

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 77/2024 OF 13th AUGUST 2024

BETWEEN

TUSBAH CONSTRUCTION COMPANY LTD APPLICANT

AND

1. THE ACCOUNTING OFFICER

**DEPARTMENT OF MEDICAL SERVICES,
PUBLIC HEALTH AND SANITATION,
COUNTY GOVERNMENT OF WAJIR**

2. THE ACCOUNTING OFFICER

**COUNTY PROJECT CORDINATOR,
COUNTY INTEGRATED PROJECT IMPLEMENTATION UNIT (CIPIU)**

3. NATIONAL PROJECT CORDINATOR

**NATIONAL PROJECT IMPLEMENTATION UNIT,
KENYA DEVELOPMENT RESPONSE TO DISPLACEMENT IMPACTS
PROJECT (KDRDIP)**

4. COUNTY PROJECT CORDINATOR

**COUNTY INTEGRATED PROJECT IMPLEMENTATION UNIT (CIPIU)
KENYA DEVELOPMENT RESPONSE TO DISPLACEMENT
IMPACTS PROJECT (KDRDIP) RESPONDENTS**



Review against the decision of the National Project Implementation Unit Kenya Development Response to Displacement Impacts Project (KDRDIP) and County Project Coordinator, County Integrated Project Implementation Unit (CIPIU) Kenya Development Response to Displacement Impacts Project (KDRDIP) in the matter of Tender No. ABAK/KDRDIP/QT/001/2023-2024 and ABAK/KDRDIP/QT/002/2023-2024 for Construction of Modern Maternity, Fencing at Abakore Health Center in Habaswein Ward and for the Supply, Delivery and Installation of Maternity Equipment at Abakore Health Center.

BOARD MEMBERS PRESENT

- | | | |
|------------------------------------|---|-------------|
| 1. Mr. George Murugu, FCI Arb, I.P | - | Chairperson |
| 2. QS Hussein Were | - | Member |
| 3. Ms. Jessica M'mbetsa | - | Member |

IN ATTENDANCE

- | | | |
|------------------------|---|------------------------|
| 1. Mr. James Kilaka | - | Acting Board Secretary |
| 2. Mr. Philemon Kiprop | - | Secretariat |
| 3. Ms. Evelyn Weru | - | Secretariat |

PRESENT BY INVITATION

APPLICANT

Mr. Ayienda

TUSBAH CONSTRUCTION COMPANY LTD

- Advocate, Amenity Ayienda & Kibagendi
Associates Advocates



REQUEST FOR REVIEW NO. 77 OF 2024

1. On 13th August 2024, Tusbah Construction Company Ltd, the Applicant herein filed a Request for Review dated 12th August 2024 together with a Supporting Affidavit in Support of the Memorandum sworn on 6th August 2024 by Ahmed Noor Taqal, its Director and a List/Bundle of Documents in Support of the Memorandum through Amenya Ayienda & Kibagendi Associates Advocates seeking the following from the Board:

- a) An Order annulling the Tender Document in respect of Tender for Construction of Abakore Health Center vide tender ABAK/KDRDIP/QT/001/2023-2024 and ABAK/KDRDIP/QT/002/2023-2024 by the Respondents and the entire procurement process in relation thereto;***
- b) An Order Compelling the Respondents to withdraw the Tender Notice and re-advertise the same via a fresh notice that unbundles the construction, supply and extension works and prescribes, fair, proportional and reasonable bidding requirements;***
- c) An Order Compelling the Respondents to withdraw the Tender Notice and re-advertise the same via a fresh notice that unbundles the specific procurement notice, tender opening and prequalification requirements;***



d) An Order directing the Respondents to comply with the law in preference and reservations set out in the Constitution and the Public Procurement and Asset Disposal Act;

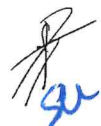
e) An Order awarding costs of and incidental to these proceedings; and

f) Such further or other orders as the Honorable Board may deem fit to issue.

2. In a Notification of Appeal and a letter dated 13th August 2024, Mr. James Kilaka, the Acting Board Secretary of the Board 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 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 Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the tender within five (5) days from 13th August 2024.



