

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 64 OF 2022 OF 1st AUGUST 2022

BETWEEN

COM TWENTY ONE LIMITED.....APPLICANT

AND

THE DIRECTOR GENERAL,

COMMUNICATIONS AUTHORITY OF KENYA1ST RESPONDENT

Notice of Motion in Request for Review of the decision of the Accounting Officer of the Communications Authority of Kenya with respect to Tender No.CA/PROC/OT/73/2021-2022 for Supply, Delivery, Installation, Commissioning and Maintenance of Broadcast Loggers.

BOARD MEMBERS

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| 1. Mrs. Njeri Onyango | Vice Chairperson (panel Chair) |
| 2. QS Hussein Were | Member |
| 3. Jackson Awele | Member |
| 4. Rahab Chacha | Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Phillip Okumu | - Acting Board Secretary |
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BACKGROUND

The Notice of Motion dated 26th August brought under Application No.64 of 2022 filed by the Respondent on 29th August 2022 emanates from orders issued by the Board on 5th August 2022 in Request for Review No. 64 of 2022 dated 15th July 2022.

REQUEST FOR REVIEW NO. 64 of 2022

A Request for Review was lodged by **COM TWENTY ONE LIMITED**, as the Applicant of P.O. Box 15818 – 00100, Nairobi, seeking a Review of the decision of the Accounting Officer of the Communications Authority of Kenya, made vide a letter dated 30th June, 2022 declaring the Applicant's bid non-responsive and terminating Tender No. CA/PROC/OT/99/2021-2022, for Supply, Delivery, Installation and Commissioning of Local Area Network (LAN) for Selected National Police Service (NPS) Stations (hereinafter referred to as "the subject tender")

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

- a) An order declaring that the Accounting Officer of the Procuring Entity's decision terminating Tender Number: CA/PROC/OT/99/2021-2022, for Supply, Delivery, Installation and Commissioning of Local Area Network (LAN) for Selected National Police Service (NPS) Stations, is null and void.***
- b) An order declaring that the Applicant's bid was responsive at the Financial Evaluation stage in accordance with sections 82 and 86 (1) (a) of the Act, thus was the lowest evaluated***

responsive bidder qualified for award of Tender Number: CA/PROC/OT/99/2021-2022, for Supply, Delivery, Installation and Commissioning of Local Area Network (LAN) for Selected National Police Service (NPS) Stations.

c) An order cancelling and setting aside the letter dated 30th June, 2022, notifying the Applicant that its bid was unsuccessful bid thereby terminating Tender Number: CA/PROC/OT/99/2021-2022, for Supply, Delivery, Installation and Commissioning of Local Area Network (LAN) for Selected National Police Service (NPS) Stations.

d) An order directing the Accounting Officer of the Procuring Entity to direct the Evaluation Committee to reinstate the Applicant's tender at the Financial Evaluation Stage and to conduct a re-evaluation of the Applicant's tender at that Financial Evaluation stage in accordance with section 82 and 86 (1) (a) of the Public Procurement and Asset Disposal Act read together with Regulation 77 of the Public Procurement and Asset Disposal Regulations, 2020.

e) In the alternative and without prejudice to prayer (d) above, an order directing the Accounting Officer of the Procuring Entity to award Tender Number: CA/PROC/OT/99/2021-2022, for Supply, Delivery, Installation and Commissioning of Local Area Network (LAN) for Selected National Police Service (NPS) Stations to the Applicant pursuant to section 87 of the

Act as the lowest evaluated responsive bidder at the Financial Evaluation stage, thereafter, to sign a contract with the Applicant in accordance with section 135 of the Act;

f) An order directing and compelling the Procuring Entity to bear the costs of this Request for Review;

g) The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

The Board set out the following issues for determination in making its decision:

- 1. Whether the Board has jurisdiction to entertain the Request for Review dated 15th July 2022 filed by the Applicant challenging the Respondents' termination of the subject tender?**
- 2. Whether the Respondent lawfully determined the Applicant's bid to be non-responsive and whether the Respondent breached the provisions of the Act and the Regulations in not awarding the subject tender to the Applicant?**

Depending on the finding in No. (2) above the following sub issue shall be answered

- i. Whether the Respondent properly carried out the procedures in terms of terminating the subject**

procurement proceedings as per the provisions of the Act?

