

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 36 OF 2024 - 2025

BETWEEN

M/S KIMPHIL KONSULT (T) LIMITED APPELLANT

AND

NATIONAL SOCIAL SECURITY FUND RESPONDENT

DECISION

CORAM

- | | |
|-----------------------------------|---------------|
| 1. Hon. Judge (Rtd) Awadh Bawazir | - Chairperson |
| 2. Dr. William Kazungu | - Member |
| 3. Dr. Gladness Salema | - Member |
| 4. Eng. Lazaro Loshilaari | - Member |
| 5. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|-------------------------|---------------------------|
| 1. Ms. Florida Mapunda | - PALS Manager |
| 2. Ms. Agnes Sayi | - Principal Legal Officer |
| 3. Ms. Violet Limilabo | - Senior Legal Officer |
| 4. Mr. Venance Mkonongo | - Legal Officer |


FOR THE APPELLANT

- | | |
|----------------------|---------------------|
| 1. Eng. Mussa Kimaka | - Managing Director |
|----------------------|---------------------|

FOR THE RESPONDENT

- | | |
|-------------------------|---------------------------|
| 1. Mr. Daudi Maneno | - Legal Officer |
| 2. Mr. Benedicto Mahela | - Director of Procurement |



- 
3. Mr. Baraka Mgya
 4. Ms. Khadija Kapufi
 5. Mr. Chacha Sebere

- Legal Officer
- Legal Officer
- Principal Procurement Officer

This Appeal was lodged by **M/S Kimphil Konsult (T) Ltd** (hereinafter referred to as "**the Appellant**") against the **National Social Security Fund** known by its acronym as **NSSF** (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. TR191/2024/2025/C/21 for Provision of Consultancy Services for an additional Lift at NSSF Mafao House in Morogoro (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, No.10 of 2023 (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 518 of 2024 (hereinafter referred to as "**the Regulations**").

On 22nd January 2025, the Respondent through the National e-Procurement System of Tanzania (**NeST**) invited eligible tenderers to participate in the Tender. The deadline for submission of tenders was set on 05th February 2025. The Respondent received two tenders including that of the Appellant within the deadline.



The tenders were subjected to an evaluation process. Thereafter, the Evaluation Committee recommended award of the Tender to the Appellant at the recommended contract price of Tanzania shillings Eighty-Seven Million Two Hundred Two Thousand Seven Hundred Twenty-Five only (TZS. 87,202,725/-) VAT Inclusive. The record of Appeal indicates that through a letter dated 03rd March 2025, the Respondent invited the Appellant to attend negotiations on the 4th March 2025 which took place as scheduled. In the course of the negotiations, the Appellant gave a discount of 5% which reduced its quoted price from TZS 84,414,500.00 to TZS. 81,626,275.00 VAT exclusive.

On 6th March 2025, the Respondent's Negotiation Team submitted a request for approval of the negotiation report to the Respondent's Tender Board. However, the Respondent's Negotiation Team reported that the negotiations with the Appellant failed because the Appellant's quoted price was higher than the Respondent's estimated budget of TZS 45,000,000. Thus, the team requested approval of the cancellation of negotiations. Furthermore, the Negotiation Team requested approval to invite the second lowest evaluated tenderer for negotiations.

On 18th March 2025, the Respondent issued a Notice of cancellation of the negotiation to the Appellant due to financial constraints. The letter indicated further that the Respondent had decided to invite the second lowest evaluated tenderer for negotiations. On the same date, that is, 18th March 2025, the Respondent invited the second lowest evaluated tenderer, M/S Digital Space Consultancy Limited to attend a negotiation meeting



scheduled on 19th March 2025. The record of Appeal shows that negotiations with the latter tenderer took place on 24th March 2025. During the negotiations, M/S Digital Space Consultancy Limited reduced its quoted price from TZS. 130,980,000.00 to TZS. 70,000,000.00 VAT Inclusive.

Then, on 24th March 2025, the Respondent's Negotiation Team requested the Respondent's Tender Board to approve the negotiation report and award the Tender to M/S Digital Space Consultancy Limited. On 2nd April 2025, the Respondent issued a Notice of Intention to award showing that the Respondent intended to award the contract to M/S Digital Space Consultancy Limited whose intended contract price was TZS 115,000,000.00. The Notice stated further that the Appellant's tender was not successful due to the failed negotiations.

Aggrieved with the reasons given for its disqualification from the Tender process, on 08th April 2025, the Appellant filed an application for administrative review to the Respondent. It disputed the disqualification and claimed that the negotiation between the parties did not fail. In addition, the Appellant challenged the Respondent's act of intending to award the Tender to M/S Digital Space Consultancy Limited for the contract sum of TZS 115,000,000.00 by submitting that this price was higher than the Appellant's.

On 09th April 2025, the Respondent issued its decision which rejected the Appellant's application for administrative review. Aggrieved with this



decision, the Appellant filed this Appeal before the Appeals Authority on 22nd April 2025.

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

1.0 Whether the cancellation of the negotiations between the parties was justified; and

2.0 To what reliefs if any are the parties entitled to?

SUBMISSIONS BY THE APPELLANT

The Appellant's submissions were made by Eng. Mussa Kimaka, Managing Director who commenced on the first issue by stating that the Appellant was one of the tenderers that participated in the Tender under Appeal. After completing the evaluation process, the Respondent invited the Appellant for negotiations which successfully took place on 4th March 2025. Then, surprisingly, on 2nd April 2025, the Appellant received the Notice of Intention to award from the Respondent. It stated that the Appellant's tender was unsuccessful because the negotiations failed. Aggrieved by this, the Appellant filed an application for administrative review to the Respondent and subsequently followed by this Appeal.

Eng. Kimaka submitted that the Appellant is challenging the Respondent's act of intending to award the Tender to M/S Digital Space Consultancy Limited. He stated that in the Tender under Appeal, the Appellant scored the highest in the technical evaluation and was the lowest in financial evaluation. It was therefore ranked the top between the tenderers that participated in the Tender.

Consequently, the Respondent invited the Appellant for negotiations. He submitted that negotiations between the parties were successfully concluded. The two parties had a mutual agreement to reduce consultancy fees by 5% that is from TZS. 84,414,500.00 VAT exclusive to TZS. 81,626,275.00 VAT exclusive. He stated further that the Respondent was required to consider the Appellant's offer of TZS 81,626,275.00 as the most cost-effective than TZS. 115,000,000.00 quoted by M/S Digital Space Consultancy Limited.

Eng. Kimaka argued that the Respondent's act of awarding the contract to a tenderer with a lower technical score and significantly higher quoted price contradicts the principles of value for money and casts doubt on the objectivity and fairness of the whole Tender process.

Eng. Kimaka submitted further that there were no formal or informal documentation indicating that negotiations between the parties failed. In addition, he stated that the Respondent did not disclose its estimated budget during the negotiations. He stated further that during negotiations parties agreed to give more time to the Appellant to refine its offered price. Eng. Kimaka stated that the Appellant submitted the refined price the following day to the Respondent. However, it did not receive any feedback from the Respondent. Thus, it was his view that the Respondent's decision to negotiate with the second lowest evaluated tenderer who also had a higher price than of the Appellant, was both procedurally unjustified and questionable.



Eng. Kimaka stated that the Respondent's contention that M/S Digital Space Consultancy Limited's price was reduced from TZS. 130,000,000.00 to TZS. 70,000,000.00 VAT inclusive, lacked transparency. He elaborated that the discount offered by M/S Digital Space Consultancy Limited was 46.15 % of its quoted price. Eng. Kimaka stated that such a large discount raises doubt regarding its practicability. According to the guidelines issued by the Engineers Registration Board (ERB) and the Architects and Quantity Surveyors Registration Board (AQRB), the profit margin of a consultancy firm or company in any consultancy assignment ranges between 5 – 10 % of the contract price. Thus, based on the referred guidelines, it would be impossible for a consultant to give such a discount that exceeds the set profit margin. It was his contention that the Respondent's negotiation process leading to M/S Digital Space Consultancy Limited offering a discount of 46.15 % raises doubt as to its legality.

Eng. Kimaka expounded further that in its Statement of Reply, the Respondent claimed that it intended to award the contract to M/S Digital Space Consultancy Limited at a price of TZS 70,000,000.00 VAT Inclusive. However, the Notice of Intention to award that was issued on 2nd April 2025, states that the intended contract price was TZS 115,000,000.00. The Respondent claimed that this notable discrepancy between the two figures is attributed to a misbehaving of the NeST system. Conversely, it failed to substantiate how the system misbehaved. Thus, the Respondent's contention in this regard is implausible, Eng. Kimaka contended.

Based on the above submissions, the Appellant prayed for the following remedies: -



- i) The Appeals Authority investigate thoroughly on the procedural flaws, discrepancies and potential acts of fraud associated with this procurement process;
- ii) Nullification of the intention to award the contract made to M/S Digital Space Consultancy Limited; and
- iii) Order the Respondent to award the contract to the Appellant.

REPLY BY THE RESPONDENT

The Respondent's reply submissions were made by Mr. Daudi Maneno, Legal Officer, assisted by Mr. Benedicto Mahela, Director of Procurement. The legal officer commenced his submissions on the first issue by giving a brief background of the matter at hand. The legal officer stated that the Appellant was among the two tenderers which participated in the Tender. After completion of the evaluation process, the Appellant was found to be the lowest evaluated tenderer and was therefore invited for negotiations. During negotiations, the Appellant was informed that its price was higher than the Respondent's estimated budget. Consequently, the Appellant gave a discount of 5% which varied its price from TZS 84,414,500.00 to TZS. 81,626,275.00 VAT exclusive.

The legal officer submitted that after completion of the internal processes, the Respondent decided to cancel negotiations with the Appellant and informed the latter through a letter dated 18th March 2025. The legal officer added further that after obtaining internal approvals, the Respondent invited the second lowest evaluated tenderer, M/S Digital Space Consultancy Limited for negotiations.



The legal officer expounded that during negotiations the second lowest evaluated tenderer gave a discount which reduced its price from TZS. 130,000,000.00 to TZS. 70,000,000.00 VAT inclusive. After completion of internal processes, the Respondent issued the Notice of Intention to award which stated that the Respondent intended to award the contract to M/S Digital Space Consultancy Limited at a contract price of TZS 115,000,000.00 VAT Inclusive. The legal officer submitted that the NeST system misbehaved and picked the read-out price instead of the negotiated price. Aggrieved with the Respondent's intention to award the tender to M/S Digital Space Consultancy Limited, the Appellant first filed an application for administrative review to the Respondent and subsequently this Appeal.

Submitting on the Appellant's ground of Appeal that its tender was highest ranked and technically superior to the other tenderer, the legal officer argued that the Appellant's contention in this regard is a clear misinterpretation. As per the record of the Tender, the Appellant was not the lowest evaluated tenderer. After negotiations between the parties failed, the Appellant became the second lowest evaluated tenderer. Hence, he contended that the Appellant's claim that its tender was found to be lowest evaluated is unfounded.

In response to the Appellant's argument that the Respondent erred in law for intending to award the contract to a tenderer with the highest price, the legal officer stated that the first Notice of Intention to award dated 2nd April 2025, was mistakenly issued following the misbehaving of the NeST System. The system inadvertently caused the selection of an incorrect



figure by picking the read-out price instead of the negotiated price. However, the error was rectified through a letter with Ref. No. MA/69/301/01A/1 dated 9th April 2025 which was duly served to the Appellant. In addition, on 17th April 2025, the Respondent issued the second Notice of Intention to award that stated clearly that the Respondent intended to award the Tender to M/S Digital Space Consultancy Limited at a contract price of TZS 59,322,033.90 VAT exclusive. The legal officer expounded that, since the Respondent rectified the intended contract price, the Appellant was not required to rely on an incorrect figure to substantiate its claim.

