

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 111/2021 OF 30TH AUGUST 2021
BETWEEN

ROYAL AUTOMATION SYSTEMS LTD.....APPLICANT
AND
THE ACCOUNTING OFFICER,
KENYA PIPELINE COMPANY LTD.....RESPONDENT

Review against the decision of the Accounting Officer of Kenya Pipeline Company Limited in relation to Tender No. KPC/PU/OT-088/I&C/NBI/20-21 for the Supply Installation and Commissioning of Master Meter Proving Systems.

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Ms. Phyllis Chepkemboi | -Member |
| 3. Mr. Nicholas Mruttu | -Member |
| 4. Mr. Joseph Gitari | -Member |
| 5. Mr. Jackson Awele | -Member |

IN ATTENDANCE

Mr. Philemon Kiprof	-Holding brief for the Acting Board Secretary
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BACKGROUND TO THE DECISION

The Tendering Process

Kenya Pipeline Company Limited (hereinafter referred to as “the Procuring Entity”) invited sealed tenders for Tender No. KPC/PU/OT-088/I&C/NBI/20-21 for the Supply Installation and Commissioning of Master Meter Proving Systems (hereinafter referred to as “the subject tender”) through an advertisement published in MyGov Publication Newspaper and the Procuring Entity’s Website (www.kpc.co.ke) on 12th January 2021.

Addendum and Clarification

Through Clarification No. 1 of 19th April 2021, the Procuring Entity extended the tender submission deadline from 2nd February 2021 to 27th April 2021.

Through Addendum No. 1 of 21st April 2021, the Procuring Entity made clarifications on questions asked by tenderers.

Tender Submission Deadline and Opening of Tenders

The Procuring Entity received a total of four (4) tenders by the revised tender submission deadline of 27th April 2021 at 10.00 am. The tenders were opened by a Tender Opening Committee shortly thereafter in the presence of tenderers’ representatives and the following tenderers were recorded as having submitted their respective tenders:

1. Burhani Ltd;
2. Royal Automations;
3. Enserve Ltd; and
4. Jujulow Forwarders

Evaluation of Tenders

An Evaluation Committee evaluated tenders in three stages, namely:

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

Preliminary Evaluation of Mandatory Requirements

At this stage, the Evaluation Committee evaluated tenders against the criteria outlined in Preliminary/ Mandatory Evaluation Criteria of Section IX: Tender Evaluation Criteria at page 89 and 90 of the Tender Document. At the end of evaluation at this stage, one (1) tender was found non-responsive while three (3) tenders were found responsive thus proceeded to the Technical Evaluation stage. The Applicant's tender was among the three (3) tenders who were found responsive at this stage were.

Technical Evaluation

The Evaluation Committee subjected the aforementioned three (3) tenders to a technical evaluation against the criteria outlined in Technical Evaluation Criteria of Section IX: Tender Evaluation Criteria at page 90 to 95 of the Tender Document. At this stage of evaluation tenders were either compliant or non-compliant. Two (2) tenders were found compliant at this stage of evaluation, thus eligible to proceed to Financial Evaluation. The Applicant's tender was among the two (2) tenders found responsive at this stage of evaluation.

Financial Evaluation

At this stage, the Evaluation Committee evaluated tenders in accordance with the criteria outlined in Financial Evaluation Criteria of Section IX: Tender Evaluation Criteria at page 95 of the Tender Document. At the end of this stage of evaluation, the Applicant's tender was found to be the lowest evaluated tender at a cost of USD 1,638,466.89.

Recommendation

The Evaluation Committee recommended the award of the subject tender to the Applicant at its tender price of USD 1,638,466.89 (US Dollars One Million, Six Hundred and Thirty-Eight Thousand, Four Hundred and Sixty-Six and Eighty-Nine Cents).

Professional Opinion

In a Professional Opinion dated 12th May 2021, the Procuring Entity's General Manager, Supply Chain reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the Evaluation Committee's recommendation on award of the subject tender to the Applicant at its tender price of USD 1,638,466.89 (US Dollars One Million, Six Hundred and Thirty-Eight Thousand, Four Hundred and Sixty-Six and Eighty-Nine Cents). The Accounting Officer approved the Professional Opinion.

Letters of Notification

The Procuring Entity notified all tenderers of the outcome of their respective tenders by letters dated 14th June 2021 and notified the Applicant that it had been awarded the subject tender.

