

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 129/2020 OF 25TH SEPTEMBER 2020

BETWEEN

RICK OFFICE SOLUTIONS LIMITED.....APPLICANT

VERSUS

ACCOUNTING OFFICER,

KENYA PORTS AUTHORITY.....1ST RESPONDENT

KENYA PORTS AUTHORITY.....2ND RESPONDENT

TECHBIZ LIMITED.....INTERESTED PARTY

Review against the decision of Kenya Ports Authority with respect to Tender No. KPA/171/2019-20/ICT for Provision of Computer Hardware Maintenance Services.

BOARD MEMBERS

- | | |
|-------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Ms. Rahab Chacha | -Member |
| 3. Mr. Alfred Keriolale | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Philemon Kiprop | -Holding brief for the Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Kenya Ports Authority (hereinafter referred to as “the Procuring Entity”) invited sealed tenders for Tender No. KPA/171/2019-20/ICT for Provision of Computer Hardware Maintenance Services (hereinafter referred to as “the subject tender”) through an advertisement published on MyGov Publication Website (www.mygov.go.ke) and the Procuring Entity’s Official Website (www.kpa.go.ke) on 9th June 2020.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of ten (10) bids by the bid submission deadline of 1st July 2020. The same were opened shortly thereafter by a Tender Opening Committee at the Procuring Entity’s Conference Room in the presence of tenderers’ representatives. The details of the tenders were recorded as follows: -

No.	Name of Bidder
1	M/s Sybex Technology Limited
2	M/s Rick Office Solutions Limited
3	M/s JoWorld Agencies Limited
4	M/s XRX Technologies Ltd
5	M/s Technology Associates E.A Ltd
6	M/s Techbiz Ltd
7	M/s Trans Business Machines Ltd
8	M/s Visible General Supplies Ltd

9	M/s Harnssen Group Ltd
10	M/s Computerways Ltd

Evaluation of Bids

Having appointed an Evaluation Committee, evaluation of bids in the subject tender was carried out in the following three stages: -

- i.** Preliminary Evaluation;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation

1. Preliminary Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause 2.15.1 of the Appendix to Instructions to Tenderers of the Tender Document. Having subjected the ten tenderers to evaluation at this stage, the Evaluation Committee observed that M/s Rick Office Solutions Ltd, M/s Techbiz Ltd, M/s Trans Business Machines Ltd and M/s Harnssen Group Ltd were responsive, therefore eligible to proceed to Technical Evaluation.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criterion outlined in Clause 2.24.1 of the Appendix to Instructions to Tenderers of the Tender Document which required tenderers to achieve an overall technical score of 80% in order to proceed to Financial Evaluation. At the end of evaluation at

this stage, the Evaluation Committee recorded the overall technical score achieved by the remaining four tenderers as follows: -

Bidder Name	Score Achieved
M/s Rick Office Solutions Limited	84.9
M/s Techbiz Ltd	99.2
M/s. Trans Business Machines Ltd	57.6
M/s. Harnssen Group Ltd	97.7

From the table outlined hereinbefore, the Evaluation Committee noted that it was only M/s. Rick Office Solutions Ltd, M/s. Techbiz Ltd and M/s. Harnssen Group Ltd that were responsive, therefore eligible to proceed to Financial Evaluation.

3. Financial Evaluation

At this stage, the Evaluation Committee applied the criterion outlined in Clause 2.24 of the Appendix to Instructions to Tenderers of the Tender Document which required the Evaluation Committee to consider the prices quoted by tenderers and recommend award of the subject tender to the lowest evaluated tenderer. The Evaluation Committee recorded the prices quoted by the remaining three tenderers as follows: -

Name of Bidder	Form of Tender Amount (Kshs) VAT Inclusive
M/s Techbiz Ltd	17,245,930.00
M/s Harnssen Group Ltd	29,904,480.00
M/s Rick Office Solutions Ltd	22,000,341.00

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Techbiz Ltd at its tender price of Kshs. 17,245,930.02 inclusive of VAT, having been found to be the lowest evaluated tenderer.

Professional Opinion

In a professional opinion dated 21st August 2020, the Procuring Entity's Acting Head of Procurement and Supplies reviewed the manner in which the Procuring Entity conducted the subject procurement process from inception including the evaluation process. He took the view that the subject procurement process met the requirements of Article 227 of the Constitution and the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"), thus requested the Procuring Entity's Acting Managing Director to approve award of the subject tender to M/s Techbiz Ltd at its tender price of Kshs. 17,245,930.02 inclusive of VAT, for being the lowest evaluated tenderer. The said professional opinion was approved by the Acting Managing Director on 24th August 2020.

Notification to Tenderers

In letters dated 7th September 2020, the Procuring Entity notified the successful tenderer and unsuccessful tenderers of the outcome of their respective bids.

THE REQUEST FOR REVIEW

Rick Office Solutions Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 25th September 2020 and filed on even date together with a Statement in Support of the Request for Review sworn on 25th September 2020 and filed on even date and a Verifying Affidavit sworn on 25th September 2020 and filed on even date through the firm of Mugoye & Associates Advocates, seeking the following orders: -

- a) An order declaring that the Procuring Entity breached section 126 (2) read together with Head of Public Service Circular No. OP/CAB/.39/1A, PPOA Circular No. 6/2010 and section 176 (1) (c) of the Public Procurement and Asset Disposal Act, 2015 read together with section 7 (2) (b) of the Fair Administrative Action Act, 2015 by awarding a bidder who is not qualified under the set criteria for such tender;***
- b) An order annulling the procurement proceedings and directing the Procuring Entity to award the Applicant as the successful bidder;***
- c) In the alternative, an order annulling the procurement proceedings be annulled and directing the Procuring Entity to start the process afresh and in compliance with the Act; and***
- d) An order directing the Respondents to pay costs of this application and interest thereof.***

In response, the Respondents lodged a Memorandum of Response dated 5th October 2020 and filed on 6th October 2020 together with an Affidavit in

Support of the Memorandum of Response, sworn on 5th October 2020 and filed on 6th October 2020 through Addraya Dena Advocate. The Interested Party did not lodge a Response to the Request for Review.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority's website (www.ppra.go.ke) in recognition of the challenges posed by Covid-19 pandemic. Through the said Circular, the Board instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with presidential directives on containment and treatment protocols to mitigate against the potential risks of the pandemic.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board. However, neither the Applicant, the Respondents nor the Interested Party lodged any written submissions.

BOARD'S DECISION

The Board has considered all the pleadings filed before it, including the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and finds that the following issue calls for determination: -

Whether the Procuring Entity breached section 126 (2) & 176 (1) (c) of the Act read together with section 7 (2) (b) of the Fair Administrative Action Act, Circular No. 6/2010 dated 18th June 2010 issued by the Public Procurement Oversight Authority and Circular Reference No. MICT/A/10/3 Vol. I dated 21st January 2020 issued by Ministry of Information, Communication and Technology, State Department of ICT.

The Board shall now proceed to address the above issue as follows: -

According to paragraph 1 to 3 of the Request for Review, the Applicant alleges that the Respondents breached section 126 (2) and section 176 (1) (c) of the Act read together with section 7 (2) (b) of the Fair Administrative Action Act, Circular No. 6/2010 dated 18th June 2010 issued by the Public Procurement Oversight Authority (the predecessor of the Public Procurement Regulatory Authority) and Guidelines issued on 21st January 2020 by Ministry of Information, Communication and Technology, State Department of ICT by awarding the subject tender to a bidder who is not qualified as supplier under Category III of the aforementioned Guidelines. In response to this

allegation, the Respondents aver that Part X of the Act on Procurement of Consultancy Services applies only to procurement of professional services which are predominantly of an intellectual or advisory nature as provided in section 115 of the Act. In addition to this, the Respondents aver that section 126 (2) of the Act does not apply to the subject procurement process because the subject tender was not in respect of procurement of consultancy services. In the Respondent's view, since it applied open method of tendering, evaluation of bids was done in accordance with section 80 of the Act and that the information provided in the Tender Document was for purposes of open competition among tenderers.