Mr. Mahela, the Respondent's Director of Procurement, submitted that, the Tender process was conducted fairly and in accordance with all procedures provided under the law. The record of the Tender shows clearly that after completion of the evaluation process, the Appellant's tender was found to be the lowest evaluated. Hence, the Appellant was invited for negotiations. However, negotiations were not successful and thereby cancelled. He stated that cancellation of the Appellant's negotiations was pursuant to regulation 298(10) of the Regulations. After cancellation of the Appellant's negotiations, the Respondent invited M/S Digital Space Consultancy Limited, the second lowest evaluated tenderer for negotiations. The Respondent's act of inviting the second lowest tenderer for negotiations was done pursuant to regulation 298(11) of the Regulations.

Mr. Mahela submitted that negotiations with M/S Digital Space Consultancy Limited took place on 19th March 2025. During negotiations, M/S Digital



Space Consultancy Limited gave a discount which lowered its price from TZS 115,000,000.00 to 70,000,000.00 VAT inclusive. Mr. Mahela emphasized that since the Respondent's estimated budget was TZS 45,000,000.00, the user department was consulted and agreed to adjust the budget by adding TZS 25,000,000.00. After such an adjustment the Respondent's budget changed to TZS 70,000,000.00. Thus, the price offered by M/S Digital Space Consultancy Limited of TZS 70,000,000.00 was found to be within the Respondent's budget. Therefore, M/S Digital Space Consultancy Limited was recommended for the award of the Tender.

Mr. Mahela elaborated further that after obtaining the Accounting Officer's approval on the recommendations of the award, the Respondent issued the Notice of Intention to award. The Notice stated that the Respondent intended to award the Tender to M/S Digital Space Consultancy Limited. Thus, in view of the sequence of events, Mr. Mahela emphasized that the Tender process was conducted in accordance with the requirements of the law.

In response to the Appellant's contention that the reason for cancellation of negotiations was not communicated to it, the Respondent's legal officer submitted that a letter for cancellation of negotiations dated 18th March 2025, was duly sent to the Appellant. The Appellant received the said letter and made it part of the annexures in its statement of Appeal. Thus, the Appellant was aware of the reason which led its tender to be unsuccessful. Therefore, the legal officer urged the Appeals Authority to disregard the Appellant's contention on its claim pertaining to this matter.



Regarding the procedures for handling application for administrative review and Appeal in NeST, the legal officer submitted that currently some of NeST Platform Modules such as Administrative Review and Appeals were not live and ready for use. Hence, the dispute resolution process has to be carried out manually.

In regard to the Respondent's failure to issue its decision on the Appellant's application for administrative review within the mandatory three days as provided under Clause 51.2 of the Instruction to Consultancy (ITC), the legal officer stated that the Respondent's response to the Appellant's complaint was issued on 9th April 2025 which addressed all issues raised by the Appellant. In addition, section 120(6) of the Act allows a procuring entity to issue its response to the Appellant's complaint within five or seven working days if it forms a team. Therefore, the legal officer stated that the Respondent's response was issued in accordance with the law.

Finally, the Respondent prayed for the following reliefs: -

- i) The Appellant's Appeal be dismissed in its entirety;
- ii) Upholds the Respondent's Intention to award the contract to M/S Digital Space Consultancy Limited;
- iii) Order the Appellant to pay costs incurred by the Respondent which includes legal representation, transportation costs of four persons and two per diem of four persons to the tune of TZS. 8,000,000.00.
- iv) Any other relief that the PPAA shall deem fit to grant.



ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether cancellation of the negotiations between the parties was justified.

In determining this issue, the Appeals Authority reviewed the record of Appeal and observed that the Appellant was one of the two tenderers that had submitted tenders. The two tenders were subjected to an evaluation process. The Appellant's tender was found to be the lowest evaluated and it was invited for negotiations. Negotiations between the Appellant and the Respondent took place on 04th March 2025. During negotiations, the Appellant offered a discount of 5% which reduced its price from TZS 84,414,500.00 to TZS. 81,626,275.00 VAT exclusive.

It was further observed that on 6th March 2025, the Respondent's Negotiation Team submitted a request to the Tender Board for cancellation of negotiations between the parties. And the reason for the said cancellation was a budget deficit to the tune of TZS. 51,319,004.50. The Negotiation Team also requested the Tender Board to approve the invitation of the second lowest evaluated tenderer into negotiations.

