

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
REVIEW NO. 65 OF 29TH DECEMBER, 2015

BETWEEN

**INB IT MANAGEMENT AND
CONSULTING LIMITED..... APPLICANT**

AND

MIGORI COUNTY GOVERNMENT.....PROCURING ENTITY

Review against the decision of the Migori County Government in the matter of Tender No MC/49/2013-2014 for Proposed Supply Customization, Installation and Implementation of Revenue Collection, Cash Flow Management and Funds Requisition System in Migori County.

Board Members Present

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| 1. | Mr. Paul Gicheru | - Chairman |
| 2. | Mr. Peter Ondieki, MBS | - Member |
| 3. | Mr. Nelson Orgut | - Member |
| 5. | Mr. Hussein Were | - Member |
| 6. | Mrs. Josephine Wambua- Mong'are | - Member |

In Attendance

1. Henock Kirungu - Board Secretary
 2. Philemon Kiprop - Secretariat
 3. Philip Okumu - Secretariat
 4. Shelmith Miano - Secretariat
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Present by Invitation

Procuring Entity, Migori County Government

1. Elekia O. Odari -Head of Supply Chain Management Services.
2. Eliud Obonyo - Deputy Director (SCMS)
3. Silvester M O Gumo - Engineer

Applicant - INB IT Management & Consulting Ltd

1. Mr. Stephen Gitonga - Advocate, Gitonga Mureithi & Co Advocates

Interested Parties

1. Nancy Tuikong - Relationship Manager, Co-op Bank

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

Invitations to Tender

This was an RFP tender for procurement of qualified consultancy firms to automate revenue streams in all the eight (8) sub-counties in Migori County. The service was to improve efficiency, timeliness, accountability and service delivery with the ultimate aim of an enhanced revenue base for Migori County.

A total of five (5) bidders were sent the Request for Proposal tender documents via email addresses and they were as listed below:-

1. Safaricom Ltd.
2. Riverbank Solutions Ltd / Kenya Commercial Bank.
3. INB Management & IT Consulting.
4. Diamond Trust Bank Ltd.
5. Co-Operative bank of Kenya Ltd.

Closing/ Opening of Bids.

The tender was closed and opened on 15th December 2014, with only two bidders submitting their proposal documents namely:-

1. INB Management & IT Consulting
P.O Box 2228-00606, Nairobi.
2. Kenya Commercial Bank / Riverbank Solutions Ltd.

P.O. Box 50633-00100, Nairobi.

Technical Evaluation

Both bidders passed the preliminary and technical requirements and were awarded marks as follows;

Bidder No.	Bidder's Name And Address	Total Points (Max. 100)	Total Score Out Of 75
1	INB Management & IT Consulting	85	63.75
2	KCB / Riverbank Solutions Ltd	95	71.25

From the above presentation, both bidders were determined as responsive having scored above the cut off minimum required points of 75% and qualified for Financial Evaluation.

In the Financial analysis, the evaluation committee considered three scenarios as follows;

- i) Scenario I - Monthly Revenue Collection grows at 30% per month for the first 3 months and remains constant for the rest of the year.

ii) Scenario II - Monthly Revenue Collection grows at 30% per month for the first 3 months and remains constant for the rest of the year.

iii) Scenario III - Monthly Revenue Collection grows at 30% per month for the whole year.

They opted for scenario (ii) as the best option of the three. The evaluation committee evaluated bidder no. 1 (INB Management & It Consulting) at a bid price of Kshs. 84,332,000 (Eighty four million, three hundred and thirty two thousand shillings only) per year and bidder no.2 (Kenya Commercial Bank Ltd / Riverbank Solutions Ltd) at a bid price of Kshs.110,628,955.30 (One hundred and ten million, six hundred and twenty eight thousand, nine hundred and fifty five shillings, thirty cents only) per year.

The financial and combined evaluation scores (F.E and T.E) were as follows:-

Bidder No.	BIDDER'S NAME AND ADDRESS	TOTAL POINTS (MAX. 25)	TOTAL SCORE OUT OF 100
1	INB Management & IT Consulting P.O Box 2228-00606,Nairobi	25	88.75

2	KCB / Riverbank Solutions Ltd P.O. Box 50633-00100, Nairobi	19.6	90.31
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Evaluation Committee Recommendation and Conclusion.

