

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL CASE NO. 07 OF 2024-2025**

**BETWEEN**

**M/S NEUDORF CORPORATION LIMITED.....APPELLANT**

**AND**

**DAR ES SALAAM INSTITUTE OF TECHNOLOGY.....RESPONDENT**

**DECISION**

**CORAM**

- |                                    |               |
|------------------------------------|---------------|
| 1. Hon. Justice (rtd) Suda Mjasiri | - Chairperson |
| 2. Ms. Ndeonika Mwaikambo          | - Member      |
| 3. Mr. Pius Mponzi                 | - Member      |
| 4. Mr. James Sando                 | - Secretary   |

**SECRETARIAT**

- |                         |                              |
|-------------------------|------------------------------|
| 1. Ms. Florida Mapunda  | - Deputy Executive Secretary |
| 2. Ms. Agnes Sayi       | - Senior Legal Officer       |
| 3. Ms. Violet Limilabo  | - Senior Legal Officer       |
| 4. Mr. Venance Mkonongo | - Legal Officer              |

**FOR THE APPELLANT**

- |                        |                    |
|------------------------|--------------------|
| 1. Mr. Ally Hamimu     | - Group President  |
| 2. Mr. Claudi Agustini | - Business Manager |



## FOR THE RESPONDENT

1. Mr. Edwin Webiro - State Attorney - Office of the Solicitor General (OSG)
2. Ms. Eliza Lukwaro - State Attorney - DIT
3. Ms. Adela Mwarika - Head Procurement Management Unit - DIT
4. Ms. Juliet Mwiambi - Procurement Officer - DIT

This Appeal was lodged by M/S **Neudorf Corporation Limited** (hereinafter referred to as "**the Appellant**") against the **Dar es Salaam Institute of Technology** commonly known by its acronym as "**DIT**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No.Y1/2023/2024/G/110 for Supply of School Laboratory Supplies under CELPAT Laboratory (hereinafter referred to as "**the Tender**").

The background of this Appeal may be summarized from the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") as follows: -

The Tender was conducted through the National Competitive Tendering method as specified in the Public Procurement Act of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 446 of 2013 as amended (hereinafter referred to as "**the Regulations**").

On 27<sup>th</sup> November 2023, the Respondent through National e-Procurement System of Tanzania (NeST) invited tenderers to participate in the Tender. The deadline for submission of tenders was set on 15<sup>th</sup> February 2024. On



the deadline, the Respondent received twelve tenders including the Appellant's.

The received tenders were subjected to evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/S Cherry Garments & Safety Solutions Limited subject to successful negotiations. The proposed contract price was Tanzania Shillings Nine Hundred Nine Million One Hundred Twenty One Thousand Six Hundred Thirty One and Ninety Eight Cents only (TZS 909,121,631.98) VAT Exclusive.

The Tender Board approved the Evaluation Committee's recommendations at its meeting held on 6<sup>th</sup> May 2024. Negotiations successfully took place on 31<sup>st</sup> May 2024. On 4<sup>th</sup> July 2024, the Tender Board approved the negotiation report and award of the Tender to M/S Cherry Garments & Safety Solutions Limited.

On 18<sup>th</sup> July 2024, the Respondent issued the Notice of Intention to award the Tender. The Notice informed the Appellant that the Respondent intended to award the Tender to M/S Cherry Garments & Safety Solutions Limited. In addition, the Notice stated that the Appellant's tender was not successful due to attachment of five contracts each with less than the required amount of TZS 200,000,000.00.

Dissatisfied with the reason given for its disqualification, on 29<sup>th</sup> July 2024, the Appellant applied for administrative review to the Respondent. The Respondent through a letter dated 1<sup>st</sup> August 2024, issued its decision which dismissed the Appellant's application for administrative review. The



Respondent's decision was served to the Appellant on 5<sup>th</sup> August 2024. Aggrieved further, on 15<sup>th</sup> August 2024, the Appellant filed this Appeal to the Appeals Authority.

