

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 37/2015 OF 15TH JULY, 2015**

**THREE STAR CONTRATORS LTD.....APPLICANT**

**AND**

**JUDICIARY OF KENYA.....PROCURING ENTITY**

Review against the decision of The Judiciary vide termination of award letter dated 30<sup>th</sup> June, 2014 in the matter of Tender No. JPIP/NCB/WORKS/06/2014-2015 for Proposed Rehabilitation of Vihiga Law Courts.

**BOARD MEMBERS PRESENT**

1. Josephine W. Mong'are - Member (In the Chair)
2. Peter Ondieki - Member
3. Paul Ngotho - Member

## **IN ATTENDANCE**

1. Philemon Kiprop - Secretariat
2. Maureen Kinyundo - Secretariat

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## **PRESENT BY INVITATION**

### **Applicant - Three Star Contractors Ltd**

1. Micheal Osundwa - Advocate
2. Joel Kusimba - Advocate
3. Rodgers Murunga - Managing Director

### **Procuring Entity - Judiciary of Kenya**

1. Micheal Obuya - Procurement/JPIP
2. Nancy Kanyago - Project Coordinator
3. Joseph Were - PM OC RJ
4. Mwikali Mangusi - Administration

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### **Interested Party**

1. Kevin Otieno - Representative, Philmark Systems

## **BOARD'S DECISION**

Upon hearing the representations of the parties and interested candidates before the Board and upon considering the information and all the documents before it, the Board decides as follows:

## **BACKGROUND OF AWARD**

The Judiciary of Kenya advertised for Open Competitive Bidding for the Rehabilitation of courts across the country through financing by the World Bank and hence the bidding was conducted using National competitive Bidding procures . The tender was advertised on 18 November 2014 on the Daily Nation and Standard Newspaper, respectively. The original closing date was extended from 18 December 2014 to 14 January 2015. The Tender attracted eleven bidders.

### **Summary of the Tender Processing**

The lowest evaluated bidder **M/s Three Star Contractors Ltd** was recommended for award. The tender committee in its meeting JTC20/2014-2015 held on 9 March 2015 deliberated and awarded the tender to **M/s Three Star Contractors Ltd** at their tender price of **Ksh 72,911,065.00** as per the recommendations of the Tender Processing Committee. The notification of award was sent to the bidder on 12 March 2015. As per the notification of award and bidding document clause 42.1, the bidder was supposed to provide a performance security with 28 days. The bidder did not provide the performance security as required.

Pursuant to clause 42.2 of the bid document, the Judiciary terminated the contract award to **M/s Three Star Contractors** and Tender Processing committee was requested to submit report on the second substantially responsive bidder for adjudication. The Tender Processing Committee subjected the second substantially responsive bidder to post qualification

verification. The results were as follows:

#	Bidder Number and Name	Average Annual Construction Turnover (Form FIN-3.2)	Financial Resources (Form FIN-3.3)	General Experience (Form EXP-2.4.1)	Specific Experience (Form EXP-2.4.2 (a))	Financial/Audit Reports (Form FIN-3.1)	Experience of Key Personnel	Major Items Construction Equipment	Historical Contract Non-performance (Form CON-2)	litigation	Acceptance for Award
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)		
	Lunao Enterprises	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

In view of the above, the Tender Processing committee recommended M/s **Lunao Enterprises Ltd** be awarded the tender having been the lowest evaluated substantially responsive bidder

## REVIEW

The Applicant M/s Three Star Contractors ltd lodged this Request for Review on 15<sup>th</sup> July, 2015 against the decision of Judiciary of Kenya in the matter of Tender No: JPIP/NCB/WORKS/06/2014-2015 for Tender for Proposed Rehabilitation of Vihiga Law Courts.

When the Application came up hearing before the Board the Applicant was represented by Mr. Michael Osundwa from the firm of M/s Osundwa and Co. Advocates. The Procuring Entity was on the other hand represented by Mr. Michael Obuya and Mr. Joseph Were. A submission on behalf of the Interested Party Philmark Systems Ltd was made by a Mr. Kevin Otieno.

