

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 142 OF 6TH DECEMBER 2019

BETWEEN

MAIJE KAIHO INTERNATIONAL LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA PORTS AUTHORITY.....1ST RESPONDENT

AND

KENYA PORTS AUTHORITY.....2ND RESPONDENT

AND

**VIRGIN CLEAN LIMITED.....3RD
RESPONDENT**

Review against the decision of the Accounting Officer of Kenya Ports Authority in respect of Tender No. KPA/006/2019-2/ADM for Provision of House Keeping Services.

BOARD MEMBERS

- | | |
|-------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Alfred Keriolale | -Member |
| 3. Mr. Steven Oundo | -Member |

IN ATTENDANCE

- | | |
|-------------------------|------------------------------|
| 1. Mr. Philip Okumu | -Holding brief for Secretary |
| 2. Ms. Maryanne Karanja | -Secretariat |

PRESENT BY INVITATION

APPLICANT

-MAEJI CONSORTIUM INTERNATIONAL LIMITED

- | | |
|-----------------------|--------------------------------------|
| 1. Mr. Sang Korir | -Advocate, Cheboi Kiprono Advocates |
| 2. Mr. Alfred Kiprono | - Advocate, Cheboi Kiprono Advocates |

PROCURING ENTITY

-KENYA PORTS AUTHORITY

- | | |
|---------------------|----------------------|
| 1. Mrs Wamuyu Ikegu | -Advocate |
| 2. Mr. Moses Sirgoi | -Procurement Officer |

THE REQUEST FOR REVIEW

M/s Maije Kaiho International Limited (hereinafter referred to as "the Applicant") lodged this Request for Review seeking the following orders:-

- 1. An order declaring that the Procuring Entity breached the provisions of the Public Procurement and Asset Disposal Act, 2015 and Article 47 and 227 of the Constitution;***

- 2. An order nullifying the award and the entire procurement proceedings in Tender No. KPA/006/2019-2/ADM for Provision of House Keeping Services in its entirety;***
- 3. An order directing the 1st and 2nd Respondents to seek extension of the tender validity period so as to carry out fresh evaluation of the bids submitted in accordance with the dictates of the Public Procurement and Asset Disposal Act;***
- 4. That in the alternative to 3 above, the 1st and 2nd Respondents be directed to prepare fresh tender document and re-tender for provision of Housekeeping Services (Supplementary);***
- 5. An order for costs of the Request for Review be awarded to the Applicant;***
- 6. Any other relief that the Review Board deems fit to grant under the circumstances.***

During the hearing, the Applicant was represented by Mr. Sang appearing together with Mr. Kiprono on behalf of the firm of Cheboi Kiprono Advocates, while the 1st and 2nd Respondents were represented by its Senior State Counsel, Mrs. Ikegu. The 3rd Respondent was represented by its Operations Manager, Mr. Munga who chose not to address the Board.

On behalf of the Applicant, Mr. Sang fully relied on the Request for Review, the Applicant's Supporting Affidavit and written submissions.

Mr. Sang submitted that the Procuring Entity did not dispute the Applicant's contention that award and notification letters were issued after the tender validity period. Secondly, that the successful bidder was not disclosed in the Procuring Entity's letter of notification issued to the Applicant.

Upon enquiry by the Board, Counsel submitted that the tender validity period of the subject tender was 120 days from the date of tender opening on 26th July 2019. On the issues contained in the Applicant's letter of notification dated 27th November 2019, it provided a list of personal protective equipment and clothing which the Procuring Entity failed to take into account in evaluating the Applicant's bid.

On his second ground, Counsel further submitted that, contrary to the Procuring Entity's contention, the Applicant provided a duly completed form declaring its Litigation History.

In response, Counsel for the Procuring Entity, Mrs. Ikegu, fully relied on the Procuring Entity's Response and Replying Affidavit.

Counsel admitted that award of the subject tender and letters of notification issued to all bidders who participated in the subject tender were issued after the tender validity period of the subject tender had

already lapsed. She further admitted that the successful bidder was not disclosed in the letter of notification issued to the Applicant.

Counsel further submitted that the tender validity period of the subject tender was not indicated in the Tender Document, however, she took the view that since bidders were required to submit tender security of 120 days, then the tender validity period would be 90 days from the date of tender opening, since the tender security is ordinarily 30 days beyond the tender validity period.

