

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 48/2021 OF 6TH APRIL 2021

BETWEEN

FAHIMYASIN COMPANY LIMITEDAPPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA URBAN ROADS AUTHORITY.....1ST RESPONDENT

KENYA URBAN ROADS AUTHORITY.....2ND RESPONDENT

AND

DELESFREE COMPANY LIMITEDINTERESTED PARTY

Review against the decision of Kenya Urban Roads Authority in respect of Tender No. KURA/RMLF/SR/149/2020-2021 for Labour Based Works for Construction of Walkways in Kaptembwo Area in Nakuru Town-Lot 20 (Youth Category)

BOARD MEMBERS

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|------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Paul Jilani | -Member |
| 3. Qs. Hussein Were | -Member |
| 4. Mr. Nicholas Mruttu | -Member |
| 5. Mrs. Njeri Onyango | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Philemon Kiprop | -Holding brief for the Acting Board Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Kenya Urban Roads Authority (hereinafter referred to as “the Procuring Entity”) invited sealed bids from tenderers to demonstrate their technical and financial competence in providing services to the Procuring Entity in respect of Tender No. KURA/RMLF/SR/149/2020-2021/ Labor Based Works for Construction of Walkways in Kaptembwo Area in Nakuru Town-Lot 20 (youth category) (hereinafter referred to as “the subject tender”). To that end, the Procuring Entity published an advertisement in MyGov Newspaper, its Website (www.kura.go.ke) and the Public Procurement Information Portal www.tenders.go.ke) on 26th January 2021.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of fourteen (14) bids by the bid submission deadline of 11th February 2021. The same were opened shortly thereafter by a Tender Opening Committee at the Procuring Entity’s Procurement Conference Hall and recorded as follows: -

Bid der no.	Name of Bidder	Tender Price/ Amount	Number of Copies Provided	Number of pages
1.	M/s Jamsar Impression Limited	20,699,040.00	1 Copy	290
2.	M/s Bomalink Solutions Limited	22,499,568.80	1 Copy	372
3	M/s Winwin Limited	20,642,780.00	1 Copy	254
4	M/s Built Environment Maintenance	16,725,344.00	1 Copy	300
5	M/s Eminence construction Maintenance	20,095,236.00	1 copy	266

Bid der no.	Name of Bidder	Tender Price/ Amount	Number of Copies Provided	Number of pages
6	M/s Mwovas Constructors Co. Limited	22,,472,332.00	1 Copy	430
7	M/s Lexah Holdings Limited	21,613,146.00	1 copy	304
8	Fahimyasin company Limited	17,505,156.00	1 Copy	263
9	Rollings Kenya Limited	21,025,928.00	1 Copy	322
10	Delsfree Company Limited	19,574,802.80	1 Copy	270
11	Malvex Kenya Limited	19,368,984.00	1 Copy	293
12	Stedma Company Limited	20,893,688.00	1 Copy	351
13	Blue Pacific Agency	20,190,496.00	1 Copy	225
14	Eduna East Africa Limited	20,738,596.00	! copy	356

Evaluation of Bids

Having appointed an Evaluation Committee, evaluation of bids in the subject tender was done in the following three stages: -

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

Preliminary Evaluation/Completeness and Responsiveness

At this stage, the Evaluation Committee applied the criterion outlined in Clause 28 of the Appendix to Instructions to Tenderers of the Tender Document at page 15 of the Blank Tender Document and found four bidders to be responsive [M/s Jamsar Impression limited, M/s Winwin Limited, M/s Delsfree company Limited & M/s Eduna East Africa Limited] and thus proceeded to Technical Evaluation.

Technical Evaluation

At this stage, the Evaluation Committee applied the criterion outlined in Clause 31 of the Appendix to Instructions to Tenderers at page 16 of the Tender Document, which was evaluated on YES/NO basis in all the measured parameters checked in the Technical Evaluation. At the end of Technical Evaluation, it is only M/s Delsfree Company Limited and M/s Eduna E.A limited who were responsive and thus eligible to proceed to Financial Evaluation.

Financial Evaluation

At this stage, the Evaluation Committee undertook a comparison of prices quoted by bidders to determine the lowest evaluated tenders. At the end of this stage, Bidder No.10 (Delsfree Company Limited) was found to have submitted the lowest evaluated bid.

