

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 119/2019 OF 11TH OCTOBER 2019

BETWEEN

CMC MOTORS GROUP LIMITED.....APPLICANT

AND

**PRINCIPAL SECRETARY, STATE DEPARTMENT OF INTERIOR,
MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL
GOVERNMENT..... RESPONDENT**

Review of Tender No MICNG/SDI/004/2019-2020 for leasing of Motor Vehicles from Local Assemblers floated by the Ministry of Interior and Coordination of National Government, State Department for Interior on the 20th of September 2019

BOARD MEMBERS

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| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Steven Oundo, OGW | -Member |
| 3. Mr. Alfred Keriolale | -Member |
| 4. Mr. Nicholas Mruttu | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Stanley Miheso | -Holding brief for Secretary |
| 2. Ms. Maryanne Karanja | -Secretariat |

PRESENT BY INVITATION

-CMC MOTORS GROUP LIMITED

- | | |
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| 1. Mr Migos Ogamba | -Advocate, Migos Ogamba & Company Advocates |
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1ST & 2ND RESPONDENT

-MINISTRY OF INTERIOR & COORDINATION OF NATIONAL GOVERNMENT, STATE DEPARTMENT OF INTERIOR

- | | |
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| 1. Ms Prisca Wambui | -Legal Counsel |
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THE REQUEST FOR REVIEW

M/s CMC Motors Group Limited (hereinafter referred to as "the Applicant") lodged a Request for Review which is dated and filed on 11th October 2019 together with a Statement in Support of the Request for Review (hereinafter referred to as "the Applicant's Statement") dated and filed on

the same date and a Further Affidavit dated and filed on 25th October 2019.

In response, the Procuring Entity lodged a Response to the Request for Review dated 16th October 2019 and filed on 17th October 2019 (hereinafter referred to as “the Procuring Entity’s Response”).

The Applicant sought for the following orders in the Request for Review:-

- a) An order declaring that Tender No MICNG/SDI/004/2019-2020 for leasing of Motor Vehicles from Local Assemblers as prepared and issued by the Respondent is illegal, null and void and the same be cancelled;***
- b) An order declaring that all the actions undertaken by and on behalf of the Respondent including but not limited to advertising, inviting, receiving, evaluating bids, awarding and/or signing contracts arising from Tender No MICNG/SDI/004/2019-2020 for leasing of Motor Vehicles from Local Assemblers is null and void and the same be cancelled;***
- c) An order that the costs of this Request for Review be awarded to the Applicant.***

During the hearing, the Applicant was represented by Mr Julius Migos Ogamba on behalf of the firm of Migos Ogamba & Company Advocates

while the Procuring Entity was represented by its Legal Counsel, Ms Prisca Wambui.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed before it, including confidential documents filed in accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") together with the oral submissions by parties.

The issues for determination are as follows:-

I. Whether the Request for Review was filed outside the statutory period under section 167 (1) of the Act thereby ousting the jurisdiction of this Board;

Depending on the outcome of the above issue: -

II. Whether the Request for Review is res subjudice in light of the pending Judicial Review proceedings in Miscellaneous Civil Application No. 284 of 2019 between Republic v. The Public Procurement Administrative Review Board & Another ex parte CMC Motors Group Limited in respect of Tender No. MICNG/SDI/008/2018-2019 for leasing of Motor Vehicles Phase V;

Depending on the outcome of the above issue: -

III. Whether the Applicant has the locus standi required under section 167 (1) of the Act to invoke the jurisdiction of this Board;

Depending on the outcome of the above issue:

IV. Whether the Request for Review proceedings have been commenced in violation of section 167 (4) (a) thereby ousting the jurisdiction of this Board.

Depending on the outcome of the above issue:-

V. Whether the Procuring Entity prepared specific requirements relating to the items under procurement that limit fair and open competition contrary to section 60 of the Act and Article 227 (1) of the Constitution.

The Board will now proceed to determine the issues framed for determination as follows:

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1** it was stated that jurisdiction is everything and without it, a court or any

other decision making body has no power to make one more step the moment it holds that it has no jurisdiction.

The Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** held that:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus:

"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any

judicial proceedings is concerned. It is a threshold question and best taken at inception. "

Accordingly, once a jurisdictional issue is before a court or a decision making body, it must be addressed at the earliest opportune moment and it therefore behooves upon this Board to determine whether it has the necessary jurisdiction to entertain the substantive Request for Review.

The jurisdiction of this Board flows from section 167 (1) of the Act which states as follows: -

"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed."

The Board observes that section 167 (1) of the Act has two limbs within which a candidate or tenderer may file a Request for Review namely;

- Within fourteen days of notification of award; or
- Within fourteen days from the date of occurrence of an alleged breach at any stage of the procurement process, or disposal process.

To determine which limb applied to the Applicant herein, the Board will provide a brief background to the Request for Review.

