 12th August 2020 when he received the Respondent's notice of intention to award. Since the Respondent had failed to substantiate the exact date the Appellant received the notice of intention to award, the Appeals Authority finds the Appellant to have become aware of such circumstances on 12th August 2020. Counting from 12th August 2020, the seven (7) working days lapsed on 21st August 2020. Thus, the Appellant submitted the application for administrative review within the prescribed time of seven (7) working days.

From the above findings the Appeals Authority concludes the first issue in the affirmative, that the Appellant filed its application for review within the prescribed time.

We would like to mention in passing that even though the law is silent on the mode of services of the notification of award, it is prudent that service should be effected using a method which enables tracking in order to avoid any doubt as to when a notification was received.

2. Whether the disqualification of the Appellant's tender is justified.

In resolving this issue, the Appeals Authority revisited the Appeal record and observed that the Appellant was disqualified for having scored 72.4% which was below the minimum required score of 75%. In disputing its disqualification, the Appellant relied on Regulation 312 (1) (d), (e) and 312 (6) of the Regulations arguing that he had already been shortlisted and that the Respondent ought to have evaluated his proposal and classify it by order of merit. Since the Appellant has all the required qualifications, he ought to have been shortlisted and awarded the contract. The Respondent on its part argued that the Appellant was disqualified for scoring 72.4% below the required minimum score of 75%.

The Appeals Authority revisited the Request for Proposal (RFP) and observed that the Respondent invited interested individual consultants to express their interest by providing detailed CVs which indicates compliance with the description of the assignment. Clause 11.0 of the RFP provide the evaluation criteria to be complied with by the individual consultants in relation to Lot II. For purposes of clarity Clause 11.1 (i) and (ii) is reproduced as follows: -

11.1 "The following criteria will be used to evaluate the submitted CVs;

S/No.	Criteria	Weight
1.	General qualification and suitability for the task to be performed.	30%
2.	Experience in procurement related assignments; At least eight (8) years experience in procurement related assignments (60%).	60%
3.	English language proficiency	10%
	TOTAL	100%

(i) *When evaluating general qualification and suitability for tasks to be performed indicated under Item No. 1 on the Table above; the consultant's academic qualification will be analysed in relation to the requirements under clause 5 – Qualifications of Consultants of the Terms of Reference. **A consultant with less qualification shall be disqualified.***

(ii) *In evaluating experience under Item No. 2 on the Table above for compliance audit assignments; a consultant with eight (8) years or more experience in the procurement related activities shall be awarded 30%. A consultant with experience in supervising/managing eight (8) years or more in procurement related assignments shall be awarded 30%. Any criteria less than the above mentioned will be **disqualified.**"*

The above mentioned provisions entail that an individual consultant was required to provide detailed information with regard to his experience in the procurement related assignment. The table under Clause 11.1 indicate the weight which would be assigned for every criterion.

The Appeals Authority revisited the Evaluation Report and observed that, evaluation was conducted in two stages namely preliminary and detailed evaluation. During preliminary evaluation, the evaluation committee checked if the submitted CVs were updated, duly signed, indicating experience and that the integrity forms were duly completed. In that process five (5) consultants were eliminated and the remaining seventy three (73) were subjected to detailed evaluation. After completion of the detailed evaluation forty five (45) Consultants were found to have scored above the required minimum score of 75%.

The Appeals Authority revisited Clause 9 of the PPRA's Evaluation Guideline and observed that a consultant before being assessed on its compliance with technical specifications, has to be assessed on the admissibility and administrative conformity of the proposal. Thereafter the technical qualification of the proposal will be assessed as per Clause 11.1 of the PPRA's Evaluation Guideline.

The Appeals Authority having reviewed the Evaluation Report, PPRA's Evaluation Guideline and the RFP is of the view that, the evaluation of the proposals was conducted in accordance with the criteria laid down in the RFP.

The Appeals Authority revisited Regulation 312 (1) of the Regulations which provide for stages to be followed for selection of individual consultants which reads: -

Regulation 312 (1) "The selection process for individual consultants shall comprise the following stages:

(a) preparation of terms of reference and contract format;

(b) advertisement of the consultancy job;

(c) preparation of the estimated budget;

(d) **preparation of the short list;**

(e) evaluation of qualification and experience;

(f) negotiation of fees and contract terms;

(g) signing of contract; and

(h) supervision and evaluation of services."

(Emphasis provided)

The Appeals Authority considered the Appellant's argument that the Respondent ought to have prepared a shortlist before the issuance of the RFP document. Thus, the Respondent's act of issuing the RFP document to seventy eight (78) consultants implied that they were all shortlisted. Hence at this stage they were supposed to be assessed on their technical capability and be ranked in accordance with the order of merit.

Regulation 312 (1) (d) read together with Clause 18 of PPRA's Evaluation Guideline indicate that there ought to have been a shortlist before the issuance of the RFP. However, the short answer to the Appellant's argument is that since the Appellant was among the

consultants who were issued with RFP, he ought to have questioned any ambiguity, omission and/or contradictory requirement pursuant to Regulation 291 (2), (3) and (5) of the Regulations which provides as follows: -

Regulation 291 (2) ***"The consultant shall critically review the documents to determine whether or not there is any ambiguity, omission or internal contradiction, or any feature of the terms of reference or other conditions which are unclear or appear discriminatory or restrictive."***

(3) ***"The consultant shall, where the consultant determines any ambiguity or omission, request the procuring entity, in writing and within the time period specified in the request for proposals documents, to clarify the ambiguity or contradiction."***

(5) ***"The specific requests for proposals documents issued by procuring entity shall govern each procurement and where any of the provisions in the documents are inconsistent with these Regulations, the consultant shall inform the procuring entity."***

(Emphasis provided)

In view of the above mentioned provisions, the consultants had an opportunity to seek for clarification in respect of any inconsistencies found in the RFP before the submission of their proposals. The Appellant did not do so. This means that he consented to be assessed in accordance with the terms and conditions of the RFP.

According to Clause 4 of the Instructions to Consultants only consultants who would score 75% and above would be shortlisted and engaged. Thus, since the Appellant scored 72.4%, he did not qualify to be shortlisted and subsequent award thereof.

From the above findings, the Appeals Authority is of the settled view that the Appellant's disqualification from the Tender process is justified. Therefore, the second issue is answered in the affirmative.

3. What reliefs if any are the parties entitled to.

Given the Appeals Authority's findings on the first issue hereinabove, the Appellant has partially succeeded in his appeal. However, in view of the findings on the second issue that the disqualification of the Appellant is justified, the appeal is hereby dismissed.

Order accordingly.

Each party is to bear its own 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 25th day of September 2020.

HON. JUSTICE (RTD) SAUDA MJASIRI


.....

CHAIRPERSON

MEMBERS:

1. DR. LEONADA MWAGIKE 

2. MR. RHOBEN NKORI 