

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 61/2021 OF 27TH APRIL 2021

BETWEEN

PEESAM LTDAPPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA POWER & LIGHTING COMPANY LIMITED...1ST RESPONDENT

KENYA POWER & LIGHTING COMPANY LIMITED..2ND RESPONDENT

HOUNSLOW ENTERPRISE LIMITED.....1ST INTERESTED PARTY

ESPAT SOLUTIONS LIMITED.....2ND INTERESTED PARTY

KAMTIX CLEANERS COMPANY LIMITED....3RD INTERESTED PARTY

SYOSSET LIMITED.....4TH INTERESTED PARTY

DASH GROWTH CLEANING SERVICES LTD.5TH INTERESTED PARTY

SAPCO ENTERPRISES.....6TH INTERESTED PARTY

YIEWSLEY VENTURES LTD7TH INTERESTED PARTY

PREFERRRED IMAGE LIMITED.....8TH INTERESTED PARTY

SIMPSONS LANES SERVICES LIMITED.....9TH INTERESTED PARTY

M&M CLEANING SERVICES.....10TH INTERESTED PARTY

ICE CLEAN CARE GROUP LIMITED.....11TH INTERESTED PARTY

JEXTREEM LOGISTICSCO.LIMITED.....12TH INTERESTED PARTY

CLEANMARK LIMITED.....13TH INTERESTED PARTY

ZUZUMZ LIMITED14TH INTERESTED PARTY

TAMALINK COMMUNICATIONS.....15TH INTERESTED PARTY

GRAND CLEANING SERVICES LTD16TH INTERESTED PARTY

Review against the decision of the Accounting Officer of Mawego Technical Institute of Mawego in relation to Tender Quotation No. MTTI/PQ/34&35/2020-2022 for Provision and Installation of Management Information System.

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mrs. Irene Kashindi | -Member |
| 3. Ms. Isabella Juma, CPA | -Member |
| 4. Eng. Mbiu Kimani, OGW | -Member |
| 5. Mr. Nicholas Mruttu | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Stanley Miheso | -Holding brief for the Secretary |
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THE REQUEST FOR REVIEW

M/s Abno Softwares International Limited (hereinafter referred to as “the Applicant”) lodged a Request for Review dated 9th April 2021 and filed on 12th April 2021 together with a Statement in Support of the Request for Review sworn on 9th April 2021 and filed on 12th April 2021, through the firm of KKOAA Advocates LLP, seeking the following orders: -

a) An order nullifying and setting aside the Respondent’s decision cancelling TENDER NO: MTTI/PQ/35/2020-2022

vide letter dated the 26th March 2021 and delivered to the Applicant on the 31st of March 2021;

b) An order setting aside the ongoing procurement process for a fresh submission of quotations for the Supply of Biometric and ERP system, ending on the 13th of April, 2021 be and is hereby set aside;

c) An order substitution the decision of the Review Board for the decision of the Respondent and awarding the Tender to the Applicant after reviewing all records of the procurement process relating to TENDER NO: MTTI/PQ/35/2020-2022;

d) Consequent to (c) above, an order directing the Respondent to sign a contract with the Applicant in accordance with the Tender and the decision of the Board;

e) An order directing the Respondent to pay the costs of and incidental to these proceedings; and

f) Such other or further relief or reliefs as this board shall deem just and expedient.

In a letter dated 12th April 2021 addressed to the 1st Respondent, the Board Secretary notified the 1st Respondent of the existence of the Request for Review and suspension of procurement proceedings in Tender Quotation No. MTTI/PQ/34&35/2020-2022 for Provision and Installation of Management Information System (hereinafter referred to as "the subject tender") pursuant to section 168 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"). The Board Secretary further directed the 1st Respondent to forward to the Board, all confidential

documents pertaining to the subject tender including a list of bidders and their contact details whilst attaching the Board's Circular No. 2/2020 of 24th March 2020, specifying the Board's administrative and contingency plan to mitigate Covid-19 pandemic and a period of five (5) days from receipt of notification by the Board Secretary within which the 1st Respondent could file a Response to the Request for Review, pursuant to Regulation 205 (3) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020"). The Board Secretary informed the 1st Respondent that no contract should be signed in respect of the subject tender until the Board has completed its review of the procurement proceedings of the subject tender.