The Procuring Entity, through a restricted tender, invited thirteen (13) interested and eligible tenderers to collect Tender Documents and submit their bids with respect to the subject tender on 20th September 2019. By the tender closing date of 30th September 2019, the Procuring Entity received a total of six (6) bids which were evaluated by the Procuring Entity's Evaluation Committee.

Through an Evaluation Report signed on 1st October 2019, the Procuring Entity's Evaluation Committee recommended award of the subject tender to the lowest responsive bidders with respect to six (6) Lots as advertised under the subject tender.

On 2nd October 2019, successful bidders with respect to the six (6) lots were duly notified of the outcome of their bids via letters dated 2nd October 2019. All unsuccessful bidders were also notified of the outcome of their bids via letters also dated 2nd October 2019.

The Applicant in this case was invited to submit its bid with respect to the subject tender and averred in its oral submissions that it obtained the

respective Tender Document from the Procuring Entity on 23rd September 2019. However, the Applicant, on its own volition opted not to submit a bid in response to the subject tender.

The Applicant further submitted that it only learned that the subject tender was awarded through an advertisement made by the Procuring Entity in the Daily Nation Newspaper dated 10th October 2019. It then filed this Request for Review on 11th October 2019.

From the above sequence of events, the Board notes that although the Applicant obtained the tender documents from the Procuring Entity on 23rd September 2019, it did not submit a bid in response to the Procuring Entity's Invitation to tender. Noting the two limbs mentioned hereinbefore with respect to section 167 (1) of the Act, the question that follows is when did the alleged breach occur in this instance?

The Board heard submissions from the Applicant that the date of the alleged breach was the 2nd of October 2019, this being the date the Procuring Entity sent notification letters of award to successful bidders which the Applicant only became aware of as a result of an advertisement in the Daily Nation Newspaper on 10th October 2019.

In response, the Procuring Entity submitted that the Applicant collected the blank Tender Document on 20th September 2019 and that since the Applicant did not submit a tender in response to the advertisement, then, the date the Applicant collected the blank Tender Document was the date of occurrence of the alleged breach.

The Board perused the Request for Review and notes the Applicant has raised seven grounds for review with respect to the subject tender as follows: -

- a) **Ground No. 1** – The Procuring Entity prepared specific requirements relating to the items under procurement that did not allow fair and open competition among those who may wish to participate in the procurement proceedings in breach on section 60 (1) (2) & (3) of the Act;
- b) **Ground No. 2** – The Procuring Entity has contravened section 60 (4) of the Act in that the technical requirements referred to a particular producer or service provider and/or a specific country of origin;
- c) **Ground No. 3** - The Procuring Entity's procurement plan for the leasing of Motor Vehicles throughout the different phases has been through the open tender and it is only now that the Procuring Entity has used a restricted method of tendering in breach of section 53 (10) of the Act

- d) **Ground No. 4** – The Procuring Entity failed to prepare a Tender Document that failed to contain sufficient information that would allow fairness, equitability, transparency, cost-effectiveness and competition among those who wished to participate in the procurement process in breach of section 58 (2) of the Act
- e) **Ground No. 5** – The Procuring Entity has undertaken the tender herein under requirements that are discriminatory and as such limited participation of candidate in contravention of Part XII of the Act
- f) **Ground No. 6** – The tender completed deviated from and contravened Articles 10, 27, 47, 201 and 227 of the Constitution as read with section 3 of the Act;
- g) **Ground No. 7** – The Tender Document was issued two days after the ruling in Administrative Review No. 99 of 2019 and before the actual signed ruling was issued on 27th September 2019 and therefore the Procuring Entity contravened section 44 (1) and 44 (2) (e) (g) (j) and section 175 of the Act

A cursory examination of the above grounds for review, reveals that the instant Request for Review mainly raises issues touching on provisions of the Tender Document applicable in the subject procurement process. The Applicant further submitted during its oral submissions that its Request for review was challenging the contents of the subject Tender Document.

It is evident therefore that the alleged breach in question refers to the point in time that the Applicant was seized with the Tender Document and was therefore in a position to identify the breach that forms the substance of this Request for Review.

The Applicant averred that it obtained the Tender Document from the Procuring Entity on 23rd September 2019 which submission was disputed by the Procuring Entity who in turn averred that the Tender Document was collected by the Applicant on 20th September 2019.

The Board examined the parties' pleadings and supporting documentation and notes that the Procuring Entity tendered a document which it referred to as a '*Copy of its Tender Documents Issuing Register*'. This document forms part of the confidential file that was submitted to this Board pursuant to section 67 (3) (e) of the Act. The Board perused the said register and observes that on 20th September 2019, one Mr Patrick Obondo signed against the register signifying collection of a Tender Document with respect to the subject tender on behalf of CMC Motors Group Limited, that is, the Applicant herein.

Having considered all parties' submissions and the documents before it, the Board notes from the Procuring Entity's *Copy of its Tender Documents*

Issuing Register' that the Applicant was seized of the subject Tender Document on 20th September 2019.

