

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 12/2022 OF 9TH FEBRUARY 2022

BETWEEN

CONTEMPORARY ENGINEERING COMPANY LIMITED ... APPLICANT

VERSUS

THE ACCOUNTING OFFICER,

STATE DEPARTMENT FOR DEVOLUTION 1ST RESPONDENT

STATE DEPARTMENT FOR DEVOLUTION 2ND RESPONDENT

Review against the decision of the State Department for Devolution in relation to Tender No: MODA/SDD/ACC/01/2020-2021 for Proposed Conference, Exhibition Centre and Recreational Facility located within the Mambo Leo Showground, along Kisumu-Vihiga Road, Kisumu County-Phase 1, Electrical Installation Works and Associated Works.

BOARD MEMBERS

1. Ms. Faith Waigwa – Chairperson
2. Mrs. Njeri Onyango - Vice Chairperson
3. Mr. Steve Oundo, OGW - Member

4. Dr. Paul Akida Jilani - Member
5. Ms. Isabel Juma -Member

IN ATTENDANCE

Philemon Kiprop - Holding brief for Acting Board Secretary

On 9th February 2022, the Applicant filed a Request for Review dated 9th February 2022 together with an Applicant's Statement in Support of the Request for Review sworn by Pauline Ogutu, the Director of the Applicant, on 9th February 2022 through the firm of S. S Malonza Advocates LLP, seeking the following orders:

- a) That the decision of the Procuring Entity as communicated in the Letter Ref No. MDP/DD/ADM/34 Vol V dated 26th January, 2022 directing the Main Contractor, M/s China Jiangxi International Kenya Limited, to immediately engage the Applicant in negotiations as their domestic Subcontractors for the Electrical Works, be set aside for reasons that:***
- i. The Procuring Entity has acted in contravention of Clauses 46 and 47 of the mandatory requirements on Instructions to Tenderers, on award of Contract and Contract signing.***

- ii. The Procuring Entity has breached Section 135(2) of the Public Procurement and Asset Disposal Act, 2015 which outlines the manner in which procurement contracts may be entered into by the accounting officer of a procuring entity and the successful tenderer.***
- b) That the Procuring Entity be directed to forthwith issue a Letter of Award and Contract for the revised scope of works for Electrical Installation Works, ICT Installation Works, & 2 No. Lifts Installation Works for the Africities auditorium to the Applicant at the contract sum of Kshs. 150,647,368.00.***
- c) That the Procuring Entity be restrained from issuing further instructions to the Main Contractor to carry out Electrical Works as stated in the letter dated 26th January, 2022 and referenced MDP/DD/ADM/34 Vol V.***
- d) That the Respondents be ordered to pay the costs of and incidental to these proceedings.***
- e) Any other or further relief as the Board may find appropriate to grant.***

In a Notification of Appeal and a letter dated 9th February 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board'), Mr. Philip Okumu, notified the 1st Respondent of the existence of the Request for Review and the suspension of procurement proceedings for the subject tender while forwarding to the

Respondents a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the 1st Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 9th February 2022.

In response to the Acting Board Secretary's letter of 9th February 2022, the 1st Respondent requested for additional time within which to gather all relevant documents and file his statement in response to the Request for Review noting that he received the Acting Board Secretary's letter dated 9th February 2022 on 11th February 2022.

However, to date, the 1st Respondent has failed and/or neglected to submit to the Board the documents specified in the Acting Board Secretary's letter dated 9th February 2022 despite being served with a reminder vide the Acting Board Secretary's letter dated 21st February 2022 and which letter informed the 1st Respondent of his obligation to submit, *inter alia*, documents requested for by the Acting Board Secretary as provided under Regulation 205 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020'). The Acting Board Secretary vide a letter dated 24th February 2022 informed the 1st Respondent that the Board had ordered the 1st Respondent submits the documents requested by the Acting Board Secretary by close of business on 25th February 2022.

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 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

On 1st March 2022, the Applicant filed its Written Submissions dated on even date.

In view of the fact that the Respondents have opted not to respond to the Request for Review, this Request for Review shall proceed undefended.

THE APPLICANT'S CASE

The Applicant avers that it was a tenderer in Tender Number MODA/SDD/ACC/01/2020-2021 for Proposed Conference, Exhibition Centre and Recreational Facility located within the Mambo Leo Showground, along Kisumu-Vihiga Road, Kisumu County-Phase 1, Electrical Installation Works and Associated Works (hereinafter referred to as the 'subject tender') having submitted its tender pursuant to an invitation to tender by way of restrictive tendering method which closed on 3rd November 2021.

