

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 122/2024 OF 13TH DECEMBER 2024

BETWEEN

SILAFRICA KENYA LTD APPLICANT

AND

THE ACCOUNTING OFFICER, NEW KCC LTD 1ST RESPONDENT

NEW KENYA COOPERATIVE CREAMERIES LTD ... 2ND RESPONDENT

Review against the decision of the Accounting Officer New Kenya Cooperative Creameries Ltd in relation to Tender No. NKCC/RT/004/2024-2025 for Supply and Delivery of IML Yoghurt Cups, Lids & Trays & IML Butter Tubs for a period of one-year renewable by another two years.

BOARD MEMBERS PRESENT

- | | |
|------------------------------------|--------------------|
| 1. Mr. George Murugu, FCI Arb, I.P | - Chairperson |
| 2. Ms. Alice Oeri | - Vice Chairperson |
| 3. Eng. Lilian Ogombo | - Member |

IN ATTENDANCE

- | | |
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| 1. Ms. Sarah Ayoo | - Holding brief for Acting Board Secretary |
| 2. Ms. Evelyn Weru | - Secretariat |



PRESENT BY INVITATION

APPLICANT

SILAFRICA KENYA LTD

Mr. Kagunyi

- Advocate, Kamau Chege & Kagunyi Advocates

1ST & 2ND RESPONDENT

**THE ACCOUNTING OFFICER,
NEW KENYA COOPERATIVE CREAMERIES
LTD & NEW KENYA COOPERATIVE
CREAMERIES LTD**

Ms. Sheila Akala

- Chief Manager Supply Chain, New Kenya
Cooperative Creameries Ltd

BACKGROUND OF THE DECISION

The Tendering Process

1. New KCC Limited, the Procuring Entity and 2nd Respondent herein invited sealed tenders in response to Tender No. NKCC/RT/004/2024-2025 for Supply and Delivery of IML Yoghurt Cups, Lids & Trays & IML Butter Tubs for a period of one-year renewable by another two years' subject to satisfactory performance (hereinafter referred to as "the subject tender"). Tendering would be conducted under restricted tendering method and would be limited to qualified tenderers. The subject tender's submission deadline was on 30th September 2024.



REQUEST FOR REVIEW NO. 122 OF 2024


2. On 13th December 2024, Silafrica Kenya Ltd, the Applicant herein, filed a Request for Review dated 5th December 2024 together with an Applicant's Statement sworn by Jayveer Singh on 4th December 2024 (hereinafter referred to as "the instant Request for Review") seeking the following orders from the Board:

- a) An order annulling the tender no NKCC/RT/004/2024 -25 for SUPPLY & DELIVERY OF IML YOGHURT CUPS, LIDS, PLASTIC TRYAS & BUTTER TUBS in its entirety and terminating/cancelling the procurement process.**
- b) An order directing the Respondents to maintain tender no NKCC/RT/007/2022-2023 for SUPPLY & DELIVERY OF IML YOGHURT CUPS, LIDS & TRAYS FOR A THREE-YEAR PERIOD currently held by the Applicant.**
- c) An order directing the Respondents to initiate a new procurement process for items not covered by the Applicant's tender no NKCC/RT/007/2022-2023 in accordance to the requirements of the Public Procurement and Asset Disposal Act, 2015 and its attendant Regulations, 2020.**



d) An order awarding costs of this Request for Review which was necessitated by the incompetence of the Procuring Entity.

3. In a Notification of Appeal and a letter dated 13th December 2024, Mr. James Kilaka, the Acting 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 of the subject tender, while forwarding to the said Procuring Entity 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 Procuring Entity was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 13th December 2024.
4. Vide a Hearing Notice dated 18th December 2024, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 23th December 2024 at 2:00 p.m. through the link availed in the said Hearing Notice.
5. On 18th December 2024, the Respondents filed through Ms. Sheila Akala a response to the instant Request for Review dated 18th December 2024,



in the form of a letter and signed by Mr. Samuel Ichura, Ag. Managing Director of the Procuring Entity.

6. At the hearing on 23th December 2024, the Board read out the pleadings filed by respective parties in the matter. Mr. Kagunyi for the Applicant informed the Board that he was yet to be served with the Respondents' response in the matter, and that the Respondents had reached out to the Applicant directly and had discussions aimed at settling the matter amicably. He requested for more time for parties to negotiate and have the matter marked as settled. On her part, Ms. Akala for the Respondents confirmed that this was the position and parties were in negotiations over the matter.
7. Having considered parties' submissions, the Board directed (a) the Respondent to serve their response upon the Applicant by 3.00 p.m. on 23rd December 2024, (b) the matter be canvassed by way of written submissions, (c) the Applicant to file and serve its written submissions and authorities by 12.00 noon on 24th December 2024, and (d) the 1st and 2nd Respondents to file and serve their written submissions and authorities by 6.00 p.m. on 24th December 2024. Parties were informed that they were at liberty to file a consent in the matter and cautioned to adhere to the strict timelines as specified in the Board's directions since



the Board would rely strictly on the documentation filed before it in rendering its decision.

8. Parties were also informed that the instant Request for Review having been filed on 13th November 2024 was due to expire on 3rd January 2024 and that the Board would communicate its decision on or before 3rd January 2024 to all parties to the Request for Review via email.
9. On 24th December 2024, the Applicant filed its Written Submissions dated 24th December 2024 together with its Authorities in support of the instant Request for Review.
10. On 24th December 2024 the 1st and 2nd Respondents filed its Written Submissions dated 24th December 2024.

PARTIES' SUBMISSIONS

Applicant's case

11. The Applicant submitted that the instant Request for Review is premised on the grounds that:
 - i The subject tender is similar to Tender no NKCC/RT/007/2022-2023 awarded to the Applicant for SUPPLY & DELIVERY OF IML YOGHURT CUPS, LIDS & TRAYS FOR A THREE-YEAR PERIOD.



- ii The tender in (i) above awarded to the Applicant is still running and the Applicant has not received any notice cancelling the existing tender.
- iii The said action by the 1st and 2nd Respondents is contrary to Section 4, 5 and 6 to the Fair Administrative Action Act Cap 7 Laws of Kenya.

12. The Applicant avers that on or about 5th September 2024, it learnt of the subject tender which is similar to Tender no NKCC/RT/007/2022-2023 awarded to it for Supply & Delivery of IML Yoghurt Cups, Lids & Trays for a Three-Year Period awarded to it that was still in operation having not received any notice cancelling the existing tender.

13. The Applicant further avers that upon receipt of the subject tender, it made an enquiry to the Respondent pursuant to Clause 6.1 of the Tender Document but the same was not responded to despite several follow ups for clarity. That there being no response, the Applicant became reasonably apprehensive that it stands to lose substantial revenue and investment in the finished goods held under the pre-existing tender valid up to November 2025, which await the issuance of a Purchaser Order (P.O) by the Respondents.

14. The Applicant submitted that pursuant to the pre-existing tender, it holds in stock finished goods worth in the excess of Kshs. 17,500,000/- and



despite several engagements with the Respondents on issue of Purchase Order, the same has not been forthcoming, and thus the action of floating the subject tender caused it extreme apprehension, and thus the basis of the instant Request for Review.

15. As to whether the Respondents' floating of the subject tender was fair, rightful and/or met the legal threshold, the Applicant contends that contrary to the Respondents averments, the Tender Document as advertised was a substantive tender and the Respondents are making an attempt at disowning the intent behind its advertisement. It further contends that the impugned decision by the Procuring Entity to float and advertise the subject tender while there is a pre-existing tender for the same items is illegal and amounts to unfair administrative action that ought to be quashed. In support of its case, it referred the Board to the holding by Justice CK Nzili in *Mbaabu v Cabinet Secretary in Charge of Lands & 5 others* (Judicial Review Application E001 of 2023) [2023] KEELC 20512 (KLR).

16. The Applicant urged the Board to grant the prayers sought in the instant Request for Review with costs.

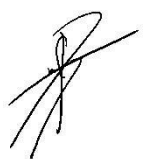
1st and 2nd Respondents' case

17. The Respondents aver that the Procuring Entity is the largest and leading business entity in the dairy industry in East Africa involved in procurement



and processing of quality milk and milk products and is at the forefront of Kenya's dynamic and fast growing dairy industry.

18. It is the Respondents' case that the Tender Document with regard to the subject tender was sent to the Applicant on Thursday, September 19th 2024 at 12:38 p.m. with the objective of establishing prevailing market prices and possible price negotiations with the Procuring Entity and was not intended for award and that this information was shared with the Applicant through a series of meetings held at both parties' offices.
19. The Respondents aver that they have no intention of terminating the existing agreement with the Applicant as it is one of its key partners and that the LPOs as per the pre-existing agreement will continue to be issued on needs basis.
20. The Respondents submitted that call-off orders are done as per the Procuring Entity's Minimum Order Quantity (MOQ) requirement and as established in meetings held by both parties, the Procuring Entity believes that the held stocks will be utilized within the framework contract period.
21. They further submitted that all procurement activities with regard to the matter have been in compliance with applicable laws and regulations and urged the Board to dismiss the instant Request for Review.

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BOARD'S DECISION

22. The Board has considered each of the parties' submissions and documents placed before it and find the following issues call for determination.

A. Whether the instant Request for Review discloses a reasonable cause of action against the Procuring Entity with regard to the subject tender.

B. What orders should the Board grant in the circumstances?

Whether the instant Request for Review discloses a reasonable cause of action against the Procuring Entity with regard to the subject tender.