The Applicant request the Board for the following orders: -

1. *The Respondent's decision to terminate the Contract be reviewed and/or set aside*
2. *The Applicant be allowed to sign the Contract Agreement pursuant to the letter of offer dated 12<sup>th</sup> March 2015 and commence the contract.*

The Applicant's Request for Review is premised on Eight (8) grounds and a supporting statement sworn by its Managing Director Mr. Rodgers Murunga. The Applicant has also filed a further affidavit on 10<sup>th</sup> August 2015 to augment its application. On its part the Procuring Entity filed a Response to the Request for Review and raised preliminary Issues on Jurisdiction of the Board to hear the matter alleging that the

matter was filed out of the time allowed by law. At the onset of the hearing of the Request for Review the Board directed the parties to argue the substantive application and raise any preliminary issues together with their submissions.

The Applicant submitted that the purported termination of the Award of contract vide a letter on 26<sup>th</sup> June 2015 to it by the Procuring Entity is unlawful. It submitted that having participated in the tender subject matter of the Request for Review its bid emerged successful and was given a letter of Award on 12<sup>th</sup> March 2015 by the Procuring Entity. Subsequently the Applicant wrote back to the Procuring Entity accepting the award through its letter dated 29<sup>th</sup> March 2015.

The Applicant further submitted that on 21<sup>st</sup> April 2015 the Procuring Entity wrote to it via email advising them that the 28 days within which it had been expected to submit a performance bond had lapsed and that the Procuring Entity would terminate the Award of Contract if it did not submit its performance bond within Seven (7) days from the date of the said email. The Applicant annexed the said email correspondence to its Application for Review as part of its evidence. Counsel for the Applicant further submitted that on 27<sup>th</sup> April 2015 his client, furnished the Procuring Entity with a performance bond and the same was accepted by the Procuring Entity through the office of the Chief Registrar of the Judiciary. This Performance bond was also annexed and produced as evidence by the Applicant. The Applicant went further to state that two months later after it had submitted the performance bond, on 24<sup>th</sup> June 2015, and having not received a formal contract from the Procuring Entity it wrote an email to the Procuring Entity inquiring as to when the said contract would be received in order for it to commence the contract.

The Applicant submitted that having not received a response from the Procuring Entity, its Managing Director, Mr. Rogers Murunga proceeded to the offices of the Procuring Entity to inquire into the progress only to be informed that the Award had been terminated and a letter send to it. The Applicant further submitted that it was then supplied with a copy of the said letter dated 26<sup>th</sup> June 2015 and purported to have been collected on its behalf on 30<sup>th</sup> June 2015. It was the submissions of the Applicant that it had not been furnished with this letter before the 8<sup>th</sup> July 2015 and that it had not send any officer or agent to pick the said letter as alleged.

The Applicant urged the Board to find that it had complied with all the requirements of the tender award and that the failure by the Procuring Entity to avail to it the written contract for its execution was unwarranted, unnecessary and a violation of the terms and conditions of the Tender Document and the law on procurement which desires that procurement be done speedily and efficiently to maximize economy. The Applicant then urged the Board to direct the Procuring Entity to complete the tendering process by giving to the Applicant the written formal contract for execution. It submitted that the termination of the contract was unlawful and a breach of the Public Procurement and Disposal Act, 2005 and the Regulations therein. It urged the Board to order that the Procuring Entity do avail the contract for signature and commence the project forthwith.

