

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 48/2023 OF 14TH JULY 2023

BETWEEN

MWENGEI & ASSOCIATES CPA(K).....APPLICANT

AND

ACCOUNTING OFFICER

BUSINESS REGISTRATION SERVICES.....1ST RESPONDENT

BUSINESS REGISTRATION SERVICES.....2ND RESPONDENT

Review against the decision of the Accounting Officer, Business Registration Services in relation to Tender No. OR/OT/010/2022-2023 for Disposal of Assets (Milk-Processing Equipment) for Countryside Dairy Limited (In Liquidation)

BOARD MEMBERS PRESENT

- | | | |
|------------------------------|---|-------------|
| 1. Mr. George Murugu | - | Chairperson |
| 2. Mrs. Irene Kashindi | - | Member |
| 3. Eng. Mbiu Kimani, OGW | - | Member |
| 4. Eng. Lilian Atieno Ogombo | - | Member |
| 5. Mr. Langat Daniel | - | Member |

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IN ATTENDANCE

Mr. James Kilaka

- Secretariat

PRESENT BY INVITATION

APPLICANT - MWENGEI & ASSOCIATES CPA(K)

Mr. Joseph Munyithya

-Advocate, Munyithya, Mutugi, Umara & Muzna
Co. Advocates

**RESPONDENTS ACCOUNTING OFFICER, BUSINESS
REGISTRATION SERVICES**

BUSINESS REGISTRATION SERVICES

Mr. Odhiambo

-Advocate, Business Registration Services

BACKGROUND OF THE DECISION

The Tendering Process

1. The Office of the Official Receiver, the Procuring Entity together with the 1st Respondent herein, invited sealed tenders in response to Tender No. OR/OT/010/2022-2023 for Disposal of Assets (Milk-Processing Equipment) for Countryside Dairy Limited (In Liquidation) using the open tendering method. This was a disposal proceeding through which the assets of Countryside Dairy Limited (In Liquidation) were up for sale and the tender submission deadline was Friday, 9th June 2023 at 11:00 a.m.

Submission of Tenders and Tender Opening

2. According to the Tender Opening Minutes dated 9th June 2023 under the Confidential File submitted by the Procuring Entity, the following two (2) tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

No.	Name of Tenderer	Tendered Item
1.	Sensiri Agencies Limited	Homogenizer (GEA Double stage 5000LPH
2.	Mwengei & Associates	Carton sealer, storage tank and Aseptic Pouch Filler

Evaluation of Tenders

3. The Official Receiver constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the two (2) tenders in the following two stages as captured in the Evaluation Report dated June 2023.
- Preliminary Evaluation
 - Financial Evaluation

Preliminary Evaluation

4. At this stage of the evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out as Mandatory Requirements under Instructions To Tenderers No. 19.2 of the Tender Document.

5. At the end of the evaluation at this stage, the two (2) tenders were found to be responsive and qualifying for further evaluation at the Financial Evaluation Stage. However, the Evaluation Committee noted in its Evaluation Report that the Applicant herein did not fully paginate its submitted tender document.

Financial Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the Criteria set out as Award Criteria under Instructions To Tenderers No. 19.3 of the Tender Document.
7. Under the Tender Document, the successful tender would be the substantially responsive tender that is also determined to be the highest evaluated tender, which must be higher than the reserve price per lot.
8. At the end of the evaluation at this stage, Sensiri Agencies Limited was found to be responsive being the only tenderer that quoted above the reserve price in its lot (Homogenizer (GEA Double Stage 5000LPH). The Applicant's tender was found unresponsive for quoting far below the reserve price in its lot (carton sealer, storage tank, Aseptic Pouch Filler).

Evaluation Committee's Recommendation

9. The Evaluation Committee found that Sensiri Agencies Limited's tender was the highest evaluated tender under its lot and thus recommended the award of the subject tender for the lot to it at its tender cost of **Kenya**

Shillings One Million and Fifty Thousand (Kshs. 1,050,000.00)
inclusive of taxes.

10. Further, they recommended the Applicant's tender be tabled before a meeting of the Countryside Dairy Limited (In Liquidation)'s company creditors to recommend the way forward in light of the non-responsive tender received and the interim liquidator's objective of realizing maximum possible value.

Professional Opinion

11. In a Professional Opinion dated 12th June 2023 (hereinafter referred to as the "Professional Opinion" which was submitted to the Board pursuant to section 67(3)(e) of the Act), the Procurement Professional, Mr. Elly Ogut, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to the award of the subject tender.
12. Upon receipt of the Professional Opinion, the Official Receiver approved the award of the subject tender to the Interested Party on 12th June 2023.

Notification to Tenderers

13. Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award dated and signed 12th June 2023 by the Official Receiver.