THE REQUEST FOR REVIEW

Royal Automation Systems Limited, (hereinafter "the Applicant") lodged a Request for Review dated 24th August 2021 and filed on 30th August 2021 together with a List of Documents and a Supplementary Affidavit sworn by Gift Wanjofu Juma on 13th September 2021 and filed on 15th September 2021, through Kiriba Kariuki Advocate, seeking the following orders: -

- a. An order directing/compelling the Respondent to execute the Contract;***
- b. An order directing/compelling the Respondent to provide the Applicant with a copy of the duly executed Contract;***
- c. An order for Specific Performance of the Contract against the Respondent;***
- d. An order for costs and interests for the Review; and***
- e. Such other orders and/directions that the Board may deem just and expedient.***

In response, the Respondent filed a Replying Affidavit sworn by Peter Mwangi on 9th September 2021 on 10th September 2021 together with a Background to the Matter under Review dated 9th September 2021.

Vide letters dated 10th September 2021, the Acting Board Secretary notified tenderers in the subject tender of the existence of the Request for Review while inviting them to supply the Board with any information and arguments touching on the subject tender. Further, the Acting Board Secretary furnished all tenderers with the Board's Circular No.2/2020 dated 24th March

2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. None of the tenderers filed a response with the Board.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests for review applications be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

The Applicant filed its written submissions dated 13th September 2021 on 15th September 2021 whilst the Respondent filed its written submissions dated 20th September 2021 on even date.

BOARD'S DECISION

The Board has considered each of the parties' pleadings, written submissions and confidential documents submitted by the Respondent pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the "Act") and finds the following issues call for determination: -

- I. Whether the Request for Review was filed within the statutory period of 14 days of occurrence of alleged breach of duty imposed on the Respondent by this Act in accordance with Section 167(1) of the Act read together with Regulation**

203(2)(c)(iii) of the Public Procurement Asset and Disposal Regulations, 2020 (hereinafter "Regulations 2020") to invoke the jurisdiction of the Board.

Depending on the outcome of the first issue,

II. Whether the Procuring Entity terminated the subject tender pursuant to Section 63 of the Act or nullified the award of contract to the Applicant pursuant to Section 66 of the Act.

III. Whether the Applicant is entitled to the orders sought in the Request for Review.

The Applicant avers that it received a letter of award dated 14th June 2021. Pursuant to the contents of the said letter, the Applicant on its part executed the contract on 5th July 2021 and was thereafter advised that the Respondent would execute the contract and a copy of the duly executed contract would be sent to it. The Applicant further avers that as at the date of the Request for Review, it had not received a copy of the duly executed contract from the Respondent, despite making several written demands to the Respondent, in breach of Section 135(3) of the Act.

The Applicant avers it has suffered loss because it was required to provide a performance bond from a reputable bank in Kenya of USD 163,864.69 (One Hundred and Sixty-Three Thousand, Eight Hundred and Forty-Six and Sixty-Nine Cents) only within fourteen (14) days of receipt of the notification of

award. In compliance, it took a loan from a financier at an interest rate of 20% for three months and procured the performance bond from Family Bank for a period of 12 months beginning 2nd July 2021. It is its averment that a failure to execute the contract on the part of the Respondent will cause it to incur unnecessary expenses for the renewal of the Bond.

The Applicant submits that the termination of the Procurement Proceedings was grounded on false allegations not based on any evidence and thus the termination is null and void *ab initio*. It further submits that the failure of the Respondent to sign the contract, is a continuing breach of the contract, that is, each day the Respondent refuses to execute the contract is when time begins to run. It further submits that the Respondent has not provided any evidence to prove the allegations leveled against it.

In response, the Respondent submits that on 14th June 2021, all tenderers were notified of the Respondent's decision to award the tender to the Applicant and the unsuccessful tenderers were notified of the reasons they were unsuccessful. The Respondent further contends that the Applicant signed the contract on 2nd July 2021 and submitted the same to the Respondent, however, before it signed the contract it was seized with information that the Applicant had engaged in corrupt, fraudulent, and unethical conduct relating to the tender, based on this it notified the Applicant on 27th July 2021 that the procurement proceedings for the subject tender had been nullified pursuant to Clause 2.30 of the Tender Document which required tenderers to adhere to the highest standard of ethics and

were required to sign a declaration that they would not be involved in corrupt or fraudulent practices.

It is the Respondent's submission that the Applicant has filed its Request for Review outside the statutory period of 14 days prescribed in Section 167(1) of the Act as read together with Regulation 203(2)(c)(iii) of Regulations 2020. It is its contention that the Applicant was informed of the termination of the procurement proceedings and that it will not sign the contract on 27th July 2021, and ought to have filed its appeal on or before 10th August 2021 yet the Applicant filed the Request for Review on 30th August 2021. Consequently, the Board lacks jurisdiction to hear and determine the Request for Review.

The Respondent further submits that the Applicant did not file an Affidavit in support of the grounds for the Request for Review in accordance with Regulation 203(2)(b) of Regulations 2020, thus rendering the Request for Review defective because filing supporting documents is a matter of evidence and not a technicality therefore this omission cannot be cured by the overriding objective principal.

The Board not, it is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. Nyarangi JA stated as follows in the *locus classicus* case of ***The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited [1989] eKLR:***

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction." [Emphasis added]

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

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

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

The Supreme Court in the case of ***Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others [2012] eKLR*** pronounced itself regarding where the source of jurisdiction of a court or any other decision as follows: -

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings." [Emphasis added]

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

"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed."

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

"(2) The request referred to in paragraph (1) shall—

- a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;**
- b) be accompanied by such statements as the applicant considers necessary in support of its request;**
- c) be made within fourteen days of—**
 - i. the occurrence of the breach complained of, where the request is made before the making of an award;**
 - ii. the notification under section 87 of the Act;**
or
 - iii. the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.**
- d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable."**

As such, the import of Section 167(1) of the Act read together with Regulation 203(2)(c)(iii) of Regulations 2020 is that tenderers ought to file a request for review within 14 days of occurrence of breach complained of, where the request is made after making of an award to the successful tenderer to invoke the jurisdiction of the Board. Put differently, the Board's jurisdiction will not be invoked in instances where a request for review

application has been lodged with it after the lapse of the statutory period required for filing the same.

In determining whether the Request for Review was filed within time, the Board notes that the Applicant allegation of breach of duty imposed by the Act on the Respondent is on refusal to sign the contract with respect to the subject tender after the Applicant was awarded the same. In the circumstances, Regulation 203(2)(c)(iii) referenced hereinabove comes to play because an award of the subject tender has already been made to the Applicant as the successful tenderer.

Section 135(3) of the Act provides as follows on signing of contracts;

"The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period."

The Board deems it necessary to examine the Tender Document and the provisions relating to the duration of signing of a contract between the Procuring Entity, and a successful tenderer. The Tender Document provides as follows:

Clause 2.28.3 of Section II. Instructions To Tenderers at page 20 of the Tender Document provides as follows:

"The parties to the contract shall have it signed within 30 days (but in any event not before expiry of 14 days) from the date of notification of contract award unless there is an administrative review request."

Section VII: Standard Forms at page 105 of the Tender Document the Respondent provided a standard form to be used for notification of award as follows:

LETTER OF NOTIFICATION OF AWARD

Address of Procuring Entity

To:
RE: Tender No.
Tender Name

This is to notify that the contract/s stated below under the above mentioned tender have been awarded to you.

1. Please acknowledge receipt of this letter of notification signifying your acceptance.
2. **The contract/contracts shall be signed by the parties within 30 days of the date of this letter but not earlier than 14 days from the date of the letter.**
3. You may contact the officer(s) whose particulars appear below on the subject matter of this letter of notification of award.

(FULL PARTICULARS) _____

SIGNED FOR ACCOUNTING OFFICER

The import of the above provisions of the law and the Tender Document is that the Applicant and the Respondent ought to have signed the contract within 30 days from the date of notification of award but not before 14 days from the date of notification of award. In the instant case the letter of notification is dated 14th June 2021, 30 days from the date of notification is 14th July 2021 as rightly averred to by the Applicant in paragraph 1(d) of the instant Request for Review. This is the latest date the contract ought to have been signed by both parties. Taking the date of 14th July 2021, the Applicant was aware that from the 15th July 2021, the Respondent had not signed the contract and the 14 days of occurrence of breach of duty imposed on the Respondent by the Act started running from the 15th July 2021, ending on 29th July 2021. The Applicant was thus required to approach the Board by filing its Request for Review latest 29th July 2021. However, the Applicant filed the instant Request for Review on 30th August 2021.

Further, both parties agree that through a letter dated 27th July 2021 the Respondent informed the Applicant that the contract for the subject tender will not be executed because the procurement process had been nullified. Even if the Board is to consider the date of 27th July 2021 as the date the Applicant learnt of occurrence of alleged breach of duty imposed on the Respondent by the Act, 14 days from the 27th July 2021 within which the Applicant ought to have approached the Board lapsed on 10th August 2021.

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

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

FINAL ORDERS

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

- 1. The Request for Review dated 24th August 2021 and filed on 30th August 2021 with respect to Tender No. KPC/PU/OT-088/I&C/NBI/20-21 for the Supply Installation and Commissioning of Master Meter Proving Systems, be and is hereby struck out for want of jurisdiction.**

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

Dated at Nairobi this 20th Day of September 2021



.....
CHAIRPERSON

PPARB



.....
SECRETARY

PPARB