On the same date of 12th April 2021, the Board's Secretariat Officer sent the letter dated 12th April 2021 and Circular No. 2/2020 of 24th March 2021 to the Procuring Entity's email (mawegotechnical@gmail.com and mawegoinstitute@yahoo.com) vide the Board's official email (pparb@ppra.go.ke). This email was not responded to by the Procuring Entity. According to the Postal Corporation of Kenya Expedited Mail Service (EMS) Tracker, the Acting Board Secretary's Letter of 12th April 2021, was received at the Procuring Entity's office on 14th April 2021. However, to date, the Respondents did not file a response to the Request for Review neither did they forward confidential documents relating to the subject tender to the Board as instructed.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed that all request 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. However, none of the parties to the Request for Review filed written submissions.

BOARD'S DECISION

The Board has considered the Applicant's Request for Review, the Statement in Support of the Request for Review together with other documents attached thereto and finds that the following issue calls for determination: -

- I. Whether the Applicant has the requisite locus standi of a candidate or tenderer in the subject procurement process to invoke the jurisdiction of the Board.**

Depending on the outcome of the first issue: -

- II. Whether the Procuring Entity's Cancellation of a Local Service Order for Biometric and Enterprise Resource Planning System vide a letter dated 26th March 2021 addressed to the Applicant is justified in law.**

From the documentation provided to the Board by the Applicant, the Applicant alleges that it participated in a prequalification tender for Provision and Installation of Management Information System advertised by the

Procuring Entity on 26th June 2020. According to the Applicant, it submitted a tender in respect of the prequalification by the tender submission deadline of 16th July 2020. Subsequently thereafter, it received notification of successful pre-qualification on 12th November 2020 and on the same date, signified its acceptance of being pre-qualified as the Procuring Entity's service provider.

The Applicant further states that following a successful system demonstration on 25th and 26th January 2021 at the Procuring Entity's offices, it received a Local Service Order (LSO) on 5th February 2021 from the Procuring Entity. The LSO required the Enterprise Resource Planning (ERP) System being procured by the Procuring Entity to have a; Student Registration Module, Finance Module, Procurement Module, Examination Module, 2 Cameras with Temperature Access Points with forced Face Mask Wearing, Clocking in for students and staff and Stranger/Student Identification. According to the Applicant, upon receiving the LSO, it began engagements with the Procuring Entity on a contract in addition to several discussions that the Procuring Entity had with the Applicant on amendment of the contract.

Despite these engagements, it is the Applicant's position that on 31st March 2021, it received a letter dated 26th March 2021 from the Procuring Entity informing it of Cancellation of LSO for Biometric and ERP System. Flowing from the said cancellation, the Applicant states that it received an invitation from the Respondent to submit a quotation for the Biometric and ERP System

on the same date of 31st March 2021. Being aggrieved by the cancellation, the Applicant filed the instant Request for Review.

Having considered the sequence of events relating to the Applicant's instant Request for Review, the Board would like to point out that the Respondents did not file a response to the Request for Review, thus the Applicant's allegation that there was a pre-qualification exercise for Provision and Installation of Management Information System, has not been controverted. Furthermore, the Applicant furnished to the Board, a letter dated 12th November 2020 addressed to the Applicant regarding "**Notification of Pre-qualification**" with respect to **Tender No. MTTI/PQ/34/2020-2022** notifying the Applicant that: -

"...your application mentioned above has been considered for pre-qualification.

Please acknowledge receipt of this letter of notification signifying your acceptance. Quotation shall be sorted for when need arise.

You may contact the officer (s) whose particulars appear below on the subject matter of this letter of notification of award"

The Board has also perused the letter dated 17th November 2020 addressed to the 1st Respondent wherein the Applicant signified its acceptance of pre-qualification for "**Tender No. MTTI/PQ/34/2020-2022 for Provision and Installation of a Management Information System.**"

The Applicant has therefore substantiated its allegation that it participated in a pre-qualification exercise for "**Tender No. MTTI/PQ/34/2020-2022 for Provision and Installation of a Management Information System**", was found successful as stated in the letter dated 12th November 2020, thereafter signified its acceptance of the pre-qualification on 17th November 2020.

With that in mind, the Board observes that a question arises as to whether a pre-qualification exercise is a stand-alone procurement method.

Section 92 of the Act provides that: -

"92. Methods of procurement

Subject to this Act and prescribed provisions, an accounting officer of a procuring entity shall procure goods, works or services by a method which may include any of the following—

- (a) open tender;***
- (b) two-stage tendering;***
- (c) design competition;***
- (d) restricted tendering;***
- (e) direct procurement;***
- (f) request for quotations;***
- (g) electronic reverse auction;***
- (h) low value procurement;***
- (i) force account;***

(j) competitive negotiations;
(k) request for proposals;
(l) framework agreements; and
(m) any other procurement method and procedure as prescribed in regulations and described in the tender documents."

