

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 104 OF 2022 OF 8TH DECEMBER 2022

BETWEEN

DIGNITY TRADERS LIMITED..... APPLICANT

AND

ACCOUNTING OFFICER,

KENYA MARITIME AUTHORITY.....1ST RESPONDENT

KENYA MARITIME AUTHORITY2ND RESPONDENT

Review against the decision of the Accounting Officer, Kenya Maritime Authority in relation to Tender No. KMA/ONT/011/2022-2023 for Proposed Office Fit Outs at KMA-IP CCTV Surveillance, Access Control, IP P.B.X and Structured Cabling System Installation Works.

BOARD MEMBERS PRESENT

- | | |
|----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. QS Hussein Were | - Member |
| 3. Mr. Jackson Awele | - Member |

IN ATTENDANCE

Mr. Philemon Chemoiywo

-Holding Brief for Board Secretary

BACKGROUND OF THE DECISION

The Tendering Process

The Kenya Maritime Authority, the Procuring Entity and 2nd Respondent herein, advertised tenders using the open tendering method by way of an advertisement on 20th September 2022 through the PPIP, MYGOV publication and on the KMA. In particular, the Procuring Entity advertised Tender No. KMA/ONT/011/2022-2023 for Proposed Office Fit Outs at KMA- IP CCTV Surveillance, Access Control, IP P.B.X and Structured Cabling System Installation Works (hereinafter referred to as the 'subject tender'). The subject tender was initially to close on 12th October 2022 but an addendum was issued on 6th October 2022 extending the closing date to 19th October 2022 at 10:00 a.m.

Submission of Tender and Tender Opening

A total of fourteen (14) tenderers submitted their tenders in response to the subject tender within the tender submission deadline of 19th October 2022 at 10:00a.m. The tenders were opened in the presence of the

representatives of tenderers who attended the tender opening at the college staffroom. The submitted tenders were as follows:

Tenderer No.	Tenderer
1.	Master Power Systems Ltd
2.	Diadem Ltd
3.	MugaElectrica Contractors Ltd
4.	Pluton ICT Ltd
5.	Pong Agencies Ltd
6.	Philafe Engineering Ltd
7.	Odd-Mac Engineering Ltd
8.	Stallion Group Africa Ltd
9.	Powerwave Systems Ltd
10.	Dignity Traders Ltd
11.	Top Choice Surveillance Ltd
12.	Diva Engineering Ltd
13.	Doublenet Technologies Ltd
14.	Extreme Wireless K Ltd

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the 'Evaluation Committee') was appointed consisting of six members vide Letter Ref No.

KMA/PROC/4/1 dated 17th October 2022 and an additional five members from the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works- State Department for Public Works (SDPW) to offer technical support following a request vide Letter Ref No. KMA/PROC/4/1 dated 21st September 2022. The Evaluation Committee undertook the evaluation on the fourteen (14) tenders in the following four stages and as captured in the Evaluation Report signed by all members and dated 22nd November 2022 (hereinafter referred to as the 'Evaluation Report'):

- i. Preliminary/Mandatory Evaluation;
- ii. Technical Evaluation;
- iii. Financial Evaluation;
- iv. Post-Qualification/Due Diligence

Preliminary Examination of Bids

At this stage of evaluation, thirteen (13) tenders were determined non-responsive as captured in the Evaluation Report. Bidder No. 10, the Applicant herein was determined as responsive and therefore proceeded to the Technical Evaluation stage.

Technical Evaluation

At this stage of evaluation, the only tenderer, the Applicant herein, was determined responsive having attained a technical score of 92% more than the set minimum of 70% and proceeded for Financial Evaluation as captured in the Evaluation Report.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee as noted in the Evaluation Report noted arithmetic errors as follows:

-Page 00000556 (H/6)- error i.e. ITEM 1.05 has indicated 135,500.00 instead of 135,000.00

-Page 00000567 (H/17) - Grand summary has indicated 43,170,000.00 instead of 43,125,000.00

M/s Dignity Traders Ltd, the Applicant herein and the only responsive tenderer thus far, was disqualified at this stage.

Evaluation Committee's Recommendation

The Evaluation Committee did not recommend any award to any firms as none of the firms passed all the stages of evaluation.

Professional Opinion

The Procuring Entity's Principal Procurement Officer, Catherine Mumbi, in a Professional Opinion dated 22nd November 2022, recommended the subject tender not to be awarded since none of the bidders passed all the evaluation stages. The Accounting Officer of the Procuring Entity and the 1st Respondent herein, concurred with the Professional Opinion and approved it on 25th November 2022.