Having considered parties' pleadings, it is important for this Board to point out that by alleging the Procuring Entity breached section 126 (2) of the Act, the Applicant suggests that the Procuring Entity ought to have applied Request for Proposal method in determining award of the subject tender. We say so because section 126 (2) of the Act cited by the Applicant states as follows: -

"The procedures for evaluation of the request for proposal shall be by using each selection method set out in section 124 as may be prescribed"

Section 124 of the Act referenced hereinbefore outlines several selection methods for request for proposals whilst outlining the manner in which such selection methods may be applied by a procuring entity. These provisions

are covered under Part X of the Act which deals with Procurement of Consultancy Services and in particular, section 115 and 116 thereof provide as follows: -

"section 115. This Part applies to procurement of professional services which are predominately intellectual or advisory in nature.

Section 116 (1) An accounting officer of a procuring entity may use a request for proposals for a procurement if—

(a) the procurement is of services or a combination of goods and services; and

(b) the services to be procured are advisory or otherwise of a predominately intellectual nature.

(2) Subject to any prescribed restrictions, a procuring entity may use a request for proposals in combination with other methods of procurement under this Act."

The Board observes that procurement of Consultancy Services applies to professional services which are predominantly intellectual or advisory in nature. More importantly is the fact that section 116 of the Act gives a procuring entity discretion to determine whether or not to use request for proposal method of tendering when initiating a procurement process, because the procuring entity is the user of the services and better placed to

know its needs when making a decision on the manner in which it will undertake a procurement process including award of the tender in accordance with the applicable award criterion.

It is worth noting that Circular No. 6/2010 dated 18th June 2010 issued by the Public Procurement Oversight Authority and cited by the Applicant herein provides in part as follows: -

"The Public Procurement Oversight Authority (PPOA) has observed that there is rampant use of the Request for Quotations (RFQ) method by procuring entities in most of their procurements. Further, procurement units pre-occupy about 90% of their time in processing procurements through the aforesaid method. To forestall these challenges, PPOA has prepared Guidelines for Framework Contracting as instructions for making awards of indefinite delivery framework contracts pursuant to section 9 (c) (i) and (iv) of the Public Procurement and Disposal Act, 2005. The Guidelines should be applied as a creative approach to reduce the rampant use of the RFQ method and enhance efficiency of the procurement process and project implementation pursuant to section 31 (7) of the Public Procurement and Disposal Act, 2005."

On the other hand, Circular Reference No. MICT/A/10/3 Vol. L dated 21st January 2020 issued by Ministry of Information, Communication and

Technology, State Department of ICT referred to by the Applicant states as follows: -

"The Head of Public Services vide Circular Ref: No. OP/CAB.39/1A of February 23, 2018 directed the Ministry of Information, Communications and Technology to develop and issue guidelines for Framework Agreements and Framework Contracting as required by PPOA Circular No. 6/2010 for purposes of managing price, quantity, quality and standards in the acquisitions of ICT equipment, works and services... MDAs including State Departments and SAGAs whose budgets were not consolidated under the State Department of ICT can now use these Framework Agreements to ensure there is economies of scale and value for money"

Having considered the two Circulars outlined hereinbefore, the Board observes that Circular No. 6/2010 dated 18th June 2010 was issued by the **Public Procurement Oversight Authority** under the repealed Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Repealed Act"). This Board must address the question whether a Circular issued in 2010 by the Public Procurement Oversight Authority under the Repealed Act is still applicable given that the Act came into force on 7th January 2016 and established the Public Procurement Regulatory Authority under section 8 thereof whilst outlining methods of procurement under section 92 thereof and award criteria that can be used by a procuring entity.

Circular No. 6/2010 dated 18th June 2010 was issued after the Public Procurement Oversight Authority noted the rampant use of the Request for Quotations (RFQ) method by procuring entities in most of their procurements, thus saw the need to prepare Guidelines for Framework Contracting. This is because the Repealed Act did not identify Framework Contracting as one of the methods of procurement but listed open method of tendering (Part V), Restricted Tendering (section 73), Direct Procurement (section 74 & 75), Request for Proposals (section 76-87), Request for Quotations (section 88 & 89), Low value procurements (section 90 & 91) and Specially Permitted Procurement Procedures (section 92) as procurement procedures that could be applied by a procuring entity. However, section 92 (i) of the Act identifies Framework Agreements as one of the methods of procurement under the Act. Circular No. 6/2010 dated 18th June 2010 was issued by the Public Procurement Oversight Authority under the Repealed Act only served the purpose of guiding procuring entities because there was no clear framework in the Repealed Act for framework agreements/contracts so that they would refrain from rampant use of the Request for Quotation method.

