

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 134/2021 OF 29th OCTOBER 2021
BETWEEN

**BELT CARGO
SERVICES LIMITED APPLICANT**

AND

**THE ACCOUNTING OFFICER,
KENYA POWER & LIGHTING COMPANY RESPONDENT**

**TOP CHOICE
SURVEILLANCE LIMITED INTERESTED PARTY**

Review against the decision of the Accounting Officer of Kenya Power & Lighting Company in relation to Tender No. KP1/9A.2/OT/043/NM/20-21 for Supply, Installation and Commissioning of 2 Nos. 1250KVA and 3 Nos. 650KVA Enclosed Contanerised Diesel Generator Plus Other Accessories at Mandera and Lodwar Power Stations.

BOARD MEMBERS

- | | |
|-------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Arch. Steven Oundo | -Member |
| 3. Mr. Alfred Keriolale | -Member |
| 4. Mr. Jackson Awele | -Member |
| 5. Mr. Nicholas Mruttu | -Member |

IN ATTENDANCE

Mr. Philemon Kiprop - Holding brief for the Acting Board Secretary

BACKGROUND TO THE DECISION

Kenya Power & Lighting Company (hereinafter referred to as "the Procuring Entity") invited sealed tenders for Tender No. KP1/9A.2/OT/043/NM/20-21 for Supply, Installation and Commissioning of 2 Nos. 1250KVA and 3 Nos. 650KVA Enclosed Containerised Diesel Generator Plus Other Accessories at Manderla and Lodwar Power Stations (hereinafter referred to as "the subject tender") through an advertisement published in MyGov Publication Newspaper, on 8th June 2021 and the Procuring Entity's website (www.kplc.co.ke) on 10th June, 2021.

Tender Submission Deadline and Opening of Tenders

The Procuring Entity received a total of fourteen (14) tenders by the tender submission deadline of 28th July 2021 at 10.00 am. The tenders were opened by a Tender Opening Committee shortly thereafter in the presence of tenderers' representatives and the following tenderers were recorded as having submitted their respective tenders for Lot I and II:

1. Electro Watts Limited
2. Belt Cargo Services Ltd
3. Nginu Power Engineering (E.A.) Ltd
4. Top Choice Surveillance Limited
5. Central Electricals International Ltd

6. Hyperteck Electrical Services Ltd
7. Stema Engineering Limited
8. Achelis Materials Handling Ltd
9. Cockerill East Africa Ltd
10. AEA Limited
11. Master Energy Afrika Ltd
12. Polyphase Systems Ltd
13. Comacon Limited
14. Abe-Tec East Africa Ltd

Further, three (3) tenderers submitted physical tenders but did not submit online tenders as follows;

15. Mantrac Kenya Ltd
16. Adrian Kenya Limited
17. Lex Oilfield Solutions Ltd

Evaluation of Tenders

An Evaluation Committee evaluated tenders in three stages, namely:

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

Preliminary Evaluation

At this stage, the Evaluation Committee evaluated seventeen (17) tenders against the criteria outlined in clause 7.1.0 Part I- Preliminary Criteria of Section VII-Summary of Evaluation Process at page 66 and 67 of the Tender Document. At the end of evaluation at this stage, nine (9) tenders including the Applicant's tender were found non-responsive while Eight tenders were found responsive, of the eight (8) tenders, six (6) tenders were found responsive for both lot I and II including the Interested Party's tender, one (1) tender was responsive for lot I only and one (1) tender for lot II only, thus proceeded to the Technical Evaluation stage.

Technical Evaluation

At this stage, the Evaluation Committee evaluated a total of eight (8) tenders against the criteria outlined in clause 7.2.0 Part II(a) Technical Evaluation, clause 7.2.2 Part II(b) Detailed Technical Evaluation (Mandatory) and, 7.2.3 Part II(c) Additional Technical Requirements Scoring Criteria of Section VII-Summary of Evaluation Process at page 68 to 70 of the Tender Document. At this stage of evaluation, tenderers were required to score a minimum of 75% in order to proceed to the next stage of evaluation. At the end of evaluation at this stage, three (3) tenders were found non-responsive, while the Interested Party's tender was found responsive for both lot I and II, two (2) tenders were responsive for lot I and two (2) tenders were found responsive for lot II thus proceeded to the next stage of evaluation.