During the Applicant's oral submissions, the Board asked the Applicant when it became aware that the Tender Document in question did not meet the threshold as outlined in its Request for Review. Counsel for the Applicant responded that its client only became aware on or around 23rd September 2019 during consultations with respect to the subject Tender Document. The Applicant further confirmed that it did not seek any clarifications with respect to the subject Tender Document from the Procuring Entity.

The Board notes that the Applicant's oral submissions were not supported by evidence, noting that the Applicant's submissions contradict the Procuring Entity's Issuing Register. The Board cannot therefore rely on the Applicant's oral submissions in order to ascertain the date the Applicant collected the blank Tender Document.

It therefore means that as at 20th September 2019, this being the date the Applicant obtained the blank Tender Document, the Applicant was in a position to lodge a claim with respect to the occurrence of an alleged breach of duty by the Procuring Entity.

Section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya is instructive on the manner of computing time for purposes of written law as it states:-

"In computing time for the purposes of a written law, unless the contrary intention appears -

- (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done.***
- (b) If the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***
- (c) Where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***
- (d) Where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in***

the computation of the time.” [Emphasis by the Board]

Having studied the above provisions, the Board notes that the Applicant took the position that section 57 (b) of the IGPA applies in this instance. According to the Applicant, this provision excludes Sundays, Public Holidays and all non-working days from computation. However, this provision must be read together with section 57 (d) of IGPA which specifies the circumstances under which excluded days shall not be reckoned in the computation of time. According to that provision, *where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.*

Section 167 (1) of the Act gives a period of fourteen (14) days, which is a period that is more than 6 days specified under section 57 (d) of the IGPA. Therefore, when the period for the happening of an act or proceeding is more than 6 days, excluded days must be reckoned in the computation of time.

Assuming that the fourteenth day fell on a Sunday, a Public Holiday, or all official non-working days, which days are referred to as excluded days in

section 57 (b) of the IGPA, then the next following day would be considered as the fourteenth day.

The question that the Board must now address is when was the fourteenth day by which the Applicant was required to lodge the Request for Review and whether such date fell on an excluded day.

Noting the provisions of section 57 (a) of IGPA, the Board notes that in the computation of time in this instance, the fourteen-day period imposed under section 167 (1) of the Act started running a day after the 20th day of September 2019. In this regard therefore, the Board observes that the Applicant's right to approach this Board lapsed on 4th October 2019 which is fourteen (14) days after 20th September 2019 (since 20th September 2019 is an excluded day).

In the alternative, if we were to assume that the Applicant received the blank Tender Document on the 23rd September 2019, the Board observes that the fourteen-day period would start running on 24th September 2019 and lapse on 7th October 2019.

The dates 4th and 7th October 2019 were not excluded days within the meaning of section 57 (d) of IGPA. In any event, the Applicant only lodged

its Request for Review on 11th October 2019 when the fourteenth day imposed under section 167 (1) of the Act had already lapsed.

The Board would like to make an observation that fourteen-day statutory period ensures that this Board cannot bend or circumvent the same in favour of one party over another to ensure that the process of review is expeditious and in line with the principles under section 4 of the Fair Administrative Action Act No. 4 of 2015 which states as follows:-

"Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair."

In **Judicial Review Case No. 21 of 2015, Republic v Public Procurement Administrative Review Board & 2 others [2015] eKLR**, the High Court while considering the purpose of the statutory timeline imposed under section 167 (1) of the Act held as follows:-

"The jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender process has not been concluded. The Board has no jurisdiction to hear anything filed outside fourteen days..."

The timelines in the PP&DA [that is, the 2015 Act] were set for a purpose. Proceedings touching on procurement matters ought to be heard and determined without undue delay. Once a party fails to move the Board within the time set by the Act, the jurisdiction of the Board is extinguished in so far as the particular procurement is concerned...

[Emphasis by the Board]

The Board concurs with the High Court's finding in the above case and would hasten to add that the period set under section 167 (1) of the Act is a statutory timeline which must be adhered to by an aggrieved candidate or tenderer including all players in a procurement process. It provides an opportunity within which an aggrieved candidate or tenderer may exercise its right to administrative review to challenge a procurement process in view of a breach of duty by a procuring entity as soon as the breach occurs so that once the Board dispenses with a review application, the procurement process can proceed to its logical conclusion for the public good.

Accordingly, having established that the Request for Review was filed outside the statutory period imposed under section 167 (1) of the Act, the Board holds that it lacks the jurisdiction to entertain the substantive issues

raised in the Request for Review and proceeds to down its tools at this point.

In totality, the Request for Review is struck out for want of jurisdiction and the Board makes the following orders: -

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders: -

- I. Request for Review filed on 25th October 2019 with respect to Tender No. MICNG/S for Supply Ai/004/2019-2020 for Leasing of Motor Vehicles from Local Assemblers be and is hereby struck out.**
- II. The Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion.**
- III. Each party shall bear its own costs on the Request for Review.**

Dated this 31st October 2019

Signed

**CHAIRPERSON
PPARB**

Signed

**SECRETARY
PPARB**