

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 61/2022 OF 04TH JULY 2022

BETWEEN

MANDELA MAWEU MUISYO.....APPLICANT

AND

THE CHIEF EXECUTIVE OFFICER,

NATIONAL DROUGHT MANAGEMENT

AUTHORITY.....1ST RESPONDENT

NATIONAL DROUGHT MANAGEMENT

AUTHORITY.....2ND RESPONDENT

Review against the decision of the National Drought Management Authority with respect to Tender No. NDMA/17/2021/2022 for the disposal of unserviceable stores, equipment, motor vehicles, furniture and fittings.

- | | |
|----------------------|--------------------|
| 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

1. Mr. Philip Okumu - Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

The National Drought Management Authority, (hereinafter referred to as, "the Procuring Entity"), advertised Tender No. NDMA/17/2021/2022 for the disposal of unserviceable stores, equipment, motor vehicles, furniture and fittings (hereinafter referred to as the 'subject tender') by way of Open Tendering Method.

Bid Submission Deadline and Opening of Bids

According to the Evaluation Report dated 20th May 2022 submitted by the Procuring Entity, the tender advertisement appeared in MyGov on 8th March 2022 and also posted on NDMA and PPIP websites. Prospective tenderers were requested to visit the website www.ndma.go.ke and www.tenders.go.ke to inspect and download the Principal Tender Document. Following an Addendum issued with clarifications on 18th March 2022, the revised closing date was moved from Wednesday 23rd March 2022 at 10:30 a.m. to Thursday 31st March 2022 at 10:30 a.m.

A total of one hundred and nineteen (119) bids were received for the purchase of the various items and opened on 31st March 2022. The bids received are as tabulated in the Evaluation Report. Of interest to this Request for Review are Lot No. 12 and 46 (hereinafter referred to as "the subject Lots") of the bids for the disposal of Toyota Land Cruiser GKA 964J

Kajiado that attracted four (4) bids and Toyota Land Cruiser S/Wagon GKA943J Tharaka that attracted eight (8) bids as tabulated below:

Lot 12 *Toyota Land Cruiser station Wagon GKA964 J;*

| No | Bidder Name | Address | Bid Sum |
|-----|-----------------------|-----------------------------|------------------------|
| 16 | Feisal Mohamed Abdi | P.O Box 105588,Jamia | Lot 12-710,000 |
| 24 | Abdullahi Garane Aden | P.O Box 20617-00100,Nairobi | Lot 12-715,000 |
| 48 | Riann Investments | P.O Box 6262-00100,Nairobi | Lot 12-579,999 |
| 109 | Mandela Maweu Mwisio | P.O Box 1541-90200,Kitui | Lot 12-500,000-910,000 |

Lot 46: *Toyota Land Cruiser station Wagon GKA943J*

| No | Bidder Name | Address | Bid Sum |
|-----|--------------------------|----------------------------|------------------------|
| 7 | Abdulaziz Elsimsidele | P.O Box 271,Meru | Lot 46-710,000 |
| 16 | Feisal Mohamed Abdi | P.O Box 105588,Jamia | Lot 46-600,000 |
| 26 | G.G Construction Co. Ltd | P.O Box 1449-60200,Meru | Lot 46-36,000 |
| 48 | Riann Investments | P.O Box 6262-00100,Nairobi | Lot 46-379,999 |
| 50 | Peris KawiraKinja | P.O. Box 1840-60200,Meru | Lot 46-660,000 |
| 109 | Mandela Maweu Mwisio | P.O Box 1541-90200,Kitui | Lot 46-360,000-810,000 |
| 116 | G.G Construction Co.Ltd | P.O Box 6449-00620,Nairobi | Lot 46-440,000-760 |
| 118 | Bernard Kirambia Kairiba | P.O Box 45-60215,Marimanti | Lot 46-360,000-640,500 |

Evaluation of Tender Bids

An Evaluation Committee evaluated tender bids in two stages, namely;

- i. Mandatory Requirements Evaluation; and

ii. Financial Analysis Evaluation

Mandatory Requirements Evaluation

At this stage of evaluation, the Evaluation Committee evaluated the tender bids received by the Procuring Entity against the mandatory requirements as outlined in the Tender Document. Upon conclusion of the preliminary evaluation, the subject Lots were found responsive and proceeded to the Financial Analysis stage.

Financial Analysis Evaluation

At this stage, the Evaluation Committee was to consider the highest evaluated tender for the award as against the reserved price of the Procuring Entity. The bids by the Applicant were the highest in the subject Lots of the subject tender.

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee resolved that it would not recommend an award for the sale of the subject Lots as the vehicles are in serviceable condition.

Notification of Non-Award

In a letter dated 22nd June 2022 the Procuring Entity notified the Applicant of the non-award of the subject Lots which were withdrawn from the tender due to some technical issues.

THE REQUEST FOR REVIEW NO. 61 OF 2022

The Request was filed by Mandela Maweu Muisyo, (hereinafter referred to as "the Applicant"), who lodged a Request for Review dated and filed on 04th July 2022 (hereinafter referred to as "the Request for Review") together with a Statement in Support dated and filed on even date.

The Applicant sought the following orders in the Request for Review:

The Applicant seeks for the following orders:

- 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. 12 and 46*
- 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. 12 and 46 to the applicant having been the highest bidder at KSHS 910,000/= and KSHS 810,000/=*
- c. THAT the Board be pleased to order the respondents herein to bear the costs of these proceeding.*
- d. THAT the honorable Board be pleased to make any such further orders as the ends of justice may require.*

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic and instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the COVID-19 disease. Through this circular, the Board dispensed with physical hearings and directed that all requests for review applications shall be canvassed by way of written submissions.

The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Public Procurement and Asset Disposal Act No. 33 of 2015 (hereinafter referred to as "the Act")

The Applicant lodged a Statement in Support of the Request for Review dated 4th July 2022. The Procuring Entity filed a Response letter dated 8th July 2022 and received on the 13th July 2022. Subsequently, the Applicant filed a Supplementary Statement in Support of the Request for Review dated 16th July 2022 and received on the 18th July 2022.

THE APPLICANT'S CASE

The Applicant avers that the Procuring Entity erred in law and in fact by purporting to withdraw Lot Nos. 12 and 46 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 (hereinafter referred to as 'the Act').

The Applicant avers that the Procuring Entity advertised for the subject tender through its online portal on 8th March, 2022, and that the Applicant bid for Lots Nos. 12 and 46.

The Applicant has attached to its Request for Review a copy of the Tender Opening Minutes and avers that the Lot 12 attracted four bidders who quoted lower than the Applicant, whereas Lot 46 attracted eight bidders who also quoted lower than the Applicant. The Applicant avers that it is clear from the Tender Opening Minutes that his bid was the highest.

The Applicant avers that the Procuring Entity issued an addendum on the tender on 18th March, 2022, and that at that point the Procuring Entity was at 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 Lots No 12 and 46.

The Applicant in their Supplementary Statement dated 16th July 2022 avers from the response of the Respondent dated 8th July that 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 were tied and could not do any notification of cancellation. The Applicant further avers that 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 national 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.

The Respondents Case

The 1st Respondent states that subject of Lot No.12 was a Toyota Land Cruiser station Wagon GKA964 J, and Lot 46: Toyota Land Cruiser station Wagon GKA943J where the highest bidder, Mandela Maweu Muisyo of P. O. Box 1541 – 90200, Kitui, the Applicant herein, with bid sum of Ksh. 910,000 for Lot 12 and Ksh. 810,000 for Lot 46.

The 1st Respondent avers that the Lot (sic) 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.

BOARD'S DECISION

The Board has considered the Applicant's case, pleadings, documents and its statement and supplementary statement in support of its request for review submitted to the Board and finds that the following issues crystalize for determination: -

- 1. Whether the Board has jurisdiction to entertain the Request for Review dated 4th July 2022 filed by the Applicant challenging the Respondents' termination of the subject tender.**

In order to address the first issue, the Board shall make a determination of the following sub-issues: -

- i. Whether the Request for Review dated and filed on 04th July 2022 was filed within the statutory period of fourteen days (14) of notification of award or date of occurrence of breach at any stage of the procurement process as provided in Section 167 (1) of the Act read with Regulation 203 (2) (c) of the Regulations;**

Depending on the determination of sub-issue (i) above: -

- ii. Whether the Respondents terminated the subject tender's procurement proceedings in accordance with Section 63 of the Act in this way divesting the Board of its jurisdiction by dint of Section 167(4)(b) of the Act;**

Depending on the outcome of issue (ii) above; the following sub-issues will be analysed:

