

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 141/2021 OF 17th DECEMBER 2021

BETWEEN

DINESH CONSTRUCTION LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

COUNTY ASSEMBLY OF KISUMU.....1ST RESPONDENT

COUNTY ASSEMBLY OF KISUMU.....2ND RESPONDENT

Review against the decision of the Accounting Officer, County Assembly of Kisumu in relation to Tender No. CAK/OT/UMCAC/10/2020/2021/02 for Proposed Construction of Ultra-Modern County Assembly Chambers, Offices and Associated Works.

BOARD MEMBERS

- | | |
|--------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mrs. Irene Kashindi | -Member |
| 3. Qs. Hussein Were | -Member |
| 4. Eng. Mbiu Kimani, OGW | -Member |
| 5. Dr. Joseph Gitari | -Member |

IN ATTENDANCE

Mr. Philip Okumu - Acting Board Secretary

BACKGROUND TO THE REQUEST FOR REVIEW

The Applicant avers that it obtained a blank tender document for tender No. CAK/OT/UMCAC/10/2020/2021/02 for the Proposed Construction of Ultra-Modern County Assembly Chambers, Offices and Associated Works (hereinafter referred to as the "subject tender") from the 2nd Respondent's website (www.kisumuassembly.go.ke) on 4th November 2021. The Applicant thereafter filed this request for review and contended that the tender in the subject tender is similar to that in a previous tender wherein it had submitted a tender, and was found successful and consequently signed a contract dated 14th October 2014 with the 2nd Respondent but has since been the subject of litigation, the 2nd Respondent having frustrated the same.

The Applicant and the Respondent entered into a contract dated 14th October 2014, for the Construction and Completion of the Proposed County Assembly Building located at Milimani Area-Kisumu for the price of Kshs. 745,000,000 (Kenya Shillings Seven Hundred and Forty-Five Million). The works under the said contract were supposed to begin on 17th November 2014, and be completed by 25th April 2016.

The Applicant never began the works under the foregoing contract. A dispute arose regarding the the contract which is pending before, Qs Tom Onyango Okech, a sole Arbitrator.

It appears that the 2nd Respondent advertised a tender for the proposed construction of the Kisumu County Assembly Offices on 2nd July 2021 in

the Daily Nation but the fate of this tender was not explained to the Board. The Applicant filed proceedings before the High Court in ***Milimani HCCC No. E696/2021; Dinesh Construction Limited –v- County Assembly of Kisumu*** to challenge this advertisement.

The Tendering Process

The 2nd Respondent thereafter invited sealed tenders for the subject tender from qualified and eligible tenderers through The Daily Nation newspaper, the Procuring Entity's Website (www.kisumuassemblies.go.ke) and IFMIS Supplier Portal (<http://supplier.treasury.go.ke>) on 21st October 2021.

Pre-Bid Site Visit

A pre-bid site visit was conducted on 26th October 2021 at the site where the proposed construction of Kisumu County Assembly Chambers, Offices and Associated Works in the subject tender would take place, and certificates of bidder's pre-bid site visit issued to; Astronea Construction Ltd, Guumba Contractors, Pinnie Agency Ltd and Veevee Enterprises Ltd.

Tender Opening Committee

A tender Opening Committee was appointed by the Clerk of the County Assembly vide a letter dated 29th October 2021.

Tender Submission Deadline and Opening of Tenders

The Respondent received a total of four (4) tenders by the tender submission deadline of 5th November 2021 at 11:00 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;

- 1. Astronea Construction Ltd**
- 2. Guumba Contractors**
- 3. Pinnie Agency Ltd**
- 4. Veevee Enterprises Ltd**

Vide letters dated 18th November 2021 the Acting Board Secretary notified the Respondents of the existence of the Request for Review and the suspension of procurement proceedings pursuant to section 168 of the Act, he attached the Request for Review and the annexures therein and asked them to submit their response within 5 days from the date of the letter.

REQUEST FOR REVIEW

M/s DINESH CONSTRUCTION LIMITED (hereinafter referred to as "the Applicant") lodged a Request for Review dated 15th November, 2021 and filed 18th November, 2021 together with a Statement in Support of the Request for Review signed by Fredrick Opondo on 15th November 2021 and filed on 18th November, 2021 date through the firm of M/S Nyaanga & Mugisha Advocates seeking the following prayers;

(a) An ORDER be and is hereby issued terminating and/or cancelling the 1st and 2nd Respondents' procurement proceedings in relation to the tender for the proposed construction of Ultra-Modern Kisumu County Assembly

Chambers, Offices and Associated Works – Tender No. CAK/OT/UMCAC/10/2020-2021/02-IFMIS Negotiation No. 898999 with immediate effect.

- (b) An ORDER be and is hereby issued prohibiting the 1st and 2nd Respondents herein from commencing, proceeding and/or taking any action purportedly aimed at contracting or awarding any tender relating to the proposed construction of Ultra-Modern Kisumu County Assembly Chambers, Offices and Associated Works, which project is currently being undertaken by the Applicant vide Contract dated 14th October 2014.***
- (c) A ORDER be and is hereby issued directing the 1st and 2nd Respondents herein to fully implement the Contract dated 14th October 2014 for construction and completion of County Assembly building to be located at Milimani Area off Kolobot Road- Kisumu at agreed sum of Kshs. 750,000,000/= to its logical conclusion.***
- (d) The 1st and 2nd Respondents be and is hereby ordered to pay the costs of and incidental to these proceedings; and***
- (e) Such other or further relief or reliefs as this board shall deem just and expedient***

On their part, the 1st and 2nd Respondents filed a Preliminary Objection dated 26th November, 2021; and their Memorandum of Response dated 26th November, 2021 and all filed on even date, through the firm of Wasuna & Company Advocates.

The Preliminary Objection

In their Preliminary Objection dated 26th November 2021 and filed with the Board on even date, the 1st and 2nd Respondents raised the following grounds:-

Ground 1: The subject matter is outside the jurisdiction of the Board

The 1st and 2nd Respondents aver that the Request for Review does not, on its face, disclose a tendering or asset disposal dispute but relates to enforcement of a contract, and is clearly outside the jurisdiction of the Board under section 28 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act").

Ground 2: The Applicant lacks locus standi

The 1st and 2nd Respondents submit that The Applicant in the Request for Review is neither a tenderer nor a candidate within the meaning of section 167 of the Act, 2015, the tender submission having closed on 5th November 2021 and the Applicant did not submit its bid.

Ground 3: The subject matter is currently pending before the High Court and substantively before an arbitral tribunal

The 1st and 2nd Respondents aver that the subject matter of the Request for Review is currently being canvassed before an arbitral tribunal under the Arbitration Act, which tribunal was appointed on the application of the Applicant herein. The 1st and 2nd Respondents further aver that the Applicant has also made an application before the High Court at Nairobi over the same subject matter. The Respondents thus state that the Request for Review amounts to forum shopping and that the Board lacks jurisdiction to entertain it in the circumstances.

SUBMISSIONS

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.

None of the parties filed submissions.

BOARD'S DECISION

The Board has considered each party's case, the pleadings and the confidential documents submitted by the Procuring Entity pursuant to section 67(3) (e) of the Act and frames the issues for determination as follows;

- (I) Whether the 1st and 2nd Respondent's Notice of Preliminary Objection dated 26th November 2021 has merit***

Depending on the outcome of the first issue;

- (II) Whether the reliefs sought by the Applicant should issue***

Issue 1: Whether the Preliminary Objection has merit.

The Board will determine each ground of the Preliminary Objection in turn.

Ground 1 of the Preliminary Objection: enforcement of a contract

Under the first ground for the Preliminary Objection, the Respondents contend that the Request for Review relates to enforcement of a contract that falls outside the jurisdiction of the Board under section 28 of the Act.

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 behooves upon this 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 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 of the Act which states in part as follows 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 review of procurement proceedings under subsection (1)***
 - a. ...***
 - b. ...***

c. Where a contract has been signed in accordance with section 135 of this Act.

Section 28 of the Act states as follows

28 Functions and powers of the Review Board

28(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.”

The Applicant submits that on or about 21st October 2021, the 1st and 2nd Respondents advertised an open tender inviting bidders to apply for tender for the proposed construction of Ultra-Modern Kisumu County Assembly Chambers, Offices and Associated Works – Tender No. CAK/OT/UMCAC/10/2020- 2021/02-IFMIS Negotiation No. 898999.

After perusing through the said tender documents, the Applicant noted that the tender is similar to the Contract dated 14th October 2014 entered with the 1st and 2nd Respondents for construction and completion of County Assembly building to be located at located at Milimani Area off Kolobot Road- Kisumu for a contract sum of Kshs. 750,000,000/=.

The Applicant further submits that after signing the contract, it committed itself by entering into various collateral agreements with financiers, suppliers and insurers to secure performance bond, Contractors All Risk Policy, equipment and machinery as well as skilled and/or necessary

labour, and has so far incurred losses and expenses amounting to Kshs. 236,668,863.55/=. The Applicant added that, to date, the 1st and 2nd Respondents have neither provided the construction site nor responded to myriad correspondence sent to them by the Applicant over the subject matter.

The Applicant further states that demand for an amicable resolution of the dispute was ignored by the Respondents, and the Applicant invoked Clause 37 of the Contract dated 14th October 2014 and referred the matter to Arbitration, which proceedings are still pending before Mr. Tom Oketch, appointed by the Architectural Association of Kenya.

The Applicant added that prior to the present tendering process commenced on 21st October 2021, the 1st and 2nd Respondents had also called for tenders for the same proposed construction project vide a newspaper advertisement contained at Page 6 of the Daily Nation of 2nd July, 2021.

The Applicant further avers that after seeing the advertisement of 2nd July 2021, it (Applicant) sought interim orders of protection in ***Milimani HCCC No. E696/2021; Dinesh Construction Limited –v- County Assembly of Kisumu***, which proceedings are still ongoing.

An analysis of the pleadings by the Board filed herein reveals that there were three sets of tender proceedings as follows:

- a. An advertisement which resulted into a contract dated 14th October 2014 entered between the Applicant the 1st and 2nd

Respondents for construction and completion of County Assembly (hereinafter referred to as "the 2014 contract). The 2014 contract is the subject of a dispute between the Applicant and the Respondents which has been referred to arbitration.

- b. An advertisement dated 2nd July, 2021 for the proposed construction of Ultra-modern Kisumu County Assembly Chambers, Offices and Associated works (hereinafter referred to as "the July 2021 advertisement). Neither the Applicant nor the Respondents informed the Board of the fate of the July 2021 advertisement but it appears that the tender proceedings relating to that advertisement did not result in any award. Proceedings relating to this advertisement are pending before the High Court.
- c. An advertisement 21st October 2021, for the proposed construction of Ultra-Modern Kisumu County Assembly Chambers, Offices and Associated Works – Tender No. CAK/OT/UMCAC/10/2020- 2021/02-IFMIS Negotiation No. 898999 (hereinafter referred to as the October 2021 advertisement).

The crux of the Applicant's case is that the Procuring Entity has failed to implement the 2014 contract and should not have advertised for the same tender vide the July 2021 and October 2021 advertisements.

Both the Applicant and the Respondent submitted a copy of 2014 contract. It is thus not disputed that a contract was entered between the parties. This Board's jurisdiction is divested after a contract is entered. This is made clear by section 167(4) of the Act the provisions of which are reproduced above. Similar provisions existed under section 93(2) of the 2005 Act which was applicable at the time when the 2014 contract was entered into. Rule 8 of the Third Schedule to the Act which has transitional provisions states that parts III and XV of the Act (under which section 167 falls) shall apply with necessary modifications to procurement proceedings commenced before the commencement date of the Act. Considering all these provisions, the Board has no jurisdiction to entertain any matters arising from the 2014 contract.

Section 28 of the Act also makes it clear that the adjudicating function of the Board relates to the tendering and asset disposal disputes. Contractual disputes fall outside the purview of the Board's jurisdiction. Contractual disputes are to be determined under the mechanism set out in the contract in question. In this case, both parties have indicated and the Board has confirmed from the papers filed herein, that a dispute arising from the 2014 contract has been referred to arbitration in accordance with the terms of the agreement.

One of the prayers sought by the Applicant is for;

"A ORDER be and is hereby issued directing the 1st and 2nd Respondents herein to fully implement the Contract dated 14th October 2014 for construction and completion of County Assembly building to be located at Milimani Area off

Kolobot Road- Kisumu at agreed sum of Kshs. 750,000,000/= to its logical conclusion

The foregoing is not an order the Board can grant. It has no jurisdiction to do so. Accordingly, the Board lacks jurisdiction to the extent that the Applicant seeks orders relating to the 2014 contract. The first ground of the Respondent's preliminary objection is thus upheld.

Ground 2 of the Preliminary Objection on locus standi

The Respondents contend that the Applicant has no *locus standi* on the basis that it is neither a tenderer nor a candidate within the meaning of section 167 of the Act, 2015, the tender submission having closed on 5th November 2021 and the Applicant did not submit its bid.

The Board notes that the Applicant states at Ground 3 of its Request for Review, that, it obtained the tender documents on 4th November 2021 by downloading the same from the 2nd Respondent's website (www.kisumuassembly.go.ke) for free as per the instructions on the Tender Notice.

The Board notes that the Respondents aver that the current subject tender was floated to the public and that the tender closed on 5th November, 2021. The Respondents have further produced a copy of the Tender Notice which indicates as follows:-

"The tender documents are downloadable free of charge from the County Assembly of Kisumu website: www.kisumuassembly.go.ke or IFMIS Supplier portal"

Section 167(1) of the Act which provides as follows:-

"167(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."

Further section 2 of the Act defines a candidate and a 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;"

It is not in dispute that the Applicant did not submit a tender and is thus not a tenderer. The list of tenders who submitted tenders are set out in the introductory parts of this decision.

The Applicant however has exhibited the Tender Document as exhibit DB-10 which it says it downloaded from the Procuring Entity. The Applicant avers at paragraph 22 of the Request for Review that it is thus a candidate within the meaning of section 167 (1) of the Act. Based on this and

considering that the Procuring Entity did not specifically controvert the said averment at paragraph 22 of the Request for Review, the Board concludes that the Applicant is a candidate. The second ground of the preliminary objection accordingly fails.

Ground 3 of the Preliminary Objection on pending proceedings before an arbitral tribunal and High Court.

The Respondents contend that the Board lacks jurisdiction since the subject matter is currently pending before the High Court and substantively before an arbitral tribunal and that the Request for Review amounts to forum shopping.

As noted above, what is pending under arbitration is the dispute arising from the 2014 contract.

The Board notes from the pleadings filed herein that the proceedings pending before the High Court in ***Milimani HCCC No. E696/2021; Dinesh Construction Limited –v- County Assembly of Kisumu*** relate to both the 2014 contract and the July 2021 advertisement.

As such, the October 2021 advertisement has not been raised in the arbitration nor the High Court. In principle therefore, the Board is not barred from addressing matters arising from the October 2021 advertisement if the grounds upon which the advertisement is impugned are matters which the Board can handle. A scrutiny of the grounds upon which the October 2021 advertisement is challenged, however,

demonstrates that the grounds relate to the 2014 contract upon which the Board has found that it has no jurisdiction.

For instance, the Applicant relies on Section 135 of the Act as read together with Article 227 of the Constitution, and aver that once a contract has been entered by the procuring entity with another party for provision of goods and/or services, legal obligations arise as between parties therein and no similar tender/contract can be entertained.

The Applicant further avers that the decision of the 1st and 2nd Respondents to call for tenders in total disregard to the 2014 contract with the Applicant is contrary to the procurement laws and procedures as follows:

- a. Calling for tenders in relation to construction works already awarded to the Applicant in 14th October 2014.
- b. Failing to promote the national values and principles provided for under Article 10 of the Constitution.
- c. Failing to promote equality and freedom from discrimination as provided for under Article 227 of the Constitution.
- d. Refusing to adhere to principles of integrity under the Leadership and Integrity Act, 2012.
- e. Refusing to promote principles governing the procurement profession, international norms.
- f. Failing to maximize value for money.
- g. Failing to promote of citizen contractors
- h. Casting doubt on the integrity of the entire process and exposing procurement proceedings to ridicule and loss of public confidence.

The Applicant further added that the Respondent's decision to call for tenders despite having awarded the Applicant the same contract in 2014 offends the spirit of the Public Procurement and Asset Disposal Act 2015 and does not conform to the requirements of the Constitution of Kenya 2010.

It is clear from the above grounds that the challenge against the October 2021 advertisement cannot be divorced from the 2014 contract. As such, the Board is not able to address any of these grounds for the reasons set out above.

Issue II: Whether the reliefs sought by the Applicant should issue

Given the Board's findings and conclusion on the first issue for determination, it is not necessary to deal with the second issue for determination.

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

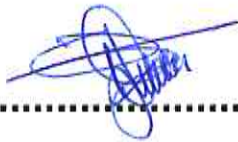
In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review: -

1. The Applicant's Request for Review lodged on 18th November 2021 is hereby dismissed.
2. Each party shall bear its own costs in the Request for Review.

Dated at Nairobi, this 8th Day of December 2021


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CHAIRPERSON
PPARB


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SECRETARY
PPARB