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REQUEST FOR REVIEW

14. On 14th July 2023, the Applicant filed a Request for Review dated 13th July 2023 and a Supporting Affidavit sworn on 13th July 2023 by Julius Ngumbau Mwengei, seeking the following orders from the Board in verbatim:

- a) ***In the circumstances of this case, the procuring entity should be compelled to declare the Applicant as the successful bidder.***
- b) ***The bid items A carton sealer, a storage tank and Aseptic pouch filler be released to the Applicant upon payment of the balance of the bid sum of Kshs. 53,800/-***
- c) ***The cost of this matter to be paid by the Respondent (procuring entity)***

15. In a Notification of Appeal and a letter dated 14th July 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 (5) days from 14th July 2023.

16. On 21st July 2023, in response to the Request for Review, the Respondents, through the Official Receiver in Insolvency, filed the 1st and 2nd Respondents' Notice of Preliminary Objection dated 18th July 2023 and 1st and 2nd Respondents' Memorandum of Response dated 18th July 2023. 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.
17. Vide a Hearing Notice dated 21st July 2023, the Acting Board Secretary, notified parties in the subject tender that the hearing of the instant Request for Review would be by online hearing on 26th July 2023 at 12.00 noon, through the link availed in the said Hearing Notice.
18. When the matter came up for hearing on 26th July 2023 at 12.00 noon all the parties herein were represented. The Board also noted that the Respondents had raised a Preliminary Objection. Accordingly, the Board directed that all parties had 3 minutes to submit on the Preliminary Objection, with the Respondents going first, followed by the Applicant.
19. On the Request for Review, all parties were assigned 10 minutes with the Applicant going first. The Applicant was also assigned an extra 3 minutes to offer a rejoinder on the submissions by the Respondents on the Preliminary Objection.

PARTIES SUBMISSIONS

Respondents' Submissions on the Preliminary Objection

20. During the online hearing, Counsel for the Respondent, Mr. Odhiambo challenged the jurisdiction of the Board on 3 Grounds:
21. First, Counsel argued that the disposal forming the subject of these proceedings was disposal under the Insolvency Act (No. 18 of 2015) and not the Public Procurement and Asset Disposal Act, 2015. He therefore argued that under Section 423(1) of the Insolvency Act only the High Court can supervise the liquidation of companies registered in Kenya and thus this Board lacked jurisdiction over the instant Request for Review.
22. Secondly, Mr. Odhiambo argued that the instant Request for Review had been brought against the wrong Respondents. He submitted that the proceedings ought to have been brought against the Office of the Official Receiver and not the Business Registration Service.
23. Thirdly, Counsel argued that the subject of the disposal was the private property of a company under liquidation. He referred the Board to the definition of a disposal under the Act to mean a divestiture of public assets and that the Act defined assets as property vested in the state. Counsel made the point that the property at had was private property.

Applicant' Submissions

24. Counsel for the Applicant, Mr. Munyithya began his address by highlighting that he had discovered on the morning of the hearing that the heading on the Request for Review and the Affidavit in Support of the Request filed by his office was different from the one on the documents he authorized his law firm to file before the Board. He pointed out that the documents he authorized for filing had 1 Respondent i.e. Official Receiver but the Request for Review as filed had 2 Respondents i.e. Accounting Officer, Business Service Registration and the Business Service Registration.
25. Put to task to explain who changed the heading of his documents, Mr. Munyithya gave varying accounts of the changes. At some point, Counsel told the Board that the documents were changed at the Board by a secretary from his office. When the Board inquired whether he allowed his secretary to make changes to documents ordinarily drafted by Advocates, Counsel changed tune and hinted at the possibility that the changes could have been sanctioned by an Associate Advocate from his office.
26. Mr. Munyithya was emphatic that he could not own the said documents and thus he sought for the Request for Review to be struck out. Mr. Odhiambo did not oppose the orders sought on behalf of the Applicant. Save to add that there was the option to withdraw the request for review which counsel for the Applicant was not averse to thus the Board directed

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parties to file a consent withdrawing the matter. However, as at the date of this Decision no consent had been filed.

BOARD'S DECISION

27. The Board has considered the representations made by the parties. Particularly, the Board has taken note of Counsel for the Applicant's unequivocal plea during the hearing that the Request for Review be struck out and Counsel for the Respondents' concurrence to this plea.

Accordingly, the Request for Review dated 13th July 2023 shall be disposed as per the final orders of the Board set out below:


FINAL ORDERS


28. 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 13th July 2023:

- 1. The Respondents' preliminary objection dated 18th July 2023 succeeds to the extent that the applicant has sued the wrong Respondents in violation of section 170(b) of The Public Procurement and Asset Disposal Act, 2015.**
- 2. The Request for Review dated 13th July 2023 be and is hereby struck out.**

3. Given the Board's finding above, each party shall bear its own costs.

Dated at NAIROBI, this 4th Day of August 2023.


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CHAIRPERSON
PPARB


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SECRETARY
PPARB

ORIGINAL COPY