3. *Vide* a letter dated 20th August 2024, the Acting Board Secretary sent a reminder to the Respondents referring to the Notification of Appeal for the Request for Review dated 13th August 2024 and notified the Respondents of the provisions under Regulation 205(3) & (4) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") with regard to the five days within which it was required to submit a response being on or about 19th August 2024 noting that the operations of the Board are time bound and require matters to be concluded within 21 days.
4. *Vide* a Hearing Notice dated 23rd August 2024, the Acting Board Secretary, notified parties of an online hearing of the Review slated for 28th August 2024 at 11.00 a.m., through the link availed in the said Hearing Notice.
5. *Vide* a letter dated 27th August 2024, the Acting Board Secretary sent a second reminder to the Respondents referring to the Notification of Appeal for the Request for Review noting that the operations of the Board are time bound and require matters to be concluded within 21 days.
6. When the matter came up for hearing on 28th August 2024, counsel on record for the Applicant, Mr. Ayienda informed the Board that he had instructed a Court Process Server by the name Abdirazak Ibrahim Abdille to effect service of pleadings in the Request for Review upon



the Respondents and the said Court Process Server had informed him that he had since effected service upon the Respondents but was yet to send back his Affidavit of Service confirming the same for filing before the Board.

7. Counsel sought for an adjournment of the hearing to enable him file the requisite Affidavit of Service with the Board and indicated that communications with the Process Server were constrained as he was still in Wajir County.

8. Having considered the application for adjournment by Mr. Ayienda, the Board confirmed from the Board Secretary that he had also effected service upon the Respondents as contemplated under Regulation 205 of Regulations 2020 and having not received a response to the application, he had sent two (2) reminders to the Respondents asking them to file their response to the Request for Review.

9. The Board found that it was necessary to satisfy itself that service had indeed been effected upon the Respondents and directed as follows:

- i The application for adjournment and filing of commensurate Affidavit of Service be and is hereby allowed.
- ii The Applicant be granted leave to effect substituted service of the Hearing Notice of the Request for Review by way advertising the same in two newspapers with wide circulation in Kenya.



- iii Upon effecting the substituted service, the Applicant to file a Return of Service evidencing the same by close of business on 29th August 2024.
- iv The matter to proceed for hearing 30th August 2024 at 9.00 a.m.

10. On 29th August 2024, counsel for the Applicant, Mr. Ayienda filed a Chamber Summons Application of even date together with a Supporting Affidavit sworn on 29th August 2024 by George Ayienda wherein he sought for the following orders:

a) THAT the firm of Amenity Ayienda & Kibagendi Associates Advocates be allowed to cease acting for the Petitioner.

b) THAT cost of this Application be in the cause.

11. *Vide* email dated 29th August 2024, the Board Secretary requested Mr. Ayienda to share the contact details of the Applicant with the Board.

12. When the matter came up for hearing for the second time on 30th August 2024 at 9.00 a.m, Mr. Ayienda submitted that he was constrained to continue acting for the Applicant in the instant Request for Review and had filed a Chambers Summons application seeking to be allowed to cease acting.

13. Having considered the Chamber Summons Application filed by Mr. Ayienda, the Board directed as follows:



- i Mr. Ayienda to file with the Board the initial Affidavit by the Court Process Server evidencing service of the Request for Review upon the Respondents and an Affidavit of Service evidencing his attempts to contact the Applicant and any other means used by the advocate to contact the Applicant.
- ii That the matter to proceed later on at 3.00 p.m. on 30th August 2024 to confirm compliance.

14. *Vide* email dated 30th August 2024 at 13:39 hours, Mr. Ayienda shared with the Board the Applicant's contact particulars as follows:

"...During our engagement with the above named Tusbah Construction Limited, the Numbers that we were in contact with are as follows:-

Ibrahim Dahir-0721882877/0740224949:

Abdi Kusow aka Qurane - 0729958646;

Zeinab Ali Director- 0726818035:

email: ibrakilo290@gmail.com."

15. Further, *vide* email dated 30th August 2024 at 13:49 hours, Mr. Ayienda filed with the Board an Affidavit of Service sworn by George Ayienda on even date confirming service upon the Applicant of his Chamber Summons Application to cease acting in the instant Request for Review.



16. The Board resumed the hearing on 30th August 2024 at 3.00 p.m. and having considered the Affidavit of Service filed by Mr. Ayienda, proceeded to grant the orders sought for the firm of Amenya Ayienda & Kibagendi Associates Advocates to cease acting for the Applicant.
17. The Board further directed that the matter would proceed for hearing on Monday, 2nd September 2024 at 9.00 a.m. and for a Hearing Notice to be issued upon all parties.
18. *Vide* a Hearing Notice dated 30th August 2024, the Acting Board Secretary, notified the Applicant and Respondents of an online hearing slated for 2nd September 2024 at 09.00 a.m., through the link availed in the said Hearing Notice.
19. On Sunday 1st September 2024 at 20:37 hours the Applicant, through Ibrahim Dahir, sent to the Board via email an undated Notice of Withdrawal which read as follows:
- "...
- NOTICE OF WITHDRAWAL**
- We would like to withdraw from the case presented to public procurement administrative review board application No. 77/2024 of 13th August, 2024.***
- Our lawyer has withdrawn from the case without our knowledge as he claims issues of not collaborating which is false.***



Despite, we would like the investigation to go on but lacking a representation we agree to withdraw and the court not to slap us with costs as we are lacking representation due to unaffordable reasons at the moment.

In the alternate, we will file for investigation to be carried out by the Director General Public Procurement Regulatory Authority.

We hereby withdraw from the case No. 77/2024 of date 13th August 2024.

Kindly assist

Thank You

(signed)

Ahmed Noor Taqal"

20. At the hearing on 2nd September 2024, the Board took notice that all parties were served with the Hearing Notice as directed during the hearing of 30th August 2024 and proceeded to consider the Applicant's email of 1st September 2024 and accompanying Notice of withdrawal.

21. In considering the question of withdrawal the Board took cognizance of Regulation 216 of Regulations 2020 which provides as follows:

Regulation 216 - Withdrawal of the requests:



(1) A request for review may be withdrawn at any time before or during the hearing by notice in writing to the Review Board Secretary signed by the applicant.

(2) The withdrawal under paragraph (1) shall be based on consent signed between parties concerned and registered with the Review Board.

(3) Upon such a withdrawal notice under paragraph (1) being received by the Review Board Secretary, the request for review shall be deemed to have been withdrawn.

(4) When a request for review is withdrawn, the Review Board Secretary shall forthwith inform the Review Board and all parties to the review of the withdrawal.

22. From the provisions of Regulation 216 the Board discerns the following key features of a withdrawn request for review:

- i. the withdrawal must be any time before or during the hearing
- ii. the withdrawal must be by a notice in writing to the Board Secretary signed by the Applicant
- iii. the withdrawal ought to be based on a consent signed between the parties concerned and
- iv. the consent in (iii) above must be registered with the Board.



23. The Board has perused all documents placed before it in this Request for Review and notes that the only document that concerns the withdrawal of the instant Request for Review is the Applicant's Notice sent via email on 1st September 2024 and signed by Ahmed Noor Taqal.
24. The said notice of withdrawal was not signed by both parties and was not registered with the Board as required under Regulation 216.
25. It is the Board's considered view that in the absence of consent signed between parties and the said consent not having been filed with the Board, the Applicant's Notice of Withdrawal emailed on 1st September, 2024 does not constitute a withdrawal of the Request in terms of the provisions of Regulation 216 of Regulations 2020. Accordingly, the Board finds that the purported withdrawal of the Request for Review by the Applicant is unlawful and the same is therefore disallowed.
26. The Board having found the purported withdrawal of the request for review to be unlawful and disallowed it, consequently holds that the instant Request for Review is still alive and the Board will proceed to make a determination on it.
27. The Board has on three occasions, once on the 28th August 2024 and twice on the 30th August 2024, had to adjourn the hearing of the instant Request for Review to allow for the parties to come to the hearing.



28. The Board notes that both the Applicant and Respondents herein were duly served by the Board Secretary with the Hearing Notice dated 23rd August 2024 informing them that the matter was slated for hearing on 28th August 2024. The Board Secretary sent a reminder of the hearing to the Respondents on 27th August 2024.
29. At the hearing of 28th August 2024, the Applicant was granted leave to effect substituted service upon the Respondents for the hearing on 30th August 2024. This was in addition to the Board's own service through its Board Secretary.
30. The Board notes that both the Applicant and Respondents herein were duly served by the Board Secretary with the Hearing Notice dated 30th August 2024 informing them that the matter was slated for hearing on 2nd September 2024.
31. During the hearing on 2nd September 2024 the Board received and considered the Applicant's Notice of Withdrawal signed by Ahmed Noor Taqal which Notice, the Board has ruled, did not meet the threshold of withdrawal of requests under Regulation 216 and that, as a result, the instant proceedings are still alive.
32. The Board, having declared the instant Request for Review to be alive during the hearing of 2nd September 2024 notes that the Applicant was not present, in person or through counsel, to prosecute its case.



