

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 152/2020 OF 18TH DECEMBER 2020

BETWEEN

**TOP CHOICE SURVEILLANCE
LIMITED & VAGHJIYANI ENTERPRISES LIMITED.....APPLICANT
AND**

**THE ACCOUNTING OFFICER,
MINISTRY OF TRANSPORT, INFRASTRUCTURE,
HOUSING, URBAN DEVELOPMENT & PUBLIC WORKS,
STATE DEPARTMENT FOR HOUSING & URBAN
DEVELOPMENT.....1ST RESPONDENT**

**MINISTRY OF TRANSPORT, INFRASTRUCTURE,
HOUSING, URBAN DEVELOPMENT & PUBLIC WORKS,
STATE DEPARTMENT FOR HOUSING & URBAN
DEVELOPMENT.....2ND RESPONDENT**

Review against the decision of Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works (State Department for Housing and Urban Development) with respect to Tender No. MTIHUDDPW/SDHUD/UDD/004/2020-2021 for the Proposed Construction of Gikomba Quarry Road Market Block D in Nairobi City County.

BOARD MEMBERS

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|---------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Qs. Hussein Were | -Member |

3. Mr. Ambrose Ngare -Member
4. Ms. Isabella Juma -Member
5. Mr. Jackson Awele -Member

IN ATTENDANCE

1. Mr. Philip Okumu -Holding brief for Secretary

REQUEST FOR REVIEW NO. 152 OF 2020

Top Choice Surveillance Limited & Vaghjiyani Enterprises Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated 17th December 2020 and filed on 18th December 2020 together with a Statement in Support of the Request for Review dated 17th December 2020 and filed on 18th December 2020 through the firm of Kinyanjui, Kirimi & Company Advocates.

The Procuring Entity was notified of the existence of the Request for Review vide a letter from the Board Secretary dated 18th December 2020. However, the Procuring Entity only lodged a Response on Notification of Appeal No. 152 of 2020 dated 29th December 2020 on 7th January 2021.

Notably, the Procuring Entity submitted confidential documents to the Board relevant to the subject tender in accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act, No. 33 of 2015

(hereinafter referred to as “the Act”) which were delivered to the Board Secretariat on 29th December 2020.

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

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- a. An order declaring that the Respondents breached the provisions of Article 227 (1) of the Constitution and sections 63 and 79 of the Public Procurement and Asset Disposal Act;***
- b. An order annulling and setting aside the decision of the Respondents contained in the letter dated 27th November 2020 to terminate the procurement proceedings with respect to Tender No. MTIHU DPW/SDHUD/UDD/004/2020-2021 for the Proposed Construction of Gikomba Phase II Market in Nairobi City County.***
- c. An order quashing and setting aside forthwith the invitation to tender via the intended re-advertisement or re-advertisement of the tender and the subsequent re-tendering process be quashed;***
- d. An order directing the Procuring Entity to complete the procurement process and the Applicant to be evaluated as per the provisions of section 80 of the Act and be awarded the tender in accordance with sections 86 and 87;***

- e. An order compelling the Respondents to pay the costs of the review to the Applicant;***
- f. Any further orders that the Honourable Bard may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.***

On 24th March 2020, the Board issued Circular No. 2/2020 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 be canvassed by way of written submissions.

The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as "the Act").

Parties to the Request for Review did not file any written submissions.

BOARD'S DECISION

The Board has considered the Request for Review filed by the Applicant together with the Statement in Support of the Request for Review and finds that the following issue calls for determination: -

Whether the Procuring Entity terminated the subject tender in accordance with section 63 of the Act

In its determination of the above issue, the Board observes that the Applicant filed the Request for Review on 18th December 2020. Thereafter, the Procuring Entity was notified of the existence of the Request for Review Application vide a letter dated 18th December 2020, which was served on the Procuring Entity on 22nd December 2020, together with a copy of the Request for Review and Circular No. 2/2020 dated 24th March 2020 specifying the timelines for filing a response.

Notably, the Procuring Entity submitted confidential documents to the Board relevant to the subject tender in accordance with section 67 (3) (e) of the Act which were delivered to the Board Secretariat on 29th December 2020 by a representative of the Procuring Entity, but failed at that time to file a response to the Request for Review. The Procuring Entity only lodged its response to the Request for Review on 7th January 2021, sixteen (16) days after it was served with a notice of a Request for Review which was outside the five (5) days' timeline stipulated in the Board's Circular No. 2/2020 and Regulation 205 (3) of the Public

Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as the "Regulations 2020").

Moreover, it is not lost to the Board that the letter conveying the Procuring Entity's response to the Request for Review is clearly dated 29th December 2020, and thus it is not clear why the Procuring Entity elected to file the same nine (9) days later on 7th January 2021.

Article 50 (1) of the Constitution states that: -

"(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body." [Emphasis by the Board]

The right to a fair hearing is a fundamental human right recognized in our Constitution, which guarantees every person the opportunity to be heard before a court or any other decision-making body.

Due to the late filing by the Procuring Entity in which the Procuring Entity breached Regulation 205 (3) of the Regulations 2020, it is the Board's considered view that the Applicant was denied the opportunity to prepare a rejoinder to the Procuring Entity's response, if it chose to do so, in violation of its right to a fair hearing as espoused under Article 50 (1) of the Constitution.

In addition, the Board is required to hear and determine a request for review application within twenty-one (21) days of filing pursuant to section 171 of the Act. Due to this statutory timeline, the Board strictly relies on documentation filed before it within the timelines specified in Circular No. 2/2020 in order to render its decision within twenty-one days.

Noting that the Applicant lodged the Request for Review on 18th December 2020, the Board is required to render a decision in the said review application on or before 8th January 2021. Since the Procuring Entity filed its response to the Request for Review on 7th January 2021, a day before the expiry of the twenty-one (21) days within which the Board has to render a decision in the said Request for Review, the Board is constrained for time to serve the Applicant with the Procuring Entity's response and further consider the Procuring Entity's response before delivering a decision in this Request for Review.

In view of the foregoing, the Board finds that the Procuring Entity Response on Notification of Appeal No. 152 of 2020 dated 29th December 2020 and filed on 7th January 2021 is filed out of time and is hereby struck out from the record of these proceedings.

In view of the above finding, it therefore follows that the Applicant's Request for Review Application remains undefended and the issues therein uncontroverted. This notwithstanding, the Board still has a duty

to determine the Request for Review Application and establish whether or not the Applicant has proven its case in this respect.

The Applicant avers in paragraph 4 of its Statement in Support of the Request for Review, that it submitted its bid in response to the subject tender on 15th October 2020. On 30th October 2020, the Applicant avers in paragraph 7 thereof that the Procuring Entity wrote to the Applicant requesting it to acknowledge an arithmetic error in its bid document, which letter it received on 16th November 2020. The Applicant avers that it responded to the Procuring Entity's letter on the same date whereby it confirmed the arithmetic error in its bid document.

In paragraph 10 thereof, the Applicant depones that on 16th December 2020, it received from the Procuring Entity a letter of notification of termination of the subject tender dated 27th November 2020, which letter indicated that the subject tender was terminated in accordance with section 63 (f) of the Act, but the said letter did not provide the reasons why the tender was non-responsive.

Further, the Applicant contends that the Procuring Entity's intended re-advertisement of the subject tender without following due procedure would deny the Applicant and any other aggrieved bidder, the right to challenge the Procuring Entity's decision to terminate the subject tender and further, prejudice the Applicant and all other bidders who participated in the subject tender.

In view of the Applicant's averments, the Board examined the letter of notification of termination of the subject tender dated 27th November 2020 annexed to the Applicant's Request for Review marked Exhibit 'TESL4' which read as follows: -

"TERMINATION OF TENDER FOR PROPOSED CONSTRUCTION OF GIKOMBA QUARRY ROAD MARKET BLOCK D IN NAIROBI CITY COUNTY TENDER NO. MTIHU DPW/SDHUD/UDD/004/2020-2021

I refer to the above mentioned tender which you submitted on 15th October 2020. Kindly note that the tender was non-responsive as per the Public Procurement and Asset Disposal Act, 2015 and was therefore terminated in accordance with section 63 (f). The process will be re-advertised soon..."

According to the above letter, the Procuring Entity terminated the subject tender in accordance with section 63 (f) on the basis that the subject tender was non-responsive. Notably, the provision referred to in the said letter, that is section 63 (f) of the Act does not exist in the Act, and it is possible that the Procuring Entity intended to refer to section 63 (1) (f) of the Act and not section 63 (f) of the Act.

This notwithstanding, the abovementioned letter serves to demonstrate that the Procuring Entity terminated the subject tender in accordance with section 63 (1) (f) of the Act on the basis of non-responsiveness of the subject tender.

The Board observes that even though an accounting officer may exercise its discretion under section 63 (1) of the Act to terminate a procurement process, such discretion must be exercised in accordance with the substantive and procedural requirements for termination of procurement proceedings.

In **Republic v. Public Procurement Administrative Review Board & another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR**, the Court held that: -

"In a nutshell therefore, the procuring entity is under duty to place sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Procuring Entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of section 63 of the Public Procurement and Asset Disposal Act, 2015"

With this in mind, the Board notes that, for one, section 63 (1) of the Act provides that a procuring entity may terminate procurement or asset disposal proceedings at any time, prior to notification of tender award. Further, a procuring entity may only terminate procurement proceedings where any of the reasons cited in section 63 (1) of the Act applies, as cited hereinbefore.

In addition to citing any of the reasons listed in section 63 (1) of the Act, a procuring entity must also comply with the procedural requirements for termination of a tender specified in section 63 (2), (3) and (4) of the Act. Section 63 (2) and (3) of the Act gives the Procuring Entity an obligation to submit a written report on the termination to the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") within fourteen days.

It is also worth noting that, section 63 (4) of the Act requires the accounting officer of a procuring entity to notify all tenderers of the termination within fourteen days of termination with reasons for the said termination.

There is no evidence before this Board demonstrating that the Procuring Entity notified the Applicant of the reasons why its bid was found non-responsive in accordance with section 87 (3) of the Act read together with Regulation 82 of the Public Procurement and Asset Disposal Regulations, 2020 which provisions provide as follows: -

Section 87 (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.

Regulation 82 (1) The notification to the unsuccessful bidder under section 87 (3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.

(2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.

However, the Board observes that prior to the Procuring Entity's letter of termination dated 27th November 2020, the Applicant avers that it received from the Procuring Entity a letter dated 30th October 2020, a copy of which is annexed to the Applicant's Request for Review and marked as Exhibit TESL2 which reads as follows: -

"ARTIHMETIC ERRORS

Reference is made to your tender for the above works dated 15th October 2020 which is currently under evaluation.

During tender opening, your tender price as read out was Kshs 729,581,350.63. However, during the bid evaluation process, it was noted that your tender had arithmetic errors within the bills of quantities amounting to Kshs. 40,408,286.54 thus your corrected bid price is Kshs. 689,173,064.09.

In accordance with Clause 24 (f) of the Instructions to Tenderers, you are kindly requested to acknowledge the above arithmetic error by closure of business Monday 2nd November 2020.

The Applicant avers that it responded to the Procuring Entity's query vide a letter dated 16th November 2020, a copy of which is attached to the Applicant's Request for Review and marked as Exhibit TESL3 which reads as follows: -

"We refer to your letter Ref: MTIHUD/SHUD/SCMS/4/10/VOL. 1/7 dated 30th October on above subject.

We have confirmed the arithmetic error as detailed in your letter and by this we confirm and acknowledge the error.

We look forward to your award and contract."

It is important to note that the Act changed the manner in which a procuring entity should treat errors found in a tender during Financial Evaluation.

Under the Public Procurement and Disposal Act, 2005 (Repealed) (hereinafter referred to as "the Repealed Act"), a bidder in a procurement process would quote a tender price, or what it referred to as the total price of a tender which would be read out by a procuring

entity at the opening of tenders in accordance with section 60 (5) (b) of the Repealed Act which provided as follows: -

"As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register —

(a) the name of the person submitting the tender;

(b) the total price of the tender including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed;

The Board notes that section 66 (4) of the Repealed Act provided that: -

"The successful tender shall be the tender with the lowest evaluated price."

This means that an award of a tender would be based on the lowest evaluated price as determined by the procuring entity at the conclusion of financial evaluation.

The procuring entity in arriving at the lowest evaluated price during financial evaluation would correct arithmetic errors as explained in section 63 of the Repealed Act which provided as follows: -

"(1) The procuring entity may correct an arithmetic error in a tender.

(2) The procuring entity shall give prompt notice of the correction of an error to the person who submitted the tender.

(3) If the person who submitted the tender rejects the correction, the tender shall be rejected and the person's tender security shall be forfeited."

This meant that during the process of financial evaluation of bids, a procuring entity would determine if there were any discrepancies in the amount quoted in a bid. If any discrepancies or errors were detected, a procuring entity would correct arithmetic errors only if the bidder in question accepted the corrections as made by the procuring entity. If the respective bidder rejected the corrections, the bid in question would be rejected at this stage of evaluation.

The process of arriving at the lowest evaluated price was further explained in Regulation 50 of the Public Procurement and Disposal Regulations, 2006 (Repealed) (hereinafter referred to as "the Repealed 2006 Regulations") which were made pursuant to the Repealed Act. The said provision states as follows: -

"(1) Upon completion of the technical evaluation under Regulation 49, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

(2) The evaluated price for each bid shall be determined by-

(a) taking the bid price, as read out at the bid opening;

(b) taking into account any corrections made by a procuring entity relating to arithmetic errors in a tender;

(c) taking into account any minor deviation from the requirements accepted by a procuring entity under section 64(2) (a) of the Act;

(e) where applicable, converting all tenders to the same currency, using a uniform exchange rate prevailing at the date indicated in the tender documents;

(f) applying any discounts offered in the tender;

(g) applying any margin of preference indicated in the tender documents.

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be the tender with the lowest evaluated price in accordance with section 66(4) of the Act (now section 86 (1) in the 2015 Act)”

[Emphasis by the Board]

This repealed Regulation introduced steps for arriving at the lowest evaluated price during Financial Evaluation. This is due to the fact that, inevitably, a bid may contain arithmetic errors, minor deviations, and there may be need to convert tenders to the same currency using the

prevailing exchange rates in the case of international competitive bids, to apply discounts offered by a tender and to apply a margin of preference as specified in the Tender Document and as required by the Act.

As far as corrections were concerned, a procuring entity in determining the evaluated price of a bid would include any corrections made by a procuring entity relating to arithmetic errors in a tender in accordance with Regulation 50 (2) (b) of the Repealed 2006 Regulations. As explained and outlined hereinbefore in section 63 of the Repealed Act, a procuring entity would correct arithmetic errors only if there was concurrence with the bidder in question.

Following acceptance of these corrections by a bidder, and taking into consideration the other factors as listed under Regulation 50 of the Repealed 2006 Regulations, a procuring entity would arrive at the evaluated price of a bid.

A procuring entity would then proceed to rank bidders in order to determine the lowest evaluated bidder in accordance with Regulation 50 (3) of the Repealed 2006 Regulations. An award of tender was therefore made based on the lowest evaluated price pursuant to section 66 (4) of the Repealed Act and which evaluated price would at times be different from the tender price, now known as the tender sum.

The enactment of the Public Procurement and Asset Disposal Act of 2015 changed the manner in which a procuring entity should treat any discrepancies or errors that it may find in a bid during financial evaluation.

Section 82 of the Act states as follows: -

"The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity."

This provision of the Act expressly prohibits any alterations or corrections to the tender sum which remains absolute and final and is not subject to any correction, adjustment or amendment.

Accordingly, any corrections made by a procuring entity to a bidder's tender sum would therefore serve no purpose because the procuring entity cannot use such corrections to rank the bidders or amend the tender sum in the form of tender, which remains absolute and final in accordance with section 82 of the Act.

Regulation 77 of the Regulations 2020 which explains the procedure for Financial Evaluation states as follows: -

"77 (1) Upon completion of the technical evaluation under regulation 76 of these Regulations the evaluation committee shall conduct a financial

evaluation and comparison to determine the evaluated price of each tender

(2) The evaluated price for each bid shall be determined by—

(a) taking the bid price in the tender form

(b) taking into account any minor deviation from the requirements accepted by a procuring entity under section 79(2) (a) of the Act

(c) where applicable converting all tenders to the same currency using the Central Bank of Kenya exchange rate prevailing at the tender opening date

(d) applying any margin of preference indicated in the tender document

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act”

It is evident that pursuant to section 82 of the Act, the tender sum as submitted and read out (i.e. the amount specified in a tenderer’s Form of Tender) is absolute and final thus cannot be corrected, adjusted or amended in any way by any person or entity. To buttress this position, the Board notes that Regulation 77 of Regulations 2020 outlines four factors to be considered in arriving at the evaluated price. None of those

factors allow corrections by a procuring entity relating to arithmetic errors in a tender during financial evaluation.

It is the Board's considered view that the mischief the Act and Regulations 2020 have cured is a scenario where a bidder can quote a figure 'X' as its tender sum in the Form of Tender in anticipation of being the lowest evaluated bidder. However, upon realization that such a bidder is not the lowest evaluated bidder, it would collude with a procuring entity to correct arithmetic errors which it 'deliberately' created in its breakdown of prices (i.e. in the Bills of Quantities) so that upon correction, its tender sum is revised downwards, lower than the initial lowest bidder and be awarded the tender based on the corrected figure.

Notably, Regulation 74 (2) of Regulations 2020 provides as follows: -

"Subject to section 79 (2) (b) of the Act any errors in the submitted tender arising from a miscalculation of unit price quantity subtotal and total bid price shall be considered as a major deviation that affects the substance of the tender and shall lead to disqualification of the tender as non-responsive"

Section 79 (2) (b) of the Act states that: -

"79. (1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

(2) A responsive tender shall not be affected by—

(a); or

(b) errors or oversights that can be corrected without affecting the substance of the tender"

The Board observes that pursuant to section 79 (2) (b) of the Act, a responsive tender is not affected by errors or oversights that can be corrected without affecting the substance of a tender. However, Regulation 74 (2) of Regulations 2020 views any errors from a miscalculation of unit price quantity subtotal and total bid price to be a major deviation that affects the substance of the tender and would lead to disqualification of the tender as non-responsive.

In the Board's considered view, certain errors or oversights can be corrected without affecting the substance of a tender. That notwithstanding, the tender sum remains the same and cannot be corrected even if errors or oversights (which are not necessarily arithmetic errors in a tender) may be identified or corrected pursuant to section 79 (2) (b) of the Act. This explains why a tenderer is bound by its tender sum hence ought to be prepared to implement a tender at its tender sum because award is made based on that tender sum. In this regard therefore, a procuring entity does not have the leeway to apply

Regulation 74 of Regulations 2020 without considering provisions of section 79 (2) (b) and 82 of the Act.

It is therefore important to note that Regulation 74 (2) of Regulations 2020 does not vest an automatic action for the Procuring Entity to find tenderers non-responsive as a result of arithmetic errors found in their bids during Financial Evaluation because the said provision is subject to section 79 (2) (b) of the Act whilst taking into account how a tender sum ought to be treated pursuant to section 82 of the Act.

In this regard therefore, the Board finds that there is no room for the Procuring Entity to correct arithmetic errors in tenderers bids and thus the Procuring Entity cannot apply Regulation 74 (2) of Regulations 2020 while conducting a Financial Evaluation.

In totality of the foregoing and in the absence of any proof to the contrary, the Board finds that the Procuring Entity did not terminate the subject procurement proceedings in accordance with section 63 of the Act, noting the Procuring Entity's failure to satisfy all the substantive and procedural requirements for termination of a tender, rendering the said termination null and void.

In view of this finding, the Board would like to point out that any action undertaken by a procuring entity consequent to an improper and/or unlawful termination process renders such an action null and void. It

therefore follows that any intended re-advertisement process to be undertaken by the Procuring Entity with respect to the subject procurement proceedings would in turn be null and void.

Accordingly, 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, the Board makes the following orders in the Consolidated Request for Review: -

- 1. The Accounting Officer of the Procuring Entity's Letters of Notification of Termination of Tender No. MTIHU DPW/SDHUD/UDD/004/2020-2021 for the Proposed Construction of Gikomba Quarry Road Market Block D in Nairobi City County issued to all bidders, including the Applicant herein, be and are hereby cancelled and set aside.**

- 2. The Accounting Officer of the Procuring Entity is hereby directed to ensure the procurement proceedings in Tender No. MTIHU DPW/SDHUD/UDD/004/2020-2021 for the Proposed Construction of Gikomba Quarry Road Market Block D in Nairobi City County proceeds to the logical**

conclusion, including issuance of notification letters to tenderers within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this Review.

3. Given that the procurement process is not complete, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 8th day of January 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB