

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 120/2019 OF 14TH OCTOBER 2019
BETWEEN
MADISON GENERAL INSURANCE KENYA
LIMITED.....APPLICANT
AND
KENYA BUREAU OF STANDARDS.....1st RESPONDENT
AND
Lt Col. (RTD) B. N. NJIRAINI,
THE ACCOUNTING OFFICER.....2nd RESPONDENT
AND
JUBILEE INSURANCE COMPANY
OF KENYA LIMITED.....INTERESTED PARTY

Ruling in the Review against the decision of Kenya Bureau of Standards in relation to Tender No. KEBS/002/2019/2020 for Provision of Staff Medical Insurance Cover.

BOARD MEMBERS

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

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT

-MADISON GENERAL INSURANCE

KENYA LIMITED

- | | |
|-----------------------|--|
| 1. Mr. Emmanuel Mumia | -Advocate, Mwaniki Gachoka & Co. Advocates |
| 2. Mr. Moses Kahoro | -Mwaniki Gachoka & Co. Advocates |
| 3. Mr. Hezron Wambugu | -Insurance |
| 4. Mr. John Muhindi | -Insurance |

1ST AND 2ND RESPONDENTS

-KENYA BUREAU OF STANDARDS

- | | |
|---------------------|------------------------------------|
| 1. Mr. James Kihara | -Advocate, Kihara & Wyne Advocates |
| 2. Ms. Ruth Mueni | -Advocate, Kihara & Wyne Advocates |
| 3. Miss Mokeira | -Legal |
| 4. Dr. John Ngeno | -Head of Procurement |

INTERESTED PARTY

-JUBILEE INSURANCE COMPANY

OF KENYA LIMITED

1. Ms. Sylvia Waiganjo -Advocate, Wambugu & Muriuki
Advocates

THE PRELIMINARY OBJECTION

Kenya Bureau of Standards (hereinafter referred to as "the Procuring Entity") lodged a Preliminary Objection dated 23rd October 2019 but filed on 28th October 2019 under Regulation 77 and 73 of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") on the grounds that:-

"The Board has no jurisdiction to entertain the Review as the same is filed outside the statutory period allowed by law"

During the hearing of the Preliminary Objection, the Applicant was represented by Mr. Emmanuel Mumia on behalf of the firm of Mwaniki Gachoka & Company Advocates while the Procuring Entity was represented by Mr. James Kihara on behalf of the firm of Kihara & Wyne Advocates. The Interested Party was represented by Ms. Sylvia Waiganjo on behalf of the firm of Wambugu & Muriuki Advocates.

PARTIES' SUBMISSIONS

Procuring Entity's Submissions

In his submissions, Counsel for the Procuring Entity, Mr. James Kihara, fully relied on the Preliminary Objection. Mr. Kihara submitted that the Applicant's Request for Review challenged the methodology/criteria used to arrive at the successful bidder as can be seen from paragraph 16 of the Request for Review.

In Counsel's view, the Procuring Entity applied a criterion of combined highest technical and financial scores to arrive at the successful bidder, and that this criterion was expressed at page 35 of the Tender Document for the bidders to be aware of the same. Hence, Counsel for the Procuring Entity contended that the Applicant only approached the Board, so late in the day, to challenge a methodology/criteria that was well known to it.

Mr. Kihara then submitted that the Applicant had an opportunity to seek clarifications on provisions of the Tender Document but failed to do so therefore making the Request for Review an afterthought. In his view, the Applicant ought to have approached the Board the moment it obtained the Tender Document on 13th August 2019. Given that the Application was lodged on 14th October 2019, Counsel contended that the same was filed out of time as it did not meet the threshold of section 167 (1) of the Act thereby stripping the Board of its jurisdiction.

Counsel submitted that the Applicant's assertion that it was the lowest bidder hence ought to have been awarded the tender was not a correct assertion since, according to Counsel, the law allows the Procuring Entity to employ any award criterion it deems fit in determining the successful bidder. To further support his submissions, Counsel submitted that the Procuring Entity filed the Blank Tender Document used in its previous procurement process for the Board's perusal, under which award of that tender was made to the Applicant based on combined technical and financial scores, and that the Applicant never complained of that award criterion.

In his view, it is only after the Applicant was found unsuccessful that it decided to approach the Board and would not have done so had its bid been found successful in the subject procurement process.

In conclusion, Counsel urged the Board to uphold the Preliminary Objection and strike out the Request for Review.

Interested Party's Submissions

In her submissions, Counsel for the Interested Party, Ms. Sylvia Waiganjo, associated herself with submissions by the Procuring Entity.

Ms. Waiganjo referred the Board to section 167 (1) of the Act and urged the Board to note that an aggrieved applicant ought to approach the Board when

there is an alleged breach of duty by a procuring entity. In Counsel's view, the Applicant was cognisant of the provision of clause 2.4 of Section II. Instructions to Tenderers of the Tender Document but failed to exercise the right to seek clarifications from the Procuring Entity as stipulated in that clause.

Counsel therefore submitted that the period for approaching the Board lapsed 14 days after the tender was advertised on 13th August 2019, thereby making the Request for Review dated 14th October 2019 to have been lodged out of the statutory period under section 167 (1) of the Act.

In conclusion, Counsel urged the Board to allow the Preliminary Objection and direct the Procuring Entity to proceed with the procurement process to its logical conclusion.

Applicant's Submissions

In his submissions, Counsel for the Applicant, Mr. Mumia referred the Board to the heading of the Procuring Entity's Preliminary Objection and urged the Board to note that the issue in contention is whether the Request for Review was filed within the statutory period under section 167 (1) of the Act and not whether the Applicant has a course of action or not.

It was Counsel's position that the Request for Review was filed within time since the Applicant, pursuant to section 167 (1) of the Act has two options within which to approach the Board. According to Counsel, the Applicant elected to approach the Board within fourteen (14) days after notification of award was made to it by the Procuring Entity.

Counsel then directed the Board to an email of 3rd October 2019 and submitted that, that was the day the Applicant received the letter of notification of unsuccessful bid that is dated 1st October 2019. Hence, Counsel was of the view that fourteen days would lapse on 17th October 2019, and since the Request for Review was filed on 14th October 2019, the same was well within the statutory timeline under section 167 (1) of the Act.

In conclusion, Counsel reiterated that the Preliminary Objection is on the time the Request for Review was lodged, which in his view, ought to be the consideration by the Board to find that the Request for Review was filed within time.

Procuring Entity's Rejoinder

In a rejoinder, Mr. Kihara urged the Board to note that the Applicant does not deny the fact that the formula used to arrive at the successful bidder was available to the Applicant when it received the Tender Document on 13th August 2019 but did not challenged the same.

Mr. Kihara submitted that the Applicant's Request for Review only seeks to delay the subject procurement process, since, had the Applicant approached the Board when it learnt of the formula to be used during Financial Evaluation, a determination would have been made at the earliest opportune moment to allow the procurement process to proceed in good time. According to Mr. Kihara, the Applicant approached the Board when the contract of the current service provider of the Procuring Entity was due to lapse thus affecting the services that the Procuring Entity is currently benefiting from.

In conclusion, Counsel urged the Board to uphold the Preliminary Objection with costs to the Procuring Entity.

BOARD'S DECISION

The Board has considered parties' submissions in support and in opposition of the Preliminary Objection and observes that the following issue calls for determination:-

Whether the Applicant filed its Request for Review outside the statutory period imposed under section 167 (1) of the Act thus ousting the jurisdiction of this Board

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the celebrated case of **The Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**, Justice Nyarangi (as he then was), stated as follows:-

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Similarly, in the case of **Samuel Macharia and Another v. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** the Supreme Court 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...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."

The jurisdiction of this Board flows from section 167 (1) of the Act which provides that:-

"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 crux of this Preliminary Objection is that according to the Procuring Entity, the Applicant failed to move this Board by way of a Request for Review within fourteen days from the date it learned of the occurrence of an alleged breach by the Procuring Entity.

The Procuring Entity submitted that the Applicant obtained the blank Tender Document on 13th August 2019 and was well aware of the criteria for evaluation that the Procuring Entity would use, as the same was provided for in the Tender Document. In the Procuring Entity's view, the Applicant only waited until its bid was found non-responsive to approach this Board. The Procuring Entity submitted that, had the Applicant been found responsive, it would not have challenged the criteria used during Financial Evaluation.

On its part, the Interested Party associated itself with submissions by the Procuring Entity. The Interested Party referred the Board to section 167 (1) of the Act and submitted that, the said provision allows a party to approach the Board when such party learns of an alleged breach of duty at any stage of the procurement process. It was the Interested Party's view that the Applicant was well aware of clause 2.4 of Section II. Instructions to Tenderers of the Tender Document which allows bidders to seek clarifications on clauses of the Tender Document, which right was not exercised by the Applicant. Clause 2.4 states as follows:-

"A candidate making inquiries of the tender documents may notify the Procuring Entity by post, fax or by email at the procuring entity's address indicated in the Invitation for tenders. The Procuring Entity will respond in writing to any request for clarification of the tender documents, which it receives not later than seven (7) days prior to the deadline for the submission of the tenders, prescribed by the procuring entity. Written copies of the procuring entities response (including an explanation of the query but without identifying the source of the inquiry) will be sent to all candidates who have received the tender documents"

It was the Interested Party's submission that the Applicant failed to exercise this right, submitted itself to the criteria outlined in the Tender Document

and could not now come to the Board, so late in the day to challenge the same because its bid was non-responsive.

In response, the Applicant submitted that section 167 (1) of the Act gives it two options under which it may approach the Board and that the Applicant elected to exercise its right to administrative review when it received the letter of notification of unsuccessful bid.

To support this view, the Applicant submitted that it received the letter of notification of unsuccessful bid dated 1st October 2019 through an email sent to it by the Procuring Entity on 3rd October 2019. It was therefore the Applicant's contention that fourteen days started running on 4th October 2019, the last day being 17th October 2019. Since the Request for Review was filed on 14th October 2019, the Applicant submitted that the same was well within the statutory period under section 167 (1) of the Act (i.e. 14 days from notification of award), hence the Board has jurisdiction to entertain the review application.

Having considered submissions by parties on the Preliminary Objection, the Board finds it necessary to interrogate the intention of the legislature in the use of the word "or" in section 167 (1) of the Act. The word "or" under consideration is the one that is placed between the two instances provided in section 167 (1) of the Act under which a party may approach this Board.

According to section 167 (1) of the Act, an aggrieved candidate or tenderer may file a Request for 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.***

The Concise Oxford English Dictionary (11 Edition, Oxford University Press) defines “or” as a ***‘conjunction used to link alternatives.’***

Applying the foregoing construction, the Board notes that the use of the word “or” in section 167 (1) of the Act connotes a conjunction that gives alternatives. The first option which an aggrieved candidate or tenderer has, is to file its Request for Review within fourteen (14) days of notification of award. The alternative option is to file a Request for Review within fourteen (14) days from the date the aggrieved candidate or tenderer learns of the alleged breach by the Procuring Entity at any stage of the procurement process or disposal process.

It is important to note that the legislature imposed the right to lodge a Request for Review within fourteen (14) days from notification of award as the first option. Due to prevailing circumstances such as the delay or failure by a procuring entity to notify a candidate or tenderer of the outcome of its bid at any stage of the evaluation process, an aggrieved candidate or

tenderer can exercise the second option. The legislature must have also considered that there would be need for an aggrieved candidate or tenderer to approach the Board earlier than at the time notification is issued, if an alleged breach already occurred at an earlier date so that once the Board dispenses with the review application, depending on the Board's orders, the procurement process can be allowed to proceed to its logical conclusion without undue delay.

It is our considered view that, it was not the intention of the legislature that bidders abuse the options under section 167 (1) of the Act such as instances where a bidder may have learnt of the occurrence of an alleged breach but sits on the right to administrative review waiting for the outcome of evaluation and that if such bidder is found non-responsive and notified of such outcome, decides to lodge a Request for Review even though it could have done so when it learnt of the alleged breach at an earlier stage of the procurement process.

The more important question before the Board is what were the circumstances in the instant case to determine the period when the Applicant ought to have approached this Board?

The Board studied the Procuring Entity's Tender Document and pleadings and notes that the subject tender applied the Open Tendering Method and not the Request for Proposal method.

Turning to the provisions of the Tender Document, the Board notes, the Procuring Entity specified the following award criteria:-

"Clause 2.25.1 Subject to paragraph 2.29, the Procuring Entity will award the contract to the successful tenderer whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily

The Board studied the Tender Document and notes that this was the only clause termed as "Award Criteria". However, at page 35, a formula is introduced to be used during financial evaluation as follows:-

"The evaluation of the responsive bids will take into account technical factors, in addition to cost factors. An Evaluated Bid Score (B) will be calculated for each responsive bid using the following formula, which permits a comprehensive assessment of the bid price and the technical merits of each bid:"

Clow

C X + T

C = Evaluated Bid Price

Clow = the lowest of all Evaluated Bid Prices among responsive bids

T = the total Technical score awarded to the bid

X = weight for the Price as specified in the BDS (i.e. 0.2)

It is important to note at this point, that the Tender Document contains an award criteria, that is, clause 2.25.1 based on the lowest evaluated bidder and a Financial Evaluation criteria at page 35 of the Tender Document based on a formula for determining the bidder with the highest combined technical and financial scores.

The Interested Party cited the provision on clarification of Tender Documents to support its view that the Applicant ought to have sought clarification on the award criteria. The introduction of a formula to be used during financial evaluation does not mean the Applicant ought to have sought clarification when the "Award Criteria" was expressed as that of "lowest evaluated tender".

It is the Board's considered view that the Applicant could not have filed a Request for Review at the time it received the Tender Document, since the Applicant had a legitimate expectation that the Procuring Entity would award the subject tender using the "Award Criteria" stipulated under clause 2.25.1 of Section II. Instructions to Tenderers of the Tender Document.

An alleged breach could only occur if the Procuring Entity departed from the Award Criteria under Clause 2.25 of the Tender Document. The Applicant got to know that the Procuring Entity departed from the "Award Criteria" under Clause 2.25, when the Applicant wrote to the Procuring Entity and received a response on 9th October 2019 attaching a summary of the evaluation report which gave reasons why the Applicant was not awarded the subject tender.

The Board notes that the occurrence of the alleged breach became known to the Applicant on 9th October 2019, making the fourteen-day period to start running on 10th October 2019 up to 23rd October 2019.

At the time the Applicant received its notification dated 1st October 2019, on 3rd October 2019, no specific reasons were given as to why the Applicant was not awarded the subject tender. Even if the earlier date of notification of unsuccessful bid were to be considered, that is, 3rd October 2019, the fourteen-day period would run up to 17th October 2019. Given that the Applicant filed its Request for Review by 14th October 2019, the Board finds that the same was filed within the statutory period under section 167 (1) of the Act.

Accordingly, the Board holds that it has the jurisdiction to entertain the Request for Review and hereby dismisses the Preliminary Objection dated

23rd October 2019 and shall now proceed to hear the Request for Review on its merit.

Dated at Nairobi, this 31st day of October 2019

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CHAIRPERSON

PPARB

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SECRETARY

PPARB

Delivered in the presence of:-

- i. Mr. Emmanuel Mumia for the Applicant;
- ii. Mr. James Kihara for the Respondents; and
- iii. Ms. Sylvia Waiganjo for the Interested Party.