Due Diligence

Due diligence was conducted on Bidder No.10 (Delsfree Company Limited) as per the tender notice and as per section 83(1) of the Public Procurement and Assets Disposal Act, 2015 herein after referred to as the Act indicating previous work experience. Bidder No. 10 was found to be competitive in all parameters considered.

Recommendation

The Evaluation Committee recommended award of the subject tender M/s Delsfree Company Limited at the Tender Sum of Kshs. 19,574,802.80

(Nineteen Million Five Hundred and Seventy Four Thousand Eight Hundred and Two shillings Eighty Cents Only) being the lowest evaluated bidder.

Professional Opinion

In a Professional Opinion dated 2nd March 2021, the Procuring Entity's Deputy Director (Supply Chain Management) reviewed the subject procurement process and expressed his satisfaction that the same met the requirements of the Act read together with Article 227 of the Constitution. He therefore urged the Procuring Entity's Director General to consider awarding the subject tender to M/s Delsfree Company Limited for being the lowest evaluated tenderer as recommended by the Evaluation Committee. The said professional opinion was approved on 8th March 2021.

Notification to Tenderers

In letters dated 15th March 2021, the Procuring Entity notified the successful tenderer and all other unsuccessful tenderers of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Fahimyasini Company Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 6th April 2021 and filed on the same day together with a Statement in Support of the Request for Review sworn and filed on 6th April 2021, through the firm of MAO Advocates LLP, seeking the following orders: -

- a. An order setting aside and/or nullifying the Procuring Entity's decision dated 15th March 2021 awarding TENDER NO. KURA/RMLF/SR/149/2020-2021 FRO LABOUR BASED***

WORKS FOR CONSTRUCTION OF WALKWAYS IN KIPTEMBWO AREA IN NAKURU TOWN-LOT 20 to M/s Delsfree Company Limited

- b. An order directing the Procuring Entity to negotiate and sign a contract with the Applicant in accordance with the tender and the decision of the Board***
- c. An order directing the Respondent to undertake fresh evaluation of all bids received in strict adherence to the tender, the Act and the Regulations and award TENDER NO. KURA/RMLF/SR/149/2020-2021 FRO LABOUR BASED WORKS FOR CONSTRUCTION OF WALKWAYS IN KIPTEMBWO AREA IN NAKURU TOWN-LOT 20 to the bidder with the most responsive bid.***
- d. An order awarding the Applicant the costs for this review application.***

In response, the 1st and 2nd Respondents lodged a Memorandum of Response to the Request for Review, dated 9th April 2021 and filed on 13th April 2021 through Peter Ogamba Bosire Advocate.

The Interested Party lodged a Notice of Preliminary Objection dated 16th April 2021 together with a Statement of Response dated 21st April and filed on even date through Abdirazak & Co. advocates. The Interested Party's Preliminary Objection raised the following grounds: -

- (1) The Application is afoul of the requirements of section 170 of the Public Procurement and Assets Disposal Act for failure to enjoin the successful tenderer to the Application.***

- (2) The Application is incompetent and defective since the Honourable Board cannot make any adverse orders against the successful tenderer where the same is not a party to the Review Application***
- (3) The failure to add the successful tender M/s Delsfree Company Limited was an egregious omission on the part of the Applicant which ousts the Honourable Boards jurisdiction to issue any adverse orders against a party that is not before it that will not have been heard.***

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority's website (www.ppra.go.ke) in recognition of the challenges posed by Covid-19 pandemic. Through the said Circular, the Board instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the pandemic.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications would 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 lodged written submissions dated 23th April 2021 and filed on 26th April 2021. The Respondents and the Interested Party did not file written submissions.

BOARD'S DECISION

The Board has considered parties' pleadings including confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and finds that the following issues call for determination: -

I. Whether the Request for Review is fatally defective as a result of the Applicant's failure to join the successful bidder as a party to the Request for Review, thus divesting the Board of jurisdiction.