On its part the Procuring Entity submitted that the Board lacked Jurisdiction to entertain the matter before it since the application had been filed outside the mandatory seven day period allowed by the Act

and the Regulations. It stated that it had issued to the Applicant a letter of termination of the Award on 26<sup>th</sup> June 2015 and that the said letter was collected by agent of the Applicant on 30<sup>th</sup> June 2015. To reinforce this point the Procuring Entity produced as an exhibit a copy of the extract of its mailing register indicating that a letter written to the Applicant had been collected from its offices on 30<sup>th</sup> June 2015. It therefore submitted that the Application having been filed on 15<sup>th</sup> July was filed way out the mandatory seven (7) day as provided by Regulation 73 of the Public Procurement and Disposal Regulations, 2006 (as amended). For this reason the Procuring Entity urged the Board not entertain the Request for Review but instead down its tools for want of Jurisdiction.

It was also the submissions by the Procuring Entity that the Board could not adjudicate the matter as filed because having issued a letter of Award under the World Bank Guidelines which formed part of this tender, then the matter ceased to be one of procurement but all the issues arising therefrom were henceforth contractual issues that were to be dealt with within the contract. It was the submission of the Procuring Entity that a letter of award constituted a contract and therefore the matters could all issues arising therein were contractual and not within the purview of the Board. The Procuring Entity went further to submit that it was a mandatory contractual requirement that the Applicant having been adjudged successful and having been issued with a letter of Award was to provide a performance bond to the Procuring Entity within 28 days of the letter of Award. This, the Procuring Entity submitted, the Applicant failed to do so and was therefore in violation of a mandatory contractual condition. In response to what the effect of the



Seven day extension it had given to the Applicant via the email dated 21<sup>st</sup> April 2015, the Procuring Entity that the same unlawful and inconsequential and the Applicant should not have acted upon it.

The Procuring Entity further submitted that the Applicant could not rely on the fact that it had not been issued with a formal Contract as a basis to file the Application since it had already been issued with a letter of award served as contract itself. To the Procuring Entity the letter of award and the Formal Contract had the same effect. The Procuring Entity further submitted that upon terminating the Award made to the Applicant it had proceeded to evaluate and notify the second lowest evaluated bidder and was in the process finalizing the contract with it. This, it submitted was in compliance of the provision Tender Document clause 41.2 therein which allowed it to award the contract to the next lowest evaluated bidder whose offer is substantially responsive. The Procuring Entity therefore urged the Board to dismiss the Request for Review and allow it to finalize the contract with the next lowest evaluated bidder.

The Board has perused the documents filed by both parties to the Request for Review and having listened to the submission by both parties and interrogated the original tender documents and has identified two issues for determination to wit;

**1. Jurisdiction ;**

- a. *Was wether the Request for Review filed within the mandatory Seven (7) day provided for by Regulation 73*

b. *Can the Board hear and adjudicate a procurement matter where a contract has already been entered into by the parties?*

2. *Was the termination of Award of Contract to the Applicant by the Procuring Entity lawful?*

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In arriving at a decision the Board has interrogated the above issues and notes the following;

*“Jurisdiction;*

a. *Was the Request for Review filed within the mandatory Seven (7) day provided for by Regulation 73”*

The Board notes from the annexed correspondences to the Request for Review that the Procuring Entity communicated to the Applicant on email and through registered mail save for the letter that it issued on 26<sup>th</sup> June 2015 terminating the of Award. The Procuring Entity stated that this correspondence was collected in person by an agent of the Applicant on 30<sup>th</sup> June 2015 and therefore Seven days should have started running from that date. The Procuring Entity however does not demonstrate how this agent of the Applicant was notified of the existence of the Termination Notice. It however produced a copy of its mailing register with a signature against a letter to the Applicant. The Applicant denied having sent anyone to the offices of the Procuring Entity and averred under oath that it did not know of the existence of the said letter until the 8<sup>th</sup> of July, 2015 when it was supplied with a copy of the letter by the Procuring Entity when its Managing Director went to inquire into the fate of the contract. The Board notes that under clause 6.1 of the General Conditions of Contract in the tender document the tender document provided as follows;

*"6.1 Communication between parties that are referred to in the Conditions shall be effective only when in writing. A notice shall be effective only when its delivered"*

The Board notes that throughout the tender processing period the Procuring Entity regularly communicated with the Applicant via email. However, the Board observes that the letter of termination of the Award was not however emailed. The Board was informed that instead of using the channel of communication already established between the two parties and instead, the board was informed that the letter was collected by an agent of the Applicant on 30<sup>th</sup> June 2015. The Board was however not informed how this agent was notified of the existence of the said letter. The Applicant disputed that the letter was collected by an agent from its office. Instead, it was the Applicant's submissions that it is only after its Managing Director visited the Procuring Entity's premises that it learnt of the existence of the letter termination and collected a copy therein on 8<sup>th</sup> July 2015. The Board is therefore persuaded that no proper communication of the termination of the Award of tender was made as envisioned under Clause No. 6.1 of the General Conditions of Contract. The Board therefore finds that the Request for Review filed on 15<sup>th</sup> July 2015 was filed within the period of time being seven (7) days time as envisioned by regulation 73 of the Public Procurement and Disposal Regulation, 2006 and hence the Board finds and holds that in the circumstances its jurisdiction has not been ousted and hence it has Jurisdiction to hear and determine the Request for Review as filed.

The Second limb of the Jurisdictional argument by the Procuring entity was that the Notice of Award having been issued to the Applicant and

an acceptance letter done by it, the matters arising therein were contractual in nature and outside the purview of the Public Procurement and Disposal Act, 2005. The Procuring therefore submitted that the Board was not the right forum to determine any issues that may arise once a tender has moved from the evaluation stage to Award and contracting Stage. In deciding this the Board is guided by the provisions of Section 93 of The Public Procurement and Disposal Act, 2005 which provide as follows

*“ 93(1) Subject to the provisions of the Part any candidate who claims to have suffered or to risk suffering loss, or damage due to the breach of a duty imposed on a Procuring Entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.”*

*93(2) the following matters shall not be subject to review by the Board;*

*a).....*

*b).....*

*c) where a contract is signed in accordance to section 68”*

*d).....*

The Board also takes note of the provisions of section 68 which State as follows;

*Section 68(1) the person submitting the successful tender and the Procuring Entity shall enter into a*

*written contract based on the tender documents, the successful tender, any clarifications under section 62 and any corrections under section 63*

- 2) *The written Contract shall be entered into within the period specified in the notification under section 67(1) but not until at least fourteen (14) days have lapsed following that notification;*
- 3) *No contract is formed between the person submitting the successful tender and the Procuring Entity until the written contract is entered into."*

The Board has also noted the provisions of Clause 40.1 of the Tender Document on the Instructions to Tenderers(ITB) which envisioned that a formal contract was to be entered into in writing within twenty(28) days from the letter of Notification. It is therefore clear to the Board is of the same view that the Tender Documents and the Act expected both parties to submit themselves to written contract for the contract to be fully formed. In the absence of such a contract, then the procurement process herein is still open and the Board therefore has Jurisdiction as provided for by Section 93 of the Act to hear and determine any issues that may arise therein, until such a time parties enter into a written contract.

The Board therefore finds and holds that the Preliminary Objections by the Procuring Entity is without merit and will proceed to dismiss it.

The Board will then proceed to consider the second issue identified herein to wit;

*“Was the termination of Award of Contract to the Applicant by the Procuring Entity lawful?”*

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In deciding the above issue the Board notes that the evaluation process of the tender subject matter of the Request for Review was concluded on or about March 2015 when the Applicant was found to have offered the lowest evaluated bid and was issued with a letter of Award dated 12th March 2015 .The Board further notes that on 29<sup>th</sup> March 2015 the Applicant wrote to the Procuring Entity accepting the Award of the tender therein. The Board notes that clause 41.1 of the Instructions to Tenderers (ITB) provided as follows;

*“Within twenty-Eight (28) days of the receipt of Notification of the award from the employer, the successful bidder shall furnish the performance security in accordance with the general condition of contract... ..”*

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The Board notes that the 28 days period within which the Applicant was expected to have furnished the performance security to the Procuring Entity were to lapse on the 9<sup>th</sup> of April 2015. The Board further notes on 21<sup>st</sup> of April 2015, the Procuring Entity instead of terminating the contract of award wrote an email to the Applicant giving it a further seven (7) days within which to submit the Performance security. At this particular point in time, nothing prevented the Procuring Entity from issuing a letter of Termination of Award to the Applicant. Instead the Procuring Entity wrote and gave the Applicant Seven (7) more days

within which to comply with this condition. The Board is persuaded that the Procuring Entity, having waived its reliance on the strict timelines it had set out by the tender document, cannot now go back and demand that the Applicant be bound by the same. The Board also notes that two months after the Applicant had deposited with it the necessary performance bond, the Procuring Entity took no further action until it was prompted by an email from the Applicant on 24<sup>th</sup> June 2015, seeking to establish the whereabouts of the formal contract. Instead, the Board notes, the Procuring Entity on 26<sup>th</sup> June 2015 penned a letter of termination of Award to the Applicant which is alleged to have been collected by the Applicant's agent on 30<sup>th</sup> June 2015. By the time the Procuring Entity was writing to the Applicant on 26<sup>th</sup> June 2015, The Applicant had already deposited with it the performance security. The Board notes that the Procuring Entity received this Performance Security on 27<sup>th</sup> April 2015 and proceeded to accept it. It did not attempt to return the document to the Applicant or raise issue on the fact that it was received outside the mandatory twenty-eight (28) day period. Instead, the Board further notes, the Procuring Entity waited for another two months to lapse before writing to the Applicant terminating the award. This action by the Procuring Entity, the Board, finds is not prompted by its need to comply with the provisions of the tender document but to the Board it appears to have been an afterthought. No other explanation or reason was adduced as to need to terminate the award at this juncture other than the late submission of a performance bond which it had already accepted. It is therefore quite obvious to the Board that the Procuring Entity is seeking to rely on terms and conditions of the general conditions of contract to lock out the Applicant when it violated

the said terms itself. No plausible explanation was offered to the Board as to why it took over two months to terminate the contract. The Board is also not persuaded by the explanation of the Procuring Entity that it was re-evaluating the second lowest bidder before it issued a formal termination of the first award. This is because from the tender document a re-evaluation was not necessary as there were clear provisions on how the Procuring Entity was to deal with the Second lowest evaluation bidder if the Applicant was not able to take up the contract which did not require a second re-evaluation.

Overall the Board finds that the attempt by the Procuring Entity to terminate the award after the compliance of the pre contract conditions by the Applicant was unlawful and in violation of the Public Procurement laws and the provisions of the tender document itself. The Board finds and is persuaded that the Applicant's Request for Review has merit and will allow it.

Pursuant to the powers conferred by the Board by dint of section 98 of the Public Procurement and Disposal Act, 2005, the Board directs and makes the following orders;

1. The Request for Review dated 13<sup>th</sup> July 2015 and filed on 15<sup>th</sup> July 2015 by M/S Three Star Contractors Limited against Judicial Programme Improvement Project (Judiciary of Kenya) in respect of tender No. JPIP/NCB/WORKS/06/2014-2015 for the proposed Rehabilitation of Vihiga Law Courts is hereby allowed;
2. That the Procuring Entity Judicial Programme Improvement Project(Judiciary of Kenya) is directed to prepare and issue a



formal written Contract to the Applicant M/S Three Star Contractors Limited in accordance with Notification of Award issued by it on 12<sup>th</sup> March 2015 and cause the same to be executed by the parties within 15 days from the date herein.

3. That Board noting that the effect of its orders will lead to a contractual arrangement beneficial to the Applicant will not make any orders as to cost.

Dated at Nairobi on this 11<sup>th</sup> August, 2015



**CHAIRMAN**  
**PPARB**



**SECRETARY**  
**PPARB**

