

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 60 OF 2022 OF 4th JULY, 2022
BETWEEN
OLIVILE ENTERPRISES
LIMITED.....APPLICANT
VERSUS
THE CHIEF EXECUTIVE OFFICER NATIONAL DROUGHT
MANAGEMENT AUTHORITY.....1ST RESPONDENT
NATIONAL DROUGHT MANAGEMENT
AUTHORITY.....2ND RESPONDENT

Review against the decision of the Chief Executive Officer National Drought Management Authority in relation to Tender Number NDMA/17/2021/2022 for disposal of unserviceable stores, equipment, motor vehicles, furnitures and fittings and assorted items.

BOARD MEMBERS

- | | |
|----------------------|--------------------|
| 1. Ms. Faith Waigwa | - Chairperson |
| 2. Ms. Njeri Onyango | - Vice-Chairperson |
| 3. Steven Oundo | - Member |
| 4. Dr Paul Jilani | - Member |
| 5. Eng Mbiu Kimani | - Member |

IN ATTENDANCE

Mr. Stanley Miheso

- Holding brief for the Acting Board Secretary

BACKGROUND TO THE DECISION

The National Drought Management Authority (hereinafter referred to as the procuring entity/2nd Respondent) planned to dispose of a number of unserviceable stores equipment, motor vehicles, furniture and fittings through the open tendering process. It advertised on 8th March 2022 through MyGov Publication for Tender No. **Tender Number NDMA/17/2021-2022 for disposal of unserviceable stores, equipment, motor vehicles, furnishers and fittings and assorted items** (hereinafter referred to as "the subject tender"). The tender closing date was indicated as 23rd March 2022 at 10.30 a.m.

Clarifications and Addendum

The Procuring Entity through a letter dated 18th March 2022 advised that it had made an addendum to provide additional information in reference to the subject tender advertised in MyGov publication on 8th March 2022 that was also posted on its website and the Public Procurement Information Portal. Prospective bidders were requested to visit the websites to inspect and download the addendum to the subject tender. The tender closing date was moved from Wednesday 23rd March 2022 at 10.30 a.m. to Thursday 31st March 2022 at 10.30 a.m.

Tender Submission Deadline and Opening of Bids

By the tender submission deadline of 31st March 2022 at 10.30 a.m., the 2nd Procuring Entity recorded receiving One Hundred and Nineteen (119) tenders for various lots though the record under no. 108 was blank. The appointed Tender Opening Committee in its minutes recorded the following tenderers as having submitted their tenders under Lot 11:

No	Bidder Name	Bid Sum
13	Abdulahi Garane Aden	Lot 11- Kshs750,000
38	Stephen Kinyua Mburu	Lot 11-Kshs460,000-kshs810,000
48	Riann Investments	Lot 11-kshs479,999-kshs249,999
76	Raphaella Ameno	Lot 11-kshs700,000-kshs1,055,000

Evaluation of Tenders

The Procuring Entity appointed a Tender Evaluation Committee (hereinafter referred to as "the Evaluation Committee") as captured in the Evaluation Report signed by all members of the Evaluation Committee on 20th May 2022. Evaluation was based on:

1. Mandatory requirements; and
2. Financial Analysis.

Mandatory Requirements

At this stage, in evaluating the tenders, the Evaluation Committee was required to evaluate the tenders per the mandatory requirements spelt out in the tender as follows:

Mandatory Requirements Evaluation

Mandatory Evaluation For Tender Number NDMA/17/2021-2022	
MR1	Submit a clearly serialized and marked one original and one copy of the bid document
MR2	Provide evidence of payment deposit slip as required and attached receipt from NDMA cash office or bank slip as proof of payment
MR3	Duly filled and signed the Confidential Business Questionnaire in the format provided
MR4	Duly filled and signed the Form of Tender in the format provided
MR5	Duly filled and signed Self Declaration Form SD1 in the format provided
MR6	Duly filled and signed the Self Declaration form SD2 in the format provided
MR7	Duly filled and signed the Declaration and Commitment on the Code of Ethics in the format provided
MR8	Duly filled and signed the schedule of items and Prices form in the format provided
MR9	Duly filled and signed the Tender Deposit Commitment Form in the format provided

At the end of evaluation at this stage all the tenderers that had met all the mandatory requirements and proceeded to the next stage.

Financial Analysis

The Evaluation Committee reported their conclusions at the financial analysis stage as follows:

LOT 11; Toyota Land Cruiser P/UP GKA527Q in Kajiado						
Bidder No	Bidder Name	Reserved Price	Bid Price	Deposit	% Deposit	Rank
38	Stephen Kinyua Mburu	460,000	810,000	81,000	18%	1
13	Abdulahi Garane Aden	460,000	750,000	46,000	10%	2
76	Raphaella Ameno	460,000	700,000	46,000	10%	3
48	Riann Investments	460,000	479,999	46,000	10%	4
Committee recommendation; No award, the vehicle is serviceable hence not for sale						

The Applicant was ranked as the highest bidder with a bid price of KShs. 810,000/- under Lot 11.

Recommendation

The Evaluation Committee made their recommendations in regard to the subject tender as follows:

1. That the successful bidders for the purchase of motor vehicles and motor cycles, ICT Equipment and Furniture & Fittings be awarded the lot(s) at the price(s) in their respective bids.
2. That for unsuccessful bidders the committee recommends a refund of their deposits through their respective bank accounts as provided by the bidders.

3. That for the lots that did not attract any bid or the bidders were unsuccessful for one reason or another, the committee recommends that the assets be disposed of in the most appropriate manner through the advice of the disposal committee.
4. Riann Investment attached two cheques to the original bid document ie Cheque; No. 000317 of Kshs 969,000.00 which was banked by the committee and it was successfully cleared. Cheque No. 000316 of Kshs 1,822,150.00 was rejected by the bank because of the threshold of One million shillings.

The committee analysed the circumstances and made the following recommendations;

- The total amount deposited was Kshs.114,400
 - Total bid price amounted to Kshs.2, 608,988.
 - Therefore, considering the cleared cheque and the deposit mentioned above, the bidder will be required to top up the total bid price for the items recommended for award with Kshs.1,639,988.
 - The committee further recommends the rejected cheque No. 000316 of Kshs. 1,822,150 be returned to the bidder.
5. During the evaluation, the committee received a communication on the assets (motor vehicles and motor cycles) which are in fair mechanical condition, hence economical to repair as per recommendations by the Chief Mechanical and Transport Engineer(CMTE). Therefore the

committee recommends the following assets be removed from the list of assets recommended for award as listed below;

Lot No	County	Description of item	Reg. number	Reserve price	CMS Tender Remarks
11	Kajiado	Toyota Land Cruiser/up	GKA 527Q	460,000	Fair mechanical condition and economic to repair
12	Kajiado	Toyota Land Cruiser	GKA 964J	500,000	Fair mechanical condition and economic to repair
13	Kitui	Toyota Land Cruiser	GK A 954J	860,000	Fair mechanical condition and economic to repair
15	Mandera	Toyota Land Cruiser	GKA 348U	520,000	Fair mechanical condition
22	Mandera	L/Rover TDi	GKA 135Q	350,000	Fair condition
36	Nairobi	Toyota L/Cruiser STD	GKA 938J	610,000	Poor mechanical condition but economical to repair
37	Nairobi	Toyota L/Cruiser STD	GKA 955J	800,000	Poor mechanical condition but economical to repair
43	Samburu	Land cruiser Defender TDI	GKA 123Q	300,000	No inspection report

Lot No	County	Description of item	Reg. number	Reserve price	CMS Tender Remarks
44	TaitaTave ta	Isuzu TFR	GKW 355	50,000	No inspection
45	Tana River	Isuzu Lorry FSR	GKA 725D	400,000	Fair condition
46	Tharaka	Toyota L/Cruiser S/wagon	GKA 943J	360,000	Fair mechanical condition
51	Turkana	Toyota L/cruiser GCMRS 105	GKA 969J	1,000,000	Good condition
52	Turkana	Isuzu FSR 32H lorry	GKA 729D	300,000	Fair condition
53	Turkana	Lorry isuzu truck	GKZ 199	300,000	Fair condition
55	West Pokot	Toyota L/cruiser SUV HZJIOJR	GKA 941J	180,000	Fair condition
57	Kajiado	Motor Bike Yamaha	GKA 767J	35,000	Fair mechanical condition
60	Nairobi	Suzuki Motorcycle	KMDE 800K	84,000	Good mechanical condition

Professional Opinion

Pursuant to Section 84 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") a Professional Opinion dated 8th June 2022 was presented to the the Accounting Officer being the 1st Respondent herein. The opinion indicated that the evaluation process with respect to the subject tender was conducted in accordance with the evaluation criteria set out in the Tender Document and was in compliance with provisions of the Act. Additionally, the opinion highlighted the recommendations made as follows: That the successful bidders for the purchase of motor vehicles and motor cycles, ICT Equipment and Furniture & Fittings be awarded the lot(s) at the price(s) in their respective bids.

Notification to the Applicant

The procuring entity sent a notification on non-award and refund for Lot 11 dated 22nd June 2022 to the Applicant. The Applicant was informed that his bid was unsuccessful and requested to present the original banking slip/receipt and bank account to facilitate refund of KShs 81,000/-. Reason for non-award was that Lot 11 was withdrawn from the tender due to some technical issues.

REQUEST FOR REVIEW NO. 52 OF 2022

M/s Olivile Enterprises Limited, the Applicant herein, lodged a Request for Review dated and filed on 4th July 2022. Accompanying the Request for Review was a statement in support of request for review made by Stephen Kinyua Mburu, the Director of the Applicant on 4th July 2022 and filed on even date. The Applicant also enclosed its marked annexures.

The Orders sought are:

- a. THAT the board be pleased to quash the decision of the NATIONAL DROUGHT MANAGEMENT AUTHORITY dated 22nd June 2022 in the matter of tender no NDMA/17/2021/2022 for disposal of unserviceable stores, equipment, motor vehicles, furnishers and fittings and assorted items specifically for LOT NO. 11***
- b. THAT the board be pleased to award tender no NDMA/17/2021/2022 for disposal of unserviceable stores, equipment, motor vehicles, furnishers and fittings and assorted items specifically for LOT NO. 11 to the applicant having been the highest bidder at 1(51-15 810,000/ =***
- c. THAT the board be pleased to order the respondents herein to bear the costs of these proceeding.***
- d. THAT the honourable board be pleased to make any such further orders as the ends of justice may require.***

Applicant relies on one ground namely:

- 1. The Procuring Entity erred in law and in fact by purporting to withdraw LOT 11 from the tendering process during the notification of the tender award/nonaward contrary to the***

provisions of Section 63 of the Public Procurement and Asset Disposal Act No. 33 of 2015

Board Notification to the Respondents of filed Request for Review

In a Notification of Appeal and a letter dated 4th July 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as "the Board") notified the Respondents of the existence of the Request for Review and suspension of procurement proceedings for the subject tender while forwarding 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 1st Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 4th July 2022. This is in compliance with Regulation 205 (3) of the Public Procurement and Asset Disposal Regulations which mandates the Accounting Officer of a Procuring Entity to submit a written Memorandum in respect to the Request for Review together with confidential documents from the tendering process.

In opposition of the Request for review, the Respondents filed Memorandum of Response to the Request for Review dated 8th July 2022 and filed on 13th July 2022.

Vide email and letters dated 13th July 2022, the Acting Board Secretary sent out a notification to the interested parties, being various bidders, in the subject tender informing them of the filed Request for Review dated 4th July 2022 and Response to the Review. The stipulated timelines to file any arguments and information was 3 days from the date of the email pursuant to PPARB Circular NO.2/2020 dated 24th March 2020, which was also attached for reference.

The Applicant on receipt of the Respondent's Response filed a supplementary statement in support of the Request for Review dated 16th July 2022 and filed on 18th July 2022.

Submissions

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 also stated that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

Neither of the parties filed written submissions for consideration by the Board.

Applicant's Case

The Applicant states the Procuring Entity advertised for the subject tender through its online portal on 8th March, 2022. That around 22nd March 2022,

the Applicant delivered its bid for Lot No. 11 which attracted the following bidders as per the tender opening minutes:

1. Bidder No.13 - AbdullahiGarane Aden - Ksh 750,000/=
2. Bidder No.38 - Olivile Enterprises Limited - Kshs 810,000/=.
3. Bidder No.48 - Riyan Investments - Kshs 479,999/=
4. Bidder No.76 – Raphaella Ameno - Kshs 700,000/=.

From the tender opening minutes, it is clear that the Applicant was the highest bidder.

That in the course of the tendering process the Procuring entity issued an addendum on the subject tender on 18th March 2022 and that at the point of the addendum, the Procuring Entity was at the liberty to cancel/terminate any lot they would have wished to but instead went all the way to the completion of the process including awarding/non awarding of the tenders having not notified of any termination/cancellation of Lot No 11.

The Applicant avers that the Procuring Entity erred in law and in fact by purporting to withdraw Lot No. 11 from the tendering process during the notification of the tender award/ non awards contrary to the provisions of Section 63 of the Public Procurement and Asset Disposal Act No. 33 of 2015. That it is only just that the Request for Review is granted in the interest of the rule of law and justice.

Respondents' Case

On its part the 1st Respondent states that the subject tender was advertised on 8th March, 2022 followed by an addendum issued on 18th March, 2022 with clarifications. The revised closing date for the tender was 23rd March, 2022.

The evaluation exercise was concluded on 20th May, 2022, while the professional opinion was raised on 8th June, 2022. During the evaluation process, the committee recommended the withdrawal of lots 11, 12, 13, 15, 22, 36, 37, 43, 44, 45, 46, 51, 52, 53, 55 and 57 from the bidding process and a letter of notification of the withdrawal was issued to all bidders who participated in the tender.

The 1st Respondent state that subject of Lot No.11 was a Toyota Land Cruiser Pick Up GK A 527Q where the highest bidder, Mr Stephen Kinyua Mburu trading as Olivile Enterprises Limited (the Applicant herein) bid sum of Kshs. 810,000.

The 1st Respondent avers that Lot 11 is among those withdrawn at the Evaluation Stage. This was as per Section 63(a)(i) of the Act due to the subject procurement had been overtaken by operation of law occasioned by a tight fiscal framework underpinning the FY 2021/2022 budget. The Procuring Entity was advised by the National Treasury through the memo Ref No: RES 1035/21/01/ 'A' (37) to reprioritize its expenditures. In this regard, the budget to purchase new replacement vehicles were not forthcoming, hence the withdrawal of the specific lots highlighted above.

Applicant's Rejoinder to the Respondents' Response

The Applicant in their supplementary statement avers that from the response of the Respondent the evaluation process was concluded on 20th May, 2022 while the advisory from the national treasury came in before 17th June 2022 when the notifications of awards was done.

The Applicant avers that after the advisory, the Procuring Entity had all the time until the 16th June, 2022 to comply with the provisions of Section 63 of the Act.

The Applicant avers that upon the first notification of award dated 17th June, 2022, the Procuring Entity became functus Officio and its hands was tied and could not do any notification of cancellation. What the Procuring Entity is referring to as withdrawal (which in law can only be meant to mean a cancellation) was done on 22nd June 2022, five (5) days after notifications of award.

The Applicant avers that both the Procuring Entity and the National Treasury are creatures of statute and can only do that which they are allowed to do by statute.

The Applicant avers that according to the provisions of Section 31(b) of the Interpretations and General Provisions Act Cap 2 laws of Kenya, an advisory from the treasury is a policy decision and therefore a subsidiary legislation that shall not override Public Procurement and Asset Disposal Act.

The Applicant adds that the high court made a decision in ***ABDULHAMID EBRAHIM AHMED Vs MUNICIPAL COUNCIL OF MOMBASA[2004] eKLR*** that where subsidiary legislation are in conflict with an act of

parliament, the subsidiary legislation shall give way to the clear provisions of the Act of parliament.

The Applicant contends that in the alternative and without prejudice to the foregoing, the advisory by the National Treasury if at all is the operations of the law that the Respondents are referring to, Section 23(3) of the Interpretations and General Provisions Act Cap 2 laws of Kenya suffices for the applicant to the extent that the Respondents would have wished to exempt themselves from the previous operation of the Public Procurement and Asset Disposal Act if for whatever purposes it was intended to repeal the act of parliament.

BOARD DECISION

The Board has considered each of the parties' case, pleadings, documents, authorities, and confidential documents submitted by the Respondents pursuant to Section 67 (3)(e) of the Act and finds the following issue calls for determination.

- 1. Whether withdrawal of Lot 11 from the subject tender by the Procuring Entity following the recommendations made in its evaluation report dated 20th May 2022 was as a by-product of the advice received from the National Treasury through the letter dated 13th May 2022 received by the Procuring Entity on 24th May 2022 and if the withdrawal/termination of tender was done in accordance with Section 63(1)(a) of the Act.**

Determination

The Board notes that the matter before it involves termination of a tender that is for the disposal of assets by the Procuring Entity. Sections 163 -166 of the Act make provisions for Disposal of Assets by Public entities.

Section 2 of the Act has described assets as:

"to mean movable and immovable property, tangible and intangible, including immovable property, stores, equipment, land, buildings, animals, inventory, stock, natural resources like wildlife, intellectual rights vested in the state or proprietary rights;"

And disposals as:

"...the divestiture of public assets, including intellectual and proprietary rights and goodwill and other rights of a procuring entity by any means including sale, rental, lease, franchise, auction or any combination however classified;"

An analysis of the subject tender reveals that it resulted from the need of the Procuring Entity to dispose off a number of unserviceable stores equipment, motor vehicles, furniture and fittings. Section II of the Tender document submitted as part of the confidential documents lists the schedule of items and prices. From the schedule, motor vehicles are listed under lots 1 to 55. Lot 11 indicates that the disposal was for Toyota Land Cruiser P/UP Registration Number GKA527Q located at Kajiado and reserved at Kshs 460,000/- with a required deposit of Kshs. 46,000/-.

An addendum No.1 was issued to tenderers on 18th March 2022 and the Board observes that the same made clarifications on Lots No. 44,59, and 60 while clarifying that bidders were free to bid for as many items as they wish. Additionally, the Addendum No.1 also added items that had been omitted from the original list for disposal. Following the addendum and or clarification, the tender closing date was moved from Wednesday 23rd March 2022 at 10.30 a.m. to Thursday 31st March 2022 at 10.30 a.m. All other items and conditions of the tender aforementioned remained as per the principle tender document. The Board notes that there was no mentions of any withdraw of the assets set for disposal and specifically item under Lot 11.

The Applicant avers to have submitted his bid in response to the advertised tender and to have been responsive during the various stages of evaluation emerging as the highest bidder only for the committee to make a recommendation of withdrawal of assets under Lot 11 following a communication from the Chief Mechanical and Transport Engineer (CMTE) to the evaluation committee on assets which are in fair mechanical condition hence economical to repair.

It has been argued before this Board by the 1st Respondent that the withdrawal of Lot 11 was done as per Section 63 (a) (i) and that the subject procurement had been overtaken by operation of the law occasioned by a tight fiscal framework underpinning the FY 2021/2022

budget. In this regard, the Procuring Entity was advised by the National Treasury through the Memo Ref No RES:1035/21/01/'A' (37) to reprioritize its expenditures. In this regard, the budget to purchase new replacement vehicles were not forthcoming, hence the withdrawal of the specific lots highlighted above.

The Board has had a chance to look at the referenced letter from the National Treasury dated 13th May 2022 received by the Procuring Entity on 24th May 2022 which we shall reproduce in part as follows:

"...

We have reviewed the requests and note that the National Drought Management Authority has a budget shortfall of KShs. 272 Million for its operations. In addition, the Authority needs GOK counterpart funds for Towards Ending Drought Emergencies Project (TWENDE) totalling KShs. 55 Million and Kshs. 1,203,890,100 for the Kenya Social and Economic Inclusion Project.

Due to a tight fiscal framework underpinning the FY 2021/22 Budget, the FY 2021/22 Supplementary Estimates No.2 was only considering (i) approved additional expenditures granted to fund emergencies; (ii) approved reallocations; and (iii) salary shortfalls. In addition, the FY 2021/22 is coming to an end with less than one and a half months remaining. Further, as guided by the National Treasury via the Circular Ref/ES/03 dated 28th June 2021, the IFMIS procurement

window for supply of goods and services to the Government will be closed on 31st May 2022.

In this regard, the National Drought Management Authority should be advised to reprioritize its expenditure in the context of the FY 2022/23 Budget once it is approved by the National Assembly."

...

The 1st Respondent's reliance on this letter from the National Treasury has been opposed by the Applicant who claims that an advisory from treasury is a policy decision and therefore a subsidiary legislation that should not override an act of parliament as provided for under Section 31(b) of the Interpretations and General Provisions Act Cap2 Laws of Kenya.

The Board is therefore called upon to make a determination as to whether the 1st Respondents actions of withdrawing Lot 11 can be justified as having been made in accordance with Section 63(a) (i) of the Act relied on and whether the withdrawal of Lot 11 amounted to termination of the asset disposal proceedings.

The process and grounds for terminating procurement proceedings as set out under Section 63 of the Act which states 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.*

In its interpretation of section 63 of the Act, the Board considers the decision of the High Court in **Republic v Public Procurement Administrative Review Board; Leeds Equipment & Systems**

Limited (interested Party); Ex parte Kenya Veterinary Vaccines Production Institute [2018] eKLR where it held as follows:

"in a nutshell therefore and based on the above-cited cases where the decision of a procuring entity to terminate procurement process is challenged before the Board the procuring entity is to place sufficient reasons and evidence before the Board to justify and support the ground of termination of the procurement process under challenge. The procuring entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of Section 63 of the Act". [Emphasis by the Board]

The courts have consistently stated that public procurement has a constitutional underpinning as dictated under Article 227 of the Constitution. Additionally, the scheme of the Act is such that a procurement process including termination of the tender process must strictly conform to the constitutional principles of transparency, openness, accountability, fairness and generally, the rule of law. In making determinations in procurement disputes, the proper approach is to first establish, factually, whether an irregularity occurred. Then the irregularity, if established, must be evaluated to determine whether it amounts to a ground of review. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking

the question of compliance to the purpose of the requirements, before concluding that a review ground has been established.

In analysing the disposal proceedings regarding the subject tender, the Board notes from the confidential documents that the Procuring Entity's internal Memo from the Deputy Director Supply Chain Management to the Chief Executive Officer dated 3rd August 2021 and referenced NDMA/SCM/Disposal/1/2021-2022, a request was made for appointment of Disposal Committee Members. The Deputy Director requested for appointment of several listed members from DDICT Department; DDF&A Department; DDHR&A Department; DD Drought Response; DD Planning Department; DDSCM. The memo also listed the functions to be performed by the Committee as:

- a. Conduct board Survey of items for disposal;
- b. ~~Verify the condition and the location of the items for disposal;~~
- c. Determine the current market value of the items for disposal;
- d. Set up a reserve price based on paragraph (c) where technical advice is not required;
- e. Verify the justification and procedure for disposal;
- f. Technical expertise where necessary to ascertain the value and the condition of the items; and
- g. Prepare a disposal report and submit it to the accounting officer, with specific recommendations on the items to be disposed or those not to be disposed and the reasons thereof.

An approval of this committee was made on 4th August 2022 as stamped on the said memo.

Establishment of a Disposal Committee is mandated under **Section 163 of the Act** which stipulates:

"(1) An accounting officer shall establish a disposal committee as and when prescribed for the purpose of disposal of unserviceable, obsolete, obsolescent, or surplus stores, equipment or assets.

(2) The disposal committee shall be responsible for verification and processing of all disposal recommendations in liaison with the head of procurement function as prescribed"

From the above, the responsibilities of the Disposal Committee are well laid out and the guidelines while undertaking any disposal proceedings. It then follows that the disposal committee is expected to follow to the letter the disposal of assets procedures set in the Act in line with observing the principles of procurement laid out under Article 227 of the Constitution.

Section 164 of the Act goes ahead to lay out the disposal procedure to be followed as follows:

"(1) The employee in charge of unserviceable, obsolescent, obsolete or surplus assets shall bring the matter to the attention of the disposal committee through the head of procurement function.

(2) An employee shall comply with subsection (1) within a reasonable time after the assets become unserviceable, obsolete or surplus.

(3) There shall be a technical report where appropriate by a relevant expert of the subject items for disposal that takes into account the real market price and in so doing, the technical expert shall set up a reserve price which shall be the minimum acceptable price below real market value of the boarded items.

(4) Subject to prescribed restrictions, the disposal committee shall meet within the prescribed period to conduct a survey and review the items, while considering the technical report under subsection (3) and recommend the best method of disposal to the accounting officer.

(5) The accounting officer shall disclose the reserve price to the prospective tenderers based on the technical report and prices set under subsection (3) of this section.

(6) Where there is no responsive bidder under subsection (5), the accounting officer shall have powers based on the recommendations of disposal committee to revise the reserve price to ensure expeditious disposal of assets and set it forth in the disposal documents so as to be known by any prospective buyer of the boarded items.

(7) After receiving the recommendations of the disposal committee, the accounting officer may approve or reject the recommendation of the committee.

(8) If the accounting officer approves the recommendations of the disposal committee, the assets that became unserviceable, obsolete or surplus shall be disposed-off in accordance with those recommendations.

(9) If the accounting officer rejects the recommendations of the disposal committee he or she shall give further direction on the matter and may refer the matter back to the committee for further consideration."

It is imperative that a Procuring Entity endeavours to comply with the stipulated guidelines while carrying out disposal of assets. The 2nd Respondent having already appointed a disposal committee way before advertising for the subject tender is expected to have noted and taken into account the provisions on procedure of disposal of assets before settling on a method of disposal.

The methods of disposal provided for under Section 165 (1) as follows:

"(1) Subject to prescribed provisions, an accounting officer of a procuring entity may dispose assets by a method which may include any of the following—

(a) Transfer to another public entity or part of a public entity, with or without financial adjustment;

- (b) sale by public tender;***
- (c) sale by public auction;***
- (d) trade-in;***
- (e) waste disposal management; or***
- (f) as may be prescribed."***

The Board observes that the law prescribes for a technical report to be prepared by the relevant expert of the subject items for disposal that takes into account the real market price and in so doing, the technical expert shall set up a reserve price which shall be the minimum acceptable price below real market value of the boarded items. The Disposal Committee must also meet within the prescribed period to conduct a survey and review the items, while considering the technical report and recommend the best method of disposal to the accounting officer. It is after receiving recommendations of the disposal committee that the Accounting Officer

either approves or rejects the recommendations of the committee. If approved, the assets that became unserviceable, obsolete, or surplus shall be disposed-off in accordance with those recommendations. If rejected, the Accounting Officer must give further direction on the matter and may refer the matter back to the committee for further consideration.

It is not in dispute that the 1st Respondent appointed a Disposal Committee as per the provisions of the Act. The Disposal Committee had the responsibility to conduct a survey, and review the items and at the same time consider a technical report so as to recommend the best

method for disposal of assets before any sale by public tender could take place . The tendering process of the subject tender herein was commenced following approval by the 1st Respondent of the recommendations by the disposal committee and the disposal method chosen by the Procuring Entity was Sale by Public tender.

The Board has noted that a tender opening committee is confirmed to have opened the received tenders on 31st March 2022 in compliance with Section 44(2) (b) and Regulation 91(2) (a) of the Regulations, 2020.

Pursuant to Section 44(2) (b) and 46 of the Act, as read together with Regulation 91 (2) of the Regulations, 2020, an evaluation committee was appointed by the 1st Respondent on 10th May 2022. The professional opinion dated 8th June 2022 confirms that it was during the evaluation process of the subject tender that the committee received a communication on the assets (motor vehicles and motor cycles) which are

in fair mechanical condition, hence economical to repair as per the recommendations by the Chief Mechanical and Transport Engineer (CMTE). It was on this recommendation that the Committee recommended the said assets to be removed from the list of assets recommended for award.

The Board notes that the recommendation made during the financial analysis as indicated at page 33 of 118 of the report of the assets disposal evaluations committee proceedings dated 20th May 2022 under Lot 11; Toyota Land Cruiser P/UP GKA527Q in Kajiado reads:

"...Committee recommendation; No award, the vehicle is serviceable hence not for sale"

The Board also observes that forming part of the submitted confidential documents to the Board is a Secretariat's Summary report of the Proceedings in reference to the Subject tender prepared by one Paul Nzuki. It reads in part that:

"The summary is of some pertinent issues arising from the exercise. It is indicated under clause iii of the Evaluation Process that:

...

...

(iii)At the onset of the process,DD/HR & Admin served the committee with a list of Motor vehicles in various sites that have the expert reports stating that the same were in fair mechanical condition, see attached.

Section 164(3) of the PPDA 2015 read together with Reg. 177(2) of the PPADR 2020 recognizes the need for technical expertise for specific items. This requirement was taken care of by the presence of a Mechanical and valuation report in respect if motor vehicle and motor cycles.

It is important to note that the Chief Mechanical and Transport Engineer (CM&TE) is the government technical expert on matters pertaining to motor vehicles and motor cycles. The comments on the inspection reports of the said

units did not recommend the said units as they are in fair mechanical condition."

The pertinent issue that the Board must address itself to is at what juncture did the Chief Mechanical and Transport Engineer (CM&TE) make and submit his technical report to warrant withdrawal of the motor vehicles subject to the disposal proceedings? Such technical report ought to have been submitted to the appointed disposal committee for their consideration as provided by Section 164(4) of the Act **before** making any recommendations to the accounting officer for approval of disposal of assets as guided by Section 164(8) of the Act and before advertisement of any tender inviting eligible bidders. It is evident that the decision to withdraw Lot 11 as reported in the Evaluation Report's recommendation was made during the evaluation process. An evaluation confirmed on 20th May 2022 cannot place on recommendations for withdrawal of Lot 11 as having resulted from the letter from the National Treasury which was received on 24th May 2022; 4 days after recommendations for withdrawal had already been made.

The Board holds that the Procuring Entity cannot purport to withdraw assets from the tendering process having already chosen a disposal method and invited eligible bidders to submit their bids. It behoves the procuring entity to follow the procedure set for disposal of assets to the letter unless any amendments on the stated provisions of law have been made by Parliament. The procedure followed in withdrawing Lot 11 of the

Subject Tender was flawed and irregular as the same did not comply with provisions of Section 164 of the Act.

As we have already established, Section 63 (1)(a)(i) of the Act states that 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;

..."

We have noted the averments made by the 1st Respondent in their Response to the Request for Review where he states that the withdrawal per Section 63(a)(i) of the Act - the subject procurement had been overtaken by operation of law occasioned by a tight fiscal framework underpinning the FY 2021/2022 budget. However, from the notification of non-award and Refund issued to the Applicant by the Procuring entity dated 22nd June 2022 informing the Applicant that his bid was unsuccessful indicated the reason for non-award as:

"...

Please note that Lot 11 was withdrawn from the tender due to some technical issues."

No explanation as to the reasons for withdrawal were issued by the Procuring Entity and neither did it rely on Section 63(1)(a) in its notification of non-award and refund dated 22nd June 2022 addressed to the Applicant. The Applicant was not informed what the technical issues were that led to withdrawal of Lot 11. It is from the Memorandum of Response to the Request for Review that the Respondents place reliance on terminating Lot 11 under the subject tender due to being overtaken by operation of the law.

In its decision in Review Application Number 57 of 2020 of 30th April 2020 between Aprim Consultants and The Accounting Officer Parliamentary Joint Service and Another, this Board addressed the question of what amounts to 'operation of law' and stated:

"The Black's Law Dictionary defines the phrase 'operation of law' as: -

"The means by which a right or a liability is created for a party regardless of the party's actual intent" [Emphasis by the Board]

*Henry Campbell Black in his book **A Law Dictionary Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern (1995)** defined the phrase 'operation of law' as follows: -*

"This term expresses the manner in which rights, and sometimes, liabilities devolve upon a person by the mere

application to the particular transaction of the established rules of law, without the act or cooperation of the party himself" [Emphasis by the Board]

From the above definitions, the Board may deduce the meaning of 'operation of law' to mean the manner in which a person or institution may acquire certain rights or liabilities in any procurement process through no action, inaction or cooperation on his/her part, but merely by the application of the established legal rules to the procurement process in question. The application of these legal rules thus changes the manner in which the procurement process ought to be handled.

Such operation of law may also arise when a new law or regulation comes into force that affects the conduct or manner in which a procurement process ought to be undertaken. An example can be made of the Public Procurement and Asset Disposal Regulations, 2020 which were published in the Kenya Gazette on 22nd April 2020. These regulations are intended to facilitate the better implementation of the Act and once they take effect upon approval by Parliament, which approval is pursuant to the Statutory Instruments Act and in accordance with section 180 of the Act, these regulations will impact the rights and liabilities of various procurement actors in any procurement process"

The question that now arises is whether the reasons advanced by the Procuring Entity in its response to justify its termination of the subject tender were as a result of an operation of the law in line with Section 63 (1) (a) (i) of the Act. It has advanced its argument on withdrawal and non-award of Lot 11 in the subject tender as being as a result of the letter from the National Treasury received on 24th May 2022. The effect of the contents of the said letter is argued to have led to termination of the disposal of assets under Lot 11. The Board will consider whether this letter from the National Treasury was a new law or regulation that came into force and affected the conduct or manner in which the procurement process ought to be undertaken.

The term 'legislation' is defined under Article 260 of the Constitution as follows:

"legislation" includes—

(a) an Act of Parliament, or a law made under authority conferred by an Act of Parliament; or

(b) a law made by an assembly of a county government, or under authority conferred by such a law;"

Further, the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya defines 'written law' as follows:

"written law means—

(a) an Act of Parliament for the time being in force;

(b) an applied law;

***(c) any subsidiary legislation for the time being in force; or
(d) any county legislation as defined in Article 260 of the Constitution;***

From the above two definitions, it is clear that legislation or what is referred to as written law includes *inter alia* laws made under authority conferred by an Act of Parliament or what is commonly referred to as subordinate or subsidiary legislation.

Section 2 of the Statutory Instruments Act, defines subsidiary legislation or what is referred to as a 'statutory instrument' to mean: -

"Any rule, order, regulation, direction, form, tariff of costs of fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued"

From the above provision it is clear that the letter received on 24th May 2022 can be categorized as a statutory instrument issued or established in the execution of a power conferred by or under an Act of Parliament under which the regulations are expressly anchored. Further, Section 23 of the Statutory Instruments Act addresses the commencement of the statutory instrument in question and provides as follows: -

"(1) A statutory instrument shall come into operation on the date specified in that behalf in the statutory instrument or, if no date is so specified, then, subject to subsection (2), it shall come into operation on the date of its publication in the Gazette subject to annulment where applicable.

(2) If a statutory instrument is made after the passing or making but before the coming into operation of the enabling legislation under which it is made, the statutory instrument, whether or not it is previously published, shall not come into operation before the date on which the enabling legislation comes into operation."

Noting that the letter from the National Treasury was dated 13th May 2022 and despite being received on 24th May 2022, it can be inferred that its directions were meant to come into operation on the 13th May 2022. This may be the reliance placed on by the Procuring entity herein claiming effects of operation of the in terminating Lot 11 of the subject tender.

However, the Board is not convinced by this argument having noted hereinabove that the Procuring Entity did not adhere to the laid out disposal procedure under the Act and only purported to rely on Section 63(1)(a)(i) in terminating the procurement proceedings in regard to Lot 11 in the subject tender while making a response to the filed request for Review. By the time of making its recommendation to terminate/withdraw Lot 11, it was not even in receipt of the letter from Treasury and its reliance of the same can only be inferred as an afterthought.

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 4th July 2022:

- 1. The 1st Respondent's letters dated 22nd June 2022 with respect to Tender Number NDMA/17/2021/2022 for disposal of unserviceable stores, equipment, motor vehicles, furniture and fittings and assorted items under Lot 11 issued to the Applicant and all other tenderers under that Lot be and is hereby cancelled and set aside.**
- 2. The 1st Respondent is hereby ordered to direct the 2nd Respondent's Evaluation Committee to to re-admit the Applicant's tender at the Financial Stage and all Tenders that were responsive including the Applicant's tender and make a recommendation forthwith.**
- 3. Further to Order 3 above, the 1st Respondent is Ordered to ensure that the Disposal Proceedings in respect of Lot 11 in Tender Number NDMA/17/2021/2022 for disposal of unserviceable stores, equipment, motor vehicles, furniture and fittings and assorted items proceed to its logical conclusion.**

4. Given that that the proceedings of the subject tender are not complete, each party will bear its own costs.

Dated at Nairobi, this 25th day of July 2022



.....
CHAIRPERSON
PPARB



.....
SECRETARY
PPARB