Depending on the outcome of the first issue: -

II. Whether the Board has jurisdiction to determine the following grounds as raised at paragraph 19 of the Request for Review :

a) Whether the Procuring Entity's form of written power of attorney found under schedule 2 section XI: schedules of supplementary information meets Section 70 (3) of the Act

Depending on the outcome of the second issue: -

3. Whether the procuring Entity evaluated the Applicants bid at the preliminary evaluation stage in accordance with table 1. Prequalification checklist for completeness and responsiveness found in the appendix to instruction

to tenderers of the tender document in respect of Clause (2), (3), (4), (5), (10), (13), (17), (18), (19), (21), (21) and (22) thereof read together with section 80(2) of the Act

Depending on the outcome of the third issue: -

4. Whether the Applicant suffered prejudice by the Procuring Entity's action of notifying the Applicant of the outcome of its bid on 22nd March 2021 vide a letter dated 15th March 2021

Depending on the outcome of the fourth issue: -

5. Whether the Procuring Entity awarded subject tender to M/s Delsfree Company Limited in accordance to the Award criteria specified in the Tender Document

The Board now proceed to address the above issues as follows: -

At paragraph 3 of the Interested Party's Notice of Preliminary Objection, they state that: -

"3 .The failure to add the successful tender M/s Delsfree Company Limited was an egregious omission on the part of the applicant which ousts the Honourable Boards Jurisdiction to issue any adverse orders against a party not before it that will not have been heard"

On the first issue framed for determination, the Board would like to point out that once a jurisdictional issue is raised before a court or a decision making

body, it must be addressed at the earliest opportune moment. It therefore behooves upon this Board to determine whether it has the jurisdiction to entertain the Request for Review filed by the Applicant.

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the celebrated case of **The Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**, Justice Nyarangi (as he then was), stated as follows:-

"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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

In the case of **Kakuta Maimai Hamisi v. Peris Pesi Tobiko & 2 Others (2013) eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus:-

"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. "

Similarly, in the case of **Samuel Macharia and Another v. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** the Supreme Court held that:-

"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."

A determination of this issue falls squarely on interpretation of section 170 of the Act which states as follows: -

"The parties to a review shall be—

(a) The person who requested the review;

(b) The accounting officer of a procuring entity;

(c) The tenderer notified as successful by the procuring entity; and

(d) Such other persons as the Review Board may determine."

The import of section 170 (c) of the Act was the subject of interpretation by the High Court in **Judicial Review No. 21 of 2019, Republic v. Public Procurement Administrative Review Board v. Kenya Ports Authority & Another ex parte Jalaram Industrial Suppliers Limited (2019)**

eKLR (hereinafter referred to as "JR No. 21/ 2019") where it was held as follows:-

"The requirement that the accounting officer and the successful tenderer to be made parties to a request for review is both statutory and mandatory. Section 170 is couched in mandatory and express terms. It was therefore not open to the Interested Party to pick and choose against which party to file the Request for Review. In the present case, the Interested Party failed to enjoin both the accounting officer of the procuring entity and the successful tenderer as required by law. The Ex Parte Applicants therefore raised the PO challenging this omission.

It is well settled that parties form an integral part of the trial process and if any mandatory party listed in Section 170 of the Act is omitted in proceedings then a request for review cannot be sustained. Failure to comply with these express provisions rendered the Request for Review filed by the Interested Party incompetent. No Court or tribunal has jurisdiction to entertain an incompetent claim brought before it...

In the instant case, the Request for Review was incompetent from inception for failure to enjoin mandatory parties. An incompetent request for review is for striking out and cannot be cured by amendment...

In the circumstances, the Court is satisfied that the Respondent acted ultra vires the jurisdiction conferred upon it by the Act”

However, the High Court in **Judicial Review Miscellaneous Application No. 356 & 362 of 2015 (Consolidated) Republic v. Public Procurement Administrative Review Board & 2 Others ex parte MIG International Limited & another (2016) eKLR** (hereinafter referred to as “JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015”) took a different position while interpreting section 96 (c) of the Public Procurement Assets and Disposal Act, 2006 (hereinafter the repealed Act) [now section 170 (c) of the Act] and held that:-

“On the face of the Request for Review, it is clear that there were only two parties to the application and these were the interested party [i.e. the Applicant) and the procuring entity. Clearly therefore, the Request fell afoul of section 96 of the Public Procurement and Disposal Act (i.e. section 170 of the 2015 Act). It is however clear that the applicants were made aware of the said application. The law, as I understand it, is that Rules of procedure are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it and where it is evident that a party has attempted to comply with the rules but has fallen short of the prescribed standards, it would be to elevate form and procedure to fetish to strike

out the proceedings. Deviations from, or lapses in form and procedure, which do not go to jurisdiction of the court or prejudice the adverse party in any fundamental respect, it has been held, ought not to be treated as nullifying the legal instruments thus affected. In those instances, the court should rise to its calling to do justice by saving the proceedings in issue. See Microsoft Corporation vs. Mitsumi Garage Ltd & another Nairobi HCCC No. 810 of 2001; [2001] 2 EA 460.

In Boyes vs. Gathure [1969] EA 385, it was held by Sir Charles Newbold, P that:

"Using an incorrect form of procedure which has, in fact, brought the parties before the court and has, in fact, enabled the parties to present their respective cases to the court is not an incorrect act of such a fundamental nature that it should be treated as if it, and everything consequent upon it, did not exist and never had existed."

It is therefore my view that the mere fact that the interested party did not make the applicants [i.e. successful bidders] parties to the Request for Review as mandated under the law does not render those proceedings fatally incompetent.

The two cases cited above were both entertained by the High Court. It is evident that the High Court in JR. Miscellaneous Application No. 356 & 362

(Consolidated) of 2015 and in JR No. 21/2019 took different positions regarding joinder of parties in a Request for Review.

Notably, the court in **Petition No. 288 of 2015, Okiya Omtatah Okiiti & another v Attorney General & 2 others [2015] eKLR** (hereinafter referred to as "Petition No. 288 of 2015") held that:-

"Based on the principle of stare decisis and by virtue of the Supreme Court being at the apex in the hierarchy of the Kenyan court system its decision is binding on this Court in so far as similar matters are concerned. A court must strictly follow the decisions handed down by higher courts within the same jurisdiction.

The circumstances in which a Court may decline to follow a decision which would otherwise be binding on it are limited to (a) where there are conflicting previous decisions of the court; or (b), the previous decision is inconsistent with a decision of another court binding on the court; or (c) the previous decision was given per incuriam."

From the above finding in Petition No. 288 of 2015, and noting the different decisions by the High Court in JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015 and JR No. 21/2019, it is the Board's considered view there is need for the Board to consider the circumstances in the instant review in order to make a determination whether or not to strike out the Request for Review for failure to join the Successful Bidder.

In that regard, the Board studied the decisions of the High Court in JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015 and JR No. 21/2019 in comparison with the circumstances of the instant review application and proceeds to make the following observations:-

In JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015, firstly, the Court noted that the successful bidder had been notified by the Board of the existence of the Request for Review. Secondly, that the successful bidder was present on the hearing date, but contended that other pleadings attached to the Request for Review had not been furnished to it. Thirdly, the Court noted that the successful bidder sought an adjournment in order to study the pleadings filed by the applicant in that case and considered that the successful bidder intimated it was ready to proceed with the hearing thus did not suffer prejudice by the applicant's failure to strictly comply with section 96 (c) of the repealed Act [which is now section 170 (c)] of the Act.

Accordingly, the Court in JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015 found the Request for Review therein was not fatally defective for the applicant's failure to join the successful bidder as a party to the Request for Review because the successful bidder had fully participated in the review proceedings and suffered no prejudice.

The Court in JR No. 21/2019 found the failure by the Applicant to join the successful bidders to its Request for Review was fatal, since none of the successful bidders participated in the proceedings before the Board.

The Board would like to note that the mischief that section 170 (c) of the Act intends to cure is to avoid instances where a Request for Review is heard and determined by the Board in the absence of a successful bidder who was neither joined as a party to the Request for Review nor notified of the filing and hearing thereof. Later on, the successful bidder learns that a decision was made by the Board, which decision may have adversely affected the award made to the successful bidder.

