

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
APPEAL CASE NO. 23 OF 2016-17
BETWEEN
M/s MUHANNA & COMPANY
LIMITED.....APPELLANT
AND
NATIONAL HEALTH INSURANCE
FUND.....RESPONDENT

RULING

CORAM

1. Hon. Vincent K.D.Lyimo, Judge(rtd)- Chairman
2. Mr. Louis Accaro - Member
3. Mrs. Rosemary Lulabuka - Member
4. Mr. Ole-Mbille Kissioki -Secretary

SECRETARIAT

1. Ms. Florida R. Mapunda - Senior Legal Officer
2. Ms. Violet S. Limilabo - Legal Officer
3. Mr. Hamisi O. Tika - Legal Officer

FOR THE APPELLANT

1. Mr. Ibrahim Muhanna -Managing Director
2. Ms. Mwanamkulu Hasa - Actuarial Assistant.

FOR THE RESPONDENT

1. Mr. Charles Misheto -Ag. Procurement Manager
2. Ms. Martha Charles -Senior Legal Officer
3. Mr. Lawson Kawamala -Procurement Officer
4. Mr. Ivo Edward -Procurement Officer
5. Ms. Rose Temba -Senior Actuarial Officer

This Ruling was scheduled for delivery today 6th April 2017, and we proceed to do so.

The Appeal at hand was lodged by M/s MUHANNA & COMPANY LIMITED (hereinafter referred to as "the Appellant") against the National Health Insurance Fund, commonly known by its acronym NHIF (hereinafter referred to as "the Respondent").

The Appeal is in respect of Tender NO. PA/071/2016/2017/C/01 for Provision of Consultancy Services for conducting the 5th Actuarial Valuation of the National Health Insurance Fund as of 30th June, 2016, (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 facts of the Appeal may be summarized as follows:

The Respondent vide the African Newspaper, the issue of 17th to 23rd September, 2016 as well as the Fund's website, invited qualified Consultancy firms to submit their Technical and Financial Proposals for the tender under the International Competitive Tendering procedures (ICB) specified in the Public Procurement Act No. 7 of 2011 (hereinafter referred

to as “the Act”) and the Public Procurement Regulations GN. No. 446 of 2013 (hereinafter referred to as GN. No. 446/2013) both as amended.

The deadline for the submission of the proposals was 6th October 2016, whereby five (5) proposals were received from the following consultancy firms;

1. M/s Muhanna & Company Limited
2. M/s Ernst & Young
3. M/s African Actuarial Consult
4. M/s African Risk & Insurance Service Limited
5. M/s Alexander Forbes.

The Technical Proposals were firstly subjected to evaluation process which was conducted in two stages namely; preliminary and detailed evaluation. At the preliminary evaluation stage, the proposals by M/s African Risk & Insurance Service Limited and M/s African Actuarial Consult were found to be non-responsive for failure to comply with the requirements of the Request For Proposal (RFP).

The remaining three (3) proposals were thus subjected to the technical evaluation. During this stage, the proposal by M/s Ernst & Young Ltd was disqualified for failure to meet the set minimum technical scores, which was 75%. The proposals by M/s Alexander Forbes and M/s Muhanna & Company Limited met the minimum score by scoring 92.0% and 76.1% respectively.

The above two firms were therefore proposed to be invited for opening of their respective Financial Proposals. The Tender Board at its meeting held

on 25th November 2016, approved the recommendations. On 1st December, 2016, the Respondent vide his letter with Ref. No. NHIF/T.50C/1/32 informed the Appellant of his scores and he invited him for the opening of the Financial Proposals.

On 13th December 2016, the opening of the two Financial Proposals took place in presence of the Appellant's representative and in the absence of another bidder. The read out prices of the two firms were as hereunder;

S/N	Name of the bidder	Read out price in TZS.
1.	M/s Alexander Forbes	216,332,311 Plus 29,224,591/- Local Taxes
2.	M/s Muhanna & Company Limited	127,650,000/- Plus 25,254,000/- Local Taxes

It is on record that on 23rd December 2016, that is, after the financial proposals had been opened, the Appellant wrote to the Respondent challenging the marks awarded to him in Technical scores. He thus, requested the Respondent to review his technical scores and avail him the detailed break down on how his proposal was judged. The Appellant's complaint contained two major grounds namely;

- i. That, the awarded scores were unusually low given the track record experience they have in the region and internationally in similar mandates and quality proposals in the past.
- ii. That, the quality of their proposals in the past for similar projects through out the East Africa in most cases received more than 85%.

The Respondent did not respond to the Appellant's request until 2nd January, 2017, when he informed the Appellant amongst other issues that evaluation process of the tenders was yet to be finalized and that any complaint regarding evaluation, recommendations and award thereof cannot be disclosed until the release of the Notice of Intention to award the contract. Nevertheless, the evaluation of the Financial proposals was carried out whereby the Evaluation Committee checked for arithmetic correction of errors before subjecting them to the combined technical and financial as well as rankings. The combined technical and financial proposals for the two were as follows;

1.	M/s Alexander Forbes	86.05%
2.	M/s Muhanna & Company Limited	80.88%

Based on the above ranking, the Evaluation Committee recommended the award of the contract to M/s Alexander Forbes at a contract price of TZS. 245,556, 902.00 inclusive of taxes.

The Tender Board at its extra ordinary meeting held on 30th January, 2017, approved the recommendations by the Evaluation Committee and awarded the contract to M/s Alexander Forbes at a contract price of TZS. 245,556, 902.00 VAT inclusive.

That, on 6th February 2017, the Respondent issued the Notice of Intention to award the contract to all bidders.

Aggrieved by the Respondent's intention, on 10th February 2017, the Appellant wrote to the Respondent's Accounting Officer challenging the technical scores given to him and re-iterated his earlier grounds with addition of a new ground that the technical proposal was not evaluated based on the responsiveness to the terms of reference, applying the criteria and sub criteria as well as the point system specified in the Instruction to Consultants (ITC).

On 22nd February, 2017, the Respondent's Accounting Officer delivered his decision, in which he informed the Appellant that his scores awarded based on the terms of reference, application of the criteria and sub criteria as well as the point system specified in the ITC. He thus dismissed the complaint for lack of merits and he availed a copy of the scores to the Appellant for reference as well as clarity and transparency.

Dissatisfied further by the Respondent's decision, on 8th March 2017, the Appellant filed this Appeal to the Appeals Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant's Appeal contains one major ground, namely;

That, the Respondent breached Clause 36.1 of the Tender Document in that, the technical proposal was not evaluated based on the responsiveness to the terms of reference, application of the criteria and sub criteria as well as the point system specified in the ITC sub Clause 36.2 specifically on these aspects:

- i. Methodology and approach on how to carry the assignment;

- ii. Actuary who is certified fellow of the Faculty of Actuaries or any international recognized institution;
- iii. Details of the qualifications of the other members of the team that will undertake the assignment;
- iv. Local firm participation; and
- v. Knowledge of the country.

In amplifying his ground of Appeal based on the above criteria, the Appellant submitted that;

- They clearly specified in their methodology section that they will be coordinating with the in-house Actuaries by discussing with them the work methodology, data analysis and the assumption in details. Furthermore, they provided that the fund covers both active members and retirees, of which the projection period was suggested to be 75 years, based on international actuarial guidelines by the International Labour Office and the International Actuarial Association for benefits provided after retirements. As such, the GAP specific to retirees and their spouses will be calculated based on a projection period of 75 years.
- The RFP did not require that certificates of qualification to be attached to back-up the actuarial credentials. However, their RFP contained well documented credentials of their experts in Actuarial and Health care fields in the international arena. Thus, their leader and other experts satisfied the requirement. The Appellant ought to have been awarded full score of 10 marks and not 5 assigned by the Respondent.

- It is common for international tenders that attract international firms to reward credits to firms that have local branches and local offices as satisfying criterion. In so far as their branch has been fully registered locally and has full operations it is their belief that their firm ought to have been rewarded points for being on the ground permanently in Tanzania. They thus, ought to have been given a minimum score of 2 points out of 2.5.
- Their proposal contained a team leader, one Ibrahim E. Muhanna who has a deep working knowledge of Tanzania and East Africa in general as well as six other professionals explained in sections 2 and 5 of their proposal. The Respondent ought to have awarded him 9 out 10 instead of 7.2 marks awarded.

Finally the Appellant prayed for the following reliefs:-

- i. Nullification of evaluation criteria and sub criteria listed above.
- ii. Re-evaluation of technical proposals.

SUBMISSIONS BY THE RESPONDENT

The Respondent's written replies to the grounds of appeal were as follows:-

- i. That, the Appellant's grounds of Appeal are baseless as are based on his opinion and not the Terms of Reference of the RFP. His claims are not supported by any misnomer the Evaluation Committee has committed.

- ii. That, the Appellant's RFP did not state anywhere in the methodology section that he will be coordinating with the Respondent's in-house actuaries in providing data needed and ensure answers are given to any question which is the responsibility of the client as per the RFP. Furthermore, the Appellant indicates in his RFP that such stages will not be done in Tanzania. No requirement for counterpart staff was provided in the RFP.
- iii. That, according to the best practice, the nature of the scheme which the Respondent offers, short and long term like pension funds for soundness projection, 75 years for health insurance is unrealistic and will mislead the fund.
- iv. That, education certificates are mandatory documents which qualify what has been mentioned in the Curriculum Vitae (CV). CV in itself cannot be used as a tool to prove education level. Furthermore, some information on the CV does not show the year of graduation of the personnel. The Consultant was under obligation to provide proof. Additionally, according to the Act and its Regulations, basis for the tender evaluation is the content of the tender document itself without recourse to extrinsic evidence. The Appellant referred the Respondent to search for information regarding their leader to have been the founding member of the International Actuarial Association through on line instead of finding them in the tender document.
- v. That, the Appellant's firm's registration in Tanzania does not entail that it involves local firms in the actuarial arena. The Act as amended

provides clearly the manner in which scores regarding this aspect is to be done. Having an office in Tanzania does not guarantee involvement of local firms or experts without indicating in his proposal.

- vi. The marks 7.2 awarded in the knowledge of the country criterion is based on the experience justified by the lead consultant and the remaining 2.8 was deducted due to nationality factor of the other proposed team members who are not stationed in Tanzania.

Finally, the Respondent prayed for the following orders;

1. Dismissal of the Appeal as well as the Appellant's prayers for lack of merits;
2. The Respondent to be allowed to proceed with the award of the tender in observance of the law.
3. Costs of the Appeal.

ANALYSIS BY THE APPEALS AUTHORITY.

Before embarking into the analysis of the parties' submissions on the merits of the Appeal, the Appeals Authority in the course of perusal of various tender documents and the sequence of events for the tender, it became clear that there was the issue of the timeliness of the appeal. The Appeals Authority *suo moto*, deemed it necessary to verify whether the Appeal as filed was properly before it. The first issue to be considered was whether the Appeal is properly before the Appeals Authority.

Having framed the above issue, the Appeals Authority proceeded to resolve it as hereunder.

First, the Appeals Authority observed that, on 1st December 2016, the Respondent issued a notice to the Appellant as well as the other bidder who had met the minimum score, informing them not only the scores of their technical proposals and qualified for the next stage but also inviting them to attend the opening ceremony of their respective financial proposals on 13th December 2016. The Appellant acknowledged to have received this letter on 2nd December 2017. It is the Appeals Authority's views that, since the evaluation of technical and financial proposals under the consultancy services are distinct processes, the Appellant ought to have challenged the scores assigned to him immediately after the Respondent's notification. To the contrary, the Appellant appears not to have challenged that decision. Further, that on 13th December 2016 at the opening ceremony of the financial proposals, the Appellant did not complain of the scores given, though he was present and the same were again read out. That noted the Appeals Authority is of the view that in terms of Section 95(1) and 96(1) and (4) of the Act, as amended, the Appellant ought to have exercised his legal mandate to seek for administrative intervention of the Respondent's Accounting Officer within seven working days provided therein. That is to say, from 2nd December 2016, the Appellant was required as of late, to lodge his complaint on 13th December 2016. It was until 23rd December 2016, when he officially lodged his complaint. The Appeals Authority is of the view that the Appellant's complaint was an afterthought and indeed contravened the above cited provisions of the Act.

Second, the Appeals Authority observed that, even by assumption that the complaint submitted by the Appellant to the Respondent's Accounting

Officer on 23rd December 2016 was proper, the Appeals Authority is of the view that immediately after the decision of the Respondent's Accounting Officer had been delivered on 2nd January 2017, the Appellant being dissatisfied with that decision, he ought to have invoked his rights provided for under Section 97(2)(b) of the Act to lodge his Appeals to this Appeals Authority. However, he condoned of this right.

The above findings notwithstanding, the Appeals Authority observed further that, immediately after the evaluation of both technical and financial proposals, on 6th February 2017, the Respondent via his letter with Ref. No. NHIF/T.50/BC/2/84, issued a Notice of Intention to award the contract to all bidders who participated in the tender process. Dissatisfied with the notice, on 10th February 2017, the Appellant through his letter with Reference No.IEM/TZ42/B/2/9/17, lodged his official complaint to the Respondent's Accounting Officer. In response to the Appellant's complaint, on 22nd February 2017, the Respondent's Accounting Officer delivered his decision by dismissing the Appeal. It is the view of the Appeals Authority that the Appellant was required instantly to lodge his appeal to this Appeals Authority on or before 3rd March 2017. To the contrary, his appeal was lodged on 8th March 2017. Three working days beyond the limit set by the law.

It is the firm view of the Appeals Authority that under all two circumstances above, this Appeal cannot stand for it has been lodged hopelessly out of time and that the Appeals Authority lacks jurisdiction to entertain the same.

Accordingly, the Appeals Authority's conclusion regarding the issue above is that the Appeal is not properly before it.

In view of the above findings, the Appeal is hereby dismissed for being filed out of time and without leave to do so. Each party to bear own costs.

It is so ordered.

The right of Judicial Review as per Section 101 of the Act is explained to parties.

This Ruling is delivered in the presence of the parties this, 6th day of April 2017.



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JUDGE (rtd) V.K.D. LYIMO

CHAIRMAN

MEMBERS:

1. MRS. R. A. LULABUKA



2. MR. LOUIS ACCARC