Letters of Notification

Vide letters dated 30th November 2022, signed by the Acting Director General of the 2nd Respondent notified tenderers of the outcome of evaluation of the subject tender. In particular, the Applicant was issued a regret since its tender was declared unsuccessful with the reasons being detailed in the notification letter of regret as being arithmetic error were detected.

REQUEST FOR REVIEW

On 8th December 2022, M/s Dignity Traders Limited, the Applicant herein, through the firm of M/s Chepkuto Advocates filed a Request for Review dated 7th December 2022 together with the Applicant's Supporting Affidavit sworn by Joyce Wangui Kariuki, a Director of the Applicant herein, seeking the following orders, verbatim:

- a. A declaration that the Procurement Entity breached the provisions of Article 227(1) of the Constitution and Sections 63 and 79(1) and (2) of the Public Procurement and Disposal Act;**

- b. The decision of the Respondents to terminate the procurement proceedings with respect to the tender herein be annulled and set aside;**

- c. The procurement process to be completed and the Applicant be evaluated as per the provisions of Section 80 of the Act;**

- d. An order directing the Procuring Entity to complete and release the outcome of the procurement process in regard to the tender;**

- e. An order compelling the Procuring Entity to award the tender to the Applicant who strongly believes it was the lowest evaluated bidder;**

- f. An order compelling the Respondents to pay the costs to the Applicant arising from/and incidental to this Application;**

- 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.**

In a Notification of Appeal and a letter dated 8th December 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board"), Mr. James Kilaka, notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondents a copy of the Request for Review together with the Board's Circular No. 02/20 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 8th December 2022.

On 14th December 2022, the 1st and 2nd Respondent filed their Memorandum of Response dated 13th December 2022 and an Affidavit in Support of the Memorandum of Response signed by John Omingo dated 13th December 2022. The Applicant filed its Written Submissions in support of the Request for Review dated 7th December 2022.

APPLICANT'S CASE

The Applicant avers that the Procuring Entity breached the provisions of Section 63 and 79(2)(a)(b) of the Public Procurement and Asset Disposal Act (hereinafter referred to as 'the Act) and Article 227(1) of the Constitution by unlawfully disqualifying the Applicant's bid on account of allegedly failing to adhere to the provisions of the Act despite the same being responsive.

The Applicant avers that the Procuring Entity failed to recognize that the errors in the Applicant's tender were minor and did not materially depart from the requirements set out in the Tender Document thus rendering the tender as responsive.

The Applicant further argues that the Procuring Entity failed to acknowledge that minor arithmetic errors which may be corrected without affecting the substance of the tender ought not to affect the responsiveness of the Applicant's bid under the provisions of Section 79(2)(b) of the Act. Additionally, the Procuring Entity failed to take into account the fact that the Applicant had fully complied with the eligibility criteria and mandatory requirements under the Tender Document and submitted valid bid.

The Applicant argues further that the Procuring Entity prejudiced the Applicant's legitimate expectation to evaluate its bid in accordance with the principles under Article 227(1) of the Constitution and the Act, being that the evaluation ought to be fair, equitable, transparent and cost effective and the disqualification of the Applicant's bid is therefore unfair, illegal and unjustifiable as it is not in accordance with the provisions of Article 227(1) of the Constitution and the Act.

The Applicant pleads that the breaches by the Procuring Entity have denied it the opportunity to compete fairly in the award of the subject tender and that the subject tender has not been fairly evaluated. In conclusion the Applicant prays that it is only just, fair and in furtherance of the principles of natural justice and fair administrative action that the orders sought in the instant Request for Review be granted to safeguard the due process

and efficacy of remedies availed to the Applicant herein by the Act. The Applicant has also sought to establish that its bid was not evaluated in accordance with Section 80 of the Act in that the Procuring Entity's Tender Document paragraph 29.1 defines a substantially responsive tender as one that "*meets the requirements of the Tender Document without material deviation, reservation or omission.*" The Applicant avers that the errors in their bid did not fall within the definition of material deviation and therefore complied with paragraph 29.

RESPONDENTS' CASE

In response, the 1st and 2nd Respondents filed their Memorandum of Response and an Affidavit in Support of the Memorandum of Response. In the said response the Procuring Entity avers that the Request for Review is misconceived, defective, bad in law and abuse of the process of the Board. The Procuring Entity states that it does not dispute that the Applicant met the mandatory requirements.

The Procuring Entity avers that during the financial evaluation stage, it was noted that the Applicant's tender document was marred with arithmetic errors and as such subject to the Application of Regulation 74(2) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter

referred to as the 'Regulations 2020'). The errors detected are as set out hereinabove.

