

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 37/2023 OF 5TH JUNE 2023

BETWEEN

COPYTECH OFFICE SOLUTIONS LIMITED.....APPLICANT

AND

ACCOUNTING OFFICER,

KENYA PORTS AUTHORITY.....1ST RESPONDENT

KENYA PORTS AUTHORITY.....2ND RESPONDENT

Review against the decision of the Accounting Officer, Kenya Ports Authority in relation to Tender No. KPA/120/2022-2023 for Design, Supply, Integrate and Implementation of an Operations Control Center (OCC) for Kenya Ports Authority.

BOARD MEMBERS PRESENT

- | | | |
|--------------------------------|---|------------------|
| 1. Mr. George Murugu | - | Chairperson |
| 2. Mrs. Njeri Onyango F.CI Arb | - | Vice-Chairperson |
| 3. Eng. Mbiu Kimani | - | Member |

IN ATTENDANCE

Mr. James Kilaka - Secretariat

PRESENT BY INVITATION

APPLICANT - COPYTECH OFFICE SOLUTIONS LIMITED

Mr. Omollo - Advocate, Sigano & Omollo LLP Advocates

**RESPONDENTS ACCOUNTING OFFICER, KENYA PORTS
AUTHORITY**

KENYA PORTS AUTHORITY

Mr. Paul Munyao Advocate, Munyao. Muthama & Kashindi Advocates

Mr. Henry Kariuki- Advocate, Munyao. Muthama & Kashindi Advocates

BACKGROUND OF THE DECISION

The Tendering Process

Kenya Ports Authority, the Procuring Entity and the 2nd Respondent herein, invited sealed tenders in response to Tender No. KPA/120/2022-2023 for Design, Supply, Integrate and Implementation of an Operations Control Center (OCC) for Kenya Ports Authority (hereinafter referred to as the "subject tender") using an open competitive method. The invitation was by way of an advertisement published on 5th May 2023 on the 2nd Respondent's website www.kpa.co.ke and the Public Procurement Information Portal www.tenders.go.ke. The subject tender submission deadline was Friday, 26th May 2023 at 10:00 a.m.

Addendum No.1

On 19th May 2023, the Procuring Entity issued an Addendum extending the tender submission deadline to Tuesday, 6th June 2023.

Submission of Tenders and Tender Opening

The instant Request for Review was filed and served upon the Procuring Entity before the submitted tenders had been opened.

Evaluation of Tenders

According to the Tender Document, the evaluation of the submitted tenders in the subject tender was to be conducted in the following 2 stages:

- i. Preliminary Evaluation
- ii. Technical Evaluation

Preliminary Evaluation

At this stage of the evaluation, the Evaluation Committee would be required to examine the tenders using the criteria set out in Clause 3 Preliminary Examination for Determination of Responsiveness under SECTION III-EVALUATION AND QUALIFICATION CRITERIA at pages 36 to 39 of the Tender Document.

Evaluation at this stage requires that the Evaluation Committee examines the submitted tenders to ensure that they meet in all respects the eligibility criteria and other mandatory requirements in the ITT and that the tenders are complete in all aspects of the mandatory requirements outlined under the preliminary evaluation criteria.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee would be required to examine the tenders using the Criteria set out as Clause 4(a). Technical Evaluation under Section III-EVALUATION QUALIFICATION CRITERIA at pages 39 to 40 of the Tender Document.

REQUEST FOR REVIEW

On 25th June 2023, the Applicant filed a Request for Review dated 5th June 2023 and a Supporting Affidavit in support of the Request for Review sworn on 5th June 2023 by Samuel Njoroge Kimani, seeking the following orders from the Board in verbatim:

a) The procurement proceedings in Tender No. KPA/120/2022-23/CO- Design, Supply, Integrate and Implementation of an Operations Control Center (OCC) for Kenya Ports Authority be and are hereby annulled in entirety and set aside.

b) The Accounting Officer of Kenya Ports Authority is hereby directed to issue a fresh notice and tender document for Tender No. KPA/120/2022-23/CO- Design, Supply, Integrate

and Implementation of an Operations Control Center (OCC) for Kenya Ports Authority based on Document No. 10; Standard Tender Document for Procurement of Information Technology issued by the Public Procurement Regulatory Authority and taking into consideration the findings of the Review Board herein.