Part IX of Regulations 2020 provides the manner in which the procurement methods listed hereinbefore are undertaken including the procedure for Community Participation being another procurement method prescribed in Regulations 108 to 112 of Regulations 2020. None of the procurement methods under section 92 of the Act and Regulations 2020 include pre-qualification as a stand-alone procurement method.

As regards pre-qualification, sections 95 and 96 of the Act provides the manner in which the same is undertaken in the following terms: -

"94. Pre-qualification documents

- (1) An accounting officer of a procuring entity shall promptly issue prequalification documents to all candidates who request them and shall maintain a record of all candidates to whom documents are issued.***
- (2) The pre-qualification document shall contain all the information specified in section 93 and any other information necessary for the potential candidates***

to prepare and submit applications to be pre-qualified.

(3) Without prejudice to the generality of paragraph (2), such information shall include—

(a) the name, address and contact details of the procuring entity;

(b) details of the procurement requirements, including the nature and quantity of goods, works or services and the location and timetable for delivery or performance of the contract;

(c) instructions on the preparation of applications to pre-qualify, including any standard forms to be submitted and the documentary evidence and information required from candidates;

(d) instructions on the sealing, labelling and submission of applications to pre-qualify, including the location and deadline for submission; and

(e) information on how applications will be evaluated.

(4) The accounting officer of a procuring entity shall allow the candidates at least fourteen days to prepare and submit their applications to be pre-qualified.

- (5) The accounting officer of a procuring entity shall promptly respond to all requests for any clarification relating to the pre-qualification document where such requests are received before the deadline for submission.**

95. Approval of pre-qualified candidates

- (1) The evaluation committee shall, in writing, record the results of its evaluation of applications for pre-qualification using the evaluation criteria in the pre-qualification documents and shall state which candidates were found to be qualified and the reasons why any candidates were not qualified.**
- (2) The record of results prepared under subsection (1) shall be submitted with recommendations of the evaluation committee and the professional opinion of the head of procurement function to the accounting officer for approval.**
- (3) A procuring entity shall invite tenders from only the approved persons who have been pre-qualified.**

(4) A procuring entity shall notify every candidate who submitted an application for pre-qualification but did not qualify.

Having considered the procedure for pre-qualification outlined hereinbefore, the Board observes that after successful pre-qualification, a procuring entity invites tenders from approved persons who have been pre-qualified pursuant to section 95 (3) of the Act. Section 2 of the Act defines the term "tender" as: -

"an offer in writing by a candidate to supply goods, services or works at a price; or to acquire or dispose stores, equipment or other assets at a price, pursuant to an invitation to tender, request for quotation or proposal by a procuring entity"

Thus, apart from firms/companies submitting tenders in a pre-qualification exercise, the provision under section 92 of the Act provides guidance that tenders are also submitted in another procurement exercise undertaken by a procuring entity after successful pre-qualification of firms/companies. This in itself, is sufficient evidence that a pre-qualification exercise precedes a tender process to be undertaken by a procuring entity using one of the procurement methods listed under section 92 of the Act, thus leading the Board to find that a pre-qualification is not a stand-alone procurement method.

According to paragraph 19 of the Applicant's Statement in Support of the Request for Review, the Applicant received an **"Invitation to Submit**

Quotations for Biometric and ERP System” on 31st March 2021 in respect to a Request for Quotation after cancellation of an LSO through the letter of 26th March 2021. The **“Invitation to Submit Quotations for Biometric and ERP System”** forms part of the annexures to the Applicant’s Request for Review. However, the same does not cite the Applicant as an addressee as can be seen from the following details: -

" [Procuring Entity’s Letterhead]

REQUEST FOR QUOTATION

You are invited to submit Quotation for Biometric and ERP System

A. This is not an order

B. This quotation should be submitted so as to reach the undersigned by 5.00 pm on 13th April 2021

C. Your quotation should be inclusive of VAT and delivery cost and MUST remain firm for 90 days from date of opening.

Complete document bearing quotation name should be closed in plain sealed envelope marked and addressed to:

THE PRINCIPAL,

MAWEGO TECHNICAL TRAINING INSTITUTE

P.O BOX 289-400222,

OYUGIS

The institution reserves the right to accept or reject any quotation (s) in part or whole and does not bind itself to accept the lowest bid or give reason thereof”

It therefore follows that the Applicant is alleging the Procuring Entity applied the Request for Quotation method provided in section 92 (f) of the Act after pre-qualification of persons in a prequalification exercise where the Applicant was successful.

Having established prequalification is not a stand-alone method of procurement, the Board must now address the question whether the Applicant has the requisite locus standi of a candidate or a tenderer in the alleged Request for Quotation procurement process undertaken by the Procuring Entity after a pre-qualification exercise.

The answer to this question is important because the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes evidenced by the following provision: -

"Section 27. Establishment of the Public Procurement Administrative Review Board

(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

Further, Section 28 of the Act provides as follows: -

"28. Functions and powers of the Review Board

(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."

Having noted the Board is a specialized decision making body, it is important to establish whether the Applicant has satisfied the locus standi of a candidate or tenderer to invoke the jurisdiction of the Board.

It has well been an enunciated principle that jurisdiction is everything, following the decision in **The Owners of Motor Vessel 'Lillian 'S' vs Caltex Oil Kenya Ltd 1989 K.L.R 1**, where Justice Nyarangi opined as follows: -

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 down tools in respect of the matter

before it the moment it holds the opinion that it is without jurisdiction."

In **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011**, the court had occasion to interrogate the instruments that arrogate jurisdiction to courts and other decision making bodies. The court held as follows: -

"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 jurisdiction of this Board flows from Section 167 of the Act, which provides 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...

Regulation 203 (2) of Regulations 2020 further states that: -

"(1) A request for review under section 167 (1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations

(2) The request referred to in paragraph (1) shall—

(a) state the reasons for the complaint including any alleged breach of the Constitution the Act or these Regulations

(b) be accompanied by such statements as the applicant considers necessary in support of its request

(c) be made within fourteen days of—

(i) the occurrence of the breach complained of where the request is made before the making of an award

(ii) the notification under section 87 of the Act or

(iii) the occurrence of the breach complained of where the request is made after making of an award to the successful bidder"

The terms "**Locus standi**" is defined in the **Black's Law Dictionary, 9th Edition** at page 1026 as: -

"The right to bring an action or to be heard in a given forum".

The Court of Appeal in **Alfred Njau & 5 others vs. City Council of Nairobi [1983] eKLR** put it in the following terms: -

"The term "locus standi" means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding."

Section 167 (1) of the Act cites candidates and tenderers as the only persons who can file a Request for Review before this Board. This therefore means, it is candidates and tenderers who have the locus standi (the right to appear) before this Board. Section 2 of the Act defines the terms "**candidate**" and "**tenderer**" 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"

Even assuming the Procuring Entity undertook a Request for Quotation procurement process after a prequalification exercise, as alleged by the Applicant, this Board must establish whether the Applicant was a candidate or tenderer in the alleged Request for Quotation tender. To establish whether an applicant was a candidate in a procurement process, such an applicant must provide documentation demonstrating that it obtained Tender

Document (s) from a public entity pursuant to an invitation notice by a procuring entity.

Issuance of a Tender Document is a requirement vested upon the accounting officer of a procuring entity in compliance with section 58 of the Act which states as follows: -

"58. Standard procurement and asset disposal documents

(1) An accounting officer of a procuring entity shall use standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.

(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications."

Section 2 of the Act recognizes that a person who obtains a Tender Document from a public entity pursuant to an invitation notice by a procuring entity is called a tenderer.

The Applicant furnished the Board with a Request for Quotation letter which was allegedly issued to it on 31st March 2021. The Request for Quotation letter does not state the manner in which a Tender Document applicable in the subject tender could be obtained by the Procuring Entity. Furthermore,

the Applicant did not furnish the Board with any Tender Document applicable in the alleged Request for Quotation tender.

In the absence of proof to the contrary, the Board finds that the Applicant does not satisfy the locus standi of a candidate within the meaning of section 2 of the Act to invoke the jurisdiction of the Board under section 167 (1) of the Act.

Having found the Applicant was not a candidate in the subject procurement process, the Board does not see the need to address the question whether or not the Applicant was a tenderer because the answer to that question requires the Board to consider whether the Applicant submitted a bid to the Procuring Entity in response to the alleged Request for Quotation tender, yet the Board has no bids before it. In essence, the Applicant's failure to satisfy the locus standi of a candidate, ousts the jurisdiction of the Board in the first instance.

Accordingly, the Board finds that it lacks jurisdiction to entertain the Applicant's Request for Review, thus proceeds to down its tools at this point and shall not address the second issue framed for determination.

FINAL ORDERS

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

- 1. The Request for Review filed by the Applicant on 12th April 2021 with respect to Tender Quotation No.**

MTTI/PQ/34&35/2020-2022 for Provision and Installation of Management Information System, be and is hereby struck out for want of jurisdiction.

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

Dated at Nairobi this 3rd day of May 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB