

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO.55 OF 2022 DATED 29THJUNE 2022

BETWEEN

RENTCO AFRICA LIMITED.....APPLICANT

AND

**THE ACCOUNTING OFFICER,
KENYA ELECTRICITY
TRANSMISSION CO. LTD 1STRESPONDENT**

**KENYA ELECTRICITY
TRANSMISSION CO. LTD.....2NDRESPONDENT**

Review against the decision of the Accounting officer of Kenya Electricity Transmission Co. Ltd with respect to Tender No KETRACO-ST 009-2021 for Request for Proposals for Design, Construction and Commercial Operation of Tier IV Data Centre on a Revenue Share Model.

BOARD MEMBERS PRESENT

1. Faith Waigwa - Chairperson
2. Irene Kashindi - Member
3. Rahab Chacha - Member
4. Hussein Were - Member
5. Nicholas Mruttu - Member

IN ATTENDANCE

Phillip Okumu- Acting Secretary to the Board

BACKGROUND TO THE DECISION

The Respondents invited interested persons to submit their Expression of Interest for Provision of a Commercial Tier IV Data Centre Solution vide an Open International Tender No. KETRACO/PT/015/2021 and five (5) firms submitted their responses. These were;

- i. Canovate Electronics
- ii. El Sewedy Technology-Egypt
- iii. MTN Business (K) Limited
- iv. RENTO Africa Limited in Partnership with China Mobile Limited, China Communication Services and iXAfrica Data Centre.
- v. Sterling and Wilson Pvt Limited

The Respondents only found two (2) bidders/firms as being responsive to the Expression of Interest (EOI). These were El Sewedy Technology-Egypt and RENTCO Africa Limited in Partnership with China Mobile Limited, China Communication Services and iXAfrica Data Centre and the Respondents subsequently issued the two (2) firms with the Request for Proposal (RFP) and only RENTCO Africa Limited in Partnership with China Mobile Limited, China Communication Services and iXAfrica Data Centre responded to the RFP.

REQUEST FOR REVIEW NO.55 OF 2022

The Request for Review was lodged by M/s Rentco Africa Limited on 29th June, 2022 in the matter of Tender No.**KETRACO-ST-009-2021** for Design, Construction and Commercial Operation of a Tier IV Data Centre on a Revenue Share Model.

The Applicant seeks for the Board to:

- 1. Extend the tender validity period which expires on 29th June 2022 and to extend the same for a further Sixty (60) days from 29th June 2022 to enable the Applicant undertake the subject tender according to the criteria set out in the Tender Document, the Public Procurement and Asset Disposal Act 2015, the Regulations thereunder and the Constitution.***
- 2. Make no order as to costs.***

In a Notification of Appeal and a letter dated 29th June 2022, the Acting Board Secretary notified the Respondent of the existence of the instant Request for Review and the suspension of procurement proceedings for the subject tender while forwarding to the Respondent a copy of the instant 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 instant Request for Review together with confidential documents concerning the subject tender within 5 days from 29th June 2022.

On 7th July, 2022, the firm of Samwel Rambo Advocate on behalf of Kenya Electricity Transmission Co. Ltd the Procuring Entity herein, filed notice of appointment. On the same date of 7th July, 2022 the Respondent filed a notice of preliminary objection. On 8th July, 2022 the Advocate of the Respondent herein, filed memorandum of Response dated 7th July 2022 and filed with the Board on the 8th July, 2022 and a further Memorandum of response dated 18th July, 2022 was filed with the Board on even date.

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 13th July 2022, the Applicant filed Applicant's Supporting Affidavit sworn by one **Robert Nyasimi** dated 12th July, 2022 and filed with the Board on 13th July, 2022.

APPLICANT'S CASE

The Applicant states that itself and the Respondents have been jointly conducting due diligence as per the terms of the tender document which culminated into a joint visit to Singapore as part of the due diligence. The Applicant has incurred lots of expenses into the said due diligence.

The Applicant submits that the tender validity period was extended for a further period up to 28thMay 2022 to allow for completion of the procurement process and that vide a letter dated 24thMay 2022, the Applicant requested for a further extension of the tender validity period pursuant to Section 88 of the Public Procurement and Asset Disposal Act, 2015.

The Applicant avers that both itself and the Procuring Entity have taken great strides towards the actualization of the tender requirements and there is need to extend the tender validity period for a further sixty (60) days to enable the conclusion of the due diligence and the attendant requirement of the tender.

RESPONDENT'S CASE

The Respondents have filed a Notice of Preliminary Objection to the Request for Review, dated 7thJuly 2022 and filed on even date.

The Respondents submit that the Board does not have jurisdiction to hear and determine the application for the reason that the extension of a Tender Validity Period can only be done by the Accounting Officer (the 1st Respondent herein) and not the Board.

The Respondents further submit that the Applicant submitted its Tender in a partnership and has not filed any authority from the partners authorizing it to file these proceedings.

Without prejudice to the above preliminary objection the Procuring Entity filed a Memorandum of Response to the Request for Review dated 8th July 2022 filed with the Board on even date, the Respondents further aver that pursuant to Section 88 of the Public Procurement and Asset Disposal Act 2015 (the Act), the Accounting Officer extended the tender validity period by a further 30 days to lapse on 28th May 2022.

The Respondents further state that Section 88 (3) of the Act dictates that an extension of a tender validity period can only be done once and for a period of not more than thirty (30) days, and that the request by the Applicant to the Respondents to extend the tender validity period for a further 30 days cannot, therefore, be acted upon by the Respondents as the same will be contrary to the provisions of Section 88 (3) of the Act.

The Respondents aver therefore that the tender validity period has lapsed and the tender process stands terminated.

The Respondents state that they subsequently terminated the procurement proceedings vide its letter dated 27th June 2022 addressed to the Applicant and letter dated 28th June 2022 addressed to the Director General PPRA in accordance with Section 63 of the Act.

The Respondents therefore state that it is not possible to extend the tender validity period of a process that was terminated by the Respondents and that this Board has no powers under the Act and the attendant Regulations to extend the tender validity period of any tender issued by a Procuring Entity.

The Respondents thus state that this Board, therefore, has no jurisdiction to determine the Application currently before it.

BOARD'S DECISION

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

- 1. Whether the Respondent terminated the subject tender's procurement proceedings in accordance with Section 63 of the Act on account that material governance issues were detected to divest the Board of its jurisdiction by dint of Section 167(4)(b) of the Act;**
- 2. Whether the Board can extend the tender validity period**
- 3. Whether the Applicant has locus to file the instant Request for Review having submitted its Tender in a partnership.**

Depending on the determination of the first issue;

- 4. Whether the tender validity period of the subject tender has expired; and**

5. What are the appropriate orders the Board should grant in the circumstances.

Issue no.1 Whether the Respondent terminated the subject tender's procurement proceedings in accordance with Section 63 of the Act on account that material governance issues were detected to divest the Board of its jurisdiction by dint of Section 167(4)(b) of the Act;

The Respondents aver that the tender validity period had lapsed and the tender process stood terminated, which the Respondents subsequently terminated the procurement proceedings vide their letter dated 27th June 2022 addressed to the Applicant and another letter dated 28th June 2022 addressed to the Director General, Public Procurement Regulatory Authority (PPRA) in accordance with Section 63 of the Act.

The Board notes that its jurisdiction flows from Section 167(1) of the Act. However, in matters where a termination of procurement proceedings has been effected in accordance with Section 63 of the Act, such jurisdiction of the Board is ousted by dint of Section 167(4) of the Act because termination of procurement proceedings effected in accordance with Section 63 of the Act cannot be subject to administrative review proceedings before the Board. It is therefore incumbent on the Board to

establish whether the subject tender's procurement proceedings were terminated in accordance with Section 63 of the Act or not.

Termination of procurement proceedings is governed by Section 63 of the Act and where such termination meets the requirements of Section 63 of the Act, the jurisdiction of this Board is ousted by dint of Section 167 (4) (b) of the Act.

The High Court in **Republic v Public Procurement Administrative Review Board & Another Exparte Selex Sistemi Integrati [2008] Eklr**(hereinafter referred to as "the Selex Sistemi Integrati Case"), while determining the legality of Sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Repealed Act") that dealt with termination of procurement proceedings and took the position that the Board had the duty to question whether a decision by a procuring entity terminating a tender met the threshold of Section 100 (4) of the Repealed Act.

It is therefore important for this Board to determine whether the Respondent terminated the subject tender in accordance with provisions of Section 63 of the Act.

Section 63 of the Act provides as follows: -

(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) the subject procurement has been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination. [Emphasis by the Board]

From the above provision of Section 63 of the Act the Accounting Officer is given latitude to terminate procurement proceedings before a notification of award is issued and must only occur if any of the circumstances enumerated in Section 63(1) (a) to (i) of the Act are present for any termination to be deemed lawful, including submitting a report to Director-General, Public Procurement Regulatory Authority.

As noted herein before the issue of termination was raised by the Respondents at paragraph 14 of their Memorandum of Response filed with the Board on 8th July, 2022, which stated as follows:

*"14. **THAT** the Respondent subsequently terminated the procurement proceedings vide its letter dated 27th June 2022 addressed to the Applicant and letter dated 28th June 2022 addressed to the Director General Public Procurement Regulatory Authority in accordance with Section 63 of the*

PPAD Act. Annexed and marked ATW 1 and ATW 2 are copies of the said letters and emails forwarding them to the recipients)”

By a letter dated 27th June, 2022 addressed to Robert Nyasimi, the Chief Executive Officer, Rentco Africa Limited in Partnership with China Mobile Limited, China Communication Services and iXAfrica Data Centre, the Respondents notified Rentco Africa Limited via email dated July 5th 2022 08:14 from Gideon Kipngetich <gkipngetich@ketraco.co.ke, sent to info@rentcoafrika.com, of the termination of the procurement proceedings of the subject tender.

The Respondent terminated and communicated to the Applicant of the termination of the procurement proceedings of the subject tender on account that they have realized that this project is of a Public Private Partnership nature. However the letter to Director General Public Procurement Regulatory Authority dated 28th June, 2022 gives a different reason as to why the Respondents terminated the subject tender, being pursuant to Section 63(1) (e) of the Act.

It's apparent to the Board that the communication of termination to the Applicant and to the Director General was done during the pendency of the case contrary to the express provision of Section 168 of the Act which has effect of staying any Procurement proceedings once a Request for Review has been filed.

The Board further finds that the letter to the Director General ,Public Procurement Regulatory Authority is not a report in the format prescribed by the Act, and that the reasons advanced in the letter to Director-General and to the Applicant contradict each other. The mere action of communicating termination during the pendency of a case is enough to point procedural impropriety by the Procuring Entity and the Board will proceed to hold that the termination was not proper.

In the circumstances, we find the substantive and procedural statutory pre-conditions under Section 63(1) (e), (3) and (4) of the Act were not satisfied when terminating the procurement proceedings of the subject tender. Accordingly, the Board's jurisdiction is not ousted by dint of Section 167(4) (b) of the Act.

3. Whether the Applicant has locus to file the instant Request for Review having submitted its Tender in a partnership.

The Procuring Entity avers that the Applicant submitted its Tender in a partnership and has not filed any authority from the partners authorizing it to file these proceedings.

The Applicant in response filed a supporting affidavit on 13th July, 2022 and deponed that it has authority from the members of the Consortium of Rentco Africa Limited as per the Teaming Agreement.

The Board notes that the Procuring Entity apart from raising the Preliminary Objection on locus, did not support its Preliminary Objection and therefore, in the absence of such proof the Board will proceed to disallow the preliminary objection.

Whether the Board can extend the tender validity period

The Respondents submit that only the Accounting officer can extend the tender validity period in a procurement process and therefore the Board does not have jurisdiction to hear and determine the Application based on the prayer sought for by the Applicant.

It is apparent that the Respondents herein have challenged the jurisdiction of the Board to hear and determine the instant Request for Review. It is important to note that the Jurisdiction of the Board flows from Section 167(1) of the Act.

In **Civil Appeal Application No. 4 of 2019, Charles Onchari Ogoti v Safaricom Limited & another [2020] eKLR**, the court cited the famous decision in **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696** which explains the nature of a preliminary objection as follows:

What constitutes a Preliminary Objection is set out in the case of Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696, where it was held that:

"a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission

that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration"

The Preliminary Objection raised by the Respondents opposes the jurisdiction of the Board to entertain the Request for Review. It is trite 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.

Similarly, in the case of **Kakuta Maimai Hamisi v. Peris Pesi Tobiko & 2 Others (2013) eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus: -

"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. "

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. 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."

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 Board in **Application No.16/2022 of 24thFebruary2022** between **CPF Financial Services Limited = Versus= the Accounting Officer, The public Service Superannuation Scheme** observed as follows

"We note the Judicial Review Court did not address whether a tender validity period that has expired is capable of being extended in its Decision of 6th May 2022 in JR. Application No.E37 of 2022. What the Judicial Review Court held is that the Board retains the power to order as many extensions of the validity to achieve a procurement that is compliant to the constitution and the law. Notably, we believe the Judicial Review Court did not address whether a tender validity period that has expired is capable of being extended because, the same was not an issue framed for determination in the Decision of the Board of 17th March 2022."

From the above decision of the High Court it is clear that the Board has wide powers under Section 173 of the Act and can extend the tender validity period as many times as possible and the Board cannot therefore shy away from extending validity period were it is due rightly, and before the tender validity has lapsed.

Whether the tender validity period of the subject tender has expired;

The Respondents state that the tender validity period of the subject tender expired on 28th May 2022 following extension of the same by the 1st Respondent for a period of 30 days from 28th April 2022 to 28th May, 2022.

The Board further notes from the Applicant's Supporting Affidavit filed on 13th July, 2022 that they extended the tender by a further 30 days on vide letter dated 25th May, 2022 to 29th June, 2022 and the instant Request for Review was filed on 29th June, 2022.

The Procuring Entity states in its response that pursuant to Section 88 of the Act, the Accounting Officer extended the tender validity period by a further 30 days to lapse on 28th May, 2022 which action can only be done once and for fixed a period of 30 days and as such argue that the Request by the Applicant to the Respondent to extend the tender by a further 30 days could not be acted upon and maintains the tender validity period lapsed on 28th May, 2022.

The Board notes that pursuant to the Tender Document the subject tender was to remain valid for 120 days from the proposals' submission date and or closing of the bid documents. The 120 days tender validity period for the subject tender lapsed on 28th April, 2022 and a notice of extension was issued to the bidders to extend their validity to 28th May, 2022 via a letter dated 26th April, 2022. The Applicant extended its tender validity as appropriate to 28th May, 2022.

The Board further notes that the Applicant on its own motion requested to extend their bid validity for a period of 30 days from May 29, 2022 via a letter dated 24th May, 2022 to enable the signing and conclusion of the Procurement process.

Section 88 of the Act provides as follows with respect to extension of tender validity:

Extension of tender validity period

(1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.

(2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.

(3) An extension under subsection (1) shall be restricted to not more than thirty days and may only be done once.

(4) For greater certainty, tender security shall be forfeited if a tender is withdrawn after a bidder has accepted the extension of bidding period under subsection (1).

From the foregoing provisions of Section 88 of the Act, an accounting officer of a Procuring Entity has only one chance to extend a tender validity period and for a maximum period of 30 days. In the circumstances of this Request for Review the Procuring Entity and the Applicant exhausted that right on 25th May, 2022.

The Applicant did not approach the Board before that period (28th May, 2022) to Request for extension of the tender validity. It follows therefore that the tender validity period for the subject tender lapsed on 28th May, 2022 and any subsequent extension is null and void.

What are the appropriate orders the Board should grant in the circumstances.

The Board has held that the termination of the subject tender was not proper and further held that the tender validity period has lapsed.

The Applicant's prayer is for the Board to extend the tender validity period which in its (Applicant's) view expires on 29th June 2022 and to extend the same for a further Sixty (60) days from 29th June 2022 cannot be granted.

The Board's finding is that the tender expired on 28th May, 2022 and Board determines that it cannot extend a tender that has expired.

FINAL ORDERS

In exercise of the powers conferred upon it under Act, the Board makes the following orders with respect to the Request for Review dated 29th June 2022:

- 1. The Request for Review dated 29th June 2022 in regard to the subject tender is hereby dismissed.**
- 2. Given the findings of the Board in this decision, each party shall bear its own costs in this Request for Review.**

Dated at Nairobi this 20th Day of July 2022.



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CHAIRPERSON
PPARB



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SECRETARY
PPARB

