

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 49 OF 2023 - 2024

BETWEEN

M/S EVOLVE COMPANY LTDAPPELLANT

AND

**MINISTRY OF LIVESTOCK AND
FISHERIES (LIVESTOCK)RESPONDENT**

DECISION

CORAM

- | | |
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| 1. Hon. Justice (Rtd) Sauda Mjasiri | - Chairperson |
| 2. Adv. Rosan Mbwambo | - Member |
| 3. Mr. Rhoben Nkori | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|-----------------------------|-----------------------------|
| 1. Mr. Thomson E. Mwasikili | - Managing Director |
| 2. Ms. Alice Kahinga | - Advocate, Smith Advocates |

FOR THE RESPONDENT

- | | |
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| 1. Ms. Neema Mwanda | - Director of Legal Services |
| 2. Ms. Stella Kombi | - Senior Supplies Officer |



- | | |
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| 3. Ms. Yasinta Sebastian | - Legal Officer |
| 4. Dr. Charles Mhina | - Director of Administration and
Human Resources Management |
| 5. Mr. Francis Chanyika | - Principal Assistant Vocational
Teacher |

This Appeal was lodged by **M/S Evolve Company Ltd** (hereinafter referred to as "**the Appellant**") against the **Ministry of Livestock and Fisheries (Livestock)** (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. 99/2023/2024/G/42 for Supply and Installation of Furniture and Fittings for Office Use (hereinafter referred to as "**the Tender**").

The Tender was conducted through National Competitive Tendering method as specified in 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 as amended (hereinafter referred as to "**the Regulations**").

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: -

On 27th October 2023, the Respondent through National e-Procurement System of Tanzania (**NeST**) invited eligible tenderers to participate in the Tender. The deadline for submission of tenders was set on 10th November 2023. By the deadline four tenderers, the Appellant inclusive submitted their tenders.



The received tenders were subjected to evaluation. After completion of the evaluation process, the evaluation committee recommended award of the Tender to M/S Jaffery Ind. Saini Limited. The recommended contract price was Tanzania Shillings Three Billion Eight Hundred Seventy Million Six Hundred Forty Seven Thousand One Hundred Twenty Eight only (TZS 3,870,647,128.00) VAT exclusive.

The Tender Board approved the evaluation committee's recommendations at its meeting held on 17th April 2024. The approved recommendation of award was subject to negotiations with the proposed successful tenderer on specifications, quality of the furniture to be supplied, delivery period and price reduction.

Negotiations successfully took place on 29th May 2024. Thereafter, the negotiations report was tabled before the Tender Board at its meeting held on 03rd June 2024. After deliberations the Tender Board approved award of the Tender to M/S Jaffery Ind. Saini Ltd. The approved contract price was Tanzania Shillings Four Billion Five Hundred Sixty Five Million Nine Hundred Seventy Nine Thousand Five Hundred Fifty Six only (TZS 4,565,979,556.00) VAT inclusive.

On 08th June 2024, the Respondent issued a Notice of Intention to Award the Contract. The Notice informed the Appellant that the Respondent intends to award the contract to M/S Jaffery Ind. Saini Ltd. In addition, the Notice stated that the Appellant's tender was disqualified for failure to comply with technical requirements and general experience as it was not a prime contractor in some of the key activities.



Dissatisfied with the reasons given for its disqualification, on 15th June 2024, the Appellant filed an application for administrative review. The Appellant claimed that there was no response from the Respondent. Aggrieved further with the Respondent's acts, the Appellant filed this Appeal before the Appeals Authority on 28th June 2024. In response thereof to the filed Appeal, the Respondent submitted a Statement of Reply.

When the matter was called on for hearing, the following issues were framed, namely: -

- 1.0 Whether there is a valid tender for determination 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 led by Ms. Alice Kahinga learned advocate. She commenced on the first issue by stating that there is no valid tender for determination by the Appeals Authority as the validity period had already expired. The learned counsel contended that Clause 25 of the Tender Data Sheet (TDS) specified the validity period for the Tender to be 120 days. Counting from 10th November 2023, which was the tender opening date, the tender validity period expired on 9th March 2024.



The Appellant contended that despite the expiry of the tender validity period, on 8th June 2024, the Respondent issued notification of award of the Tender to M/S Jaffery Ind. Saini Ltd. The learned advocate submitted that the Respondent's act of awarding the Tender to M/S Jaffery Ind. Saini Ltd after the expiry of the Tender validity period is null and void in the eyes of the law. Based on this submission, the learned advocate prayed that the Appeal be allowed on this ground as there is no valid Tender for determination by the Appeals Authority and the Respondent be ordered to re-start the Tender process.

Having heard the Appellant's submissions on the first issue which is a point of law, the Appeals Authority asked the Respondent to reply on the same in order to ascertain if there is a valid tender for determination.

REPLY BY THE RESPONDENT

The Respondent's submissions were made by Ms. Neema Mwanda, Director of Legal Services. She commenced on the first issue by conceding that the Tender validity period had expired. She stated that Clause 25 of the TDS specified the tender validity period to be 120 days from the tender opening date. She contended that the tender opening took place on 9th November 2023. Therefore, the tender validity period of 120 days expired on 9th March 2024.