However, with the commencement of the Act on 7th January 2016, Frameworks Contracts were provided for, specifying how they are applied among other methods of procurement including request for proposal tendering to be used at the discretion of a procuring entity. There is therefore no need for a procuring entity to rely on Circular No. 6/2010 dated 18th June 2010 issued under the Repealed Act whose purpose was to guide procuring

entities because there was no clear framework for framework contracting under the Repealed Act, especially with the import of section 5 (1) of the Act which states as follows: -

"This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services."

The Board further notes that Circular Reference No. MICT/A/10/3 Vol. L dated 21st January 2020 issued by Ministry of Information, Communication and Technology, State Department of ICT makes reference to Circular No. 6/2010 dated 18th June 2010 issued by the Public Procurement Oversight Authority under the Repealed Act with respect to framework contracting yet the Act gives discretion to procuring entities under section 116 of the Act in deciding whether to use Request for Proposals in undertaking a procurement process and award of the tender.

It is the Board's considered view that the Procuring Entity herein did not have an obligation to apply Circular Reference No. MICT/A/10/3 Vol. L dated 21st January 2020 issued by Ministry of Information, Communication and Technology, State Department of ICT which cites Circular No. 6/2010 dated 18th June 2010 issued by the Public Procurement Oversight Authority under the Repealed Act and moreso, did not have an obligation to award the

subject tender based on the provision of section 126 (2) of the Act. Section 5 of the Act states that the Act prevails in case of any inconsistency between the Act and any other legislation, government notices or circulars, in matters relating to procurement and asset disposal and in this regard, a procuring entity should be guided by the Act which already outlines procurement methods and gives discretion on the use of request for proposals pursuant to section 116 of the Act in determining award of a tender.

Having studied the Procuring Entity's confidential file submitted pursuant to section 67 (3) (e) of the Act, the Board observes that the Procuring Entity, through an advertisement published on MyGov Publication Website (www.mygov.go.ke) and the Procuring Entity's Official Website (www.kpa.go.ke) on 9th June 2020 invited sealed tenders from tenderers who would demonstrate their technical and financial capability to implement the subject tender. In essence, the Procuring Entity applied the open method of tendering which was open to all persons willing to participate. The Applicant herein was among 10 tenderers who responded to the Procuring Entity's advertisement notice by submitting a bid by the bid submission deadline of 1st July 2020. It is also worth noting that from the Evaluation Report dated 10th August 2020, the Applicant's bid was evaluated at the Preliminary, Technical and Financial Evaluation Stages save for the fact that at the end of Financial Evaluation, the Interested Party was found to have submitted the lowest evaluated bid and not the Applicant. In essence, the Applicant fully participated in the subject procurement process with full knowledge that the Procuring Entity applied the open method of tendering

and was expected to award the subject tender to the lowest evaluated tenderer in accordance with Clause 2.24 of the Appendix to Instructions to Tenderers of the Tender Document, waited patiently for the outcome of evaluation of its bid and now raises an alleged breach of section 126 (2) and 124 of the Act by the Procuring Entity, because the Applicant's bid was found non-responsive. The Procuring Entity chose to apply the award criterion of lowest evaluated tender price because it used open tendering method. This Board cannot fault the Procuring Entity for using that award criterion since the same applies in open method of tendering noting further that the Procuring Entity had discretion to choose whether or not to use the Request for Proposal method and the applicable award criterion had it opted to procure for consultancy services of an intellectual or advisory nature.