According to the Applicant seven (7) tenderers participated in the subject tender and that vide a letter dated 3rd January 2022 and received by it on 4th January 2022, the 2nd Respondent notified it of the 2nd Respondent's

decision to award the Applicant the subject tender. However, due to budgetary constraints the Ministry of Devolution in consultation with the technical State Department for Public Works revised the scope of works and amount and the Applicant vide its letter dated 4th January 2022 duly accepted the revised contract sum amount of Kshs.150,647,368/= from the evaluated contract sum of Kshs.188,643,238.00 together with the revised works.

The Applicant alleges that upon award of the contract the 2nd Respondent was to issue a notification to enter into a contract/ notification of award to all tenderers pursuant to Clause 43 of the Instructions to Tenderers of the Tender Document and Clause 44 of the Instructions to Tenderers of the Tender Document provided that no contract would be signed earlier than the expiry of a standstill period of 14 days to allow any dissatisfied tenderer to launch a complaint. The Applicant alleges that upon expiry of the standstill period in ITT 42.1 or upon addressing a complaint that has been filed within the standstill period, the 2nd Respondent ought to have transmitted the letter of award to successful tenderers as provided in Clause 46 of the Instructions to Tenderers of the Tender Document. Further that upon expiry of the 14 days of the notification of intention to enter into a contract and upon the parties meeting their respective statutory requirements, the 2nd Respondent ought to have sent the successful tenderer the contract agreement and within 14 days of receipt of the contract agreement, the successful tenderer ought to have signed, dated and returned it to the 2nd Respondent as provided in Clause 47 of the Instructions to Tenderers of the Tender Document .

It is the Applicant's contention that the 2nd Respondent is under an obligation to transmit a letter of award to it and thereafter enter into a contract agreement with the Applicant as mandated by Clauses 46 and 47 of the Instructions to Tenderers of the Tender Document following the expiry of the standstill period of 14 days from the date the Applicant was issued with a letter of intention to award the subject tender noting that the Applicant accepted the same on 4th January 2022.

The Applicant alleges that the 2nd Respondent has contravened Clauses 46 and 47 of the mandatory requirements on Instructions to Tenderers of the Tender Document because the 1st Respondent vide a letter dated 26th January 2022 and another one dated 27th August 2021 copied to, and received by, the Applicant on 2nd February 2022 purported to direct the Main Contractor, M/s China Jiangxi International Kenya Limited, to immediately engage the Applicant in negotiations as the main contractor's domestic subcontractors for electrical works of the project.

The Applicant alleges that the 2nd Respondent is in breach of Section 135 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') by proceeding to direct the main contractor to enter into negotiations with the Applicant as domestic subcontractor for electrical works when Section 135(2) of the Act requires procurement contracts to be entered into by the accounting officer of a procuring entity and the successful tenderer in writing based on the tender documents.

According to the Applicant, the letter dated 26th January 2022 directing the main contractor to enter into fresh negotiations with the Applicant for electrical works as domestic subcontractors without any reason is in breach of Article 227 of the Constitution that requires the 2nd Respondent while contracting for goods and services to do so in a system that is fair, equitable, transparent, competitive and cost effective.

The Applicant contends that it stands to suffer prejudice due to the manner in which the Respondents have acted contrary to the law and Tender Document and for that reason, the 2nd Respondent's decision directing the main contractor to immediately engage the Applicant in negotiations as the main contractor's subcontractors for electrical works should be set aside forthwith.

BOARD'S DECISION

The Board has considered the Applicant's case, documents, pleadings, written submission in support of its request for review and finds the issue that crystalize for determination is as follows:

Whether the Applicant has proved its case to warrant the grant by the Board of the orders sought in the Request for Review.

We have hereinbefore established that this Request for Review is undefended. However, for the Board to grant the orders sought in the

Request for Review, the Applicant is required at the bare minimum to prove its case.

This Request for Review is hinged on breach of duty imposed on the Respondents by the Constitution, Act and the Tender Document of the subject tender. Whilst evidence of the provisions of the Constitution and the Act need not be tendered because the Board is deemed to have judicial notice of the Constitution and the Act, the same cannot be said with respect to the provisions of the Tender Document of the subject tender.

The Applicant's case is that it is aggrieved by the 1st Respondent's decision directing the main contractor of the project to engage it for negotiations with a view of having the Applicant as a domestic subcontractor of electrical works. According to the Applicant, this arrangement is contrary to the provisions of the Tender Document especially Clauses 43, 44, 46 and 47 of the Instructions to Tenderers of the Tender Document. However, the Applicant fails to tender evidence of such Tender Document for the subject tender as part of the annexures to its Statement in Support of the Request for Review.

It is trite that he who alleges must prove. This principle is firmly embedded in the Evidence Act, Chapter 80, Law of Kenya which stipulates in Section 107 thereof as follows:

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

This was enunciated by the Honourable Justice Majanja in the case of **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015]eKLR** where he held as follows:

"...as a general preposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issues"

The Applicant having alleged that the Respondents are in breach of provisions of the Tender Document bear the burden of proving the same. The Applicant has failed to discharge this burden because it has failed to provide evidence of the Tender Document of the subject tender.

In the absence of such proof, we have no powers to argue the Applicants case and we are inclined to find that the Applicant's allegation of breach of the provisions of the Tender Document is unsubstantiated and the orders sought in the Request for Review cannot be granted.

We observe that the Respondents herein have failed to respond to the request for Review and failed to submit documents requested for by the Acting Board Secretary vide a letter dated 9th February 2022 despite several reminders.

Section 168 of the Act provides as follows:

168. Notification of review and suspension of proceedings

Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed.

Regulation 205 of Regulations 2020 provides as follows:

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

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

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

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

As already established hereinbefore, the Acting Board Secretary notified the 1st Respondent of the existence of the Request for Review and suspension of procurement proceedings of the subject tender vide a notification of appeal dated 9th February 2022 in accordance with Section 168 of the Act read with Regulation 205(1) and (2) of Regulations 2020. Separately, vide a letter dated 9th February 2022, the Acting Board Secretary directed the 1st Respondent to, within 5 days from 9th February 2022, file his response on the Request for Review together with the background to the tender evaluation report, procurement officer's professional opinion, other documents listed in Part D of Schedule 1 Form 5 attached to the Acting Board Secretary's letter dated 9th February 2022 and contact addresses of those who participated in the subject tender and which document and information

formed part of confidential documentation under Section 67 (1) of the Act but was required under Section 67(3)(e) of the Act.

The 1st Respondent vide a letter dated 16th February 2022 acknowledged having received the Acting Board Secretary's letter dated 9th February 2022 on 11th February 2022 and sought for additional time to gather all relevant documents and respond to the Request for Review. However, to date, the 1st Respondent has refused and or neglected to submit to the Board through the Acting Board Secretary, the background to the tender evaluation report, procurement officer's professional opinion, the documents listed in Part D of Schedule 1 Form 5 attached to the Acting Board Secretary's letter dated 9th February 2022 and contact addresses of those who participated in the subject tender in breach of Regulation 205(3) of Regulations 2020 and Section 44(2)(j) of the Act for failure to ensure compliance with his responsibility under Regulation 205(3) of Regulations 2020

An accounting officer of a procuring entity who is in breach of Regulation 205(4) of Regulations 2020 commits an offence and is liable to a fine not exceeding Kshs.4,000,000/= or to imprisonment for a term not exceeding 10 years or to both.

The Public Procurement Regulatory Authority (hereinafter referred to as the 'Authority') is mandated under Section 9(m)(v) to create a central repository or database that includes state organs and public entities, such like the 2nd

Respondent, that are non-compliant with procurement laws and to inform, as applicable, the Cabinet Secretary, Parliament, the relevant County Executive member for finance, the relevant County Assembly or Auditor-General on issues of non-compliance with procurement laws once the relevant state organ or public entity ignores the written directives of the Authority, including material breaches of the measures established under the Act in accordance with Section 9(n) of the Act.

Having found the 1st Respondent is in breach of Section 44(2)(j) of the Act and Regulation 205(3) of Regulations 2020, we deem it fit to share this decision, which we hereby do, with the Authority through the Director General of the Authority for its knowledge and further action under the Act whether by itself or with the help of any other relevant authorities so as to end the impunity exhibited by the 1st Respondent herein.

In view of our finding that the Applicant has failed to prove its case in the Request for Review, we find the same is ripe for dismissal and proceed to make the following specific order.

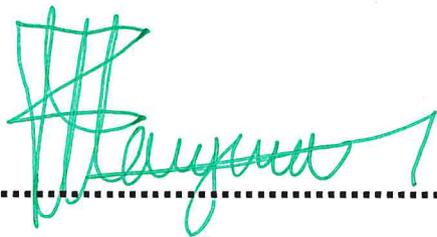
FINAL ORDERS

In exercise of powers conferred upon it by Section 173 of the Act No. 33 of 2015, the Board makes the following orders in the Request for Review dated 9th February 2022:

1. The Request for Review dated 9th February 2022 be and is hereby dismissed.

2. Given the outcome herein, each party will bear its own costs in the Request for Review.

Dated at Nairobi this 2nd day of March 2022.

A handwritten signature in green ink, appearing to be 'Hayward', written over a horizontal dotted line.

CHAIRPERSON

PPARB

A handwritten signature in blue ink, appearing to be 'R. O. Ochieng', written over a horizontal dotted line.

SECRETARY

PPARB