23. We understand the Applicant's case to be that the Procuring Entity illegally floated the subject tender which is similar to Tender No. NKCC/RT/007/2022-2023 for Supply & Delivery of IML Yoghurt Cups, Lids & Trays for a Three-Year Period (hereinafter referred to as "the 1st Tender") awarded to the Applicant and is still running and in operation. The Applicant submitted that the action of floating the subject tender by the Procuring Entity led it to become reasonably apprehensive that it stood to lose substantial revenue and investment in the finished goods



currently held awaiting issuance of an LPO as agreed upon by parties following previous discussions.

24. On the other hand, we understand the 1st and 2nd Respondents' case to be that the Tender Document with regard to the subject tender was sent to the Applicant with the objective of establishing prevailing market prices and possible price negotiations with the Procuring Entity and that this information was shared with the Applicant through a series of meetings. The Respondents submitted that they had no intention of either awarding the subject tender or terminating the existing contract with the Applicant and that they were remained committed to ensuring that all procurement activities are conducted in compliance with applicable laws and regulations.

25. Having considered parties' pleadings and submissions, the Board observes that the gist of the Applicant's case is that it stands to lose substantial revenue and investment in the goods held under the existing contract with the Procuring Entity emanating from the 1st Tender due to the decision of the Procuring Entity to float the subject tender which relates to supply of similar goods. The Applicant views this decision as illegal and malicious and believes the subject tender poses a risk to the 1st Tender.

26. The Board deems it necessary to address its mind to whether there is a reasonable cause of action against the Respondents in view of the allegations made by the Applicant in the instant Request for Review.

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27. Order 2 Rule 15 of the Civil Procedure Rules 2010 provides that:

***"(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-
(a) it discloses no reasonable cause of action or defence in law;***

..... "

28. In the case of **Edward Moonge Lenguuranga vs James Lanaiyara & Another (2019) eKlr**, the High Court defined a cause of action as:

"a set of facts sufficient to justify a right to sue to obtain property or enforcement of a right against another party. The term also refers to the legal theory upon which a plaintiff brings suit."

29. The Court of Appeal in **DT Dobie & Co(K) Ltd v Muchina (1982) KLR** defined the term 'reasonable cause of action' to mean

"an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer. "

30. As such, it is important to look at the averments and the prayers sought by the Applicant for us to determine the cause of action in the instant Request for Review.



31. We have scrutinized the entire Request for Review as filed by the Applicant and note that the grounds as framed and prayers sought revolves around the speculation that it will lose revenue under its existing contract which is valid up to November 2025 due to the decision by the Procuring Entity to float the subject tender which is an invitation for qualified bidders to supply similar goods as those being supplied under the 1st Tender.

32. The Respondents submitted that they have no intention of terminating the existing contract with the Applicant and that they only shared the Tender Document with the intention of carrying out a market survey to establish prevailing market prices. Even if the Procuring Entity floated the subject tender with the intention of awarding the same, we note that nothing under the Act precludes the Procuring Entity from engaging multiple suppliers for supply of similar goods. In saying so, we are guided by the provisions of Section 141 of the Act which provides for framework contracting as follows:

"Section 141 of the Act-Framework contracting and multiple awards

(1) Subject to any prescribed restrictions an accounting officer of a procuring entity may apply framework contracting arrangements by making awards of indefinite-delivery contracts and multiple awards of indefinite or definite quantity contracts for procurements under this Act.



(2) For the purposes of subsection (1), "multiple award" means award of separate (partial) contracts to two or more bidders of the same item."

33. In essence, an accounting officer may apply framework contracting arrangements by making awards of indefinite-delivery contracts and multiple awards of indefinite or definite quantity contracts.

34. In view of the foregoing, there being a valid procurement contract in place, we are cognizant of the fact that Section 167(4)(c) of the Act provides that this Board is divested of jurisdiction to entertain a review application in instances where a contract has already been signed in accordance with Section 135 of the Act. The Board is therefore constrained to entertain any issues raised by the Applicant relating to its contract in the 1st Tender with the Procuring Entity since this would not be the right forum to address such issues and a bidder cannot use the Board's process to supervise an existing contract.

35. The Applicant has not substantiated its allegation that the Procuring Entity committed an illegality under the Act by floating the subject tender. Neither has it pointed the Board to any provisions of the Act that the Procuring Entity may have breached in floating the subject tender.

36. In the circumstances, we find that the instant Request for Review does not disclose a reasonable cause of action against the Procuring Entity with regard to the subject tender.



What orders the Board should grant in the circumstances?

37. We have found that the instant Request for Review fails to disclose a reasonable cause of action against the Procuring Entity with regard to the subject tender.

38. The upshot of our finding is that the instant Request for Review fails.

FINAL ORDERS

39. 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 5th December 2024 and filed on 13th December 2024 be and is hereby dismissed.

B. Each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 2nd Day of January 2025.

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**CHAIRPERSON
PPARB**

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**SECRETARY
PPARB**