The Procuring Entity avers that Clause 31.2(a) of the Tender Document provided that an error detected if considered a major deviation that affects the substance of the tender, the tender should be considered non-responsive. Further that Clause 31.2 expounds and echoes Regulation 74(2) of the Regulations 2020 that a correction of the Applicant bid on the grand total would contravene Section 82 of the Act and therefore states that the Procuring Entity complied with the applicable law and all the requirements under the Tender Document during the procurement process.

The Procuring Entity states that no award has been made as the bids submitted were non-responsive and therefore submits that the Procuring Entity has been fair, equitable, transparent, competitive and unbiased and is in compliance with the Constitution.

BOARD'S DECISION

The Board has considered each of the parties' cases, documents, pleadings, written submissions, authorities together with confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and finds the issues that arise for determination are:

- 1. Whether the Applicant's tender bid was evaluated in accordance with the Tender Document and Section 80 of the Act;**
- 2. What orders should the Board grant in the circumstances?**

We now proceed to address and make a determination on the aforesaid issues.

Whether the Applicant's tender bid was evaluated in accordance with the Tender Document and Section 80 of the Act;

The Board has considered and perused all the material submitted before it both by the Applicant and the Procuring Entity. We note that the Applicant was the only responsive tenderer at the Preliminary/Mandatory Evaluation and at the Technical Evaluation stage. Trouble befell the Applicant at the Financial Evaluation stage. The Evaluation Committee noted as follows:

(i) B10: Dignity Traders Ltd

Arithmetic errors were detected as follows:

-Page 00000556 (H/6)- error i.e. ITEM 1.05 has indicated 135,500.00 instead of 135,000.00

-Page 00000567 (H/17) - Grand summary has indicated 43,170,000.00 instead of 43,125,000.00

M/s Dignity Traders Ltd was disqualified at this stage."

The same reason was issued in the Notification of Regret dated 30th November 2022 for which the Applicant sought a debrief dated 1st December, 2022. Perhaps dissatisfied with both the reasons in the Notification of Regret and the debriefing letter the Applicant lodged the instant Request for Review dated 7th December, 2022 and filed on 8th December 2022.

The Board notes that the Applicant has conceded to the existence of arithmetic errors in its bid but contends that the same amounted to a minor deviation that does not affect the substance of the tender.

Article 227 of the Constitution of Kenya provides as follows:

"Procurement of public goods and services

- (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.***
- (2) An Act of Parliament shall prescribe a framework within***

which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

- a) Categories of preference in the allocation of contracts;*
- b) The protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;*
- c) Sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and*
- d) Sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.” [Emphasis ours]*

Section 80(2) of the Act provides as follows: -

"80(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional

associations regarding regulation of fees chargeable for services rendered."

Section 82 of the Act reads as follows:

"82. No correction of errors

The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity."

Regulation 74(2) of the Regulations 2020 reads as follows:

"74(2) Subject to section 79(2)(b) of the Act, any errors in the submitted tender arising from a miscalculation of unit price, quantity, subtotal and total bid price shall be considered as a major deviation that affects the substance of the tender and shall lead to disqualification of the tender as non-responsive."

On its part, this is not the first time the Board is called upon to adjudicate on a matter of this nature. Indeed, we have handled such before and therefore have existing precedents that can offer the much required guidance and contribute towards the development of jurisprudence.

In Application No. 144/2020 of 25th November 2020 Between County Builders Limited v Principal Secretary, Ministry Of Transport, Infrastructure, Housing, Urban Development And Public Works, State Department Of Housing And Urban Development the Board held as follows: -

"The Board finds that Regulation 74 (2) of Regulations 2020 does not vest an automatic action for the Procuring Entity to find tenderers non-responsive as a result of arithmetic errors found in their bids during Financial Evaluation because the said provision is subject to section 79 (2) (b) of the Act whilst taking into account how a tender sum ought to be treated pursuant to section 82 of the Act."

The Board has perused the Tender Document issued by the Procuring Entity. Paragraph 29 of the Tender Document defines a substantially responsive tender as one that, *"meets the requirements of the Tender document without material deviation, reservation, or omission."* In the same vein the Tender Document defines a material deviation, reservation or omission as one that, if accepted, would- *"a) Affect in any substantial way the scope, quality, or performance of the Works specified in the Contract; b) limit in any substantial way, inconsistent with the tender document, the Procuring Entity's rights or the tenderer's obligations under*

the proposed contract; c) if rectified, would unfairly affect the competitive position of other tenderers presenting substantially responsive tenders.”

In Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR, the High Court in interpreting Section 79(2) of the Act by stated; *“The Procuring Entity may regard a tender as responsive **even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender.**”*

The same court defined a minor deviation as; *“one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. **The defect or variation is immaterial when the effect on price, quantity, quality or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired.** The contracting officer either shall give the bidder an opportunity to cure*

any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the Government.”

We note and enlist all these provisions of the Constitution, the Act, our own decisions and the decisions of the High Court that has supervisory powers over the Board and whose decisions are binding before us to enable the Board arrive at a most informed decision in the instant Request for Review. The arithmetic errors calculated in actual monetary value are:

Page 00000556(H/6)- item 1.05 which has indicated 135,500 instead of 135,000;

Page 00000567(H/17)- grand total indicated 43,170,000.00 instead of 43,125,000.00;

Since the Act requires that the tender sum as submitted and read out during the tender opening is the absolute final and should not be corrected, the same should be retained as such. It is obligatory that the same should not be amended or corrected by anyone in any way.

In the interest of preserving the integrity of the procurement proceedings and staying true to the underlying objective of Section 82 of Act, the Procuring Entity's evaluation committee should arrive at the lowest

evaluated bidder in accordance with Regulation 77 of the Regulations 2020. This is demonstrable from the items listed in Regulation 77 of the 2020 Regulations as follows:

(1) Upon completion of the technical evaluation under regulation 76 of these Regulations the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender

(2) The evaluated price for each bid shall be determined by—

(a) taking the bid price in the tender form

(b) taking into account any minor deviation from the requirements accepted by a procuring entity under section 79 (2) (a) of the Act

(c) where applicable converting all tenders to the same currency using the Central Bank of Kenya exchange rate prevailing at the tender opening date

(d) applying any margin of preference indicated in the tender document

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act

The Procedure outlined under Regulations 77 of the Regulation 2020 above does not include correction, amendment, subtractions or an addition to the tender sum in anyway. In addition to this the Procuring Entity ought to seek a confirmation from the Applicant in writing that the Applicant agrees to be bound by its tender sum as it appears in its form of tender and as was read out during tender opening. The Applicant ought to provide its response in writing confirming whether or not it agrees to be bound by its tender sum .If the Applicant agrees as much and the Procuring Entity has determined the Applicant to be the lowest evaluated tenderer, then the Procuring Entity can proceed to award the tender at the quoted tender price. Thereafter, the Applicant will be at liberty to accept or reject the award.

Accordingly, and without unnecessarily being repetitive, the Board finds that Regulation 74(2) of the Regulations 2020 does not vest an automatic action for the Procuring Entity to find tenders non-responsive as a result of arithmetic errors found in their bids during Financial Evaluation because the said provision is subject to Section 86(1) of the Act whilst taking into account how a tender sum ought to be treated pursuant to Section 82 of the Act. Further Regulation 74(2) by its nature being a provision of a subsidiary legislation is subjected to the test of *inter alia*, Section 31(b) of the Interpretation and General Provisions Act, Chapter 2 Laws of Kenya which states that no subsidiary legislation shall be inconsistent with the

provisions of the Act [that is Section 82 of the Act]. In essence, subsidiary provisions should not be raised to a high position than their parent Act, they are simply handmaidens that enable implementing bodies attain the required vision of the Act, and whenever they contradict the parent Act they should suffer the fate of relegation to their rightful position.

In the instant Request for Review, Section 82 of the Act must prevail because the tender sum must remain final and no opportunity is offered for correction whatsoever. In conclusion, it is the Board's finding that the Procuring Entity did not have the leeway to resort to Regulation 74 of the Regulations 2020 without considering the provisions of Section 82 of the Act.

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 22nd November 2022: -

- 1. The Applicant's Request for Review dated 7th December 2022 with regards to the decision of the Accounting Officer of the Kenya Maritime Authority in relation to Tender No. KMA/ONT/011/2022-2023 for Proposed Office Fit Outs at KMA-IP CCTV Surveillance, Access Control, IP P.B.X and**

Structured Cabling System Installation Works is hereby allowed.

- 2. The letters of Notification dated 30th November, 2022 of Tender No. KMA/ONT/011/2022-2023 for Proposed Office Fit Outs at KMA-IP CCTV Surveillance, Access Control, IP P.B.X and Structured Cabling System Installation Works addressed to the Applicant and all other bidders, be and are hereby cancelled and set aside.**

- 3. The Accounting Officer of the Kenya Maritime Authority is hereby ordered to direct the Evaluation Committee to re-admit the Applicant's tender at the Financial Evaluation stage and conduct a re-evaluation of the Applicant's tender at that stage in accordance with Section 82 read together Regulations 77 Regulations 2020,taking into account the Boards finding in this Request for Review.**

- 4. Further to Order No. 3 above, the Accounting Officer of the Kenya Maritime Authority is hereby directed to proceed with the procurement process to its logical conclusion including the making of an award within 14 days from the date of this decision.**

5. Given that the procurement process is not complete, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 29th day of DECEMBER, 2022



.....
CHAIRPERSON

PPARB



.....
SECRETARY

PPARB