Upon receipt of the Appeal, the Appeals Authority notified the Respondent about the existence of the Appeal and required it to submit a Statement of Reply. In its Statement of Reply, the Respondent raised a Preliminary Objection (PO) on a point of law to wit that: -

*"The Appeal is time barred as it is lodged to the Public Procurement Appeals Authority on 15<sup>th</sup> August 2024 while the decision of the accounting officer was made via a letter dated 1<sup>st</sup> August 2024 and communicated to the Appellant on 5<sup>th</sup> August 2024, contravening Section 97(2)(b) of the Public Procurement Act [ Cap 410 R.E 2022".*

When the matter was called on for hearing and at the time of framing up the issues, the Respondent prayed to abandon the preliminary objection. In view of such development, the following issues were framed, namely: -

- 1.0 Whether there is valid Tender for consideration by the Appeals Authority;**
- 2.0 Whether the disqualification of the Appellant's tender was justified; and**
- 3.0 What reliefs, if any, are the parties entitled to?**



### **SUBMISSIONS BY THE APPELLANT**

The Appellant's submissions were made by Mr. Ally Hamimu, Group President. He commenced on the first issue by stating that the Respondent's proposal to award the Tender to M/S Cherry Garments & Safety Solutions Limited was made beyond the bid validity period of One Hundred and Twenty (120) days as specified in the Tender Document. Mr. Hamimu submitted that the said Tender was floated on 27<sup>th</sup> November 2023. The Tender opening took place on 15<sup>th</sup> February 2024. Hence, counting from 15<sup>th</sup> February 2024, the tender validity period expired on 14<sup>th</sup> June 2024, and was not extended.

Mr. Hamimu submitted that the Respondent's act of proposing award of the Tender after the expiry of the bid validity period contravened the requirements of Section 71 of the Act read together with Regulation 191(3) and (4) of the Regulations. The referred provisions require the procuring entity to finalize the Tender process including award of the Tender to the proposed successful tenderer within the tender validity period. Mr. Hamimu stated that the Appellant had not received any letter from the Respondent that requested extension of the tender validity period. Thus, the Tender expired before the issuance of the Notice of Intention to award.

In support of his submissions, Mr. Hamimu cited PPAA Appeal Case No. 7 of 2022-2023 between ***M/S Premier Medical Corporation Private Limited versus Medical Stores Department***. In the referred Appeal Case, the Appeals Authority found the Respondent to have contravened the requirements of Section 60(3) of the Act and Regulation 231(2) of the Regulations. The cited provisions require procuring entities to communicate



the Notice of Intention to award to all tenderers which participated in the Tender. However, when communicating the Notice of Intention to award, the Respondent used a wrong email address. Mr. Hamimu urged the Appeals Authority to apply the same principle in the cited case in this Appeal.

Mr. Hamimu submitted that the Respondent's act of proposing award of the tender to the successful tenderer beyond the bid validity period and without any extension contravened the requirements of Section 71 of the Act and Regulation 191(3) and (4) of the Regulations.

On the second issue, Mr. Hamimu stated that after receipt of the Notice of Intention to award dated 18<sup>th</sup> July 2024, the Appellant could not have challenged the reason given for its disqualification since the tender validity period had already expired on 14<sup>th</sup> June 2024. That is why on its application for administrative review the Appellant challenged the issuance of the Notice of Intention to award after expiry of the tender validity period.

The Appellant submitted that the Notice of Intention to award indicated that the Appellant was disqualified for attaching five contracts with less amount than the required value of TZS 200,000,000.00. The Appellant stated that a requirement to submit five contracts each with a value of TZS 200,000,000.00 was unfair, discriminatory and hindered competition. Mr. Hamimu argued that the requirement to submit previous contracts each with a value of TZS 200,000,000.00 was too high. Hence the



Appellant doubted if there was any tenderer including the successful tenderer that had complied with such a requirement.

Finally, the Appellant prayed for the following orders: -

- i. The Appeals Authority to review the Respondent's decision in respect of the Appellant's application for administrative review;
- ii. The Appeals Authority to decide the matter based on the best interest of the tenderers; and
- iii. Any other order the Appeals Authority may deem fit and just to grant.