- a. **Whether the Circular by the National Treasury dated 13th May 2022 and received 24th May 2022 can be considered as "operation of law".**
- b. **Whether withdrawal of some lots of the tender may be considered as a termination and if the tender may be terminated in part or only in whole as per the Act.**

Depending on the outcome of the first issue;

2. What orders should the Board grant in the circumstances.

The Board now proceeds to address the above issues conclusively as follows:

Whether the Request for Review dated and filed on 04th July 2022 was filed within the statutory period of fourteen days (14) of notification of award or date of occurrence of breach at any stage of the procurement process as provided in Section 167 (1) of the Act read with Regulation 203 (2) (c) of the Regulations;

Jurisdiction is defined in Halsbury's Laws of England (4th Ed.) Vol. 9 as

"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a

formal way for decision.”

In his book, “Words and Phrases Legally Defined”, Vol. 3, John Beecroft Saunders defines jurisdiction as follows: -

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court [or other decision-making body] is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.” [Emphasis by the Board]

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 held that:

“.....So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question

and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

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

In consideration to the foregoing, we observe it to be trite law that courts and decision-making bodies such as the Board can only act in cases where they have jurisdiction. Nyarangi, JA stated as follows in the *locus classicus* case of *The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) eKLR:*

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of

proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction." [Emphasis is ours]

Assumption of jurisdiction by courts and other decision-making bodies in Kenya is a subject regulated by the Constitution, by statute law, or both.

From the foregoing, it is sufficiently settled that the jurisdiction of a court, tribunal or any other decision-making body is derived from the Constitution, an Act of Parliament or both. This Board is a creature of an Act of Parliament owing to the provisions of section 27 of the Act with specific functions expressed in section 28 of the Act as follows: -

"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.

(2)

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."

In order to invoke the jurisdiction of the Board, the conditions set out in section 167 (1) of the Act must be satisfied. The said provision 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 ours]

Section 167 (1) of the Act gives aggrieved candidates and tenderers who claim to have suffered or risk suffering loss or damage due to a breach of a duty imposed on a procuring entity by the Act or the Regulations a right to 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. Regulation 203 (2) (c) of the Regulations, expounds on the manner in which the fourteen-day period for seeking administrative review can be applied as follows: -

"203. Request for a Review

- 1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations***
- 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.”*

Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act will be by way of a request for review. Further, such request for review is to take the form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

A reading of Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 confirms that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification under Section 87 of the Act; or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer.

Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

It is therefore clear from a reading of Section 167(1) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of the Regulations and the Fourteenth Schedule of the Regulations that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued or (iii) occurrence of breach

complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach.

The Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches.

In this instant application, the Applicant bases its claim on a wrongful termination of tender contrary to Section 63 of the Act through its act of withdrawal of Lots No. 12 & 46 from the tendering process during the notification of the tender award/non-award. To this end, the Board takes note of paragraph 22 and 23 of the Applicant's Statement in Support of Request for Review that avers as follows: -

"THATthe procuring entity 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. 12 & 46.

THAT the termination of LOT No. 12 & 46 after the procurement process fails to comply with the provision of Section 63 of the Public Procurement and Asset Disposal Act No. 33 of 2015"

From the reading of the extracts above, the Board notes that the Applicant's received a letter dated 22nd June 2022 and titled, "**RE: NOTIFICATION OF NON-AWARD AND REFUND- Lot 12, 44 & 46**" and lodged its Request for Review on 04th July 2022, this is well within the statutory period of 14 days specified in Section 167 (1) of the Act. In the upshot, the Board is properly seized of the matter at hand.

Whether the Respondent terminated the subject tender's procurement proceedings in accordance with Section 63 of the Act in this way divesting the Board of its jurisdiction by dint of Section 167(4)(b) of the Act

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.

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—*[Emphasis ours]*

(a) the subject procurement has been overtaken by—

(i) operation of law; or *[Emphasis ours]*

(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.*[Emphasis ours]*

(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 ours]

Section 63 of the Act is instructive on termination of procurement proceedings being undertaken by an accounting officer of a Procuring Entity at any time before notification of award is made and such termination must only be effected if any of the circumstances enumerated in Section 63(1)(a) to (i) of the Act are present. This is the substantive statutory pre-condition that must be satisfied before a termination of procurement proceedings is deemed lawful.

Further, following such termination, an accounting officer is required to give the Authority a written report on the termination with reasons and notify all tenderers, in writing, of the termination with reasons within fourteen (14) days of termination. This is the procedural statutory pre-conditions that must be satisfied before a termination of procurement proceedings is deemed lawful.

It is only after both the substantive and procedural statutory pre-conditions of termination are satisfied, that a termination of procurement proceedings can be deemed to have been effected in accordance with Section 63 of the Act for the Board's jurisdiction to be ousted by dint of Section 167(4)(b) of the Act.

It is therefore important for the Board to determine the legality, or lack thereof, of the Respondents' decision of terminating the subject tender's procurement proceedings, which determination can only be made by interrogating the procedure followed in terminating the tender noting whether the same was done in accordance to Section 63 of the Act, while further considering the reason cited for the impugned termination.

We have studied the documents submitted to the Board by the Applicant and the Respondent and note that the 1st Respondent, by a letter dated 22nd June 2022 addressed to the Applicant, notified the Applicant of the non-award of Lot No. 12 & 46 of procurement proceedings of the subject tender. The said letter of notification of non-award dated 22nd June 2022 reads as follows (extract): -

"REF. NO: NDMA/17/2021-2022

22nd June 2022

To,

Mr/s Mandela Maweu Muisyo

Bidder Number 109

P.O. Box 1541-90200 Kitui

Dear Sir/Madam,

***RE: NOTIFICATION OF NON-AWARD AND REFUND- Lot 12,
44 & 46***

We refer to your bidding for the above item(s).

After the evaluation process concluded, we regret to inform you that your bid was unsuccessful for the above item(s). You are therefore requested to present the original banking slip/receipt and your bank account to facilitate refund of Ksh.183,000. Please refer to the table below for the winning bidders;

| <i>Lot</i> | <i>Bidder No.</i> | <i>Name</i> | <i>Address</i> | <i>Bid Sum</i> |
|------------|-------------------|----------------------|------------------|----------------|
| 12 | 109 | Mandela Maweu Muisyo | 1541-90200 Kitui | 910,000 |
| 44 | 14 | Julius Waithaka | 30649-00100 Nbi | 156,000 |
| 46 | 109 | Mandela Maweu Muisyo | 1541-90200 Kitui | 810,000 |

Please note that Lot 12, 44 and 46 were withdrawn from the tender due to some technical issues.

We take this opportunity to thank you for participating and encourage you to try next time."

The Applicant avers that it received the aforesaid notification of non-award dated 22nd June 2022 and having received the first notification dated 17th June 2022 for award of Lot 3 a Toyota Landcruiser GKA 958J, the Procuring Entity became *functus officio* and its hands were tied and could not do any notification of cancellation which the procuring entity in the instant case of Lot No. 12 & 46 baptized as withdrawal.

Further, the Applicant avers that the reference by the Procuring Entity to withdrawal which in law can only mean a cancellation was done on 22nd June 2022 five days after the notification of the Award in Lot 3 referred to in the preceding paragraph of this decision.

We have taken note of the Applicant's above averments and claims together with the provisions of the Act, most particularly Section 63 (1) of the Act above, and note that a notification of termination (which in the instant case is styled as 'withdrawal of Lot No. 12 & 46') can only be made before an award of tender has been issued. We equally make reference to the extract of the notification for non-award hereinbefore reproduced. We now wish to briefly discuss what exactly, '**operation of law**' means:

In its interpretation of section 63 of the Act, the Board considered 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]

Accordingly, a Procuring Entity invoking section 63 of the Act must put forward sufficient evidence to justify and support the ground of termination of the procurement process relied on.

The Board notes that section 63 (1) (a) (i) of the Act, as cited hereinbefore stipulates that one of the grounds that a procuring entity may rely on to justify its termination of a tender is that the subject procurement has been overtaken by 'operation of law'.

The question that now arises is what is 'operation of law'?

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. The question that now arises is whether the reasons advanced by the Procuring Entity to justify its termination of the subject tender were as a result of an operation of law in line with section 63 (1) (a) (i) of the Act.

The Board observes that the reason given by the Respondents for withdrawing Lot No. 12 & 46 of the subject tender was on account of some technical issues. The Board notes that no explanation is accorded to the Applicant on what they said, '**technical issues**' were. We wish to observe that such a reason is not outlined as any of the exclusive grounds for termination provided for under Section 63 (1) of the Act.

The Board further notes that in its response to the request for Review, the Respondents through its Chief Executive Officer, Hared Hassan Lt. Col (Rtd), states that the Lots were withdrawn as 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. It is the averment of the Respondent that the Procuring Entity was advised by the National Treasury through memo Ref No: RES 1035/21/01 'A' (37) to reprioritize its expenditures. In their letter they proceed to conclude that in view of the advice the budget to purchase new replacement vehicles were not forthcoming, hence the withdrawal of the specific lots as those in question.

The Board takes note of the fact that the National Treasury Memo Ref No: RES 1035/21/01 'A' (37), dated 13th May was received on the 24th May 2022. This was four days after the Evaluation Report of the subject tender that is dated 20th May 2022. In the said Evaluation Report the reason noted for the non-award of Lot No. 12 & 46 is, "... **No award, the vehicle is serviceable hence not for sale.**" It is worth noting that up to this point in time there are three different reasons that have been advanced by the Procuring Entity as to why there is a withdrawal of Lot No. 12 & 46 of the subject tender. The variance in reasons adduced for the withdrawal of Lot No. 12 & 46 from the subject tender points to the possibility of a decision having been made to withdraw the Lots from the tendering process long for reasons extrinsic to the law. The reference to the advice by the National Treasury that was received four days after the Evaluation Report had concluded that there be no award of the Lots is at best a scapegoat intended to defeat the ends of justice.

The Board further notes that despite the purported impugned withdrawal decision having been made on the Evaluation Report dated 20th May 2022 and even before the notification of non-award to the Applicant vide a letter dated 22nd June 2022, the Procuring Entity has not filed the statutory provided for written report to the Authority informing the Authority of the Termination and the reasons thereof as required by Section 63 (2) and (3) of the Act.

In light of the discussions and analysis hereinabove the Board is of the considered view that this was not a reason for the withdrawal of the Lot No. 12 & 46 of the subject tender which in essence are tantamount to termination of tender proceedings as contemplated under section 63 of the Act and should not have been used by the Procuring Entity to justify termination (or withdrawal as styled by the Procuring Entity) of the tender proceedings under Section 63 (1) (a) (i) of the Act.

Suffice to add that Section 63 of the Act only preempts a termination or cancellation of a tender and not 'Lot(s)' within a tender, especially where the mode of award is the same. We hasten to add that the Procuring Entity has been accorded a leeway of termination or cancellation at any time before an award is made, this termination or cancellation can be invoked even at the addendum and clarification stage and the same has to be done following all the substantive and procedural provision and criteria enumerated in Section 63 of the Act. We note that the Procuring Entity never took full advantage of the said provisions and/or intentionally looked

the other side as it proceeded to follow through the impugned processes in the subject tender.

In the end, the reason given to the Applicant for the termination through withdrawal of Lot No. 12 & 46 of the subject tender is in the considered view of the Board at best strange to the exclusive provisions of Section 63 of the Act and at worst extrinsic to the said provision. The situation is in our view exacerbated by the failure by the Procuring Entity to file with the Authority the statutorily required written report informing the Authority of the termination of tender proceedings and the reasons therefore. Suffice to add for the umpteenth time that those reasons must conform with the exclusive stipulations of Section 63 of the Act. Consequently, the advice by the National Treasury as referenced hereinabove cannot stand the test set by the law as amounting to operation of law that can warrant the termination of tender proceedings.

It is in light of the above-noted observations that the Board notes that the Respondents failed to adhere to the substantive and procedural statutory pre-conditions of Section 63 of the Act. Accordingly, the Board's jurisdiction is not ousted by dint of Section 167(4)(b) of the Act.

This being the case, we hold and reiterate our above-stated arguments with the effect of concluding that the Respondents did not satisfy the substantive and procedural pre-conditions of Section 63 (1) of the Act. Accordingly, we find that the Respondents did not properly terminate the subject tender in accordance with Section 63 of the Act.

With the foregoing in mind, the Board now turns to the disposition of the request for review dated 4th July 2022 in the following specific orders:

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Act, the Board makes the following orders in the Request for Review dated 4th July 2022:-

- 1. The Procuring Entity's Letter of Notification of Non-Award dated 22nd June 2022 with respect to Tender No. NDMA/17/2021/2022 for the disposal of unserviceable stores, equipment, motor vehicles, furniture and fittings under Lot 12 & 46 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 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 12 and**

46 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

