

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 32/2022 OF 19TH APRIL, 2022

BETWEEN

SHREE SIKANDRABAD COMPANY

LIMITED..... APPLICANT

VERSUS

THE ACCOUNTING OFFICER/ CEO

MOI TEACHING AND REFERRAL

HOSPITAL (ELDORET).....RESPONDENT

ELEVATE CARE LIMITED..... INTERESTED PARTY

Review against the decision of the Chief Executive officer of Moi Teaching and Referral Hospital (MTRH) in relation to Tender No: MTRH/T/64/2021-2022; For Supply and Delivery of Hand Surgery Set.

BOARD MEMBERS

- | | |
|---------------------------|---------------|
| 1. Ms. Faith Waigwa | - Chairperson |
| 2. Ms. Phyllis Chepkemboi | - Member |
| 3. Mr. Hussein Were | - Member |
| 4. Mr. Isabella Juma | - Member |
| 5. Mr. Jackson Awele | -Member |

IN ATTENDANCE

Mr. Philemon Kiprop - Holding brief for the Acting Board Secretary

BACKGROUND TO THE DECISION

The Procuring Entity advertised for Tender No. MTRH/T/64/2021-2022 – For Supply and Delivery of Hand Surgery Set on 1st February, 2022 in compliance to requirement under Section 96 of the Public Procurement and Asset Disposal Act, 2015 and Regulations thereto.

That upon advertisement, the tender document was uploaded on both state tender portal and MTRH website in compliance to provision of section 98 of the Public Procurement and Asset Disposal Act, 2015.

The tenders were opened on 28th February, 2022 at 10.00 a.m. in presence of the tenderers who chose to attend. Tender opening proceedings were carried out in compliance to legal requirements provided for under section 78 of the Public Procurement and Asset Disposal Act, 2015 and guidelines contained in Invitation to Tender .Nine (9) expressed their interest in the subject tender.

The Subject procurement was evaluated by an ad hoc Tender Evaluation Committee appointed by Moi Teaching and Referral Hospital, Chief Executive Officer and the Tender Evaluation Committee carried out evaluation in three stages namely preliminary Evaluation stage, technical Evaluation stage and financial evaluation stage, the Applicant was

disqualified at preliminary evaluation stage and therefore declared non responsive, the interested party emerged the lowest evaluated bidders having passed technical Evaluation stage and financial evaluation stage and its price was the most competitive.

Thereafter the tenderers were notified the outcome of this procurement proceeding in compliance to requirement under Section 87 of the Public Procurement and Asset Disposal Act, 2015 on 4th April, 2022 and reasons as to why their tenders were not successful were provided.

REQUEST FOR REVIEW NO. 32/2022

On 19th April, 2022, Shree Sikandrabad Company Limited, the Applicant herein, lodged a Request for Review dated 14th April, 2022 together with a Supporting Affidavit sworn by Mr. Ferdinand Wanyama, the Director of the Applicant, seeking the following orders:

- a) The respondent's decision awarding tender No. MTRH/T/64/2021-2022 for Supply and Delivery of Hand Surgery Set to M/s elevate Care Limited (the Interested Party herein)be annulled and set Aside***
- b) The respondent's letter dated 4th April, 2022 notifying the Applicant that it was not successful in MTRH/T/64/2021-2022 for Supply and Delivery of Hand Surgery Set be annulled and set aside.***
- c) A declaration that the Procuring Entity failed to evaluate the Applicant bid in accordance with criteria and procedures***

provided in the tender documents in accordance with Section 79(2),(80) and 82 of the Act read together with Regulations' 74 and 75 of the Regulations.

- d) The respondent be directed to order the evaluation committee to re-admit the Applicant 's bid at for fresh evaluation and to carry out re-evaluation of the Applicant bid noting to observe and Apply criteria in the tender document and in accordance Section 79(2),(80) and 82 of the Act read together with Regulations' 74 and 75 of the Regulations.***
- e) Further to prayer (d) above, the Board in exercise of its discretion ,to direct the respondent o conclude the subject procurement process including the making of an award to the lowest and most responsive evaluated bidders in accordance with Section 86 of the Act read together with Section 80(2) and 82 of the Act within specified period***
- f) The respondent be compelled to pay to the Applicant the costs arising from/and incidentals to this Application and***
- g) The Board to make such and further orders as it's deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this request for Review.***

In a letter dated 19th April, 2022, the Acting Board Secretary, Mr. Philip Okumu, notified the Respondent of the existence of the Request for Review and the suspension of procurement proceedings for the subject tender

while forwarding to the Respondent 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 Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 19th April, 2022.

During the filing of the Request for Review, the Public procurement Regulatory Authority on behalf of the Board received a sum of Kshs.10,000 (Ten Thousand shillings only) from one Mr. Ferdinand Gabriel Wanyama being non refundable filing fees set out as per Part II Fees For Reviews and the Secretary acknowledged filing of the request for review. The Review Board Secretariat however noted that the at the time of filing the fees paid by the Applicant was less than that ascertainable charges being Ksh.34,461.01 and thus less by a sum of Ksh.24,461.01 this additional fees were demanded from the Applicant verbally and vide an email dated 20th April,2022 and letter dated 27th April,2022 to no avail.

In response to the Request for Review by the Applicant on 28th April 2022, the Procuring Entity responded to the Request for Review by filing a Notice of Preliminary Objection dated 27th April,2022 and Procuring Entity's statement against the Application for Request for Review dated 27th April 2022 through Josphat Mutuma Kirima Advocates.

Vide letters dated 28th April,2022, the Acting Board Secretary notified all tenderers in the subject tender, via their respective addresses as provided

by the Respondent, of the existence of the Request for Review while forwarding to the tenderers a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24th March 2020. Further, all tenderers were invited to submit to the Board any information and arguments about the subject tender within 3 days from 28th April 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.

None of the Party's filed their Written Submissions.

APPLICANT'S CASE

The Applicant state that the Procuring Entity failed to comply with the Act while carrying out evaluation of the Applicant bid ,the Procuring Entity breached the provisions of Paragraph 27,28,29 and 33.1 of the tender document as they failed to acknowledge that the Applicants 's bid was responsive and its responsiveness was not affected by minor deviations that do not materially depart from the requirements set out in the tender documents and thus failed to or acted in breach of Section 3 of the Act and Article 227 of the constitution.

PROCURING ENTITY'S RESPONSE

The Procuring Entity in response to the Request for Review filed preliminary objection that the Request for Review offends Section 167(1)

of the Act and Regulations' 203(1)(c) of the regulations' as it was filed outside the 14- day period

In response to the substantive Request for Review the Procuring Entity deny that that the Applicant presented its bid in accordance with the Instruction to Tenderers and by observing relevant legal provisions.

That this procurement was evaluated by an ad hoc Tender Evaluation Committee appointed by Moi Teaching and Referral Hospital, Chief Executive Officer in compliance to provision of section 46(1) of the Public Procurement and Asset Disposal Act, 2015.

That Tender Evaluation Committee discharged their mandate in strict adherence to evaluation criteria which was provided for from page 30 – 36 of the bidding document. Tender Evaluation Committee enforced requirements as provided for under section 80(2) of the Public Procurement and Asset Disposal Act, 2015.

That the Applicant's tender was declared non –responsive for failure to adhere to the provision of section 74(1)(i) of the Public Procurement and Asset Disposal Act (2015), section 74(1)(b) of the Public Procurement and Asset Disposal Regulations (2020) and provision of clause 2.2 (8) under Section III – Evaluation and Qualification Criteria.

The Procuring Entity aver that mandatory evaluation procedures and criteria cannot be waived by invoking provisions of clauses 27, 28, and 29 of Instruction to Tenderers since they are anchored on provisions of section

55, 74 of the Public Procurement and Asset Disposal Act, 2015 and Regulations 74.

The Procuring Entity further avers that all tenderers were notified of the outcome of the procurement proceeding in compliance to requirements under section 87 of the Public Procurement and Asset Disposal Act, 2015 on 4th April, 2022 and reasons as to why their tenders were not successful were provided.

The Applicant confirmed under paragraph 6 that there was error in its bid and proposed that it ought to have been treated as a minor deviation. Guided by the provision of section 79(2)(a) the error which was committed by the Application was significant since it failed to satisfy requirement under section 74 of the Public Procurement and Asset Disposal Act, 2015 and Regulations 74. As envisaged by the PPADA, deviation should not materially depart from requirements set out in the tender document or infringe legal requirements.

BOARDS DECISION

The Board has considered each of the parties' pleadings, cases, documents, written submissions, list of authorities and confidential documents submitted to it by the Respondent pursuant to Section 67 (3) (e) of the Act and finds the following issues call for determination:

- 1. Whether the Request for Review is fatally defective for failure to be accompanied by the requisite filing fees.**

Depending on the outcome of the first issue;

2. **Whether the Request for Review filed was filed within the statutory period of 14 days stipulated in Section 167(1) of the Act.**

Depending on the outcome of the second issue;

3. **Whether the Applicants' bid was properly paginated in accordance with the requirement of the tender document and whether any omission/error/deviation thereof can be treated as minor deviation.**

We shall now proceed to determine the issues framed for determination.

The Board Secretariat brought to the attention of the Board that the Applicant herein have not paid additional fee since the fee paid at the time of Ksh. 10,000 is less than the ascertained fees of Ksh. Ksh.34, 461.01.

The Board is mindful of fifteenth schedule (rr.203) (2) (d) and 209 (5) fees for Reviews and conservatory orders issue thereto and fact that the Applicable filing fees are those provided Legal Notice No. 106 of 18th June 2013 of the regulations'. Part II Fees For Reviews Paragraph 7 of 2006 Regulations' which provides that the Secretary may demand additional fee if the fee paid at the time of filing is less than that ascertained to be chargeable. The Board Secretary in an email dated 20th April, 2022 and

letter dated 27th April, 2022 demanded the additional fees from the Applicant in line with the provisions of regulation to no avail

The filing fees payable by the Applicant as per the Legal Notice No. 106 of 18th June 2013 guided by the Applicant tender sum of Kshs. 5,784,404 million is Kshs.34, 461.01 the Applicant paid Ksh.10,000 only the additional fees which was to be paid is a sum of Ksh.24,461.01 which the Applicant did not pay.

The Board notes that without the payment of the Requisite fees, the Request for Review is not properly filed as per the minimum requirements under Section 167(1) of the Public Procurement and Asset Disposal Act, 2015 read together with Regulation 203 (d) of the Public Procurement and Asset Disposal Regulations, 2020.

The Board will therefore proceed to state that the Request for Review is fatally defective for the reason that the Request for Review filed with the Board on 19th April, 2022 was not accompanied with the requisite Appeal fees provided for by the Regulations'

Regulation 209(4) of Regulations 2020 permits the Board to hear preliminary objections as part of a substantive request for review and give one decision. Regulation 209(4) of Regulations 2020 provides as follows:

209(4) The Review Board may hear the preliminary objection either separately or as part of the substantive request for review and give a separate or one decision.

The Board having made a finding on the first issue will not delve on the other issues framed for determination since failure to pay requisite fees is fatal and the Board will proceed to make the following final orders

FINAL ORDERS

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

- 1. The Applicant's Request for Review, by Shree Sikandrabad Company Limited, and lodged the Board on 19th April, 2022 with respect to Tender No. MTRH/T/64/2021-2022; For Supply and Delivery of Hand Surgery Set be and is hereby struck out.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 10th Day of May 2022.



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CHAIRPERSON

PPARB



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SECRETARY

PPARB