The record of Appeal indicates that through a letter dated 18th March 2025, the Respondent notified the Appellant about the cancellation of negotiations. On 19th March 2025, the Respondent conducted negotiations with M/S Digital Space Consultancy Limited which reduced its quoted price from TZS 130,000,000.00 to TZS 70,000,000.00 VAT inclusive. After completion of its internal processes, the Respondent issued the Notice of Intention to award the contract to M/S Digital Space Consultancy Limited.



Consequently, the Appellant first filed the application for administrative review and subsequently this Appeal.

In ascertaining whether the Respondent's cancellation of the Appellant's negotiations was proper, the Appeals Authority reviewed regulation 235 of the Regulations which reads as follows: -

"r.235.(1)Timu ya majadiliano itaandaa muhtasari wa kikao utakaosainiwa na pande zote mbili kwamba ni kumbukumbu za kweli na sahihi za majadiliano yaliyofanyika na kuwasilisha muhtasari huo kwa Kitengo cha Usimamizi wa Ununuzi

(2) Kitengo cha Usimamizi wa Ununuzi kitawasilisha mapendekezo ya timu ya majadiliano kwa afisa masuuli au bodi ya zabuni ili-

(a) kuendelea na utoaji wa tuzo ya mkataba kwa mzabuni aliyependekezwa, ikijumuisha makubaliano yaliyofikiwa wakati wa majadiliano;

*(b) **kurekebisha malengo ya majadiliano na kufanya majadiliano zaidi;** au*

(c) kuvunja majadiliano na kukataa zabuni.

(3) Pale ambapo timu ya majadiliano inapendekeza kukataliwa kwa mzabuni, Timu hiyo inaweza vilevile, endapo itaonekana inafaa, kupendekeza kumwalika mzabuni mshindi anayefuata kwenye orodha kwa ajili ya majadiliano".

(Emphasis supplied)



The above provision provides in clear terms that a negotiation team is required to prepare minutes of negotiations which would be signed by both parties to the negotiations. The minutes should indicate clear deliberations which transpired during negotiations and be submitted to the procurement management unit which in turn had to submit the same to the accounting officer or tender board for approval. Either of the two may approve award of the contract based on negotiations, amend or improve areas of negotiations for further negotiations or cancel the negotiations and reject the tender.

In substantiating whether the Respondent complied with requirements of regulation 235 of the Regulations, the Appeals Authority reviewed the record of negotiations between the parties and noted that there were four agenda items under the said negotiations to wit: reduction of the proposal fee, staffing, methodology, and final delivery or work schedule. The record of negotiations indicates that the parties agreed on reduction of the price from TZS 84,414,500.00 to TZS. 81,626,275.00 VAT exclusive, staffing and final delivery or work schedule. On the methodology, the Appellant did not agree on the additional items which were not initially included in the Terms of Reference (TOR) and Appellant requested additional payment for the freshly introduced items.

After reviewing the record of negotiations, the Appeals Authority observed that there was no disagreement on the item related to the reduction of the proposal fee. In fact, the record shows that the parties agreed on such an item and the record of negotiations was signed by both parties. However, the Appeals Authority noted that when submitting the negotiation report



for approval, the Negotiation Team prepared covering minutes which indicated that negotiations between the parties failed due to a budget deficit. That is, the Respondent had a budget deficit of TZS 51,319,004.50. Thus, the Negotiation Team recommended to cancel the negotiations with the Appellant. The team also requested approval to invite the second lowest evaluated tenderer into negotiations.

Based on the above facts, the Appeals Authority finds that the covering minutes prepared by the Negotiation Team for submission of the negotiation report, did not contain the true record of the negotiations. They contained different facts from the record of negotiations particularly that the parties did not reach consensus on reduction of the proposal fee while conversely, the record of negotiations shows that the parties indeed agreed on the discount offered by the Appellant. In addition, that record shows that the Appellant did not agree on the newly introduced tasks under methodology. Again oddly, the covering minutes were silent on this part.

According to regulation 235(1) of the Regulations, the negotiation team was required to prepare minutes of negotiations which contained a true record of deliberations. The minutes were to be signed by both parties to the negotiations and submitted for approval. The record of this Appeal indicates that the approving authority had granted approval of cancellation of negotiations with the Appellant based on the contents of the covering minutes and not the record of negotiations.

The Appeals Authority further finds that before the Respondent decided to cancel the negotiations with the Appellant, it was required to adhere to



requirements of regulation 235(2)(b) of the Regulations quoted above. This provision allows a procuring entity to refine terms of negotiations and continue with the negotiations. It is evident, the Appellant had offered a discounted price during negotiations amounting to TZS. 81,626,275.00 VAT exclusive. Thus, before deciding to cancel the negotiations, the Respondent was required to refine the agenda on reduction of the proposal fee to get the best price from the Appellant through negotiations. Surprisingly, instead of invoking regulation 235(2)(b) of the Regulations, the Respondent cancelled the negotiations with the Appellant and invited the second lowest evaluated tenderer for negotiations whilst the latter had quoted the price of TZS 115,000,000.00 that was substantially higher than of the Appellant's.

The Appeals Authority has failed to comprehend how was the Respondent certain that the second lowest evaluated tenderer with a higher price of TZS 115,000,000.00 than of the Appellant's TZS 81,626,275.00 would be able to reduce its price to suit the Respondent's budget of TZS 45,000,000.00. Common sense dictates that it would have been easier for the Respondent to negotiate down the Appellant's price rather than that of the second lowest tenderer's. In view of these circumstances, the Appeals Authority is of the considered view that according to regulation 235(2)(b) of the Regulations, the Respondent was required to continue with negotiations with the Appellant before inviting the second lowest evaluated tenderer.

The Appeals Authority further observed that negotiations between the Respondent and the latter tenderer led to a contract price of TZS



70,000,000.00 VAT inclusive which did not fall within the Respondent's stated budget. During the hearing the Respondent contended that although the negotiated price was still higher than its budget, the user department agreed to top up by TZS 25,000,000.00. The Respondent did not produce any document to substantiate the budget for this Tender that varied from TZS 45,000,000.00 to TZS 70,000,000.00. In addition, the Appeals Authority noted with concern the Respondent's decision of increasing the budget when negotiating with the latter tenderer but failing to do the same with the Appellant as the first lowest evaluated tenderer.

The Appeals Authority noted with concern which entity was the appropriate approving authority for this Tender. According to the record of Appeal, the estimated budget for this Tender was TZS 45,000,000.00. And according to the Ninth Schedule to the Regulations, the approving authority for tenders relating to provision of services below TZS 5,000,000,000.00 falls within the mandate of the Accounting Officer. Consequently, only the Accounting Officer had the mandate for approval for the estimated budget of TZS 45,000,000.00.

The record of Appeal shows that the covering minutes prepared by the Negotiation Team for submission of the negotiation report were addressed to the Tender Board instead of the Accounting Officer. During hearing, the Respondent was asked to confirm whether all steps in the Tender were approved by the appropriate authority. In response, the Respondent stated that the Accounting Officer was the approving authority for this Tender and had approved all steps. However, the Respondent did not provide any proof that substantiated approval of the Accounting Officer.



Based on this fact, the Appeals Authority doubts the Respondent's conduct during negotiations.

In considering the Respondent's proposition that its decision to cancel negotiations with the Appellant was proper and in accordance with section 91(3) of the Act read together with regulation 298 (10) and (11) of the Regulations. The relied provisions read as follows: -

"s.91(3) *Where the negotiations under subsection (2) fail to result in an acceptable contract, the accounting officer shall-*

(a) *for tenders requiring approval by the accounting officer, terminate the negotiations invite the next ranked firm for negotiations*

r.298 (10) *Ikiwa majadiliano yatashindwa kufikiwa kwa mkataba unaokubalika, taasisi nunuzi baada ya kupata idhini ya afisa masuuli au bodi ya zabuni itasitisha majadiliano na kualika kampuni ya ushauri elekezi inayofuata kwa ajili ya majadiliano.*

(11) *Mshauri elekezi atapewa taarifa ya sababu za kusitisha majadiliano na ikiwa majadiliano yameanza na kampuni ya ushauri elekezi inayofuata, taasisi nunuzi haitafungua tena majadiliano ya awali*".

(Emphasis supplied)



The above provisions read together state that if negotiations fail to reach a consensus agreement, after obtaining the approval of the accounting officer, the procuring entity should terminate the negotiations and invite the second lowest evaluated tenderer. And that, the tenderer whose negotiation have been cancelled should be informed about the cancellation and once negotiations with the second lowest evaluated tenderer have been commenced, the earlier negotiations should not be re-opened.

After applying the above quoted provision to the facts of this Appeal, the Appeals Authority could not establish that negotiations between the Appellant and the Respondent failed. The record of negotiations, which is the basic document for substantiating any failure of negotiations, does not indicate so. In fact it proves otherwise. Under these circumstances, the Appeals Authority finds the Respondent's cancellation of the negotiations with the Appellant by relying on section 91(3)(a) of the Act and regulation 298(10) and (11) of the Regulations to be improper in the eyes of the law.

Then, the Appeals Authority considered the Appellant's contention that the Notice of Intention to award issued on 2nd April 2025 indicated that the Respondent intended to award the Tender to the highest evaluated tenderer. After reviewing the record of Appeal, the Appeals Authority observed that it is true that the referred notice indicated that the Respondent was intending to award the Tender to the highest evaluated tenderer. However, the Respondent rectified such anomaly and served the Appellant with a letter dated 9th April 2025. It further issued the second Notice of Intention to award on 17th April 2025 which rectified the said



anomaly. In view of this rectification, the Appeals Authority finds that the Appellant's rights in this regard have not been prejudiced.

Regarding handling of applications for administrative review and Appeals in NeST, the Appeals Authority wishes to enlighten the parties that the Complaint and Appeals Management module in NeST is live and currently working and all the disputes arising out of public procurement processes are to be handled through that module.

In regard to the Appellant's contention that the Respondent was required to issue its decision with respect to its application for administrative review within three working days after receipt of the complaint pursuant to Clause 52.1 of the ITC, the Appeals Authority observes that such a requirement contravenes section 120(6) of the Act. The provision in the Act requires an accounting officer, after receipt of a complaint from a tenderer, to issue its decision within five working days or alternatively within seven working days if it formed an independent review team. As per the record of Appeal, the Appellant submitted its application for administrative review to the Respondent on 8th April 2025. The Respondent issued its decision through a letter dated 9th April 2025. The Appellant did not object receiving the Respondent's decision within five working days. In view of this position, the Appeals Authority rejects the Appellant's proposition in this regard.

In obiter, the Appeals Authority urges the Respondent when preparing the Tender Document to conform to section 120(6) of the Act which requires an accounting officer's decision on the application for administrative review



to be issued within five working days or seven working days if it formed a team.

Given the above position regarding the Respondent's cancellation of the negotiations with the Appellant, the Appeals Authority is of the settled view that the Respondent's conduct in this regard contravened the law.

After having said all and done, the Appeals Authority holds the first issue in the negative that the cancellation of the negotiations between the parties was not justified.

2.0 To What reliefs if any, are the parties entitled to

Taking cognizance of the above finding, the Appeals Authority hereby upholds the Appeal and nullifies the Respondent's intention to award the Tender to M/S Digital Space Consultancy Limited. The Appeals Authority orders the Respondent to re-instate the Appellant into the Tender process and re-start the negotiation 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 121(7) of the Act.

The Right of Judicial Review as per section 125 of the Act is explained to the parties.



This decision is delivered in the presence of the parties this 23rd day of May 2025.

HON. JUDGE (rtd) AWADH BAWAZIR



.....
CHAIRPERSON

MEMBERS: -

1. DR. WILLIAM KAZUNGU.....


2. DR. GLADNES SALEMA.....


3. ENG. LAZARO LOSHILAARI.....