- c) The Accounting Officer of Kenya Ports Authority be and is hereby directed to publish the new tender notice and tender document for Tender No. KPA/120/2022-23/CO- Design, Supply, Integrate and Implementation of an Operations Control Center (OCC) for Kenya Ports Authority on the Government of Kenya's Public Procurement Information Portal (www.tenders.go.ke) within such period to be stipulated by the Review Board.***
- d) The Accounting Officer of Kenya Ports Authority be and is hereby directed to allow bidders to withdraw their bids (if they so wish to do so) pursuant to section 76(1) of the Act and submit new bids, taking into consideration, the new tender document that would be issued by the Respondents in compliance with the orders of the Review Board.***
- e) Any other relief that the Board may deem fit and just to grant.***
- f) Costs of the Review.***

In a Notification of Appeal and a letter dated 5th June 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st and 2nd Respondents

of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents 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 and 2nd Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 5th June 2023.

On 15th June 2023, in response to the Request for Review, the Respondents, through Turasha J. Kinyanjui, Advocate filed a Notice of Appointment of Advocates dated 14th June 2023, a Notice of Preliminary Objection dated 14th June 2023, a Memorandum of Response dated 14th June 2023 together with the Respondents' Affidavit in support of the Memorandum of Response sworn on 14th June 2023 by Mr. Daniel Amuyunzu, the 2nd Respondent's Manager, Procurement and Contract Management. The Respondents also submitted to the Board a confidential file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 15th June 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board

any information and arguments concerning the subject tender within 3 days from 15th June 2023.

Vide a Hearing Notice dated 19th June 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender that the hearing of the instant Request for Review will be by online hearing on 20th June 2023 at 12.00 p.m., through the link availed in the said Hearing Notice.

On the morning of 20th June 2023, the Respondents through the firm of Munyao, Muthama & Kashindi Advocates filed a Notice of Change of Advocates dated 19th June 2023.

Later on the 10th June 2023 at 12.00 noon only the Applicant and Respondents joined the online hearing session through their respective Advocates. The Applicant was being represented by Mr. Omollo The Respondents were represented by Mr. Munyao and Mr. Kariuki. None of the tenderers who took part in the subject tender was represented despite notice of the hearing.

The Board gave directions on the conduct of the hearing and assigned the Applicant and Respondents 10 minutes each to make oral submissions on their respective cases with the Applicant getting an extra 5 minutes to offer a rejoinder in respect of the Respondents' submissions. However, before the hearing would start, Mr. Munyao sought an adjournment informing the Board that his firm had just come on record for the Respondents and needed some

time to familiarize themselves with the matter. He also indicated that the Applicant and Respondents were also engaged in talks with the view of arriving at an amicable resolution of the matter. Mr. Omollo acceded to the request for an adjournment and confirmed the pending talks on resolution of the matter.

Upon considering the parties' respective submissions, the Board gave directions adjourning the hearing to 21st June 2023 at 2:00 p.m. The Board also directed the parties to file any consent before the appointed hearing time in the event of any agreement in the matter.

Accordingly, on 21st June 2023, pursuant to Regulation 216 of the Regulations 2020, the parties herein filed a jointly executed Notice of Withdrawal of Request for Review by Consent dated 20th June 2023.

When the Request for Review came up for hearing on 21st June 2023, Counsel for the Applicant and Counsel for the Respondent confirmed that they had filed the Notice of Withdrawal of Request for Review by Consent dated 20th June 2023 and that they wished to have the matter withdrawn.

FINAL ORDERS


In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 5th June 2023:

1. The Applicant's Request for Review dated 5th June 2023 be and is hereby marked as withdrawn.

2. Each party shall bear its own costs.

Dated at NAIROBI, this 26th Day of June 2023.


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CHAIRPERSON
PPARB


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SECRETARY
PPARB