In those instances, the failure by an aggrieved Applicant to join a successful bidder, or the failure to notify the successful bidder of the hearing interferes with the successful bidder's right to a fair hearing who later learns that a decision was made against its award. The right to a fair hearing is a principle of natural justice recognized under Article 50 of the Constitution which states as follows:-

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

Further, Article 47 of the Constitution which deals with fair administrative action provides the following: -

"47. (1) every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the

right to be given written reasons for the action. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall— (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration”

The successful bidder’s right to a fair hearing (under Article 50) and right to fair administrative action (under Article 47) has not been affected in the instant Request for Review, noting that the purpose of section 170 (c) of the Act has been achieved as evidenced by the successful bidder’s participation in this Request for Review through filing of its pleadings, that is a Notice of Appointment of the firm of Abdirazak and Co. Advocates dated 16th April 2021 and filed on the same date; (b) Notice of Preliminary Objection dated 16th April 2021 and filed on even date and (c) Interested Party’s Statement of Response dated 16th April 2021 and filed on 21st April 2021.

Accordingly, it is the Board’s finding that the Applicant’s failure to join the successful bidder to this Request for Review does not make the review application fatally incompetent in this instance where the successful bidder has actively participated in these review proceedings, thereby exercising its right to fair administrative action and right to a fair hearing under Article 47 and 50 of the Constitution, respectively. Consequently, the Board has jurisdiction to determine the other issues framed for determination.

The Board observes that the Applicant in its Request for Review in part (c) stated:-

"failure to provide sufficient information to allow for fair competition which violates section 70 (3) of the Public Procurement and Assets Disposal Act and failure to invoke section 79(2) of the Public Procurement and Assets Disposal Act on minor error can be collected or overlooked."

Section 70 (3) of the Act states the following:-

"The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders."

The Applicant is seeking to challenge certain provisions of the Tender Document as seen in part c of its Request for Review that the provisions are not proper in law in that they did not provide sufficient information to allow for fair competition.

In the Applicant's view, this led to an evaluation that was flawed because the Respondent applied provisions not proper in law.

In response, the Respondents stated at paragraph 31, 32 and 33 of the Procuring Entity's Memorandum of Response that:-

"31. Additionally, the procuring entity states that the Applicant's bid was non-responsive to the stage 1 requirements of the tender and therefore could not have been evaluated further, as the Applicant's bid was not in conformity with section 79 (1) of the Public Procurement and Asset Disposal Act, 2015 as read with Regulations 74

of the Public Procurement and Asset Disposal Regulations, 2020.

32. in further response, the Procuring Entity states that for a bidder to be awarded a tender, it is mandatory that they pass the preliminary , technical and financial evaluation stages in accordance with the requirements of an evaluation process provided for in the Procurement law and its Attendant Regulations in particular sections 55,79 and 80 of the Public Procurement and Asset Disposal Act,2015 and Regulations 32,74,75,76 and 77 of the Public procurement and Asset Disposal Regulations,2020. Further, the procuring Entity affirms that the Applicant did not meet the above requirements hence disqualified at the preliminary stage. On the other hand, M/s Delsfree Company Limited met all the requirements of the evaluation process stipulated in the Procurement Law and its attendant Regulations. Thus merited the award of the tender pursuant to section 86 (1) (a) of the Public Procurement and Assets Disposal Act, 2015 which provides "that the successful tender shall be the one that objectively emerges as the lowest EVALUATED price.

33. In further response, the Procuring Entity avers that the award to m/s Delsfree Company Limited was in accordance with section 86(1) (a) of the Public Procurement and Assets Disposal Act, 2015. The Procuring Entity denies that the Applicant was in compliance of section 80 (3) of the Public

Procurement and Asset Disposal Act, 2015. The Procuring Entity avers that it conducted the Procurement in accordance with the Constitution, Procurement laws and Regulations, Requirement of the Tender Notice and Tender Document and in accordance with a system that is fair, equitable, transparent, competitive and cost effective. ”

In the Respondents' view, if the Applicant was not satisfied by the technical evaluation criteria, it ought to have sought clarification from the Procuring Entity. In the absence of any clarification, it is the Respondents' view that any complaint raised before this Board is time barred pursuant to section 167 (1) of the Act.

In addressing this issue, the Board observes that one of the scenarios provided in section 167 (1) of the Act read together with Regulation 203 (2) (c) of Regulations 2020 within which a request for review can be filed is fourteen days from the date of occurrence of a breach complained of where the request is made before the making of an award.

With that in mind, the Board observes that the statutory timeline provided under section 167 (1) of the Act provides an opportunity within which an aggrieved candidate or tenderer may exercise its right to administrative review challenging a breach of duty by a procuring entity as soon as the breach occurs so that once the Board dispenses with a review application, the procurement process can proceed to its logical conclusion for the public good.

This Board has noted the rising number of bidders who abuse the options under section 167 (1) of the Act, whereby they learn of an alleged breach of duty during the early stages of a procurement process but wait for the outcome of their bids, and if such outcome is not favourable, they feel motivated to file a case against a procuring entity, raising complaints that could have been raised at any stage before evaluation is concluded. If the outcome of their bids is favourable, such applicants never raise any alleged breaches they might have identified at any stage of a procurement process or disposal process.

The Applicant participated in the subject procurement process by submitting a tender by the tender submission deadline of 11th February 2021 without challenging those technical specifications in a request for review filed before this Board as opposed to participating in the procurement process.

The Applicant could have approached the Board within fourteen days after the tender submission deadline raising an allegation that the Tender Documents did not meet the provisions of the law.

Had it been awarded the subject tender, the Board is persuaded that the Applicant would not raise any complaint with the Tender Document. The Applicant participated in the subject procurement process, waited patiently for the outcome of its bid and is now challenging the Tender Document, so late in the day after sleeping on its right to seek administrative review.

Having established that this ground is time barred, the Board finds that it lacks jurisdiction to entertain the Applicant's allegation that the Procuring Entity's form of written power of attorney found under schedule 2 section

XI: schedules of supplementary information does not satisfy Section 70 (3) of the Act

The Board will now address the third issue as follows. The Notification letter from the Procuring Entity to the Applicant dated 15th March 2021 stated the following:-

“Dear Sir/Madam,

RE: LABOUR BASED WORKS FOR CONSTRUCTION OF WALKWAYS IN KAPTEMBWO AREA IN NAKURU TOWN LOT 20 (YOUTH CARTEGORY)

NOTIFICATION OF REGRET

Your bid for the above mentioned tender refers.

Pursuant to the provisions of section 87 (3) of the Public Procurement and Asset Disposal Act, 2015, this is to notify you that Kenya Urban Roads Authority has finalized processing of the above Tender and your bid was unsuccessful due to the reasons stated below.

- *Signatory has no Power of Attorney*
- *Appendix to form of bid signatory has no Power of Attorney*
- *Bid securing declaration form signatory had no Power of Attorney*
- *Signatory to Confidential Business Questionnaire has no Power of Attorney*

- ***Prices BOQ not signed/initialized***
- ***Signatory to debarment form has no Power of Attorney***
- ***Certificate of tenderers visit to site not signed/filled by the bidder as indicated in the Tender Notice***
- ***Schedule of major Items of Plant was not fully filled as required.***
- ***Schedule of key personnel signatory has no Power of Attorney contrary to section II clause 5.1 (a) of the bid document***
- ***Schedule of completed works form signatory has no Power of attorney contrary to section II Clause 5.1 (a)***
- ***Schedule of ongoing projects signatory has no power of attorney***
- ***Schedule of other supplementary information not fully filled contrary to mandatory requirement provided in the tender notice item 3.1 of QC; section; schedule 8.***
- ***Schedule of other supplementary form was not fully filled***

The tender was awarded to M/S DELSFREE COMPANY LTD P.O BOX 10298-30100 ELDORET at the Tender sum of Kshs. 19,574,802.80 (Kenya Shillings Nineteen Million Five Hundred Seventy Four Thousand Eight Hundred two eighty cents) having satisfied the conditions of responsiveness, technical and financial evaluation, and being the lowest evaluated bidder.”

From the above notification letter the Board observes that the listed reasons deal with one vital document that is the Power of Attorney.

From its Request for Review, the Applicant states that,

“11. The sole reason for rejection of the Applicant’s bid other than the repetition in the notification of regret is, “signatory had no power of attorney.” This is contrary to the overwhelming evidence that the signatory had the authority from the bidder to sign the documents on its behalf.

