REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 122/2021 OF 6th OCTOBER 2021

BETWEEN

DEVID M. MEREKA T/A
MEREKA & COMPANY ADVOCATES.....APPLICANT

AND

THE ACCOUNTING OFFICER,
INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION..... RESPONDENT

Review against the decision of the Accounting Officer of the Independent Electoral and Boundaries Commission in relation to Tender No. IEBC/PRQ/01/2020-2021 for Pre-Qualification for Provision of Legal and Consultancy Services.

BOARD MEMBERS

1. Mrs. Irene Kashindi -Member (Panel Chair)
2. Dr. Joseph Gitari -Member
3. Mr. Nicholas Mruttu -Member
4. Qs. Hussein Were -Member

IN ATTENDANCE

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

BACKGROUND TO THE DECISION

The Tendering Process

Independent Electoral Boundaries Commission (IEBC) (hereinafter referred to as "the Procuring Entity") invited sealed tenders for Tender No. IEBC/PRQ/01/2020-2021 for Pre-Qualification for Provision of Legal and Consultancy Services (hereinafter referred to as "the subject tender") through the Procuring Entity's website (www.iebc.or.ke) and the government tenders portal (www.tenders.go.ke).

Background

The Applicant filed a Request for Review dated 5th October 2021 together with a statement in support sworn by David Mukii Mereka on 5thOctober 2021 and filed on 6th October 2021. Consequently, through a Notification of appeal dated 6th October 2021, the Acting Board Secretary notified the Procuring Entity of the existence of the Request for Review in relation to the subject tender. In addition, the Acting Board Secretary attached a letter dated 6th October 2021 advising the Procuring Entity 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 of the Public Procurement and Asset Disposal Act (hereinafter" The Act"). Further, the

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 provides that a Procuring Entity should file a response together with all documentation with the Board within 5 days of service.

The Notification of Appel and the attachments thereto were dispatched on 7th October 2021 through Posta Kenya.

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 Procuring Entity did not file a response and neither did it submit original/ confidential documents within the 5 days stipulated in the circular. The Acting Board Secretary sent a reminder by a letter dated 18th October 2021 sent via email on 19th October 2021 at 12.34 pm. The said letter reminded the Procuring Entity of the provision of Regulation 205 of The Public Procurement and Asset Disposal Regulations 2020 (hereinafter "Regulations 2020") which provides as follows;

205. Notification of the Review and suspension of procurement proceedings

(1) The Secretary shall, immediately after the filing of the request under regulation 203, serve a notice thereof to the accounting officer of a procuring entity in accordance with section 168 of the Act.

(2) The notification of the filing of the request for review and suspension of procurement proceedings shall be communicated, in writing, by the Review Board Secretary.

(3) Upon being served with a notice of a request for review, the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the request for review together with such documents as may be specified.

(4) An accounting officer of a procuring entity who fails to submit the document within the stipulated period under paragraph (3), commits an offence and shall be liable to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both.

(5) The Review Board Secretary shall immediately notify all other parties to the review upon receipt of such documents from a procuring entity under paragraph (3).

The Acting Board Secretary gave the Procuring Entity until 19th October 2021 to file a response. The Procuring Entity did not however file a response.

THE REQUEST FOR REVIEW

M/s David M. Mereka T/A Mereka & Company Advocates (hereinafter referred to as "the Applicant") lodged a Request for Review dated 5th October 2021 and filed on 6th October 2021 together with a Statement in Support of the Request for Review signed by David Mukii Mereka on 5th October 2021 filed on 6th October 2021 seeking the following prayers;

i. ***The decision of the Respondent dated 31st August 2021 declaring the Applicant's bid as unsuccessful be set aside and substituted with an order declaring the said bid as successful.***
ii. ***The Applicant be prequalified for provision of legal services to the Respondent for the period ending June 2023.***
iii. ***Costs of the review.***
iv. ***Such other orders the Review Board may deem fit to issue.***

As noted above, the Procurement Entity did not file any response. None of the parties filed submissions as outlined in Circular No. 2/2020 dated 24th March 2020.

BOARD'S DECISION

Notwithstanding the fact that the Procuring Entity did not file a response, it is incumbent that the Board has to satisfy itself as to whether or not the Request for Review is merited.

Accordingly, the Board has considered the Applicant's case and its pleadings and frames the issues for determination as follows;

I. ***Whether the Procuring Entity evaluated the Applicants' bid in accordance with the Tender Document as read with Section 80(2) of the Act.***

II. ***What are the appropriate orders to grant in the circumstances?***

Issue 1.

The Applicant avers that it received a notification dated 31st August 2021 on 23rd September 2021 which notified the Applicant that its bid for the subject tender had failed at the preliminary stage for the following reasons;

i. The Tax Compliance Certificate expired on 20th April 2021,

ii. A Bank opinion or guarantee indicating credit line limit was not attached.

iii. Copies of National Identification Cards (IDs)/Passports for directors were not attached.

iv. A Statement that the Applicant has no pending litigation against the commission was not attached.

The Applicant added that it wrote to the Procuring Entity to submit on 1st October 2021 after it received the notification letter on 23rd September 2021 asking the Procuring Entity to reconsider its decision. According to the

Applicant, the reasons upon which its bid was disqualified do not go to the root of the tender but are issues which can be rectified on the basis that do not affect the competency or otherwise of the firm. The Applicant indicated that the Applicant is yet to receive a response its letter dated 1st October 2021. The Applicant added that its honest belief is that the Procuring Entity will consider the content of its letter dated 1st October 2021 and admit its tender and for the following reasons:

i. That the Applicant's firm is competent and has previously been admitted to the panel of the Procuring Entity's Advocates and that it has successfully conducted several election petitions on behalf of Procuring Entity.

ii. The expired Tax Compliance Certificate was attached by an inadvertent error and a copy of the current TCC was forwarded to the Procuring Entity by the letter of 1st October 2021.

iii. The Bank opinion or Bank guarantee as requested is not applicable to persons under category 1 and 2 and therefore the Applicant was exempt.

iv. The IDs and Passport of Directors was not applicable to persons under category 1 and 2 and as such the firm was exempt. The Applicant added that it nevertheless submitted the National ID's of Partners and Staff Members of the firm by the letter dated 1st October 2021.

v. A statement that the firm of Mereka and company does not have any pending litigation against the Procuring Entity was provided by the letter dated 1st October 2021.

The Applicant argued that the above mentioned errors are minor, inadvertent and excusable and do not go to the root of the tender and have since been rectified by the Applicant.

The Board notes from the notification letter that the Applicant's bid was declared as non-responsive by the Procuring Entity at the Preliminary Evaluation stage of the procurement process. As such, it is evident that the Applicant's bid did not proceed to the other stages of evaluation, and was not evaluated any further.

The evaluation of public procurement tenders should be undertaken in accordance with the criteria set out in the Tender Documents. This is captured at Section 80(2) of the Act which provides as follows;

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the

relevant professional associations regarding regulation of fees chargeable for services rendered." [Emphasis added]

It is noteworthy that the Applicant has conceded that it did not meet the requirements in question but contended that the failure to meet the requirement was minor, excusable and rectifiable.

A determination of whether or not the grounds upon which the Applicant's bid was disqualified amounted to minor errors requires the Board to consider the provisions of section 79(1) of the Public Procurement & Asset Disposal Act, 2015 (hereafter referred to as "the Act") which states as follows: -

"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) <u>minor deviations that do not materially depart from the requirements set out in the tender documents</u>; or

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

(3) A deviation described in subsection (2) (a) shall—

(a) <u>be quantified to the extent possible</u>; and

(b) <u>be taken into account in the evaluation and comparison of tenders</u>." **[Emphasis by the Board]**

The Board notes at that the requirements in question were mandatory requirements as specified in the Tender Document. The Applicant contended that it was exempt from the requirements relating to bank opinion or bank guarantee as well as for submission of IDs and passport of directors but the Board did not see any provision on exemption in the tender document submitted by the Applicant. In addition, the Applicant did not proffer any explanation to support its contention that it was exempt from complying with these requirements.

It is trite law that a bidder's failure to meet a mandatory requirement is not excusable as a minor deviation within the meaning of section 79 of the Act.

In ***PPARB Application No. 115/2020 of BOC Kenya Plc vs Kenyatta National Hospital***, the Board held as follows when addressing a similar issue:

> ***"From the foregoing, it is evident that a mandatory requirement cannot be waived by a procuring entity or termed as a 'minor deviation' as a mandatory requirement is instrumental in determining the responsiveness of a bid and is the first hurdle a bid must overcome in order to be considered for further evaluation. "***

Further

> ***"In the instant case, the Board has established that the Applicant by its own admission failed to provide a tender***

security/bid bond valid for 150 days from the date of tender opening as required under the Tender Document and was therefore disqualified from further evaluation at the preliminary evaluation stage for failure to comply with a mandatory requirement.

It is therefore the finding of this Board that the Procuring Entity evaluated the Applicant's bid at Preliminary Evaluation stage in accordance with section 80 (2) of the Act, as read together with Article 227 (1) of the Constitution with respect to Mandatory Requirement No. 7 of Clause 2.24 Evaluation and Comparison of Tenders on page 26 of the Tender Document read together with Clause 2.14.1 of the Appendix to Instructions to Tenderers on page 25 of the Tender Document.

In totality of the foregoing, the Board holds that the Request for Review lacks merit and the same is hereby dismissed. "

In the same vein, the Board finds that the Applicant's failure to meet the mandatory requirements of the tender was not excusable as a minor deviation. It would go against the tenets of fairness and transparency as enunciated under Article 227 of the Act to allow a bidder to submit

documents after close of bid submission purporting to rectify gaps subsequently noted after submitting a bid.

Issue 2

In totality of the foregoing, the Board concludes that the Request for Review lacks merit and is dismissed in entirety.

FINAL ORDERS

In exercise of the powers under section 173 of the Act, the Board makes the following orders:

1. **The Request for Review dated 5th October 2021 and filed on 6th October 2021 be and is hereby dismissed.**
2. **There be no order as to costs.**

Dated at Nairobi this 26th day of October 2021

F.W

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CHAIRPERSON **SECRETARY**

PPARB **PPARB**