

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 124/2021 OF 15th OCTOBER 2021

BETWEEN

WILSON MUSYOKA MUOKI APPLICANT/INTERESTED PARTY

AND

HON. ATTORNERY GENERAL sued on

behalf of the Ministry of Education, State

Department of Early Learning and Basic Education ... RESPONDENT

Review against the decision of the Ministry of Education State Department of Early Learning and Basic Education in relation to Tender No. SDPW/SB/009/2020-2021.

BOARD MEMBERS

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| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Paul Jilani | -Member |
| 3. Mr. Nicholas Mruttu | -Member |
| 4. Mr. Jackson Awele | -Member |
| 5. Mrs. Irene Kashindi | -Member |

IN ATTENDANCE

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| Mr. Stanley Miheso | -Holding brief for the Acting Board Secretary |
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THE REQUEST FOR REVIEW

The Applicant filed a Request for Review dated 14th October 2021 together with a Statement in Support of the Request for Review sworn by Wilson

Musyoka Muoki on 14th October 2021 and filed on 15th October 2021 through the firm of Muoki & Co. Advocates.

In his Request for Review, the Applicant avers that the Principal Secretary, Public Works advertised Tender No. SDPW/SB/009/2020-202 (hereinafter referred to as 'the subject tender') in which qualified contractors/suppliers, who applied for the subject tender, signed a contract with the Principal Secretary, Department of Public Works. Thereafter, the Ministry of Education State Department of Early Learning and Basic Education made unnecessary requirements which did not form part of the contract that was signed between qualified contractors/suppliers and the Principal Secretary, State Department of Public Works. It is for this reason that the Applicant is aggrieved by the actions of the Ministry of Education, State Department of Early Learning and Basic Education and seeks the following orders which we reproduce verbatim:-

- 1. The Ministry of Education State Department of Early Learning and Basic Education to use the contract signed by Contractors/suppliers and the Principal Secretary, Department of Public Works as it is without varying the terms.***
- 2. The Ministry of Education State Department of Early Learning and Basic Education to issue instructions to the qualified contractors/suppliers to commence the works under the subject tender immediately.***
- 3. The Ministry of Education State Department of Early Learning and Basic Education to be refrained from taking any action that could amount to unprocedural and unlawful abandonment or cancellation of the subject tender.***

4. The Ministry of Education State Department of Early Learning and Basic Education to be compelled to pay the applicant the costs arising from / and incidentals to this application.

5. The Board to make such and further as it may deem fit and appropriate and insuring the ends of justice are full met in the circumstances in this request for review.

Through a Notification of Appeal dated 15th October 2021, the Acting Board Secretary notified the Respondent and the Principal Secretary, Ministry of Education, State Department of Early Learning and Basic Education of the existence of the Request for Review in relation to the subject tender. In addition, the Acting Board Secretary attached a letter dated 15th October 2021 advising the Respondent and the Principal Secretary, Ministry of Education, State Department of Early Learning and Basic Education to furnish the Board with its response as well as the confidential documents pertaining to the evaluation of tenders in the subject tender pursuant to Section 67 (3) (c) and (e) of the Public Procurement and Asset Disposal Act (hereinafter referred to as the 'Act'). Further, the Acting Board Secretary attached the Board's Circular No. 2/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Clause 2 of the said Board's circular requires a Procuring Entity/Respondent to file a response together with all necessary documentation with the Board within 5 days of service of the Request for Review upon the Procuring Entity/Respondent.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, the Board also dispensed with physical hearings and directed all requests for review applications 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.

To date, the Respondent herein has not filed a response to the Request for Review and neither has it submitted original/ confidential documents requested for by the Acting Board Secretary.

BOARD'S DECISION

The Board has considered the Applicant's pleadings, the documents filed before it and finds the following issues call for determination: -

- 1. Whether the Applicant has the locus standi to invoke the jurisdiction of the Board under section 167 (1) of the Act read together with section 2 of the Act.**

Depending on the outcome of the first issue: -

- 2. Whether the Applicant has substantiated his allegation of breach of duty imposed on the Respondent by the Act and the Public Procurement and Asset Disposal Regulations 2020, (hereinafter referred to as the 'Regulations 2020').**

Section 167 (1) and (4) (c) of the Act provide as follows:

“(1) 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.

(2)

(3)

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)-

(a)

(b)

(c) where a contract is signed in accordance with section 135 of this Act "

From the above provision, it is clear that only candidates or tenderers can move the Board to hear a tendering or asset disposal dispute by way of a Request for Review. Further, even where a candidate or tenderer is aggrieved by the decision of a procuring entity, such candidate or tenderer cannot move this Board to hear its grievances if a contract with respect to a tender in issue has been signed in accordance with section 135 of the Act.

On the other hand, section 2 of the Act defines who a candidate and tenderer are as follows:-

"Candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity.

"Tenderer" means a person who submitted a tender pursuant to an invitation by a public entity.

Accordingly, a candidate is a person who has obtained the tender documents from a public entity pursuant to an invitation notice. The Applicant has not furnished the Board with any proof showing that they obtained the tender document pursuant to an invitation notice by the Principal Secretary, State Department of public Works thus, he is not a candidate within the meaning of section 2 of the Act. Furthermore, the Applicant has not even furnished the Board with a copy of the tender document for the subject tender.

Further, the Applicant has not furnished the Board with a copy of the tender he submitted in response to the subject tender, if any, or a copy of a letter of notification of award or a copy of a contract signed between him and the Principal Secretary, State Department of Public Works as proof of having been a tenderer in the subject tender. Furthermore, the Applicant has not even alleged to have been a tenderer of the subject tender.

In the absence of proof of being a candidate or a tenderer and by his own admission that a contract for the subject tender has been signed by all parties concerned, the Board finds the Applicant has no locus to invoke its jurisdiction to hear the instant request for review.

Noting that the Respondent failed to respond to the Request for Review despite being invited to do so by the Acting Board Secretary, the Board shall make no orders to costs.

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 dated 14th October 2021:

The Request for Review dated 14th October 2021 and with respect to Tender No. SDPW/SB/009/2020-2021 be and is hereby struck out with no orders as to costs.

Dated at Nairobi this 5th day of November 2021

**CHAIRPERSON
PPARB**

**SECRETARY
PPARB**