12. First, at page 123 of the bid, titled “securing declaration form” at the bottom of the page it indicates as follows:

(i) “signed by Director (insert legal Capacity of the person signing the Bid Securing the Declaration.”

(ii) It goes on to state, “Name Yasin Jaldesa (insert the name of the person signing the Bid Security Declaration)

(iii) It further states, “Duly authorized to sign the bid for and on behalf of Fahimyasyn Company Limited (insert complete name of the Bidder)

(iv) Then it is stamped with the company stamp as a show of the assent of the authority by the company.

13. From the above exposition, it is clear the company had designated Yasin Jaldesa as its authorized officer with the

power to sign the bid Documents. Therefore, the contention that the document was signed by a person without power of attorney is not true.....”

Clause 5 under table 1 in the Appendix to Instructions to tenderers instructed bidders to properly fill, stamp and sign a Power of attorney and attach the same in their bids. At section II Instruction to Tenderers and conditions of Tender in the Blank tender, at Clause 5 Qualifications of the Bidder;

”5.1 Bidders shall as part of their bid:

- (a) Submit a written power of attorney authorizing the signatory of the bid to commit the bidder and***
- (b) Update any information submitted with the bids and update in any case the information indicated in the schedules and continue to meet the minimum threshold criteria set out in the bid document”***

In the Procuring Entity’s Memorandum of response at paragraph 27 it states that, ***”in reply to paragraph 11-16 (inclusive) of the Request for Review, the Procuring Entity states that the Requirement of a Power of Attorney was express and mandatory, as the Authority to sign for the bidder cannot be inferred as a matter of law.***

28. In reply to paragraphs 17-21 of the Request for Review, the Procuring Entity further avers that the Concept, use/ importance and application of the Power of Attorney are universal and well known or ought to have been known to the Applicant, and as such, omitting it was grave and fatal”

From the foregoing, The Power of Attorney was a mandatory requirement and a criterion for evaluation. This is evidenced at section II Instruction to Tenderers and conditions of Tender in the Blank tender, at Clause 5 Qualifications of the Bidder. The Applicant did not provide the Power of Attorney in accordance with the criteria and format provided in the Tender Document. Under section 80 (2) the Act states that, "***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.***"

The power of Attorney was a mandatory requirement in the instructions to tenderers which was pegged on several requirements requested by the Procuring Entity hence the reason why the listed areas in the Applicant's letter are on providing a Power of Attorney. The absence of a power of Attorney affected the signing of all documents that were to be signed by a person granted a power of attorney.

Further, the Board studied the Applicant's bid and notes that at page 92 and 181 is a schedule of supplementary information which was not filled, stamped or signed, at page 122 of its original bid, a certificate of bidder's visit to site is attached but with no evidence that the person signing has a power of attorney since none was attached.

In addition, at page 130 of its bid, there is a duly filled schedule of major items of construction plant and equipment with no evidence that the person signing has a power of attorney since none was attached. At pages 252 to 255, the Applicant attached a Bills of Quantities which is stamped and initialed. However, failure to provide any mandatory document at the preliminary Evaluation stage in an evaluation calls for disqualification and it means the Applicant could not proceed to the next level of evaluation.

Accordingly, the Board finds that the Procuring Entity evaluated the Applicant's bids in accordance with section 79 (1) of the Act.

On the fourth issue for determination, the Applicant alleged that the Procuring Entity cleverly dated the Applicant's letter as 15th March 2021 but sent the same to the Applicant on 22nd March 2021. The Procuring Entity on the other hand denies this allegation whilst explaining that the proceeding before the Board were filed within time and that the Applicant was informed of the reasons why its bid was unresponsive.

In addressing this issue the Board observes that section 87 (3) of the Act requires unsuccessful bidders to be notified the same time a successful bidder is notified. The Procuring Entity and the Interested Party did not clarify the date when the Interested Party received its letter of award. On the other hand, there is no Evidence before this Board demonstrating that the Applicant and the Interested Party were not notified at the same time. Notably, all the letters of notification to the successful bidder and unsuccessful bidders are all dated 15th March 2021 meaning they were prepared on the same date. It is also worth noting that having been informed

of the specific reasons why its bid was nonresponsive, the Applicant had the opportunity to challenge those reasons pursuant to section 167 (1) of the Act.

To that end, the Board finds that the Applicant suffered no prejudice as a result of the Procuring Entity preparing letters on 15th March 2021(including that of the Applicant) but furnishing the Applicant with its letter on 22nd March 2021.

The Board addresses the last issue for determination as follows;

On the last issue for determination, the Applicant challenged award of the subject tender to the Interested Party. In the Applicant's view, the Respondents are not achieving value for money by awarding the subject tender to the Interested Party. The Applicant have stated that their bid price was lower than the successful bidder's price by Kshs. 2,000,000/= . This is in the Request for Review from paragraph 4 to 10 thereof.

In response, the Respondents stated at paragraph 33 of the Procuring Entity's Memorandum of Response that M/s Delsfree Company Limited met all the requirements of the evaluation process stipulated in the Procurement law and its attendant Regulations thus merited the award of the tender pursuant to section 86 (1) (a) of the Act, 2015 which provides 'that the successful tender shall be the one that objectively emerges as the lowest EVALUATED price'.

Having considered parties' rival cases, the Board notes that an evaluation committee first determines bidders' responsiveness to eligibility and

mandatory requirements (including technical specifications) before a consideration of price is undertaken at the Financial Evaluation stage so as to arrive at the lowest evaluated tender.

Award of a tender in an open tender is made to a bidder who is substantially responsive to eligibility and mandatory requirements (including technical specifications) and is found to have submitted the lowest evaluated price at the end of Financial Evaluation.

Clause 32.1 of Section II. Instructions to Tenderers of the Tender Document page 18 provided the award criterion as follows: -

"Subject to paragraph 32, the Employer will award the contract to the bidder whose bid has been determined to be substantially responsive to the bidding documents and who has offered the lowest Evaluated Bid price pursuant to clause 29, provided that such bidder has been determined to be (a) eligible in accordance with the provisions of sub-clause 3.1, and (b) qualified in accordance with the provisions of clause 4."

Clause 29 referenced above deals with evaluation of tenders at the Mandatory Requirements (Preliminary Evaluation) stage, Technical Evaluation and Financial Evaluation.

Section 86 (1) (a) of the Act describes a successful tender in an open tender as a tender with the lowest evaluated price. The principle of cost-effectiveness cited in Article 227 (1) of the Constitution is not the only

principle applicable to procurement of goods and services because, state organs and public entities are required to procure for goods and services in a system that is fair, equitable, transparent, competitive and cost-effective. This explains why evaluation of bids is done in stages, so that bidders compete for award of a tender by first demonstrating their responsiveness to eligibility and mandatory requirements (including technical specifications) before a consideration of price is made at the Financial Evaluation Stage.

In the instant case, the Interested Party is the only bidder that advanced to the Financial Evaluation Stage where the Procuring Entity had an obligation of determining the lowest evaluated tender price. In any case, the Applicant was already found nonresponsive at the preliminary evaluation stage as established by the Board. The Interested Party had a tender price of Kshs. 19,574,802.80. It is the Board's considered view that it was correct for the Procuring Entity to award the subject tender to the lowest evaluated tenderer, that is, the interested Party because Clause 32.1 of Section II. Instructions to Tenderers of the Tender Document provided that award shall be made to the lowest evaluated tenderer. This award criterion corresponds to the award criteria in open tenders specified in section 86 (1) (a) of the Act.

To that end, the Board finds that the Procuring Entity awarded the subject tender to the Interested Party as the lowest evaluated tenderer in accordance with the award criteria provided in Clause 32.1 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act.

In totality, the Board dismisses the Request for Review and proceeds to issue the following orders:

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Act, the Board makes the following orders in the Request for Review: -

- 1. The Request for Review filed by the Applicant on 6th April 2021 in respect of Tender No. KURA/RMLF/SR/149/2020-2021 for Labour Based Works for Construction of Walkways in Kaptembwo Area in Nakuru Town Lot 20 (Youth Category) is hereby dismissed.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 26th day of April 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB