

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 20/2022 OF 7TH MARCH, 2022

BETWEEN

BUILDLINK DEVELOPMENT LTD.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA NATIONAL HIGHWAYS AUTHORITYRESPONDENT

AND

BEBROSO CONSTRUCTION CO. LTDINTERESTED PARTY

Review against the decision of the Accounting Officer of Kenya National Highways Authority in the matter of Tender No. KeNHA/R5/165/2021 for Performance based contract for maintenance of Thika – Kenol (Dual) A2.

BOARD MEMBERS

- | | |
|----------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Qs. Hussein Were | -Member |
| 3. Arch. Steven Oundo, OGW | -Member |
| 4. Mr. Jackson Awele | -Member |
| 5. Ms. Rahab Robbie Chacha | -Member |

IN ATTENDANCE

Mr. Philip Okumu

- Acting Board Secretary

BACKGROUND TO THE DECISION

Introduction

The Project is located in Kiambu County. The first road section starts at Delmonte and ends at Kenol covering a total length of approximately 11 Km, one direction and 22 Km in dual carriageway. The section is a dual carriageway with high traffic. The second road section (Old Murang'a Road) starts at Dellview and joins the main Thika – Kenol Road with a total length of approximately 9.4 Km. The section is a single carriageway with medium traffic.

The Kenya National Highways Authority (KeNHA) (hereinafter referred to as "the Procuring Entity") intends to procure works for Performance Based Contract for the Maintenance of Thika -Kenol (Dual) A2 Road. The source of funding is the Government of Kenya using proceeds from the Road Maintenance Levy Fund (RMLF).

The Tendering Process

The Tender Invitation Notice was placed in *MyGov* Newspaper on 7th December, 2021 inviting sealed tenders from eligible Contractors for the Performance Based Contract for the Maintenance of Thika -Kenol (Dual) A2 Road (hereinafter referred to as "the subject tender"). The same was also uploaded onto the Procuring Entity's website and the Public Procurement Information Portal (PPIP).

Pre-Bid Site Visit

The Procuring Entity carried out a pre-bid site visit on Thursday, 16th December, 2021 attended by its representatives and the representatives of prospective tenderers.

Tender Submission

Tenders were received and publicly opened on Monday 6th January, 2022 at 11:00 AM at the Procuring Entity's Nairobi Regional Offices in the presence of tenderers' representatives who chose to attend.

Four (4) tenderers responded as highlighted in the table below.

S/No	Name of Bidder	Postal address	Bid price Kshs
1.	Prime Auto & Gen. Trading Enterprises	P.O. Box 3618- 00506 Nairobi	688,550,179.33

S/No	Name of Bidder	Postal address	Bid price Kshs
2.	Fourway Construction Co. Ltd	P. O. Box 43372-00100 Nairobi	905,670,854.11
3.	Buildlink Development Limited	P.O Box 26166-00505 Nairobi	783,379,727.51
4.	Debroso Construction Co. Ltd	P.O. Box 16247-00622 Nairobi	754,404,535.00

TENDER EVALUATION

The tenders were evaluated through three stages as follows:

- Preliminary Evaluation
- Detailed Technical Evaluation
- Financial Evaluation

Preliminary Evaluation

Three tenders were disqualified at the preliminary evaluation stage and one passed. The disqualified tenders were as follows:

- i. Number 1 – M/s. Prime Auto & General Trading Ltd
- ii. Number 2 – M/s. Fourway Construction Co. Ltd
- iii. Number 3: M/s. Buildlink Development Ltd.

Number 4, M/s. Debroso Construction Ltd, the Interested Party herein, was found to be responsive and proceeded to technical evaluation stage.

Technical Evaluation

The Interested Party was responsive to the preliminary requirements of the tender and was subjected to detailed Technical Evaluation. The Interested Party was responsive at detailed Technical Evaluation and having met the minimum pass mark of 75% hence proceeded to financial evaluation.

Financial Evaluation

Financial Evaluation involved the comparison of tendered amount per bill item against the Engineer's Estimate for the tenderer who was responsive at the technical evaluation stage, the Interested Party. The tenderer was found to have offered the lowest evaluated tender of **Kshs. 754,404,535.00** (Kenya Shillings Seven Hundred and Fifty Four Million Four Hundred and Four Thousand Five Hundred and Thirty Five Only) and hence recommended for due diligence process.

Recommendation

The Tender Evaluation Committee recommended that due diligence process be undertaken on the lowest evaluated tenderer **M/s Debroso Construction Co. Ltd of P.O Box 16247-00622, Nairobi** for Tender No. KeNHA/R5/165/2021 - Performance Based Contract for the Maintenance of

Thika - Kenol (Dual) A2 Road, pursuant to Section 83 of the Public Procurement and Asset Disposal Act, 2015.