Financial Evaluation

At this stage, the Evaluation Committee evaluated tenders in accordance with the criteria outlined in clause 7.3.0 Part III Financial Evaluation of Section VII- Summary of Evaluation Process at page 71 of the Tender Document. At the end of this stage of evaluation, the Interested Party's tender was found to be the lowest evaluated tender for both lot I and II at a cost of Kshs 210,242,511.04 and a total of Ksh 420,485,022.08 inclusive of VAT.

Recommendation

The Evaluation Committee recommended the award of the subject tender to the Interested Party at its tender price of Ksh 420,485,022.08 inclusive of VAT, (Kenya Shillings Four Hundred and Twenty Million, Four Hundred and Eighty-Five Thousand, and Twenty-Two, and Eight Cents) for both lot I and II.

Professional Opinion

In a Professional Opinion dated 31st August 2021, the Procuring Entity's General Manager, Supply Chain & Logistics reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the Evaluation Committee's recommendation on award of the subject tender to the Interested Party at its tender price of Ksh 420,485,022.08 inclusive of VAT, (Kenya Shillings Four Hundred and Twenty Million, Four Hundred and Eighty-Five Thousand, and Twenty-Two, and

Eight Cents) for both lot I and II. The Accounting Officer approved the Professional Opinion.

Letters of Notification

The Procuring Entity notified all tenderers of the outcome of their respective tenders by letters dated 6th September 2021 and notified the Interested Party that it had been awarded the subject tender for lot I and II.

THE REQUEST FOR REVIEW

Belt Cargo Services Limited, (hereinafter "the Applicant") lodged a Request for Review dated 27th October 2021 and filed on 29th October 2021 together with a Supporting Affidavit sworn by John Njoroge Muigai on 27th October 2021 and filed on 29th October 2021 and a Supplementary Affidavit sworn by John Njoroge Muigai on 11th November 2021 and filed on even date through the firm of S. N. Thuku & Associates Advocates, seeking the following orders:

- 1. To Nullify the decision of the procuring entity to award the Tender for Lot 2;***
- 2. That the procurement entity awards the subject tender to the Applicant;***
- 3. In the alternative and without prejudice to the request in (2) above, the procuring entity be ordered to Re- evaluate tenders in the subject tender in Lot 2 for Prequalification for Suppliers & Contractors for Off-Grid Spare Parts, Works and Services and award the Tender in compliance with the***

provisions of the Public Procurement and Asset Disposal Act No. 33 of 2015, the regulations therein and the Tender documents;

- 4. An order directing the Respondent and the Procuring Entity to redo or correct anything within the entire procurement process found to not have been done in compliance with the law;***
- 5. That in the event the tender is going to be reviewed, a different and distinct review board be appointed for the purposes of the review of that tender;***
- 6. The costs of the review be awarded to the Applicant;***
- 7. Any other relief that this Board may deem fit and just to grant.***

Vide letters dated 29th October 2021 the Acting Board Secretary notified the Respondents of the existence of the Request for Review.

In response, the Respondent filed a Response to the Applicant's Request for Review dated 4th November 2021 on 5th November 2021 on its own behalf.

Vide letters dated 5th November 2021, the Acting Board Secretary notified tenderers in the subject tender of the existence of the Request for Review while inviting them to supply the Board with any information and arguments touching on the subject tender. Further, the Acting Board Secretary furnished all tenderers with the Board's Circular No. 2/2020 dated 24th March

2020, detailing administrative and contingency measures to mitigate the spread of Covid-19.

The Interested Party filed a Notice of Appointment of Advocates together with a Replying Affidavit sworn by Benson Gakere on 11th November 2021 and filed on 12th November 2021 and a Notice of Preliminary Objection dated 11th November 2021 and filed on 12th November 2021 through the firm of Kinyanjui, Kirimi & Company Advocates.

Electro Watts Limited filed a letter dated 9th November 2021 on even date.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, the Board 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.

The Applicant filed Written Submissions dated 10th November 2021 on 11th November 2021 and the Respondent filed Written Submissions dated 9th November 2021 and filed on 11th November 2021.

BOARD'S DECISION

The Board has considered all the pleadings and written submissions filed before it, including the confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act

(hereinafter the "Act") and finds that the following issue calls for determination: -

I. Whether the Request for Review was filed within the statutory period of 14 days of occurrence of alleged breach of duty imposed on the Respondent by this Act in accordance with Section 167(1) of the Act read together with Regulation 203(2)(c)(iii) of the Public Procurement Asset and Disposal Regulations, 2020 (hereinafter "Regulations 2020") to invoke the jurisdiction of the Board.

Depending on the outcome of the first issue,

II. Whether the Procuring Entity Evaluated the Applicant's tender in accordance with clause 7.1.0 Part I- Preliminary Criteria of Section VII-Summary of Evaluation Process as read together with section 80(2) of the Act.

III. Whether the Interested Party was evaluated in accordance with clause 7.1.0 Part I- Preliminary Criteria of Section VII-Summary of Evaluation Process as read together with section 80(2) of the Act.

IV. Whether the Evaluation Committee was constituted in accordance with section 46 of the Act.

V. Whether the Notification letters dated 6th September 2021 were issued in accordance with section 87 of the Act.

The Respondent has raised a Preliminary Objection at paragraph 15 of its Response to the Request for Review and avers that the review violates section 167 (1) of the Act and Regulation 203 (2) (c)(iii) of Regulations 2020 because the same has been brought after the lapse of fourteen days of notification of award, therefore the Board lacks jurisdiction to hear and determine this Request for Review. The Respondent avers that the letters of notification dated 6th September 2021 were sent by email to all tenderers on 13th September 2021 and via the Applicant's postal address on 16th September 2021, therefore the Request for Review filed on 29th October 2021 has been filed outside the statutory 14-day period stipulated in the aforementioned sections of the Act and Regulations 2020.

Further, on 12th November 2021 the Interested Party in its response filed a notice of Preliminary Objection dated 11th November 2021 raising the following grounds: -

- 1. The entire appeal is hopelessly filed out of time and without leave of the Board since the notification of the award was made on 6th September 2021 and the review was filed on or about 29th October 2021.**
- 2. The tender process comprised of Lot 1 and Lot 2 yet the review only challenges one part of the process**

3. That the entire appeal totally lacks merit and does not disclose any cause of action.

On the other hand, the Applicant submits that it received its notification letter on 15th October 2021 and not on 13th September 2021 as alleged by the Respondent, therefore the 14 days stated running on 15th October 2021 and not 13th September 2021. Further that the Respondent has not attached proof that the email was sent on 13th September 2021. It further avers that under the Business Questionnaire, its contact person is one Mr. John Njoroge Muigai and the email provided is beltcargo1@gmail.com.

The Board notes, it is trite law that courts and decision making bodies can only act in cases where they have jurisdiction as held in Nyarangi JA stated as follows in the *locus classicus* case of ***The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited [1989] eKLR:***

"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." [Emphasis added]

Similarly, in the case of ***Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others [2013] eKLR*** the Court of Appeal emphasized the importance of the issue of jurisdiction and stated that: -

"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. "

It therefore behoves the Board to determine whether it has jurisdiction to entertain the Request for Review.

The Supreme Court in the case of ***Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others [2012] eKLR*** pronounced itself regarding where the source of jurisdiction of a court or any other decision 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. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality;

it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings." [Emphasis added]

The jurisdiction of the Board flows from Section 167(1) of the Act which states as follows:

"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."

Section 167(1) of the Act should be read and considered with Regulation 203 (2) of the Regulations 2020 which states that:

"(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.*
- d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.”*

As such, the import of Section 167(1) of the Act read together with Regulation 203(2)(c)(iii) of Regulations 2020 is that tenderers ought to file a request for review within 14 days of occurrence of breach complained of, where the request is made after making of an award to the successful tenderer to invoke the jurisdiction of the Board. Put differently, the Board's will be divested of its jurisdiction in instances where a request for review application has been lodged with it after the lapse of the statutory period required for filing the same.

In determining whether the Request for Review was filed within time, the Board notes that the Applicant's allegation of breach of duty imposed by the Act on the Respondent is on its disqualification from the procurement process communicated vide a notification letter dated 6th September 2021. Which reads;

'We refer to the referenced tender dated 28th July 2021 and regret to inform you that following evaluation, your bid was unsuccessful. The brief reason is as follows:

(i) 7.1.2 The Declaraton Form you submitted was not complete. Some requirements as per template provided were omitted.

The successful bidder was M/s Top Choice Surveillance Ltd.

....."

Having considered parties' arguments, the Board notes that Section 87 of the Act gives responsibility to the Respondent on notifying tenderers of the outcome of their tenders. This provisions states that: -

"(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"

In effect, the Respondent being the person responsible for notifying tenderers of the outcome of their tenders, should provide evidence of the date when the letters of notification were dispatched to all tenderers. The Board has perused the confidential file as submitted to the Board pursuant to section 67 (3)(e) of the Act and notes that the Respondent has provided notification letters dated 6th September 2021 addressed to Belt Cargo Services Limited, further the Respondent attached an email sent on 13th September 2021 at 13.05 addressed to bcs@beltcargo.com from one Lincoln Kagundu (Lkagundu@kplc.co.ke).

The Board reviewed the Applicant's original tender and notes that the email provided by the Applicant is bcs@beltcargo.com and beltacargosl@gmail.com. The notification letter was sent to the Applicant via bcs@beltcargo.com on 13th September 2021. While the Respondent has not attached proof of postage of the same letter on 16th September 2021, vide a letter dated 5th July 2021 addressed to the Procuring Entity, the Applicant indicated its address as follows;

"Nabui House 3^d Floor

Off Mpaka Road, Westlands

P.O Box 688-00618 Ruaraka, Kenya

Cell:.....

Telephone:.....

Email: bc**s**@beltcargo.com

In light of the foregoing the Board is of the view that one of the Applicant's email is ***bc**s**@beltcargo.com*** and the notification letter dated 6th September 2021 was sent to one of the email addresses provided by the Applicant in its tender on 13th September 2021 as per the attached email contrary to the Applicant's averments that it did not receive the same because its email address is ***beltcargosl@gmail.com***. Time started running on the date of notification, being 14 days from 13th September 2021, and the Applicant had until 27th September 2021 to file its request for review. However, the same was filed on 29th October 2021.

In the circumstances of this Request for Review, the Board finds that it lacks jurisdiction to hear and determine the same because the Request for Review was not filed within the statutory period of 14 days of occurrence of alleged breach of duty imposed on the Respondent by this Act in accordance with Section 167(1) of the Act read together with Regulation 203(2)(c)(iii) of Regulations 2020.

Accordingly, the Board proceeds to strike out the Request for Review for want of jurisdiction and downs its tools at this point. Consequently, the Board shall not address the other issues framed for determination.

FINAL ORDERS

In exercise of the powers under section 173 of the Act, the Board makes the following orders with respect to the Request for Review:

1. The Request for Review dated 27th October 2021 and filed on 29th October 2021 with respect to Tender No. KP1/9A.2/OT/043/NM/20-21 for Supply, Installation and Commissioning of 2 Nos. 1250KVA and 3 Nos. 650KVA Enclosed Contanerised Diesel Generator Plus Other Accessories at Mandera and Lodwar Power Stations, 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 19th Day of November 2021

CHAIRPERSON

PPARB

SECRETARY

PPARB