

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 23/2022 of 14<sup>TH</sup> MARCH 2022**

**BETWEEN**

**WESTPAC GENERAL SUPPLIERS LIMITED..... APPLICANT**

**AND**

**THE MANAGING DIRECTOR,**

**KENYA PORTS AUTHORITY..... 1<sup>ST</sup> RESPONDENT**

**THE KENYA PORTS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**AND**

**JOINT VENTURE BETWEEN AERONAUTICS**

**LIMITED AND MAGAL SECURITY**

**SYSTEMS LIMITED.....INTERESTED PARTY**

**REVIEW AGAINST THE DECISION OF THE ACCOUNTING OFFICER,  
KENYA PORTS AUTHORITY IN RELATION TO TENDER NO.  
KPA/091/2021-22/SS FOR PREQUALIFICATION FOR DESIGN,  
SUPPLY AND IMPLEMENTATION OF THE PROPOSED INTEGRATED  
SECURITY MANAGEMENT SYSTEM FOR THE PORT OF LAMU**

**BOARD MEMBERS**

- |                          |               |
|--------------------------|---------------|
| 1. Ms. Faith Waigwa      | - Chairperson |
| 2. Ms. Rahab Chacha      | -Member       |
| 3. Dr. Paul Akida Jilani | -Member       |
| 4. Mr. Nicholas Mruttu   | -Member       |
| 5. Mr. Jackson Awele     | -Member       |

## **IN ATTENDANCE**

Mr. Philip Okumu

-Acting Board Secretary

## **BACKGROUND**

The Respondents advertised tender number KPA/091/2021-22/SS for Prequalification for Design, Supply and Implementation of the proposed Integrated Security Management System for the Port of Lamu (hereinafter referred to as the 'subject tender') in the Daily Nation and the Standard Newspaper editions of 3<sup>rd</sup> February 2022 as well as through publication on the 2<sup>nd</sup> Respondent's website. The deadline for submission of tenders was stipulated as 21<sup>st</sup> February 2022 but was subsequently extended vide various addenda ending with Addendum No. 3, to 15<sup>th</sup> March 2022.

The Request for Review was filed on 14<sup>th</sup> March 2022, a day before the tenders were to be opened by the Respondents. Accordingly, no opening, evaluation or award has been made in respect of this tender.

## **THE REQUEST FOR REVIEW**

The Request for Review, dated 14<sup>th</sup> March, 2022 was lodged by M/s **Westpac General Suppliers Limited** (The Applicant) through the firm of Kabugu & Co. Advocates seeking the following orders:-

***a. The Respondents be directed as follows;***

***i. To remove the mandatory requirement for tenderers to demonstrate possession of both a valid National***

***Construction Authority (NCA1) Certificate (Electrical Engineering and Networking) and a valid National Construction Authority (NCA1) Certificate for Civil Contractor and Energy & Petroleum Regulatory Authority (EPRA Class A1***

***ii. To remove the maximum number of 3 partners in the case of Joint Venture;***

***iii. to review the mandatory requirement for tenderers to demonstrate a turnover of 700 million or its equivalent in USD per year in Tender No. KPA/091/2021-22/SS, and permit any partner or all the partners jointly in the joint venture to demonstrate a turnover of Kshs 700 Million or its equivalent in USD in accordance with, the Public Procurement and Asset Disposal Act, 2015, the Regulations and the Constitution.***

***b. The Respondents pay the costs of this Review to the Applicant; and,***

***c. Any other relief this honourable Review Board deems just in the circumstances.***

The Request for Review is supported by the Applicant's "Supporting Affidavit" duly sworn by Mr. Kennedy Zombe, the Applicant's authorized officer, on 14<sup>th</sup> March, 2022.

The Respondents filed the following documents in response to the Request for review through the 2<sup>nd</sup> Respondent's in house counsel, Turasha J. Kinyanjui:-

- (i) 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response, dated 18<sup>th</sup> March 2022;
- (ii) Affidavit in Support of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response, sworn by Cosmas Makori, the 2<sup>nd</sup> Respondent's Head of Procurement & Supplies on 18<sup>th</sup> March 2022;
- (iii) Written submissions dated 29<sup>th</sup> March, 2022.

The Interested Party filed the following documents in response to the Request for review through the firm of Mwaniki Gachoka & Co. Advocates:-

- (i) Notice of Preliminary Objection dated 29<sup>th</sup> March, 2022.
- (ii) Statement of Response signed by Ronald Kirui, the Interested Party's Authorized Representative, on 29<sup>th</sup> March, 2022

The Request for Review raises one main ground of review to wit; that at Section III of the Tender Document on Qualifications Criteria and Requirements the 2<sup>nd</sup> Respondent sets out various mandatory requirements that are onerous, unfair, and discriminatory and thereby deny numerous tenderers the opportunity to competitively tender for the tender as follows;

- i. Applicants shall have a valid National Construction Authority (NCA1) Certificate (Electrical Engineering and Networking), valid National

Construction Authority (NCA1) Certificate for Civil Contractor and Energy & Petroleum Regulatory Authority (EPRA Class A1);

- ii. There shall be a maximum number of 3 partners in the case of Joint Venture;
- iii. Applicants are required to submit certified audited accounts for the last three financial years demonstrating a turnover of at least Kshs. 700 million or its equivalent in USD per year.

The Applicant submits that the said requirements are made in blatant disregard of the Act, Regulations and other related laws including Article 47 of the Constitution of Kenya, 2010 (hereinafter referred to as the 'Constitution'), Section 3 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') and Section 4 as read with Sections 6 and 7 of the Fair Administrative Action Act, 2015 (hereinafter referred to as the 'FAA Act').

In specific to the aforementioned averments, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that these mandatory requirements are a prescribe of the law and cannot be waived. They submit that to render the services of the subject tender, tenderers must meet all mandatory statutory requirements and therefore the Tender Document cannot be termed to be in breach of any provision of the Constitution. To hold otherwise would equate to circumventing the law and putting the security of the Port, the region and the country at large, at immense risk.

In response to Ground No. 7 (ii), the Respondents aver that the mandatory requirement for a maximum number of 2 partners in the case of a joint venture was reviewed upwards to 3 as shown in item No. 8 of Addendum No. 2 dated 14<sup>th</sup> February 2022 and cannot be revised further upwards nor can it be left open. In support of this submission, the Respondents rely on the requisition of the user department supplied to the Board as part of confidential documents which shows that integrity and credibility of the intended Integrated Security Management System will be compromised if opened to many third parties thereby infiltrating the system and exposing the Country. They further state that limiting the joint venture to 3 members is justified from a technical security perspective in order to safeguard the Security System of the Port facility, vessels calling the Port and the entire complex, which is a national security installation.

In Response to Ground No. 7 (iii), the Respondent avers that the Port of Lamu is an international commercial port which operates as per the requirements of the International Ship and Port Security (ISPS) Code. As such, the mandatory requirement in Section III (iv) for the Applicants to submit certified audited accounts for the last three (3) financial years demonstrating a turnover of at least Kshs. 700 million or its equivalent in USD per year (and in cases of Joint Venture, the lead partner must meet this criterion), is a clear indication of the magnitude of the nature of the procurement. Contrary to the general allegations made by the Applicant that this requirement is onerous, unfair and discriminatory, the Respondents aver that the nature of procurement and the magnitude of works involved cannot possibly be left to chance of underperformance or poor performance.

The Respondents aver that tenderers are required to satisfactorily demonstrate the adequacy of their financial resources and capability to meet the huge cash flow requirements for the implementation of the Port facility integrated security management system.

On its part the Interested Party has raised a preliminary objection against the Request for Review on two main grounds to wit; that the Applicant is neither a candidate nor a tenderer and therefore has no locus standi to file the request for review and secondly that the Request for Review was filed outside the 14 day deadline from the date of occurrence of the breach complained of.

The Interested Party further avers that the requirements set out in the Tender Document apply to all tenderers equally and that the 2<sup>nd</sup> Respondent's user department has the exclusive mandate to determine the requirements for goods and services they wish to procure. The Interested Party contends that the Applicant is attempting to usurp the role of the 2<sup>nd</sup> Respondent's Evaluation Committee.

### **THE BOARD'S DECISION**

The Board has reviewed the rival arguments presented in the respective parties' pleadings and has also had sight of such confidential documents as have been availed by the 2<sup>nd</sup> Respondent pursuant to Section 67(3)(e) of the Act. Accordingly, the Board has crystallized the following two (2) issues for determination:

a. **Whether the Board has jurisdiction to hear the request for review under section 167(1) of the Act**

It is trite law that courts and decision-making bodies can only act in cases where they have jurisdiction to do so. In the leading authority on this point, Nyarangi JA in the *locus classicus* case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) eKLR** stated as follows

***"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 downs its 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."***

Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, that **whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter.**" (emphasis ours)

It accordingly behoves the Board to determine whether it has jurisdiction to entertain the Request for Review before considering any other issue arising therein.

The jurisdictional issue herein is essentially that contrary to Section 167(1) of the Act, the Applicant is neither a tenderer nor a candidate and secondly that the Applicant filed its Request for Review more than 14 days after the alleged breach complained of occurred. Section 167(1) of the Act provides for the filing of a request for review as follows;

***"(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence***

***of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.”***

In **Smartmatic International Holding B.V vs Independent Electoral And Boundaries Commission And Public Procurement Administrative Review Board And 1 Other HCJRMISC/E134/2021,** the High Court provided the following exposition on Section 167(1) of the Act;

***“In my humble view, assuming there was any breach of the provisions of either the Constitution or the Pubic Procurement and Asset Disposal Act in the tender document, it occurred as early as 14 April 2021 when the procuring entity placed an advertisement in the print or electronic media inviting sealed bids for the tender. But for purposes of instituting review proceedings against the tender before the respondent under section 167(1) of the Act, time started running as soon as the applicant in the review in the request for review downloaded a copy of the tender documents. It is at this stage that the applicant, or any other candidate or tender for that matter is deemed to have been aware of the breaches complained of in the tender document...”*** [Emphasis by the Board]

In this case, the Applicant being a candidate in the procurement proceedings is not in doubt. Under Section 2 of the Act, a candidate is defined as ***a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity.*** From

the Applicant's averments challenging provisions of the Tender Document a reasonable presumption may be made that it indeed obtained the Tender Document as directed in the Respondent's advertisement and is accordingly a candidate within the meaning of the Act. What is not clear however is when the Applicant downloaded or obtained in whatever nature the said Tender Document as none of the parties make any averment on the point in the pleadings before the Board. A **Preliminary Objection** as described in the case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696**, where Law J A stated that;

**"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which objection point may dispose the suit".**

Further the Court stated;

**"A preliminary objection raises a pure point to law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".**

In the circumstances, the onus was on the Interested Party as the mover of the objection to provide all the facts necessary to prove and uphold its objection. The date when the Applicant obtained the Tender Documents is

a critical fact for purposes of the instant objection and without which the preliminary objection fails to muster as defined in the above case. The same is without merit and is hereby dismissed.

**b. Whether Section III of the Tender Document contains any requirements that are onerous, unfair, and discriminatory.**

Upon careful consideration of the parties rival pleadings and submissions on this issue, the Board observes that Section 60 of the Act sets out the specific requirements for Tender Documents as follows;

***(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.***

***(2) The specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured.***

***(3) The technical requirements shall, where appropriate—***

***(a) conform to design, specification, functionality and performance;***

***(b) be based on national or international standards whichever is superior;***

- (c) factor in the life of the item;*
  - (d) factor in the socio-economic impact of the item;*
  - (e) be environment-friendly;*
  - (f) factor in the cost disposing the item; and*
  - (g) factor in the cost of servicing and maintaining the item.*
- ....”

Additionally, the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') provide in this regard as follows;

***34. Subject to the Act, a user department of a procuring entity shall be responsible for—***

***(h) preparing and submitting technical specifications for goods, works and services to the procurement function;***

***68 (4) Pursuant to section 70(4) of the Act, the accounting officer of a procuring entity shall prepare the tender document clearly indicating the technical and financial evaluation criteria to be applied which shall be quantifiable, measurable and objective in line with the provisions of section 80(3) of the Act in consultation with the user department and other relevant departments.***

**71. Initiation of procurement**

**(1) Pursuant to section 73 of the Act, the head of the user department shall initiate the procurement process through a requisition as per the approved procurement plan.**

**(2) The user department shall submit the requisition under paragraph (1) to the head of the procurement function for processing which shall be accompanied by the following, as applicable—**

**(a) feasibility studies or surveys and reports;**

**(b) specifications, bills of quantities, technical drawings, or terms of reference;**

**(c) environmental and social impact assessment reports;**

**(d) reasonable expected date of delivery; and**

**(e) any other necessary information pertaining to the procurement.**

**(3) When estimating the value of the goods, works or services, the accounting officer shall ensure that the estimate is realistic and based on up-to-date information on economic and market conditions.”**

From the foregoing, the Board observes that the Act and Regulations 2020 arrogate wide powers and discretion on an accounting officer and user department of procuring entities in the preparation of Tender Documents

including the specifications of the goods and services sought thereunder. So far as the Board can comprehend, the underlying rationale for this is that unless cogent evidence is supplied to the contrary, as the entity that requisitions the goods, works or services being procured, a procuring entity best understands its technical and financial needs as to provide specifications that will ensure conformity, functionality and performance of the procured goods and services.

In the instant case, the Respondents have cited the Lamu port as a strategic installation which bears high security implications for the port and the country at large and further that as an international commercial port its operations must meet the requirements of the International Ship and Port Security (ISPS) Code. No cogent justification and/or evidence has been provided by the Applicant to rebut the Respondents' justifications for these requirements. The Board observes that the Applicant's objections are vague, bare and fail to state with particularity the basis upon which it believes the requirements it challenges to be objective. The mere fact that the Applicant is unable to meet some of the requirements does not necessarily imply that the same are unattainable. Indeed it is premature to presume that none of the tenderers who had submitted their tenders as at the date of the request for review – which happens to be the last day before submission of tenders deadline – met the 2<sup>nd</sup> Respondent's requirements in the Tender Document. The argument that the requirements are onerous, unfair or discriminative merely because the Applicant cannot meet them in our respectful opinion finds no basis in law and cannot hold especially before tender opening and evaluation when other tenderers' tenders have not been opened or

evaluated to ascertain compliance. To hold otherwise without cogent supporting evidence would be to countenance usurpation of the highly specialized procurement functions of procuring entities and thereby debase the principles of public procurement set out under Article 227 of the Constitution.

The Board observes that it is the duty of the party who disputes any matter in a procurement process to set out its case with sufficient specificity as to enable the Board appreciate and fully address the issues arising from it and to enable parties to the proceedings fully respond to the same. As it were, the preparation of Tender Documents is from the foregoing provisions of the Act and Regulations 2020 more often than not a complex and highly technical activity. The Board would accordingly be ill advised to second guess and/or substitute its opinion with that of a procuring entity and its user department unless reasonably credible, cogent and authoritative evidence is supplied to warrant the same. Save for the general statements, the Applicant has not made any attempt to provide alternative justification to rebut the Respondent's explanations.

This Board like a court of law is bound by parties' pleadings and cannot venture on a discovery expedition on behalf of a litigant. To do so would not only be ultra vires our powers but would also prejudice the rights of other tenderers who may have complied with the requirements set out in the Tender Document to evaluation.

In the circumstances, we find no merit in the Applicant's complaints and dismiss the same.

Under Section 80(3) of the Act, all tenderers are entitled to fair evaluation of their tenders in strict compliance with the Tender Documents and the applicable law. It would be unfair and presumptuous to deny other tenderers the opportunity at evaluation on the basis of the unfounded apprehensions of the Applicant.

The Upshot of the foregoing is that the Request for Review lacks merit and the Board makes the following specific orders:-

### **FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review dated 14<sup>th</sup> March 2022:-

- 1. The Preliminary objection dated 29<sup>th</sup> March, 2022 lacks merit and be and is hereby dismissed.**
- 2. The Request for Review dated 14<sup>th</sup> March 2022 lacks merit and be and is hereby dismissed.**

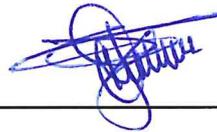
3. The Procuring Entity is hereby directed to proceed with the subject procurement in strict compliance with the Tender Document and the applicable law.
4. Given the procurement process is still ongoing, each party shall bear its own costs in the Request for Review.

Dated at Nairobi, this 4<sup>th</sup> day of April, 2022.



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**CHAIRPERSON**  
**PPARB**



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**SECRETARY**  
**PPARB**