Professional Opinion

In a Professional Opinion signed by the Deputy Director - Supply Chain Management on 9th February, 2022 the Head of Procurement of the Procuring Entity opined that the procurement process complied with the Act and recommended for approval of award of the subject tender to M/s Debroso Construction Co. Ltd of P.O Box 16247-00622, Nairobi.

The Accounting Officer approved the award on the same date, 9th February, 2022.

Notification of Award

Buildlink Development Limited, the Applicant herein, was disqualified at the preliminary evaluation stage. In a letter of notification dated 14th February 2022, the Applicant was notified that its tender was unsuccessful. The letter reads in part as follows:

"The reasons for your tender being unsuccessful were as follows:

a) You did not attend the mandatory pre-tender site visit meeting.

- b) Schedule D for Contractor's Equipment (Form EQU) was not duly filled i.e details of the name of manufacturer, model, power rating, capacity and year of manufacture were not indicated.***
- c) Schedule G of materials basic prices was not duly filled i.e. column for source indices was not filled.***
- d) You did not fill the amount in words on the BoQ summary page."***

Following the letter of notification dated 14th February, 2022 the Applicant filed this Request for Review with the Public Procurement Administrative Review Board (hereinafter, 'the Board').

REQUEST FOR REVIEW NO. 20/2022

The Request for Review was lodged by M/s Buildlink Development Ltd of P.O. Box 26166-00505 Nairobi, on 7th March, 2022 in the matter of Tender No. KeNHA/R5/165/2021 for Performance based contract for maintenance of Thika – Kenol (Dual) A2.

The Applicant, through the firm of Odongo, Okal & Company Advocates, sought for the following orders of the Board:

- a) An order that the decision of the Respondent dated 14th February, 2022 declaring the Applicant's bid as unsuccessful be set aside and substituted with an order declaring the said bid as successful.***

- b) Consequently, that the Applicant be awarded the tender for Performance based contract for maintenance of Thika – Kenol (Dual) A2.*
- c) Costs of the Request for Review.*
- d) Such other Orders the Review Board may deem fit to issue.*

On its part the Respondent prays that the Request for Review be dismissed with costs. In response, the Respondent lodged a Notice of Preliminary Objection together with a Response to the Request for Review, both dated 14th March 2022 and filed with the Board on 15th March 2022, through Lawrence Maruti Advocates.

On 24th March 2022, the Applicant filed a Reply to the Notice of Objection dated 24th March 2022.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate the effects of Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request 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 bore the Board's official stamp.

On 17th March 2022, the Respondent filed its written submissions whilst the Applicant filed its written submissions on 24th March 2022.

BOARD'S DECISION

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

- i. Whether the Board has jurisdiction to entertain the Request for Review on account of the same having been filed out of time;*

Depending on the outcome of the above issue:

- ii. Whether the Procuring Entity wrongly applied the criteria of the Bidding Document in evaluating the Applicant's tender in breach of the Provisions of Section 80 (2) of the Act.*

The Respondent lodged a Notice of Preliminary Objection dated 14th March 2022 and filed on 15th March 2022 together with its response.

As to whether the Board has jurisdiction to entertain the Request for Review on account of the same having been filed out of time;

The Respondent's Preliminary Objection was based on the ground that the Request for Review was time barred in that it was filed outside the period allowed in law pursuant to section 167(1) of the Public Procurement & Asset Disposal Act, 2015 as read together with Regulation 203(2)(c) of the Public Procurement & Asset Disposal Regulations, 2020 hence the Board lacks the requisite jurisdiction to hear and determine this Request for Review.

The notice of preliminary objection filed by the Respondent touches on the jurisdiction of the Board. The Board is duty bound to dispense with the issue of jurisdiction and only make a step into the merits of the Request for Review if it is satisfied that it has jurisdiction to do so.

It is settled law that courts and decision-making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" v. Caltex Oil Kenya Limited (1989) KLR 1**, it was held that jurisdiction is everything and without it, a court or any *other decision-making body* has no power to make one more step the moment it holds that it has no jurisdiction.

The Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** pronounced itself with respect to where the jurisdiction of a court or any other decision-making body flows from. It held 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..."

The decision of the Supreme Court in *Samuel Kamau Macharia Case* is very critical in determining where the jurisdiction of this Board flows from.

This Board is a creature of statute owing to the provision of section 27 (1) of the Act which provides that: -

"27. Establishment of the Public Procurement Administrative Review Board

(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

Further, Section 28 of the Act provides as follows: -

"28. Functions and powers of the Review Board

(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 above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes. The jurisdiction of the Board is provided in section 167 (1) of the Act, which provides that: -

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

Having established that the Board is a creature of the Act, it means the jurisdiction of the Board emanates from the Act. The Preliminary Objection raised by the Respondent challenged the jurisdiction of the Board to

entertain the Request for Review on account of the review having been filed out of time.

To address the ground of the Respondent's Preliminary Objection, the Board notes that the Procuring Entity's Letter of Intention to Award the contract was dated 14th February, 2022. The Board has also seen a copy of a printout of an email addressed to the four tenderers by the Procuring Entity informing them as follows:

"The Tendering process for the above tender has been finalized and the Letters of Award and Regret have been posted via Registered Mail on 14th February, 2022. Kindly check your postal office for your letter."

The Board further notes that the Applicant stated at paragraph 4 of its Request for Review that it received the letter of notification on 2nd March 2022. It is not in doubt that the Applicant filed the instant Request for Review on 7th March 2022, five days after the notification, as alleged by the Applicant.

The Board is cognizant of the provisions of 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 ..."

Further, Regulation 203 (2) (c) of the Public Procurement & Asset Disposal Regulations, 2020 provides as follows: -

"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."***

As already observed herein, the Applicant filed the instant Request for Review on 7th March 2022, five days after its alleged receipt of notification on 2nd March 2022.

The question to be addressed is when was the Applicant notified of the outcome of the tender process. Was it on 14th February, 2022, or on 2nd March 2022?

To answer this question, the Board has retraced the steps of the procurement process of the subject tender after the tender evaluation stage.

On 14th February, 2022 the Procuring Entity informed tenderers via email that the letters of award and regret had been posted via registered mail on 14th February, 2022.

The Board has perused the Confidential Business Questionnaire submitted by the Applicant in its tender and finds that the Applicant's address stated therein was:

P.O. Box 26166 – 00505, Nairobi, Kenya, info@buildlinkdev.com

The Applicant's letter of notification was addressed as follows:

M/s Buildlink Development Limited

P.O. Box 26166-00505

Nairobi.

Item 5 of the Confidential Business Questionnaire of the tender document provides for the filling of full address and contact details of the Tenderer. The address and contact details provided in the Confidential Business Questionnaire are assumed to take precedence over any other similar details. In the instant case the assumed correct postal address of the Applicant is P.O. Box 26166 – 00505 Nairobi because it is the address in the Confidential Business Questionnaire that was submitted in the Applicant's tender.

Turning to the registration of the letters at the post office, the Board has looked at the acknowledgment of receipt of the four letters at the post office and notes that the acknowledgement was signed by the receiving officer and stamped dated 14th February, 2022. All the letters were issued with tracking numbers. The Applicant's letter was registered at the post office to address:

M/s Buildlink Development Limited, P.O. Box 26166-00505, Nairobi

It was then issued with a Tracking No. R.D. 14 810 958 8 KE.

The Board is satisfied that the Applicant's letter of notification was correctly addressed and referenced at the post office. In any event, by the Applicant's own admission, it received the letter of notification on 2nd March, 2022 but did not explain the means by which it obtained the letter or controvert the

allegations by the Respondent that the letters were posted by registered mail.

Having established that the Procuring Entity correctly addressed the Applicant's letter of notification and that the same was correctly registered at the post office, the Board turns to the **Interpretation and General Provisions Act, Chapter 2** Laws of Kenya at Section 3(5), which states as follows:

"When any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post".

By virtue of the above provision of Section 3(5) of the **Interpretation and General Provisions Act, Chapter 2** service of the letter of notification is deemed to have occurred on 14th February, 2022. Fourteen days after that lapsed on 28th February, 2022 pursuant to Section 57(a) of the Interpretation and General Provisions Act, Chapter 2. Pursuant to Section 167 (1) of the Act as read together with Regulation 203 (2) (c) of the Public Procurement

& Asset Disposal Regulations, 2020, the Applicant cannot bring a competent request for review after 14 days of notification which, in this case, was 28th February, 2022.

The Board therefore finds that the Applicant, having filed this Request for Review on 7th March 2022, was time barred.

In totality of the first issue framed for determination, the Board finds that it has no jurisdiction to entertain the Request for Review for being time barred and proceeds to down its tools. Consequently, the Board shall not address the subsequent issue framed for determination.

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 dated 3rd March, 2022 and filed on 7th March, 2022 in respect of Tender No. KeNHA/R5/165/2021 for Performance based contract for maintenance of Thika – Kenol (Dual) A2 be and is hereby struck out.**

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


Dated at Nairobi, this 28th day of March 2022.



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CHAIRPERSON

PPARB



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SECRETARY

PPARB