Ms. Mwanda stated that it is true that the Respondent issued the Notice of Intention to award the Tender on 8th June 2024. However, having realized that the tender validity period had expired, the Tender Board through circular resolution dated 14th June 2024, nullified the Tender proceedings



including the intention to award the Tender. She added that by the time the Tender was nullified the Respondent had only issued the Notice of Intention to award and not award of the contract as contended by the Appellant.

Ms. Mwanda submitted that Section 71 of the Act requires award of the Tender to be made within the tender validity period as specified in the Tender Document. She stated that it is an undisputed fact that the Tender Document specified the tender validity period to be 120 days. However, the Respondent did not finalize the award process within the specified tender validity period as required by the law.

She stated further that Regulation 191(4) of the Regulations allows the procuring entity in exceptional circumstances to request tenderers to extend the tender validity period for the Tender. She submitted that the Respondent overlooked this requirement of the law. Hence, no request for extension of the tender validity period was made by the Respondent. Thus, the tender validity period expired.

Ms. Mwanda stated that Regulation 231(2) of the Regulations requires the accounting officer having satisfied itself that all the procedures were followed to award the Tender. In this Tender the Respondent's accounting officer did not award the Tender as the relevant procedures were not adhered to as per the requirements of the law.

In support of her submissions, Ms. Mwanda cited ***PPAA Appeal Case No. 22 of 2020-21 between M/S S.E.C (East African) Company Limited and Bank of Tanzania.*** In the referred Appeal, the Appeals Authority



nullified the Tender proceedings after it had established that the tender validity period for the tender had expired. Ms. Mwanda urged the Appeals Authority to apply the same principle in this Appeal.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether there is a valid tender for determination by the Appeals Authority

In resolving this issue, the Appeals Authority took cognizance of the fact that the Respondent conceded that the tender validity period had expired since 9th March 2024. Nevertheless, the Appeals Authority deemed it prudent to enlighten the parties on the importance of adhering to the tender validity period as specified in the Tender Document.

In so doing, the Appeals Authority reviewed Clause 17.1 of the Instructions To Tenderers (ITT) read together with Clause 25 of the TDS. These Clauses indicate that the tender validity period for this Tender was 120 days. The Appeals Authority further reviewed Section 71 of the Act and Regulation 191(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 (1) the validity period required for tenders shall be specified in the tender document".

(Emphasis supplied)

The above quoted provisions clearly indicate that tenderers are required to make their tenders valid for a period specified in the Tender Document. In addition, a procuring entity is required to specify the tender validity period that would be sufficient to enable it to complete the evaluation of tenders. Furthermore, the time specified should be sufficient for the appropriate Tender Board to review the recommendations and approve award of the contract.

The Appeals Authority reviewed the record of Appeal and observed that the tender opening took place on 10th November 2023. Counting from the tender opening date, the tender validity period of 120 days expired on 9th March 2024.

Regulation 191(4) of the Regulations allows in exceptional circumstances a procuring entity to request tenderers to extend the tender validity period, provided that such a request is made prior to the expiry of the initial specified period. Regulation 191(4) of the Regulations reads as follows: -

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"***



(Emphasis supplied)

During the hearing of this Appeal, the Respondent conceded that much as the law allows the procuring entity to request tenderers to extend the validity period of their tenders, such an opportunity was overlooked by the Respondent. Hence, no request was made for extension of the tender validity period by the Respondent. Thus, the tender validity period for the Tender was not extended.

The Appeals Authority observed further from the record of Appeal that despite the expiry of the tender validity period, the Respondent proceeded with the Tender process by conducting negotiations with M/S Jaffery Ind. Saini Ltd on 29th May 2024. The Tender Board approved award of the Tender to M/S Jaffery Ind. Saini Ltd on 3rd June 2024. On 8th June 2024, the Respondent issued the Notice of Intention to award. The Appeals Authority is of the firm view that since the tender validity period expired on 9th March 2024 and there was no extension of the same, all the Respondent's acts after the expiry of the said period were null and void in the eyes of the law.

Given the fact that the Respondent conceded that the tender validity period had expired and the same was not extended, the Appeals Authority finds that there is no valid tender for determination. In the circumstances, the Appeals Authority concludes the first issue in the negative.



Taking into consideration our findings hereinabove, the Appeals Authority would not delve into the remaining issues. The Appeals Authority hereby allows the Appeal on that basis.

In view of the fact that the tender validity period had expired, the Appeals Authority hereby order the Respondent to re-start the Tender process in accordance with 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 is as provided under Section 101 of the Act.

This Decision is delivered in the presence of the parties on this 7th day of August 2024.

HON. JUSTICE (rtd) SAUDA MJASIRI



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CHAIRPERSON

MEMBERS: -

1. ADV. ROSAN MBWAMBO



2. MR. RHOBEN NKORI