### **SUBMISSIONS BY THE RESPONDENT**

The Respondent's submissions were made by Mr. Edwin Webiro, learned State Attorney from the Office of the Solicitor General. He commenced on the first issue by stating that the tender validity period for this Tender was One Hundred and Twenty (120) days as specified under Clause 25 of the Bid Data Sheet (BDS). Counting from 15<sup>th</sup> February 2024 when the Tender was opened, 120 days was to expire on 14<sup>th</sup> June 2024. Before expiry of the tender validity period, the Respondent through a letter dated 3<sup>rd</sup> June 2024, requested tenderers to extend the tender validity period from 13<sup>th</sup> June 2024 to 15<sup>th</sup> August 2024. The request for extension was communicated to tenderers through their postal addresses. Particularly, the said request was sent to the Appellant through P.O Box 55093 Dar es Salaam, the learned State Attorney contended.

The learned State Attorney submitted that the proposed successful tenderer and two other tenderers accepted the request and extended the





tender validity period to 15<sup>th</sup> August 2024. The learned State Attorney stated that the Respondent's request for extension of the tender validity period was in accordance with Section 71 of the Act and Regulation 191(3) and (4) of the Regulations. In view of the fact that there was an extension of the tender validity period, the learned State Attorney contended that the Respondent's decision of intending to award the Tender to the proposed successful tenderer was proper in law.

On the PPAA Appeal Case No. 7 of 2022-2023 between ***M/S Premier Medical Corporation Private Limited versus Medical Stores Department***, cited by the Appellant, the learned State Attorney stated that the circumstances of the case are distinguishable with the current Appeal. In the cited case, the issue was whether the Notice of Intention to award was issued in compliance with the law whereas in the current Appeal the issue is whether the Respondent requested the extension of the bid validity period. The learned State Attorney submitted that since in the Tender under Appeal the Respondent requested tenderers to extend the tender validity period and some of the tenderers accepted the request, the laid down principle in the cited case is inapplicable under the circumstances of this Appeal.

On the second issue, the learned State Attorney submitted that it is an undisputed fact that the Appellant failed to comply with the specific technical experience requirement as it submitted five contracts each with less amount than the required value of TZS 200,000,000.00 specified in the Tender Document. In addition, the Appellant conceded to have failed to





comply with the specific experience criterion. However, it raised an argument that the requirement was unfair and discriminatory.

The learned State Attorney submitted that, had the Appellant found the specific technical experience requirement to be discriminatory it ought to have sought for clarification before the deadline for submission of tenders. However, the Appellant did not do so. Instead it participated in the Tender by submitting five contracts which were below the required value of TZS 200,000,000.00 for each contract. The learned State Attorney elaborated that the Respondent's basis of specifying the value of TZS 200,000,000.00 for previous contracts was due to the nature of the project that is intended to be executed. The Respondent contended that the project is of high value and demands a well experienced supplier in this area. The learned State Attorney therefore concluded his submissions by stating that the Appellant was rightly disqualified from the tender process for failure to comply with specific technical experience requirement.

Finally, the Respondent prayed for the following orders: -

- i. A declaration that the notice of intention to award and the subsequent notification of award of the Tender were done within the bid validity period as the Tender had been extended up to 15<sup>th</sup> August 2024;
- ii. A declaration that the Appellant has not been prejudiced as the awarded tenderer accepted requests for the extension of the bid validity period.
- iii. The Appeal be dismissed for lack of merit.



## **APPELLANT'S REJOINDER**

On his brief rejoinder, Mr. Hamimu submitted that when communicating the request for extension of the tender validity period the Respondent used P.O. Box 55099 which was not in use by the Appellant. Mr. Hamimu contended that by the deadline for submission of tenders, the Appellant's postal address was P.O. Box No. 77535 as registered in NeST. The Appellant started using P.O. Box No. 55099 very recently after realising that the postal address registered in NeST was given to another person. Thus, the request for extension of the tender validity period was not received by the Appellant as it was sent to a wrong postal address.

## **ANALYSIS BY THE APPEALS AUTHORITY**

### **1.0 Whether there is valid Tender for consideration by the Appeals Authority**

In determining this issue, the Appeals Authority considered the parties' contentious arguments whereby on one hand the Appellant contended that the Respondent's decision to award the Tender to the successful tenderer was invalid as it was made after the expiry of the bid validity period on 14<sup>th</sup> June 2024. The Appellant claimed that the Respondent's act in this regard contravened the requirements of Section 71 of the Act read together with Regulation 191(3) of the Regulations.

On the other hand, the Respondent stated that the Notice of Intention to award and the subsequent award of the Tender complied with the requirements of Section 71 of the Act and Regulation 191(4) of the Regulations. The Respondent indicated that the initial specified tender



validity period of 120 days was to expire on 14<sup>th</sup> June 2024. However, before the expiry of the bid validity period, the Respondent through a letter dated 3<sup>rd</sup> June 2024, requested tenderers to extend the bid validity period from 13<sup>th</sup> June 2024 to 15<sup>th</sup> August 2024. The Respondent stated that the successful tenderer and other two tenderers accepted the request and extended the tender validity period to 15<sup>th</sup> August 2024. Thus, by the time the Respondent decided to award the Tender to the proposed successful tenderer, the Tender was still valid.

In determining the validity of the parties' contentious argument, the Appeals Authority revisited Section 71 of the Act and Regulations 191(3), (4) and 192(1) of the Regulations which read as follows: -

"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.***

191(3) *The period fixed by a procuring entity shall be sufficient to permit evaluation and comparison of tenders, for obtaining all necessary clearances and approvals, and for the notification of award of contracts and finalise notification of the award of contracts and finalise a contract but the period shall not exceed one hundred and*



***twenty days from the final date fixed for submission of tenders.***

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

192(1) ***Tenderers who agree to an extension of the period of effectiveness of their tenders shall extend or seek an extension of the period of effectiveness of their tender securities provided by them or provide new tender securities to cover the extended period of effectiveness of their tenders."***

(Emphasis supplied)

The above quoted provisions of the law require the procuring entity to specify the tender validity period that would allow it to evaluate the tender and seek approval of the Tender Board within the specified period. In addition, the provisions require a procuring entity to request tenderers to extend the bid validity period where there is an exceptional circumstance. Furthermore, tenderers who agree to the request for extension of the tender validity period may also be required to extend their tender securities or provide new tender securities to cover the extended tender validity period.

The Appeals Authority reviewed the record of Appeal and observed that the bid validity period was 120 days as specified under Clause 25 of the BDS.



Tender opening took place on 15<sup>th</sup> February 2024. Counting from the Tender opening date, 120 days ought to have expired on 14<sup>th</sup> June 2024. The record of Appeal indicates further that, on 3<sup>rd</sup> June 2024, the Respondent requested tenderers to extend the bid validity period from 13<sup>th</sup> June 2024 to 15<sup>th</sup> August 2024. The successful tenderer and other two tenderers accepted the Respondent's request to extend the tender validity period through letters dated 5<sup>th</sup> June 2024.

Furthermore, the Appeals Authority noted that the Respondent had attached twelve letters including that of the Appellant which indicated that on 3<sup>rd</sup> June 2024, the Respondent requested extension of the bid validity period. Item 3 of the letter stated categorically that tenderers were requested to extend the tender validity period from 13<sup>th</sup> June 2024 to 15<sup>th</sup> August 2024. In addition, tenderers were required to accept the extension before 7<sup>th</sup> June 2024.

The Appeals Authority observed further from the Respondent's submitted List of Registered Items and Ordinary Parcels from Tanzania Posta Corporation that on 3<sup>rd</sup> June 2024 the Respondent posted twelve letters. The Appellant's letter was posted through P.O. Box 55099 Dar es Salaam. It was further noted that the same postal address is seen in the Appellant's letterhead on its application for administrative review and the Statement of Appeal filed to the Appeals Authority.

The Appeals Authority considered the Appellant's contention that the Respondent had used the postal address that was not in use by the Appellant at the time the request for extension of the tender validity period



was issued. The Appellant alleged that by the deadline for submission of tenders its postal address was No. 77535. However, it recently started using postal address No. 55099 after realizing that the former postal address which was also registered in NeST had been allocated to another person. Nevertheless, the Respondent contended that the postal address No. 55099 was obtained from Google search.

In view of the record of Appeal, the Appeals Authority is satisfied that the postal address that was used by the Respondent to communicate the request for extension of the tender validity period was the Appellant's address as was rightly conceded by the Appellant during the hearing. The allegations that the Appellant had started to use the said postal address recently is rejected since the referred address is contained in the Appellant's application for administrative review and the Statement of Appeal filed before the Appeals Authority.