She therefore submitted that the tender validity period of the subject tender lapsed on 25th October 2019, whereas letters of notification were sent to bidders on 27th November 2019.

On the prayers sought by the Applicant, Mrs. Ikegu submitted that the Applicant is not entitled to prayer 3 thereof, since in her view, section 88 (1) of the Act does not give the Board powers to extend the tender validity period.

In a rejoinder, Mr. Sang for the Applicant submitted that given the Procuring Entity's admission that the tender validity period has lapsed, the Board should direct the Procuring Entity to re-tender for the services in the subject tender afresh.

BOARD'S DECISION

The Board having considered each of the parties' cases, the documents before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and the oral submissions of parties to the Request for Review and proceeds to make the following observations:-

The Procuring Entity admitted that it failed to disclose the successful bidder in the letter of notification issued to the Applicant. Further to this, the Procuring Entity admitted that the tender validity period of the subject tender expired on 23rd October 2019.

This means that, after the tender validity period died a natural death on 23rd October 2019, the Procuring Entity ought not to have undertaken any process with a view of continuing with the procurement process. Section 87 of the Act provides that:-

"87 (1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2)

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof"

The above provision requires a procuring entity to notify the successful bidder and unsuccessful bidders of the outcome of their bids before the expiry of the tender validity period. Accordingly, the Procuring Entity violated section 87 (1) and (3) of the Act when it notified bidders of the outcome of their bids on 22nd November 2019 when the tender already lapsed on 23rd October 2019.

The Board further notes that the Procuring Entity admitted that it failed to disclose the successful bidder in the letter of notification issued to the Applicant. The Board would only wish to reiterate that one of the principles of public procurement recognized under Article 227 (1) of the Constitution is the principle of transparency that ought to guide procuring entities in their procurement processes. Article 227 (1) of the Constitution states that:-

"Whenever a State organ or public entity contracts for goods and services, it shall do so in a system that is fair, equitable, transparent, competitive and cost-effective"

The Board finds that the Procuring Entity failed to adhere to the constitutional principle of transparency under Article 227 (1) of the Constitution when it failed to disclose the successful bidder in the letter of notification issued to the Applicant.

In determining the appropriate orders to issue in the circumstances, the Board observes that having found that the tender validity period of the subject tender died a natural death on 23rd October 2019, there would be no need to nullify anything undertaken after that date, since any process initiated after a tender has lapsed is of no consequence as the same is null and void.

The Applicant urged the Board to direct the Procuring Entity to retender afresh for the services in the subject tender and the Board deems it fit to allow this prayer in terms of the final orders herein.

As regards the issue of costs, the Supreme Court in **Jasbir Singh Rai & 3 Others v Tavlochan Singh Rai & 4 others (2014) eKLR** set out the following jurisprudential guidelines on the exercise of this discretionary power to award costs:-

"It emerges that the award of costs would normally be guided by the principle that costs follow the event; the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously exercised discretion of the court, accommodation of the special circumstances of the case, while being guided by the ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior to, during, and subsequent to the actual process of litigation"

Having found that the tender validity period of the subject tender already lapsed and that the most appropriate action for the Procuring Entity to take is to re-advertise for the subject procurement process, the Board notes that this would provide another opportunity to the Applicant to participate in the procurement process, if the Procuring Entity re-advertises for the services and will therefore give the Applicant another chance to compete for award of the re-advertised tender. In the circumstances, the Board shall refrain from awarding costs in this Request for Review application.

In totality, the Request for Review succeeds in terms of the following specific orders:-

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review:-

- 1. The Procuring Entity is hereby directed to retender for Provision of House Keeping Services.**

- 2. Each party shall bear its own costs in the Request for Review**

Dated at Nairobi this 19th day of December 2019

.....

**CHAIRPERSON
PPARB**

.....

**SECRETARY
PPARB**

Delivered in the presence of:-

- i. Mr. Sang appearing together with Mr. Kiprono for the Applicant;**
- ii. Mrs. Ikegu for the 1st and 2nd Respondents; and**
- iii. Ms. Munga, Operations Manager of the 3rd Respondent**