

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

AT DAR ES SALAAM

APPEAL CASE NO. 35 OF 2017-18

BETWEEN

M/S NATIONAL SOCIAL SECURITY FUND.....APPELLANT

AND

**THE ACCOUNTANT GENERAL, MINISTRY OF FINANCE
AND PLANNING RESPONDENT**

DECISION

CORAM

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

SECRETARIAT

- | | | |
|----|------------------------|------------------------|
| 1. | Ms. Florida Mapunda | - Senior Legal Officer |
| 2. | Ms. Violet S. Limilabo | - Legal Officer |

FOR THE APPELLANT

- | | | |
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| 1. | Mr. Frank Mgeta | - Legal Officer- NSSF |
| 2. | Mr. Ismail Mohamed | - Ag. Statistics Officer- NSSF |

FOR THE RESPONDENT

- | | | |
|----|-----------------------|----------------------------------|
| 1. | Mr. Nyandalo G. Chaya | - Head, PMU - ACGEN |
| 2. | Mr. Rujama R. Chisumo | - Senior Legal Officer- MOFP |
| 3. | Mr. Amani Simba | - Senior Supplies Officer- ACGEN |

This Appeal was lodged by M/S National Social Security Fund, commonly known by its acronym as NSSF (hereinafter referred to as "**the Appellant**") against the Accountant General, Ministry of Finance and Planning (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. IE/031/2017-2018/HQ/C/09 for Provision of Consultancy Services for Actuarial Valuation for Non-Contributory Government Pension Scheme (hereinafter referred to as "**the Tender**").

According to the submissions made to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**"), the facts of the Appeal are summarized as follows:-

On 24th November 2017, the Respondent issued a Request for Proposal (hereinafter called "**RFP**") and invited five short listed consultancy firms to submit their Technical and Financial Proposals by 20th December 2017, then it was extended to 22nd December 2017. Two proposals were received from the following firms, namely; M/s National Social Security Fund and GEPF Retirement Benefits Fund.

The Technical Proposals were subjected to evaluation which was conducted in two stages namely; Preliminary and Technical Evaluation. Both proposals were found to be in compliance with RFP as they both scored above the minimum points of 80. Therefore, both firms were invited for opening of Financial Proposals which took place on 26th January 2018. Representatives from both firms attended the opening ceremony.

The Financial Proposals were evaluated and after combining the Technical and Financial scores, the proposal by M/s GEPF Retirement Benefits Fund was recommended for award. The Tender Board at its meeting held on 9th March 2018 approved the award as recommended by the Evaluation Committee.

The Respondent informed the Appellant of his Intention to award the Tender to M/s GEPF Retirement Benefits Fund through a letter dated 12th March 2018. The Appellant was also informed that, overall his proposal scored lower marks than the proposed successful tenderer.

Dissatisfied, the Appellant applied for administrative review on 15th March, 2018, airing his dissatisfaction on the scores of his technical proposal.

On 22nd March 2018, the Respondent issued his decision which rejected the Appellant's complaints for being filed out of time.

Aggrieved by the decision, on 29th March 2018, the Appellant filed this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal are as follows;

1. That, the Appellant disputes the Respondent's decision that their application for administrative review was submitted beyond the stipulated time of seven working days from the date of opening of the Financial Proposals.

The Appellant expounded that, the Notice of Intention issued on 12th March 2018 was the official communication from the Respondent that

prompted them to lodge complaints to the Respondent on 15th March 2018. They could not have filed the complaint prior to that day due to lack of any official communication thereto.

The Appellant submitted further that, the Notice of Intention to award the Tender, among others, gave them seven working days to submit complaints, if any. They lodged them within three days. As such, their application for administrative review was lodged within time, as per the requirement of Section 60(3) of the Public Procurement Act of 2011, as amended (hereinafter referred to as "**the Act**").

2. That, the Appellant's complaints are based on their dissatisfaction of the score points of the Technical Proposal in line with the evaluation criteria, sub-criteria and points system outlined in the Proposal Data Sheet (PDS) for evaluation of Technical Proposals.

In support of this ground, the Appellant submitted that, they even formed a Joint Venture with another actuarial firm based in Kenya to ensure that they complied with all the requirements.

The Appellant further submitted that, even their application for administrative review was proper, contrary to the Respondent's claim that it contravened Regulation 105 of the Public Procurement Regulations GN. No. 446 of 2013, as amended (hereinafter referred to as "GN. No. 446 of 2013"). The Appellant claimed that the provision provides for contents of the application for administrative review and not the mode of application as contended by the Respondent.

Finally the Appellant prayed for the following orders;

- i. That, as their application for administrative review was submitted within time, thus the Respondent be compelled to entertain their complaints.
- ii. Re-evaluation of the Proposal; and alternatively
- iii. Re-tendering.

REPLY BY THE RESPONDENT

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

1. That, in the administrative review lodged, the Appellant had only one concern, that is; ***dissatisfaction of the scores given to their technical proposal*** in line with the evaluation criteria, sub-criteria and points system for the evaluation of technical proposals.

The Respondent submitted that, as the concern was in respect to the Technical Proposal, the same should have been raised within seven days from when the Appellant became aware of the results. The Appellant became aware of the Technical Proposals' results on 26th January 2018 on the day the Financial Proposals were opened, since they were all read out there and then, in compliance with Regulation 302(2) of GN. No. 446 of 2013. No complaints were raised until after issuance of the Notice of Intention to Award the Tender.

The Respondent submitted further that, as the Appellant preferred to raise the complaint on 15th March 2018, after 47 days from the date he became aware of his technical score, instead of the seven working days pursuant to Section 96(4) of the Act; the Respondent's Accounting Officer was prohibited from entertaining the complaint submitted out of time.

The Respondent also challenged the Appellant's contention that, the Notice of Intention was the official communication that triggered the application for administrative review. Regulation 302(2) of GN. No. 446 of 2013 provides a mandatory requirement for a Procuring Entity to read out the results of Technical Evaluation before opening of Financial Proposals. The results of the technical evaluation were read out on 26th January 2018, whereby the Appellant and the proposed successful bidder were represented. The read out result is also official information that could have been complained of at this stage.

Therefore, the Appellant was not diligent in pursuing his right of administrative review to the Respondent; hence his Appeal should be treated as frivolous.

2. The Respondent submitted further that, without prejudice to number 1 above, even if the complaint was made within time, the letter dated 15th March, 2018 could not be acted upon, since it explained about the dissatisfaction of the Appellant on his technical score contrary to the mode envisaged under Regulation 105(3) of GN. No. 446 of 2013.

That, upon lapse of seven working days after issuance of the Notice of Intention to award the Tender, the Respondent proceeded to issue acceptance letter to M/s GEPF Retirement Benefit Fund on 5th April 2018.

Finally the Respondent prayed for dismissal of the Appeal for lack of merits.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority is of the view that, the Appeal has two issues calling for determination and these are;

- 1. Whether the Respondent's decision regarding the Appellant's application for administrative review was proper in law; and**
- 2. What reliefs, if any, are the parties entitled to.**

Having identified the issues in dispute, the Appeals Authority proceeded to resolve them as follows:-

- 1. Whether the Respondent's decision regarding the Appellant's application for administrative review was proper in law**

In resolving this issue the Appeals authority considered Section 96(4) of the Act, cited by the Respondent;

- S. 96(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 added)

The above provision entails that, accounting officers are prohibited from entertaining complaints or disputes lodged after seven working days from the date tenderers become aware of the circumstances giving rise to the complaint or dispute.

Now, the question is what are the circumstances that the Appellant was seeking administrative review on? The Appellant orally submitted that they were dissatisfied with the combined technical and financial scores. They further submitted that, the Notice of Intention to Award gave them seven working days within which to raise complaints, if any, pursuant to Section 60(3) of the Act. The Appellant claimed to have complied with such a requirement.

We revisited the documents submitted and observed that, the Appellant's application letter for administrative review, dated 15th March 2018 and the Statement of Appeal lodged before this Appeals Authority indicate clearly that the Appellant was dissatisfied with his ***Technical Proposal's scores*** emanating from technical evaluation process.

As the Technical Proposal's score is the basis of administrative review, the next question would be; when did the Appellant become aware of the circumstances giving rise to the complaint. We have observed that, in line with the Respondents statement, the Minutes of the Opening of Financial Proposals dated 26th January 2018 indicate that the scores for Technical Proposals of both firms were read out in the presence of representatives from both firms. The Appellant was represented by Mr. Xavier Lukuvi, Mr. Ismael Mohamed and Mr. Dominic Mwete, while the proposed successful

tenderer was represented by one Mr. Chaina Chacha. The Appellant's firm scored 80.38% and M/s GEPF Retirement Benefits Fund scored 92%.

From the above, there is no doubt that the Appellant became aware of the circumstances giving rise to the complaint on 26th January 2018, as such, pursuant to Section 96(4) of the Act, the complaint should have been filed within seven working days from 26th January 2018, that is not beyond 6th February 2018. As the Appellant filed the application for administrative review on 15th March 2018, after 27 working days had lapsed, they were completely out of time.

Based on the above analysis, the Appeals Authority disagrees with the Appellant's argument that he became aware of the circumstances giving rise to the complaints after issuance of the Notice of Intention to award the Tender, and we agree with the Respondent's decision that they were prohibited from entertaining the Appellant's application for administrative review since it was submitted out of time.

Regarding other grounds by the parties that, the complaint was not properly crafted and the dissatisfaction of the technical scores, the Appeals Authority finds prudent not to proceed determining them since the findings made herein suffice to dismiss this Appeal.

All in all, the first issue is answered in the affirmative, that the Respondent's decision regarding the Appellant's application for administrative review was proper in law.

2. What reliefs, if any, are the parties entitled to

Taking cognizance of the findings above, the Appeals Authority hereby dismisses the Appeal for lack of merits as the Respondent's decision in relation to the Appellant's application for administrative review was proper in law.

The Respondent may proceed with the Tender process in observance of the law.

No order as to costs.

It is so ordered.

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

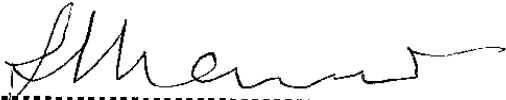
The parties have a right to Judicial Review as per Section 101 of the Act.

The Decision is delivered in the presence of the parties this 4th May 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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