From the record of Appeal, the Appeals Authority is of the firm view that the Tender under Appeal is valid as its validity period was extended before expiry. In view of this observation, the Appeals Authority finds the Respondent's decision to award the Tender to the proposed successful tenderer and the subsequent issued Notice of Intention to award to have been made within the tender validity period. The Appeals Authority therefore finds the Respondent to have complied with the requirements of Section 71 of the Act and Regulations 191(3), (4) and 192(1) of the Regulations.



The Appeals Authority distinguished Appeal Case No. 7 of 2022-23 between ***M/S Premier Medical Corporation Private Limited versus Medical Stores Department*** relied upon by the Appellant as the circumstances of the two cases are different. In the referred Appeal the Respondent communicated the Notice of Intention to award through a wrong email address of the Appellant while in the current Appeal the Respondent communicated the request for extension of the tender validity period through the Appellant's valid postal address.

Given the circumstances, the Appeals Authority concludes the first issue in the affirmative that there is a valid Tender for consideration.

## **2.0 Whether the disqualification of the Appellant's tender was justified**

In resolving this issue, the Appeals Authority reviewed the record of Appeal and observed that according to the Notice of Intention to award, the Appellant was disqualified because each of the attached five contracts had a value which was less than TZS 200,000,000.00.

In substantiating if the Appellant's disqualification was justified, the Appeals Authority reviewed the evaluation report and observed that the Appellant was disqualified at the technical evaluation stage for failure to comply with specific technical experience as it submitted five contracts each with a value less than TZS 200,000,000.00 as required in the Tender Document.





The Appeals Authority reviewed Section IV - Qualification and Evaluation Criteria and observed that under technical evaluation tenderers were required to demonstrate their specific experience by submitting five contracts each with the value of TZS 200,000,000.00 that had been successfully and substantially completed. The requirement reads as follows: -

"Specific experience	<i>The bidder shall demonstrate that it has successfully completed at least five contracts within the last five years prior to the bid submission deadline, each with a value of at least TZS 200,000,000.00 that have been successfully and substantially completed and that are similar in nature and complexity to the goods and related services under the contract."</i>

In ascertaining if the Appellant complied with the above quoted requirement, the Appeals Authority reviewed the Appellant's tender submitted in Nest. It observed that under the slot for specific experience the Appellant had attached five contracts. The attached contracts each were of less value than the required amount of TZS 200,000,000.00 specified in the Tender Document. Thus, the Appellant failed to comply with specific experience requirement.

The Appeals Authority further considered the Appellant's contention that the requirement to submit five contracts each with a value of TZS 200,000,000.00 was discriminatory to some of the tenderers hence denying them a right to participate in the Tender. The Appeals Authority observed that since the Appellant was aware of the existence of the said criterion prior to submission of its tender it should have sought for

clarification in compliance with Clause 8.1 of the Instruction To Tenderers (ITT) and Regulation 13 of the Regulations. To the contrary, the Appellant never sought for clarification but proceeded to participate in the Tender. In view of this observation, the Appeals Authority rejects the Appellant's argument in this regard as it has no basis.

From the above observations, the Appeals Authority is of the settled view that the Respondent's act of disqualifying the Appellant's tender complied with the requirements of Regulation 206(2) of the Regulations which provides that where a tender is not responsive to the tender document, it shall be rejected by the procuring entity and may not be subsequently made responsive by correction or withdrawal of the deviation. Regulation 206(2) of the Regulations reads as follows: -

**"206(2) *Where a tender is not responsive to the tender document, it shall be rejected by the procuring entity, and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation.*"**

(Emphasis Supplied)

Consequently, the Appeals Authority concludes the second issue in the affirmative that the disqualification of the Appellant's tender was justified.

### **3.0 What reliefs, if any, are the parties entitled to?**

Taking cognizance of the above findings by the Appeals Authority, the Appeal is hereby dismissed, and the Respondent is ordered to proceed with the Tender process in observance of the law.



We make no order as to 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 6<sup>th</sup> day of September 2024.

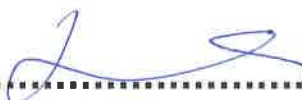
**HON. JUSTICE (rtd) SAUDA MJASIRI**



.....  
**CHAIRPERSON**

**MEMBERS: -**

**1. MS. NDEONIKA MWAIKAMBO**.....



**2. MR. PIUS MPONZI**.....