Section 7 (2) (b) of the Fair Administrative Action Act, 2015 states that: -

"7 (1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-

(a) a court in accordance with section 8; or

(b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if-

(a)

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with”

It is not lost to the Board that section 7 (2) (b) of the Fair Administrative Action Act gives the Applicant the right to invoke the jurisdiction of a court or tribunal to review an administrative action or decision if the Applicant is of the view that a mandatory and material procedure or condition was not complied with. However, the Applicant has failed to demonstrate any mandatory obligation on the Procuring Entity to apply section 126 (2) of the Act in awarding the subject tender having established the said provision falls under Part X of the Act which deals with Procurement of Consultancy Services and gives the Procuring Entity discretion under section 116 thereof to choose whether or not to use the Request for Proposal method and award criterion applicable had it opted to procure for consultancy services of an intellectual or advisory nature.

The Applicant subjected itself to the subject procurement process and only lodged this Request for Review because its bid was found non-responsive. There is no doubt in our minds that if the Applicant was awarded the subject tender, it would not have raised any issue regarding the question whether the Procuring Entity breached section 126 (2) read together with section 124 of the Act, section 7 (2) (b) of the Fair Administrative Action Act, Circular

Reference No. MICT/A/10/3 Vol. L dated 21st January 2020 issued by Ministry of Information, Communication and Technology, State Department of ICT which cites Circular No. 6/2010 dated 18th June 2010 issued by the Public Procurement Oversight Authority under the Repealed Act.

The Applicant further alleges that the Procuring Entity breached section 176 (1) (c) of the Act in awarding the subject tender to the Interested Party. The said provision states that: -

"176 (1) A person shall not: -

(a);

(b);

(c) *delay without justifiable cause the opening or evaluation of tenders, the awarding of contract beyond the prescribed period or payment of contractors beyond contractual period and contractual performance obligations*"

The Applicant did not challenge the period taken by the Procuring Entity in opening and evaluation of tenders but based its allegation of breach of section 176 (1) (c) of the Act with respect to award of the subject tender to the Interested Party. It is also worth noting that the Act does not specify number of days within which award of a tender and signing of a contract ought to be done by a procuring entity, provided that such award and signing

of a contract is done within the tender validity period. To support this view, the Board notes that section 87 (1) and 135 (3) of the Act provide as follows:

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"Section 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

Section 135 (3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period"

Having considered the foregoing provisions, the Board studied the Tender Document and notes that Clause 2.15.1 of the Appendix to Instructions to Tenderers specified the date of tender opening as 1st July 2020 whereas Clause 2.13.1 of Section II. Instructions to Tenderers stated that the tender validity period of the subject tender is 150 days from the date of tender opening. The Procuring Entity herein awarded the subject tender to the Interested Party through a letter of notification of award dated 7th September 2020, which was within the tender validity period of the subject tender. Furthermore, by the time the Applicant lodged its Request for Review on 25th

September 2020, 85 days of the tender validity period had run. The tender validity period stopped running due to suspension of procurement proceedings (including the tender validity period) pursuant to section 168 of the Act on 25th September 2020. This shows, the Procuring Entity still has 65 days remaining within which to enter into a contract in accordance with section 135 (3) of the Act. It is the Board's considered view that the Applicant has failed to demonstrate how the Procuring Entity has breached section 176 (1) (c) of the Act in awarding the subject tender to the Interested Party. Accordingly, the Board finds that the Applicant's allegation that the Procuring Entity breached section 176 (1) (c) of the Act in awarding the subject tender to the Interested Party has not been substantiated.

Having established that the Applicant's allegation that the Procuring Entity breached section 126 (2) & 176 (1) (c) of the Act read together with section 7 (2) (b) of the Fair Administrative Action Act, Circular No. 6/2010 dated 18th June 2010 issued by the Public Procurement Oversight Authority and Circular Reference No. MICT/A/10/3 Vol. L dated 21st January 2020 issued by Ministry of Information, Communication and Technology, State Department of ICT lacks merit and the Board finds that the Request for Review fails thus dismisses the same.

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 (1) of the Act, the Board makes the following orders: -

- 1. The Request for Review filed by the Applicant on 25th September 2020 with respect to Tender No. KPA/171/2019-20/ICT for Provision of Computer Hardware Maintenance Services, be and is hereby dismissed.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 15th day of October 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB