

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 131/2021 OF 28th OCTOBER 2021
BETWEEN

BLUE SEA SERVICES LTD..... APPLICANT
THE ACCOUNTING OFFICER,
CENTRAL BANK KENYA (CBK).....1st RESPONDENT
CENTRAL BANK KENYA (CBK).....2nd RESPONDENT
GREENSHINE CLEANERS AND
GENERAL SERVICES LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer of Central Bank Kenya (CBK) in relation to Tender No. CBK/020/2021-2022 for Provision of Ground Maintenance and Related Services for Central Bank of Kenya - Mombasa branch for a period of two (2) years.

BOARD MEMBERS

- | | |
|------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mrs. Irene Kashindi | -Member |
| 3. Ms. Rahab Robi | -Member |
| 4. Qs. Hussein Were | -Member |
| 5. Ms. Isabella Juma | -Member |

IN ATTENDANCE

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

BACKGROUND TO THE DECISION

The Tendering Process

Central Bank of Kenya, the 2nd Respondent herein invited sealed tenders for Tender No. CBK/020/2021-2022 for Provision of Ground Maintenance and Related Services for Central Bank of Kenya - Mombasa branch for a period of two (2) years (hereinafter referred to as the "subject tender") from qualified and eligible tenderers through the Public Procurement Information Portal (PPIP) (www.tenders.go.ke) and Central Bank of Kenya website (www.centralbank.go.ke) on 19th August 2021.

Addendum

Through Addendum 1 dated 20th August 2021, the 2nd Respondent responded to various clarification questions raised by prospective tenderers and extended the submission deadline from 6th September 2021 to 13th September 2021.

Tender Submission Deadline and Opening of Tenders

The Respondent received a total of twenty (20) tenders by the tender submission deadline of 13th September 2021 at 10:30 am. The tenders were opened shortly thereafter by a tender opening committee in the presence of

tenderers' representatives and the following tenderers were recorded as having submitted their respective tenders as follows:

- 1. Petals Hygiene**
- 2. Tum Enterprises**
- 3. Marametal and Landscaping**
- 4. Virgin Clean**
- 5. Greenshine Cleaners**
- 6. Ollreggy Investments Limited**
- 7. Macro Steps Enterprises Limited**
- 8. Suldanka Harti Limited**
- 9. Colnet Limited**
- 10. Dekings Traders Limited**
- 11. Fransa Agencies**
- 12. Saham Cleaning Services**
- 13. Parapet Limited**
- 14. Ice Clean Care Group Co. Limited**
- 15. Blue Sea Services Limited**
- 16. Dechrip East Africa Limited**
- 17. Kamtix Cleaners Co. Limited**
- 18. Digital Sanitation Services Limited**
- 19. Ikunza & Nyiila Construction Limited**
- 20. Jona Pestcon**

Evaluation of Tenders

The 2nd Respondent's Evaluation Committee (hereinafter referred to as the "Evaluation Committee") evaluated tenders in the following stages: -

- i. Compliance with the Mandatory Requirements;
- ii. Technical Evaluation on the capacity to deliver;
- iii. The Financial Evaluation;

Compliance with the Mandatory Requirements

At this stage, the Evaluation Committee applied the criteria outlined in Stage 1: Mandatory Requirements (MR) of clause 2.27 Evaluation Criteria of Section II. Appendix to Instructions to Tenderers at page 19 of the Tender Document. At the end of this stage of evaluation, four (4) tenders were found non-responsive while sixteen (16) tenders including the Applicant's and the Interested Party's tenders were found responsive, thus proceeded to the next stage of evaluation.

Technical Evaluation on the capacity to deliver

At this stage, the Evaluation Committee applied the criteria outlined in Stage 2 Technical Evaluation of clause 2.27 Evaluation Criteria of Section II. Appendix to Instructions to Tenderers at pages 19 and 20 of the Tender Document where tenders were required to attain a pass mark of 75% in order to proceed to the next stage of evaluation. Two (2) tenders were found non-responsive, while fourteen (14) tenders, including the Applicant's and

the Interested Party's tenders, were found responsive thus proceeded for financial evaluation.

Financial Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Stage 3 Financial Evaluation of clause 2.27 Evaluation Criteria of Section II. Appendix to Instructions to Tenderers at page 21 of the Tender Document. The Interested Party was found to have submitted the lowest evaluated tender at its tender sum of Kshs 2,635,200.00 (Kenya Shillings Two Thousand Six Hundred and Thirty-Five Thousand Two Hundred only).

Recommendation

The Evaluation Committee recommended award of the subject tender to the Interested Party having submitted the lowest evaluated responsive tender at its tender price of Kshs 2,635,200.00 (Kenya Shillings Two Thousand Six Hundred and Thirty-Five Thousand Two Hundred only).

Professional Opinion

In a Professional Opinion dated 7th October 2021, the 2nd Respondent's Head of Procurement Function, one Z. N. Thumbu, reviewed how the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee

recommending the Interested Party for award of the subject tender. The Accounting Officer approved the Professional Opinion.

Notification to Tenderers

In letters dated 14th October 2021, Z. N. Thumbu, the 2nd Respondent's Head of Procurement Function, notified tenderers in the subject tender of the outcome of their respective tenders.

REQUEST FOR REVIEW

The Applicant herein lodged a Request for Review dated 27th October 2021 and filed on 28th October 2021 together with an Affidavit in Support of the Request for Review sworn by Maina Muturi on 27th October 2021 and filed on 28th October 2021 through the firm of Mutisya Mwanzia and Ondeng Advocates seeking the following prayers;

- a) The Respondents' decision as communicated to the Applicant vide a letter dated 14th October 2021 be cancelled and set aside.***
- b) Any letter of award of tender arising from Tender No. CBK/020/2021-2022 for Provision of ground maintenance and related services for Central Bank of Kenya- Mombasa branch for a period of two (2) years issued by the Respondents to Interested Party be cancelled and set aside.***

- c) The Public Procurement Administrative Review Board be pleased to declare that the Applicant was the successful bidder in respect of Tender No. CBK/020/2021-2022 for the Provision of ground maintenance and related services for Central Bank of Kenya- Mombasa branch for a period of two (2) years.***
- d) The procurement and proceedings leading to the decision by the Respondents to award Tender No. CBK/020/2021-2022 for Provision of ground maintenance and related services for Central Bank of Kenya- Mombasa branch for a period of two (2) years to the Interested Party be reviewed and the Board be pleased to direct the 1st Respondent to award the said tender to the Applicant being the lowest evaluated bidder.***
- e) The Respondents be directed to execute the contract in respect of Tender No. CBK/020/2021-2022 for Provision of ground maintenance and related services for Central Bank of Kenya- Mombasa branch for a period of two (2) years.***
- f) Award of costs to the Applicant.***

The 1st and 2nd Respondent opposed the Request for Review vide a memorandum of response dated 2nd November 2021 filed on 3rd November 2021 and a Replying Affidavit sworn on 2nd November 2021 Zipporah .N. Thambu Assistant Director and Head of Procurement at Central Bank of Kenya and filed on 3rd November 2021.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, detailing an administrative and contingency management plan to mitigate the effects of the COVID-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board.

The Applicant filed written submissions on 12th November 2021 while the 1st and 2nd Respondent filed theirs on 11th November 2021.

BOARD'S DECISION

The Board has considered each party's case, the pleadings and the written submissions filed before it, including the confidential documents submitted by the Procuring Entity pursuant to section 67(3) (e) of the Public Procurement and Assets Disposal Act, 2015 (the Act) and frames the issues for determination as follows;

- I. Whether the Procuring Entity evaluated the Interested Party's tender in accordance with the Tender Document as read with Section 80(2) of the Act.***

II. Whether the Board has jurisdiction to determine the propriety of the notification letter dated 14th October 2021 issued to the Applicant.

Depending on the outcome of the second issue for determination

III. Whether the notification letter dated 14th October 2021 issued to the Applicant was proper and valid.

IV. What are the appropriate orders to grant in the circumstances?

Issue 1

The Applicant argues that under section (V) of the tender document, the Respondents required the prices quoted by a tenderer to provide for a minimum of 12 units. The Applicant added that, as per the current minimum wage bill, National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) set deductions for employees and V.A.T for the 12 units, the minimum cost to be incurred in the subject tender is Kshs. 5,281,370.496 without adding the costs of the equipment's required for performing the task, uniforms, provision for WIBA and the profit margin. According to the Applicant, the Interested Party's tender sum of Kshs. 2,635,200/- is not legally possible and would lead to a breach of the law and that it was undervalued.

The Applicant argued that the Procuring Entity's actions are negligent and amount to a total affront to Article 10, 47, 201 and 207 of the Constitution of Kenya, 2010 and also of the Act which require the Respondents to strictly act in an accountable manner to ensure that public funds are expended strictly in accordance with the law and not otherwise.

The Applicant relied on the cases of ***Republic v Public Procurement Administrative Review Board & 2 others Ex-parte Coast Water Services Board & another [2016] eKLR***, ***Republic v Public Procurement Administrative Review Board & Another [2008] eKLR*** and ***Republic v Public Procurement Administrative Review Board & 2 others Ex- Parte Akamai Creative Limited*** to the effect that procuring entities should abide by the law and provisions of the tender document.

The Respondents contended that the Applicant's assertions are totally unfounded and allowing the same would be an affront to the statutory mandate bestowed upon the 2nd Respondent as a procuring entity. The Respondent's added that the mandate of performing the tender and ensuring compliance with the law in implementation is bestowed solely upon the Interested Party and not the Respondents. The Respondents argued that the Interested Party as the successful tenderer will be bound to perform and discharge its responsibilities upon signing of the contract after being declared the successful tenderer and the price shall be as set out in its tender documents.

The Respondents relied upon this Board's previous decision in ***Application No. 144/2020 County Builders Limited Versus the Accounting Officer, Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works, State Department of Housing and Urban Development and another*** in which it was held as follows:

"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 the award is made based on that tender sum. These provisions support the Board's view that the Procuring Entity did not have leeway to apply Regulations 74 of Regulations 2020 without considering provisions of section 79(2) (b) and 82 of the Act."

It was the Respondents further submission that the Applicant's assertions that the Interested Party's tender would infringe the minimum wage is an issue that exceeds the scope of the tender documents. The Respondents added that Section V of the tender document, which has been referred to by the Applicant, was specific on the pricing requirements the tenderers were to fill. The Respondents further contended that the precise tabulations as done by the Applicant in its pleadings did not form part of the tender document.

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."

Considering the provisions of section 80(2), it is incumbent upon the Board to establish if the Procuring Entity evaluated the Interested Party's tender according to the criteria set out in the Tender Document.

The relevant provision is Schedule V of the tender document which provides as follows.

SECTION V: SCHEDULE OF REQUIREMENTS AND PRICES

Price schedule for provision of ground maintenance and related services for Central Bank of Kenya- Mombasa

<i>Item No.</i>	<i>Item description</i>	<i>Unit</i>	<i>Monthly rate</i>	<i>Total cost per year</i>	<i>Total cost for two years</i>

1	<i>For provision of ground maintenance and related services for Central Bank main building compound, Nyali Guesthouse and branch manager's house described in Section VI- technical specifications</i>	12			
<i>Subtotal</i>					
<i>Add VAT</i>					
<i>Grand total for two years</i>					

The Board observes the breakdown of cost regarding wages per month per unit, house allowance, N.S.S.F or NHIF were not required to be included in the price schedule. The Board thus agrees with the Respondent that these did not form part of the evaluation criteria.

The Applicant contends that the Interested Party's tender price would not be sufficient to meet the minimum wage requirements, statutory deductions, cost of equipment etc and leave room for a profit margin. Having not formed part of the requirements under the tender document, it is incumbent upon the Interested Party to perform the tender at its quoted tender sum and how they would comply with any other applicable law is not for this Board to determine nor is it the Procuring Entity's obligation. The bottom line is that

the Interested Party has to perform the contract at its quoted tender price. This is aptly set out under Section 82 of the Act which provides 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."

In the circumstances, the Board finds the Procuring Entity evaluated the Interested Party's tender in accordance with the provisions of the tender document. The Applicant accordingly fails on the first issue for determination.

Issue II

Through its written submissions, the Applicant contended that the letter of notification dated 14th October 2021 issued to the Applicant by the Procurement Entity was not proper. The gist of the Applicant's challenge is that the notification was not signed by the Procuring Entity's Accounting Officer.

In response, the Respondents contended that this is a new issue that was not canvassed in either the Applicant's Request for Review or Supplementary Affidavit and urged the same be dismissed.

The Respondents added that the said ground was raised out of the time provided under Section 167(1) of the Act which provides for a request for review to be filed within 14 days thus urged this Board to dismiss the same.

Without dwelling on how the issue was introduced, the Board will first address it mind to the question of jurisdiction given its importance.

It is trite law that courts and decision making bodies such as the Board can only act in cases where they have jurisdiction. Nyarangi JA stated as follows in the *locus classicus* Court of Appeal's 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 upon this Board to determine whether it has jurisdiction to entertain the issue of the Notification Letter as raised by the Applicant in its written submissions.

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 the source of the 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."

[Emphasis added]

Section 167(1) of the Act should be 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.”*

In line with the cases of ***Republic v Public Procurement Administrative Review Board & 2 Others [2015] eKLR*** and ***Republic v Public Procurement Administrative Review Board & 2 Others Ex-parte Kemotrade Investment Limited [2018] eKLR***, the Board would not have jurisdiction to entertain the propriety or otherwise of the notification letter if indeed it was raised outside the prescribed 14 days. The Board will now determine if it has jurisdiction to determine the issue of the notification letter.

It is indisputable that the issue of the impropriety of the notification letter was indeed raised for the first time in the Applicant's submissions dated 9th November 2019 and filed on 12th November 2021. While it is not certain when the Applicant received the notification letter of 14th October 2021, the

Applicant did not controvert the Respondent's submissions that the issue was raised outside the 14 days. The Board notes the issue was raised on 12th November 2021 which was 29 days computed from 14th October 2021. Bearing this in mind, the Board concludes that it has no jurisdiction to determine the propriety or otherwise of the notification letter dated 14th October 2021.

Issue III

Issue Number III for determination is now not up for determination by the Board, following the Board's findings that it has no jurisdiction to determine the propriety or otherwise of the notification letter dated 14th October 2021.

Issue IV

The upshot of the determination in the above issues for determination is that the Request for Review fails in its entirety. Each party will bear their own costs.

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review: -

- 1. The Applicant's Request for Review dated 27th October 2021 lodged on 28th October 2021 be and is hereby dismissed.**

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

Dated at Nairobi, this 18th Day of November 2021

CHAIRPERSON

PPARB

SECRETARY

PPARB