

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 33/2022 OF 20TH APRIL 2022

PRECISE ARCHITECTS LIMITED APPLICANT

VERSUS

THE ACCOUNTING OFFICER,

MINISTRY OF EDUCATION

(STATE DEPARTMENT FOR VOCATIONAL AND

TECHNICAL TRAINING) RESPONDENT

DAMA SERVICES LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer of the Ministry of Education (State Department for Vocational and Technical Training) with respect to Tender No. NCB/MOE-VTT/TVET PHASE III/3/2020-2021 for Consultancy Services for Development of Designs, Masterplans, Tender Documents and Supervision of Construction Works of Additional Departmental Blocks in Eleven (11) Technical & Vocational Education & Training (TVET) Institutions, Construction of Twin Hostels in Eight (8) Technical Vocational Colleges and a Publishing and Printing Complex for Curriculum and Training Materials.

BOARD MEMBERS

- | | | |
|--------------------------|---|-------------|
| 1. Ms. Faith Waigwa | - | Chairperson |
| 2. Dr. Paul Jilani | - | Member |
| 3. Mrs. Irene Kashindi | - | Member |
| 4. Ms. Njeri Onyango | - | Member |
| 5. Eng. Kimani Mbiu, OGW | - | Member |

IN ATTENDANCE

Stanley Miheso - Holding brief for the Acting Board Secretary

BACKGROUND OF THE TENDER

The Tendering Process

Ministry of Education (State Department for Vocational and Technical Training) (hereinafter referred to as "the Procuring Entity") invited interested consulting firms to participate in a Request for Expressions of Proposals with respect to Tender No. NCB/MOE-VTT/TVET PHASE III/3/2020-2021 for Consultancy Services for Development of Designs, Masterplans, Tender Documents and Supervision of Construction Works of Additional Departmental Blocks in Eleven (11) Technical & Vocational Education & Training (TVET) Institutions, Construction of Twin Hostels in Eight (8) Technical Vocational Colleges and a Publishing and Printing Complex for Curriculum and Training Materials (hereinafter referred to as "the subject tender").

The expression of interest was advertised on 11th May 2021 and opened on 24th May 2021 at 10:00am in the presence of bidders' representatives who chose to attend. Thirty-five (35) firms returned their expression of interest documents by the closing/opening date.

Invitation and Opening of Request for Proposals (RFPs)

Sixteen (16) firms were recommended to continue to the next stage of Request for Proposals. The letters of invitation and the Request for Proposal documents were issued to all the shortlisted firms on 20th September 2021. The Sixteen (16) firms that were invited to submit their detailed Request for Proposals (RFPs) were: -

No.	Name of Bidders
1.	Intershelter Sullivan Architects
2.	Space and Systems
3.	Clarion Architects
4.	Symbion Kenya Limited
5.	Consortium Tectura International Limited
6.	Archipoint Consulting Architects Limited
7.	Scope Design Systems Limited
8.	Heritage Associates Limited
9.	Triad Architects
10.	Precise Architects
11.	Trioscape Space Planning Limited
12.	Makro Consultancy Limited

13.	Dama Services Ltd
14.	Edon Consultants International Limited
15.	Tej Architects
16.	Skylon Designs Limited

Submission of Request for Proposals

The following nine bidders submitted their bids by the submission deadline:

Bidder No.	Name of Bidder
B1	Symbion Kenya Limited
B2	Consortium Tectura International Limited
B3	Scope Design Systems Limited
B4	Triad Architects
B5	Precise Architects
B6	Trioscape Space Planning Limited
B7	Dama Services Limited
B8	Tej Architects
B9	Skylon Designs Limited

Evaluation

The Accounting Officer thereafter appointed an Evaluation Committee to undertake evaluation in three stages, namely: -

- i. Preliminary Evaluation;
- ii. Technical Evaluation; and
- iii. Financial Evaluation.

i. First Preliminary Evaluation

The Preliminary Evaluation entailed the consideration of whether the bidders were “responsive” or “non-responsive” on submission of mandatory documentary evidence. Five (5) firms “1”, “3”, “5” “7” and “9” were found to be responsive and the rest were eliminated for being non-responsive

ii. First Technical Evaluation

The five firms thereafter proceeded to the Technical Evaluation stage. The firms were assessed based on the criteria set out in the tender document on a scale of 1 to 100 and the pass mark was 80 marks. Four firms met the required pass mark and were therefore recommended by the committee to proceed to Financial Evaluation. The Applicant scored 84 marks at this stage.

iii. First Professional Opinion

By a Professional Opinion dated 9th December 2021, the Procuring Entity’s Head of Supply Chain Management differed with the Evaluation Committee’s evaluation and recommendation. He alluded to lack of expertise of the members of the Evaluation Committee. He recommended that the Evaluation Committee be disbanded and a new Evaluation Committee be constituted with membership drawn from the State Department of Public Works.

Re-evaluation

Pursuant to the recommendations from the first Professional Opinion, a new Evaluation Committee was appointed by the Accounting Officer. The new Evaluation Committee proceeded with evaluation as follows: -

i. Second Preliminary Evaluation

The Preliminary Evaluation entailed the consideration of whether the bidders were "responsive" or "non-responsive" on submission of mandatory documentary evidence. Four (4) firms namely, "B1", "B5", "B7" and "B8" were found to be responsive and the rest were eliminated for being non-responsive.

ii. Second Technical Evaluation

The four firms thereafter proceeded to the Technical Evaluation stage. The firms were assessed based on the criteria set out in the tender document on a scale of 1 to 100 and the pass mark was 80 marks. Two firms, namely M/s Precise Architects Limited (herein after referred to as "the Applicant") and M/s Dama Services Limited (herein after referred to as "the Interested Party") met the required pass mark and were therefore recommended by the new Evaluation Committee to proceed to the Financial Evaluation stage. The Applicant scored 85.9 marks at this stage.

iii. Second Professional Opinion

By a Professional Opinion dated 14th March 2022, the Procuring Entity's Head of Supply Chain Management agreed with the new Evaluation Committee's recommendation. He recommended the approval to open the Financial Proposals for the Applicant and the Interested Party.

Opening of Financial Proposals

The new Evaluation Committee scheduled the opening of Financial Proposals for 7th April 2022. The opening was however suspended after the Applicant objected to the said opening and demanded to be furnished with the reasons why they did not attain the maximum scores at the technical evaluation stage. The Applicant sought for the reasons by a letter dated 7th April 2022. The Procuring Entity responded vide a letter dated 13th April 2022 stating that the reasons would be availed upon completion of the Financial Evaluation when notifying bidders of the outcome of the tender process. The Procuring Entity invited the Applicant and the Interested Party for Financial Opening scheduled for 22nd April 2022. The opening did not however take place given that this Request for Review was filed on 20th April 2022. Pursuant to Section 168 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') all tender proceedings automatically stood stayed upon the filing of the Request for Review.

Request for Review

The Applicant lodged a Request for Review dated and filed on 20th April 2022, together with the Statement in support of the Request for Review, signed by Arthur Mugo Mwangi on 20th April 2022 and filed on even date, through the firm of Gerivia Advocates LLP, seeking the following orders: -

- i) The Respondent's decision communicated on 7th April 2022 in relation to the Applicant's technical score be cancelled and set aside;***

- ii) The Respondent be directed to suspend the planned financial opening scheduled for 22nd April 2022 at 10:00AM as communicated to the Applicant through the letter dated 13th April 2022 pending the hearing and conclusion of these proceedings;***
- iii) The Respondent be directed to re-admit the Applicant's bid at technical evaluation stage and to re-evaluate the bid in accordance with the criteria and procedures under the Tender Document in line with Section 80 (2) & (3) of the Act and as may be directed by the Board in exercise of its mandate under Section 173 of the Act;***
- iv) Following conclusion of the re-evaluation at the technical evaluation stage, the Respondent be ordered to issue a directive to the Procuring Entity's Evaluation Committee to proceed with financial evaluation of the subject Tender and carry on with the procurement proceedings to their logical conclusion including making award in line with Section 86 of the Act;***
- v) The Board in exercise of its discretion, to give directions to the Respondent to redo or correct anything within the entire procurement process found to not have been done in compliance with the law; and***
- vi) The Respondent be compelled to pay to the Applicant the costs arising from/and incidental to this Application.***

By a Notification of Appeal and letter dated 20th April 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board") notified the Respondent of the existence of the Request for Review and the suspension of the 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. 02/20 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 five days of 20th April 2022.

The Respondent filed a Response dated 26th April 2022 signed by the Principal Secretary. The Respondent asserted that the Request for Review by the Applicant is prematurely before the Board as the Applicant should have waited for the debriefs after the conclusion of the exercise.

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

The Interested Party filed its Replying Affidavit sworn by David Kanja on 5th May 2022 through the firm of Mbugwa, Atudo & Macharia Advocates. It sought to have the application struck out for lack of merit, jurisdiction and being bad in law. It also added, that the Applicant has no *locus standi* to challenge the process halfway yet it has not been disqualified from the procurement process.

Pursuant to the Board's Circular No. 02/2020 dated 24th March 2020, detailing an 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 shall be deemed as properly filed if they bear the official stamp of the Board.

The_[MOU1] Interested party filed written submissions dated 5th May 2022 and filed with the Board on even date.

BOARD'S DECISION

The Board has considered each party's case, the pleadings and the written submissions filed before it, including the confidential documents submitted by the Procuring Entity pursuant to Section 67(3) (e) of the Act and frames the issues for determination as follows;

I. Whether the Request for Review is time-barred.

Depending on the outcome of (I) above.

II. Whether the Applicant's tender was evaluated in accordance with the criteria set out in the tender document as read with Section 80 of the Act.

III. What are the appropriate orders to grant in the circumstances?

Issue I: Whether the Request for Review is time-barred.

The Interested Party stated in its replying Affidavit that the Applicant Request for Review is time-barred in that: -

- a. It ought to have been filed within 14 days of 24th February, 2022 when the Evaluation Committee completed the technical evaluation, which according to the Interested Party, is the effective date of the occurrence of the alleged breach.
- b. If it is assumed that the operative date was when the notifications were sent on 1st April, 2022, the last day within which the Request for Review ought to have been lodged by the Applicant was 15th April, 2022.
- c. The Request for Review filed on 20th April, 2022 was way beyond the deadline in express breach of Section 167(1) of the Act.

Whether or not a request for review is filed within time touches on the Board's jurisdiction. In line with the cases of ***Republic v Public Procurement Administrative Review Board & 2 Others [2015] eKLR*** and ***Republic v Public Procurement Administrative Review Board &***

2 Others Ex-parte Kemotrade Investment Limited [2018] eKLR, the Board would not have jurisdiction to entertain the Request for Review if it was filed outside the prescribed 14 days.

It is therefore incumbent for the Board to determine at the outset, whether or not it has jurisdiction to determine the matter. This is in line with the dicta in the *locus classicus* Court of Appeal's case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited [1989] eKLR** in which it was stated that: -

"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]

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 the source of the 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."

[Emphasis added]

Section 167(1) of the Act should be 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.”***

The Board notes that the gist of the Applicant’s case is that the Procuring Entity allegedly allocated the Applicant relatively low scores at the technical evaluation stage. The Applicant states at paragraph 6 of the supporting statement that it was informed of its technical score of 85.9 marks by a representative of the procuring entity on 7th April, 2022. This was confirmed by the Procuring Entity in its response.

Given the foregoing, the alleged breach was known by the Applicant on 7th April, 2022. As such, the request for Review filed on 20th April 2022 was within time.

Issue II: Whether the Applicant's tender was evaluated in accordance with the criteria set out in the tender document as read with Section 80 of the Act.

The Applicant challenges the technical score of 85.9 marks allocated to it at the technical stage.

While the Applicant asserts that its technical proposal was not evaluated according to the criteria set out in the tender document and that this amounts to a breach of Section 80 of the Act, the Request for Review in reality is an invitation and/or an attempt to re-evaluate its tender.

The Applicant contends that it met all the technical requirements and gave appropriate responses supported with evidence where required. The Applicant has summarized the requirements of the technical proposal under the tender document and produced a "Self-Assessment Sheet" on which the Applicant has allocated itself 95 marks out of a maximum 100 marks. The Applicant has in addition given detailed information at paragraphs 13 to 43 of its supporting statement of why it believes that it met the technical requirements.

Evaluation of tenders is undertaken by procuring entities. It is not open for the Applicant to undertake a self- evaluation and assert that it ought to have been allocated 95 marks. It is also not open to the Applicant to invite the Board to conduct a re-evaluation. In the case of ***Republic v Public Procurement Administrative Review Board & 2 others Masinde Muliro University of Science and Technology [2016] eKLR***, the Court stated as follows:

"196. What the respondent in this case was doing, in essence, was thereby seeking to reevaluate the tender documents and which it did, by marking the 1st interested party and awarding it over 70 marks, which is the preserve of the Evaluation Committee.

197. I find that the respondent acted in excess of its jurisdiction by substituting the decision of the Evaluation Committee and such excess of jurisdiction is amenable to interference by this court.

201. In this case, the court further notes that the Board directed the award of the tender. **By remarking the 1st interested party and therefore qualifying it with over 70 points and ordering that the Evaluation Committee do proceed on financials only without a fidelity Guarantee bond, and that the award should be made in favour of the lowest tenderer.** No doubt, the Board was dictating to the procuring entity on who should be awarded the tender since it was clear from the Review Board's

reevaluation and marking that the 1st interested party gave the lowest amount but had failed in the technical evaluation

The Applicant wishes the Board to consider the alleged lapses in the evaluation of its technical proposal as pointed out in the Applicant's Self-Assessment and cancel the technical score given by the Procuring Entity. Doing so would amount to converting the Board to an evaluation committee which is not permissible as was made clear by the court in the case of ***Republic v Public Procurement Administrative Review Board & 2 others Masinde Muliro University of Science and Technology [2016] eKLR (supra)***.

The Applicant is however, entitled to information as to how it scored 85.9 marks at the technical stage. This is pursuant to Section 67 (4) as read with Section 68 (2)(d)(iii) of the Act which permits the disclosure to an applicant in a request for review to, *inter alia*, a summary of evaluation its tender.

Given the foregoing, the Applicant should be furnished with a summary of the evaluation of its own tender in line with Section 67(4) read with Section 68 ((2) (d) (iii) of the Act and in particular be given a breakdown of its technical score of 85.9 marks.

Issue III

The Board notes that the Respondent scheduled the opening of financial proposals on 7th April 2022 but this did not take place on the ground that the Applicant objected to the opening of the financial proposals. The Applicant also prayed that the opening of financial proposals be suspended. The Board does not consider that it was necessary for the Respondent to postpone the financial opening scheduled for 7th April 2022. The Board also sees no reason why the opening of the financial proposals should be suspended as prayed by the Applicant.

In view of the foregoing, the Respondent is directed to proceed with the opening of the financial proposal and the entire procurement proceedings to its logical conclusion. At the same time, the Procuring Entity should issue the Applicant with a summary of evaluation of the Applicant's tender within the time lines set out in the final orders below.

Save as aforesaid, the prayers sought by the Applicant are denied.

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Act, the Board makes the following orders regarding the Request for Review dated 20th April 2022: -

- I. The Accounting Officer of the Procuring Entity is directed to issue the Applicant with a summary of the Applicant's tender's technical evaluation in line with Section 67(4) read with Section 68 (2) (d) (iii) of the Act and in particular to give a breakdown of the Applicant's technical score of 85.9 marks with respect to Tender No. NCB/MOE-VTT/TVET PHASE III/3/2020-2021 for Consultancy Services for Development of Designs, Masterplans, Tender Documents and Supervision of Construction Works of Additional Departmental Blocks in Eleven (11) Technical & Vocational Education & Training (TVET) Institutions, Construction of Twin Hostels in Eight Technical Vocational Colleges and a Publishing and Printing Complex for Curriculum and Training Material. The said summary of the Applicant's tender evaluation to be furnished to the Applicant within 14 days of this decision.**
- II. The Procuring Entity to complete the procurement process for Tender No. NCB/MOE-VTT/TVET PHASE III/3/2020-2021 for Consultancy Services for Development of Designs, Masterplans, Tender Documents and Supervision of Construction Works of Additional Departmental Blocks in Eleven (11) Technical & Vocational Education & Training (TVET) Institutions, Construction of Twin Hostels in Eight Technical Vocational Colleges and a Publishing and Printing**

Complex for Curriculum and Training Material, to its logical conclusion within 14 days of this decision.

III. Each party to bear its own costs.

Dated at Nairobi, this 11th day of May 2022.



.....
CHAIRPERSON

PPARB



.....
SECRETARY

PPARB