33. The Board finds itself in a situation where the matter brought before it has been left unattended and will seek guidance in Regulation 213 of Regulations 2020, which reads as follows:

Regulation 213 - Attendance at the hearing:

"Where on the day set for the hearing of a request for review for which due notification has been given—

(a) an applicant appears and a procuring entity fails to appear, the hearing of the request for review shall proceed in the absence of the procuring entity unless the Review Board deems it fit to adjourn the hearing;

(b) a procuring entity appears and the applicant does not appear, the request for review shall be dismissed unless the Review Board deems it fit to adjourn the hearing;

(c) where both parties fail to appear, the request for review shall be dismissed unless the Board deems it fit to adjourn the hearing.

34. It is clear from Regulation 213 that, where both parties in a request for review fail to appear before the Board, the request for review shall be dismissed unless the Board deems it fit to adjourn the hearing.

35. In the matter under reference, the Board adjourned the hearing three times between 28th August 2024 and 30th August 2024 to give parties time to appear.

36. At the hearing of 2nd September 2024, neither the Applicant nor Respondents appeared before the Board. The Board takes a dim view



of the Applicant's conduct in this matter. It is reprehensible for the Applicant to take time out to file a Request for Review and along the way lose interest in prosecuting its case. The action of the Applicant has not only occasioned loss of the Board's valuable time but has also cost taxpayers money. The Board has convened three sittings at great expense to the taxpayer in members' allowances and secretariat services. Failure by the Applicant to attend the hearing and argue its case is a clear indication of abuse of the Board process and a waste of the Board's time not forgetting that it failed to comply with the Board's orders of 28th August 2024. To discourage this kind of conduct and prevent abuse of its processes the Board will issue appropriate sanctions to the Applicant.

37. Equally, the conduct of the Respondents has been wanting for failure to honour the Board's summons to provide documents and enter appearance in the matter. In the circumstances the Board will recommend to the Director General, Public Procurement Regulatory Authority, the Directorate of Criminal Investigations and the Ethics and Anti-Corruption Authority to carry out investigations pursuant to Regulation 205 to determine if the Respondents are in breach of the law and regulations and take appropriate action.

38. In view of the foregoing, the Board deems the appropriate action to take is to dismiss the instant Request for Review for want of prosecution.



39. The Board will surcharge the Applicant costs to recover the cost incurred in the three sittings. Allowances for the three Board members and secretarial expenses per sitting is about Kenya shillings 100,000.00. for the three sittings it is about Kshs 300,000.00. In the circumstances, the Board deems it just and fair to order the Applicant to pay costs amounting to Kshs. 300,000/= towards sittings of the Board Members in the instant Request for Review and the Board Secretariat subsistence allowances.

FINAL ORDERS

40. 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 this Request for Review:

A. The Request for Review dated 12th August 2024 and filed on 13th August 2024 in the matter of Tender No. ABAK/KDRDIP/QT/001/2023-2024 and ABAK/KDRDIP/QT/002/2023-2024 for Construction of Modern Maternity, Fencing at Abakore Health Center in Habaswein Ward and for the Supply, Delivery and Installation of Maternity Equipment at Abakore Health Center, for the County Government of Wajir and the Kenya Development Response to Displacement Impacts Project (KDRDIP), be and is hereby dismissed.

B. The Applicant is hereby ordered to pay costs to the Board amounting to Kenya Shillings Three Hundred Thousand

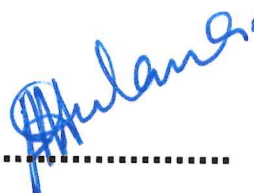


(Kshs. 300,000/=) within 14 days from the date of this decision.

- C. The Director General, Public Procurement Regulatory Authority (PPRA), in conjunction with The Directorate of Criminal Investigations(DCI) and The Ethics and Anti-Corruption Authority(EACC), do carry out investigations pursuant to Regulation 205 of The Public Procurement And Asset Disposal Regulations to determine if the Respondents are in breach of the law and Regulations herein and take appropriate action.
- D. That the Ag. Chief Executive Officer of the Board do forthwith serve a copy of this decision upon the Director General, PPRA, the Director, DCI and the Chief Executive Officer, EACC for their attention and further action.
- E. In view of the outcome of the Request for Review each party shall bear its own costs in the review.

Dated at NAIROBI this 3rd Day of September 2024.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB