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

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Act, the Board made the following Orders on 5th August 2022 in the Request for Review dated 15th July 2022:

- 1. The Accounting Officer of the Procuring Entity's decision terminating Tender No. CA/PROC/OT/99/2021-2022 for the Supply, Delivery, Installation and Commissioning of Local Area Network (LAN) for Selected National Police Service (NPS) Stations and communicated vide a letter(s) dated 30th June 2022, addressed to the Applicant and all other bidders, be and is hereby cancelled and set aside.**

- 2. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to reinstate the Applicant's tender at the Financial Evaluation stage and conduct a re-evaluation of the Applicant's tender at the Financial Evaluation stage taking into consideration the Board's finding in this case.**

3. Further to Order No. 2 above, Accounting Officer of the Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion including the making of an award within twenty one (21) days from the date of this decision and to issue notification letters to all bidders including the Applicant herein in accordance with section 87 of the Act.

4. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.

NOTICE OF MOTION APPLICATION FILED ON 29TH AUGUST 2022

The Respondent herein, the Director General, Communications Authority of Kenya, filed with the Board, on 29th August 2022, a Notice of Motion dated 26th August, 2022 together with a Supporting Affidavit sworn on 26th August 2022 through Kounah & Company Advocates seeking the following Order:

- 1. That the Respondent be and is hereby granted an extension of 14 days to comply with the Board's Order dated 5th August 2021.**

The Board notes and wishes to point out that the orders referred by the Respondent were issued on 5th August 2022 and not 2021 as indicated by the Respondent in its prayers in the Notice of Motion.

The Respondent has relied on five (5) grounds in support of its Notice of Motion Application which is stated to be brought under Article 159 (2)(d) of the Constitution.

The Respondent avers that the Board's Order dated 5th August 2022, set out strict compliance timelines of 21 days from the date of the Order.

Further, the Respondent states that the Evaluation Committee undertook re-evaluation of the tender in line with the Board's decision and recommended award of the tender to the lowest evaluated bidder, being the Applicant whose bid was Kshs. 161,599,698.80

The Respondent states that its approved budget was Kshs. 105,000,000 hence leaving a shortfall of Kshs. 55,743,305.00 which is more than the 25% threshold set out in Section 131 and 132 of the Public Procurement and Asset Disposal Act 2015 (hereinafter referred to as "the Act").

The Respondent has indicated that he wrote to the Director General of the Public Procurement Regulatory Authority seeking advice on:

- i. Whether the Authority can proceed with competitive negotiations with the only bidder whose price is beyond 25% of the approved budget.
- ii. Whether the Authority can revise the budget to accommodate the bid price at this stage of evaluation.

The Respondent avers that due to the above stated challenge, he is unable to complete the procurement process within the prescribed 21 days as ordered by the Board and is constrained to seek an extension of time in order to comply with the Board Orders of 5th August 2022.

The Respondent further filed with the Board on 30th August 2022 an Affidavit of Service dated 29th August 2022 deponing that the Court Process Server served the Applicant herein on the same day with copies of the Notice of Motion, Supporting Affidavit and annexures at their registered offices.

The Applicant in response filed a Replying Affidavit in response to the Notice of Motion Application on 6th September 2022 sworn by its executive director, Evans Mwaura Githua. This was filed on the same date that the matter was heard by the Board. The Applicant however did not place before the Board any evidence proving service of the Replying Affidavit upon the Respondent to afford him an opportunity to reply.

DETERMINATION

The Board has considered the law and the application before it and the issues raised by the Respondent in regard to its inability to comply with the orders issued on 5th August 2022 within the time set in the said decision regard to the subject tender and noted the Respondent's prayer for extension of time by a further 14 days to enable the procuring Entity to comply with the Board's orders.

The powers of the Board as stipulated under section 173 of the Act is as follows:

173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;***
- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;***
- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***
- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***
- (e) order termination of the procurement process and commencement of a new procurement process.***

The Board takes cognizance of provisions of Article 159 (2)(d) of the Constitution which states that:

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles -

b.

- c.
- d.
- e. ***Justice shall be administered without undue regard to procedural technicalities; and***
- f.

In making a determination on the issue of extension of time, the Board is guided by the holding of the Supreme Court of Kenya in ***Nicolas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others SC. App. No. 16 of 2014; [2015]eKLR (the Nick Salat Case)*** where the Court set the principles for extension of time as follows:

"... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

"... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

- 1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;***
- 2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;***

- 3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;**
- 4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;**
- 5. whether there will be any prejudice suffered by the respondents, if extension is granted;**
- 6. whether the application has been brought without undue delay; and**
- 7. whether in certain cases, like election petitions, public interest should be a consideration for extending time”**

We note that extension of time is an equitable remedy that is only available to a deserving party, at the discretion of the Board. It is not a right of a party. A party who seeks for extension of time has the burden of laying a basis to the Board's satisfaction to grant the orders prayed for.

It is clear from the admission made by the Respondent that the Respondent proceeded with the procurement process and directed the Evaluation Committee to re-instate the Applicant's tender at the Financial stage. The Evaluation Committee in turn conducted a re-evaluation of the Applicant's tender at the Financial Evaluation Stage and recommended award of the subject tender to the Applicant, being the lowest evaluated bidder at Kshs. 161,599,698.80 subject to Budget.

The Board further notes the issues raised by the Respondent concerning its approved budget and its letter to the Director General Public Procurement

Regulatory Authority seeking advice on whether to proceed with competitive negotiations with the Applicant and whether to revise its budget to accommodate the bid price during its evaluation process. The Procuring Entity has provided proof of the said Budget, the sum whereof the Board has taken note of.

We shall not dwell on the above issues having considered that the same have been raised with the Director General Public Procurement Regulatory Authority and the same do not go to the root of the prayer for an order of extension of time to comply with the Board's order dated 5th August 2022. The Respondent shall pursue the advice obtained from the Director General Public Procurement Regulatory Authority in resolving the same without any interference from this Board.

The Board is persuaded by its decision in **PPRA Application No. 23 of 2019 Pastoralists Initiative for Development and Advocacy (PIDAD) V The Presidency, Executive Office of the President, Department of Arid and Semi-Arid Regions and Another**, where the Board considered the Procuring Entity's request for extension of time to comply with its Orders in Application 23 of 2019 and by extension Application No. 33 of 2019 (an application filed before the Board relating to procurement of same tender). The Board considered the circumstances giving rise to the Procuring Entity's inability to comply with the orders issued on 28th March 2019 and in its holding allowed the request for extension of time by 14 days to enable that process be completed and achieve intended purpose.

The Board also notes that the Applicant(the successful bidder) while raising certain objections regarding statements contained in the Procuring Entity's Affidavit regarding the Budget for the subject tender has not opposed the request for extension of time. In deed the need for extension of time is acknowledged. The Board therefore, is of the view that both parties are agreed on the need for extension of time. As regards other matters raised in the Replying Affidavit of the Bidder, the Board considers that those matters do not go to the core of the prayer for extension of time as prayed for by the Procuring Entity. Further those matters have been raised late in the day and the Procuring Entity has not been granted an opportunity to respond. There is no evidence to show that the procuring Entity, being the Applicant in the present Notice of Motion, has been served with the said Affidavit to enable it to respond to the said issues. It would be unjust and contrary to the tenets of fair hearing for the Board to make any findings in that regard without affording the Procuring entity a chance to respond.

Consequently, in exercise of the powers conferred upon the Board by Section 173 of the Act and in order to enable completion of the procurement process by the Respondent herein, the Board makes the following orders:

- a) The Notice of Motion dated 26th August 2022 be and is hereby allowed and the Respondent is granted an extension of fourteen (14) days from the date of this decision, to enable the Procuring Entity complete the procurement process as ordered on 5th August 2022 in Request for Review No. 64 of 2022**

b) Each party shall however bear its own costs arising from this Notice of Motion for the reason that the orders granted above are beneficial to all parties.

Dated at Nairobi this 9th day of September ,2022



.....
VICE CHAIRPERSON (PANEL CHAIR)

PPARB



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SECRETARY

PPARB