The evaluation committee then recommended that Bidder No.1 (INB Management & IT Consulting), be awarded the contract to provide the services at the lowest evaluated bid price of Kshs. 84, 332, 000.00 (Eighty four million, three hundred and thirty two thousand shillings only) per year.

Tender Committee's Decision - 1

The tender committee upheld the evaluation committee's recommendation by awarding bidder no. 1 (INB Management & IT Consulting of P.O. Box 2228-00606, Nairobi the tender) the to provide the services at lowest evaluated bid price of Kshs.84, 332, 000.00 (Eighty Four Million, Three Hundred and Thirty Two Thousand Shillings Only) per year.

TENDER COMMITTEE

Subsequently the 14th Tender Committee of Migori County Government held on 17th December, 2015 deliberated and approved the termination

of the Tender for Proposed Supply Customization, Installation and Implementation of Revenue Collection, Cash Flow Management and Funds Requisition System in Migori County.

THE REQUEST FOR REVIEW

This Request for Review was lodged on 29th December, 2015 by M/s INB IT Management And Consulting Limited against the decision of the tender committee of the Migori County Government (The Procuring Entity) dated 17th December, 2015 in the matter of Tender No. MC/49/2013-2014 Proposed Supply Customization, Installation and Implementation of Revenue Collection, Cash Flow Management and Funds Requisition System in Migori County.

When this Request for Review came up for hearing, the Applicant was represented by Mr. Stephen Gitonga, Advocate, from the firm of Gitonga & Co. Advocates while the Procuring Entity was represented by Mr. Elekia O. Odari, Head of Supply Chain Management Services who made submissions together with Mr. Eliud Obonyo Deputy Director (SCMS).

The Applicant raised a total of thirteen grounds of review and urged the Board to make the following orders:-

1. THAT the Board be pleased to make a declaration that the decision of the Procuring Entity contained in the letter dated 25th November 2015 is unfair, illegal and unlawful.
2. THAT the Board be pleased to annul and/or cancel the purported termination of the award of tender No. MC/49/2013-2014 by the Procuring Entity vide its letter dated 20th November, 2015.
3. THAT the Board be pleased to order the Procuring Entity to avail and execute the contract with the Applicant for Tender No. MC/49/2013-2014: Provision of Revenue Collection Software for The County Government of Migori and for Supply, Customization, Installation and Implementation of Revenue Collection, Cash Flow Management and Funds Requisitioning System pursuant to the Notification of Award dated 21st January 2015 and in any event within Fourteen (14) days of the Order.
4. THAT the Board restrains the Procuring Entity from procuring the services in relation to Tender No. MC/49/2013-2014: Provision of Revenue Collection Software for The County Government of Migori and for Supply, Customization, Installation and Implementation of Revenue Collection, Cash Flow Management And Funds Requisitioning System from other tenderers other than the Applicant as provided for in the Notification of Award dated 21st January 2015.

5. THAT the Board be pleased to order the Procuring Entity to pay the costs of these proceedings.
6. THAT the Honourable Board be pleased to make any or such further Orders as the ends of justice may require.

The Applicant case

The Applicant commenced its submissions by stating that the Procuring Entity had violated section 68 of the Public Procurement and Disposal Act, 2005 by its failure to conclude the procurement process when it declined to sign the Contract with the Applicant. It was the Applicant's position that it had emerged the successful bidder after an elaborate procurement process. He further submitted that the Procuring entity had not challenged the initial tender process which proceeded to conclusion and a letter of award of tender issued. Counsel for the Applicant stated that once the process was completed, the Applicant was given a contract by the Procuring Entity which it signed and returned to the Procuring Entity to execute. He however submitted that despite several attempts and prompting; the Procuring Entity did not sign its part of the contract and offered no explanation as to why that was not done. Instead the Procuring Entity took the Applicant round and round in a wild goose chase without offering any formal communication. Counsel for the Applicant submitted that it made several attempts to meet with the County Secretary of the Procuring Entity to seek an explanation as to the reasons for the delay without success. Instead Counsel for the Applicant submitted that it learnt

through the media that the procuring entity had restarted the process afresh through an advertisement in the media. On enquiring through telephone what was happening, Counsel for the Applicant submitted that it was invited to collect a letter of cancellation from the Procuring Entity's office. It was the Applicant's submission that the purported termination of the procurement process was a nullity as it did not comply with the law and especially with the Provisions of Section 36 of the Public Procurement and Disposal Act, 2005 which sets out an elaborate process that a Procuring Entity must comply with if it chooses to terminate a procurement process. It was the Applicant's submission that this was not done and hence the purported termination was a nullity, The Applicant urged the Board to find in its favour and order the Procuring Entity to conclude the procurement process by signing the contract on its part.

On the issue of costs, Counsel for the Applicant submitted that it held a costly demonstration at the county and also committed resources towards implementation of the contract once an award had been made to it. It went further to submit that a cancellation at this late hour was manifestly unfair as it was bound to cause it heavy financial loss and loss of business opportunity. It further submitted that the actions by the Procuring entity was in breach of the Applicant's legitimate expectation that after successfully participating in the tender, a contract would follow as provided for by law and that the Procuring Entity having created a legitimate expectation , it was duty bound to comply with the

duty created by statute. The Applicant further submitted that the net effect of the illegal action by the Procuring Entity of purporting to terminate the tender would subject the Applicant to financial liabilities, loss and damages. The Applicant went further to state that it had, from the time of the procurement carried out a demonstration and a pilot run pre and post- award, and to has todate exercise and expended huge financial resources including funds mobilized and utilized in several trips to and from Nairobi to pursue the conclusion of the signing of the contract without much success. The Applicant urged the board to award it costs among other orders.

The Procuring Entity's position

In its response, the Procuring Entity submitted that indeed the Applicant had emerged the successful tenderer after an elaborate Procurement Process and that an award of tender was made to the Applicant. The procuring entity further submitted that as a result of the award, a draft contract was sent to the Applicant for its input and comment but according to the Procuring entity, the Applicant did not return the contract back to it with its comments as expected. It was the Procuring Entity's submissions that having not received any comments or input from the Applicant on the contract, it returned the matter back to the tender committee which recommended that the process be terminated and restarted afresh. The Procuring Entity submitted that it then issued the Applicant and Kenya Commercial Bank/Riverbank

Solutions Ltd with letters informing them that the tender was being cancelled and advised them to look out for a re-advertisement of the same in the local daily newspapers.

The Procuring entity further opposed the prayer by the applicant to be awarded costs. It submitted that the question of financial loss and loss of opportunity did not arise because it was not obliged to pay for the pilot run, demonstration and post award's expenses. The procuring entity submitted that any costs incurred by the applicant were commercial expenses that any tenderer is deemed to assume when it submits itself to a procurement process.

The Applicant's Response

In its answer to the submissions by the procuring entity Counsel for the Applicant urged the board to reject the explanations advanced by the Procuring entity and find in its favour as the actions by the Procuring Entity were in clear violation of the Public Procurement and Disposal Act and the Constitution of Kenya.

The Boards findings

Having heard the submissions made by and having read and perused all the documents submitted by the parties before it, the board has

identified only one issue for determination in this request for review, to wit;-

“Whether the purported termination of the Tender No.:- MC/49/2013-2014 By the Migori County Government, the procuring entity in this matter was lawful and in compliance with the law.”

As a basis for it's final decision the Board has established the following facts which are relevant to this request for review and which were not in dispute:-

1. That The Procuring Entity advertised for EOI in the newspaper on or about 5th March, 2015.
2. That upon conclusion of EOI 5 five firms were shortlisted for the Request for proposals as set out at page 3 of this decision.
3. That two Bidders M/s KCB/River Bank Solution Ltd, and M/s INB Management and IT Consulting Limited the Applicant herein returned there Proposals.
4. That the Procuring Entity's 14th Tender Committee meeting in it's meeting held on 8th January, 2015 approved the award of the tender to the Applicant.

5. That the Applicant being the Successful Bidder was issued with a letter of notification of award dated 21st January, 2015.
 6. That the 11th Tender Committee of Migori County Government held on 19th November, 2015 approved the termination of the Tender to the Applicant on the ground that it failed to enter into a contract with it.
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7. That the Procuring Entity re-advertised the tender in the Standard newspaper of 23rd December, 2015

The Board however finds that under the Provisions of Section 67 and 68 of the Act on the procedure to be followed by a procuring Entity once an award has been made is clear . The said sections provide as follows;

Section 67.(1) Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted.

While section 68 provides 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

- (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 days have elapsed following the giving of that notification.*

The Board has established from the facts before it that the Applicant on its part went ahead and executed its part of the contract and made several attempts to have the Procuring Entity carry out its obligations without much success. The Board has further found on the basis of the evidence before it and more particularly from the annexed SMS messages by the Applicant in its further affidavit that the Applicant demonstrated commitment to complete the procurement process but was met with resistance and lack of cooperation by the Procuring Entity. The Board further finds that indeed instead of executing the contract, the Procuring Entity sought to terminate the award of the tender and on 23rd December of 2015 allegedly send out to the Applicant and the Kenya Commercial Bank/Riverbank Solutions letters purporting to cancel the tender though there was no evidence annexed to the procuring entity's response that these letters were sent either by registered post were hand delivered or were served in any other manner. The Board additionally finds that this was almost eleven(11) months after the letter of award had been given to the Applicant. The Board is

not persuaded by the explanation offered by the procuring entity as to the reasons for its failure to execute the contract and as to why it took 11 months for it to terminate the procurement process.

The board is alive to the provisions of section 36 of the Act which bestows upon a procuring entity the right to terminate a procurement process.

Section 36 provides as follows in part;

"S.36 (1) A procuring Entity may, at any time terminate procurement proceedings without entering in to a contract."

The right is however not absolute and imposes upon a procuring entity which wishes to rely on it some obligations that it must carry out in order to benefit from this right. Section 36(2) provides as follow;

S.36 (2) The Procuring Entity shall give prompt notice of a termination to each person who submitted a tender, proposal or quotation or, if direct procurement was being used, to each person with whom the procuring entity was negotiating."

In an attempt to comply with this provisions, the Board finds that the Procuring Entity addressed to the Applicant and to the other bidders letters but as the Board has stated served as earlier indicated as there was no evidence of service. The Board further finds that in order for a

termination process to be complete the law under section 36(7) and (8) of the Act obligates the Procuring entity to carry out further steps. These provisions state as follows;

"S.36(7) A public Entity that terminates procurement proceedings shall give the Authority a written report on termination"

"S.36(8) A report under subsection(7) shall include the reasons for termination and shall be made in accordance with any directions of the Authority with respect to the contents of the report and when it is due."

The procuring entity readily conceded before the Board that it did not comply with the Provisions of Sections 36(7) & (8) and termed it as a mistake.

The Board wishes to reiterate that the said section 36 has set out an elaborate process by which a procuring entity that elects to terminate a procurement process must follow and having heard the submissions by the Procuring Entity, the board notes that there was failure to adhere to the procedure in its entirety and as such the purported termination was a nullity and unlawful.

The Board also finds that the tender committee is the organ which purported to terminate the subject tender. This was in itself irregular since once the tender committee had made a recommendation of award became *functus officio* and the only options open to it were to accept the tender evaluation committees recommendation of award, reject it or return it to the tender evaluation committee with reasons.

The Board has further perused the minutes of the purported termination and notes that no reasons were give for the decision nor the Applicant heard before the purported termination.

On the issue that the procuring entity cannot execute a contract since the tender validity period has lapsed, the Board finds that the award to the Applicant which was made on 21st January 2011 was made during the tender validity period. The issue of tender validity is in the Board's respectful view only relevant upto the point of making an award.

In any event and as already stated above, the Applicant executed the contract and returned it back to the procuring entity. This cannot therefore be a basis for the procuring entity to terminate the procurement process.

The issue of whether the High Court and the Board have the Jurisdiction to inquire into whether a termination of an award under Section 36 of the public Procurement and Disposal Act is lawful or not is now well

settled. The High Court settled this point in the case of Selex Sistemi intergrete -vs- The Public Procurement Review Board (NAI HC JR 1260 OF 2008) where High Court (both Justices J.G. Nyamu and G.A. Dulu) held that the Board has jurisdiction to hear and determine any grievance arising from the exercise of the power conferred upon a Procuring Entity under the Provisions of Section 36 of the Act. The High Court further held that the Provisions of Section 36(6) of the Act do not oust the jurisdiction of the Court or the Board to hear any grievance arising under the Provisions of Section 36 of the Act. The Board has followed the above decision and has adopted the position taken by the High Court in several of its past decisions as illustrated by the case of Horsbridge Network Systems (E.A) Ltd -vs - Central Bank of Kenya PPARB APPL. NO.65 OF 2012) where the Board held that it has jurisdiction to investigate the circumstances under which a Procuring Entity has exercised the power of termination under Section 36 of the Act.

The Board held similarly in the case of Aon Kenya Insurance Brokers Ltd =vs= Teachers Service Commission (PPARB NO.8 of 2015) where the Board restated that it has the Jurisdiction to inquire into an issue of termination under the Provisions of Section 36(6) of the Act. And in the recent case of Arid Contractors Suppliers =vs= Meru University of Science & Technology(PPRAB NO.62 OF 2015) where the Board restated this position and set aside a purported termination of an award

on the ground that the same had no basis both in law and fact, which is the same in the case now before the Board.

The Board has also variously held that a tender process is a serious exercise which should not be taken lightly and it is not therefore open to a procuring entity to unilaterally terminate an award or a procurement process without following the law and without any proper reasons or basis. A tender process involves expenses both to the tenderers and the procuring entity. Funds expended by a procuring entity in inviting tenders is public money which should not be expended at the procuring entity's whims.

On the issue of costs which the applicant sought the Board awards it the board finds that once the applicant was issued with a letter of notification of award the Applicant made an unconditional acceptance and provided a performance Bond. It is only natural for a party to start the mobilization of resources towards execution of the contract. Securing of the performance bond comes with expenditure and keeping it running for eleven months is also a cost in itself. The Board also finds that the Applicant made several trips from Nairobi to Migori to try to seek a conclusion of this matter and even at one time engaged it's Advocate to accompany him which also went to increase costs. The Board is therefore persuaded that the applicant has demonstrated sufficient reasons as to why it should be awarded costs. In any event,

the Applicant has also been successful in this review and the general principle in law is that costs follow the event.

BOARD'S DECISION

Based on the above findings and in the exercise of the powers conferred upon it by the provisions of S.98 of the Public Procurement and Disposal Act, the Board makes the following orders on this Request for Review.

1. *The Request for review in respect of Tender Number MC/49/2013-2014 FOR THE SUPPLY, CUSTOMIZATION AND INSTALLATION AND IMPLEMENTATION OF REVENUE COLLECTION CASHFLOW MANAGEMENT AND FUNDS REQUISITION SYSTEM, IN MIGORI COUNTY filed by INB IT MANAGEMENT AND CONSULTING LIMITED against the MIGORI COUNTY GOVERNMENT on 29th December 2015 is hereby allowed.*
2. *The purported termination of the subject tender by the 11th Tender Committee of the procuring entity on 19th November 2015 is nullified and set aside.*
3. *That the advertisement by Migori County Government carried out on 23rd December 2015 for TENDER NUMBER MC/115/205-2016 FOR THE SUPPLY, DELIVERY, CUSTOMIZATION AND COMMISSIONING OF A REVENUE COLLECTION AND MANAGEMENT SYSTEM is hereby also nullified and set aside.*

4. Pursuant to the powers conferred upon it by virtue of the Provisions of Section 98 of the Act, the Board hereby directs and orders the Procuring Entity to forthwith proceed and conclude the procurement process in tender number MC/49/2013-2014 FOR THE SUPPLY, CUSTOMIZATION AND INSTALLATION AND IMPLEMENTATION OF REVENUE COLLECTION CASHFLOW MANAGEMENT AND FUNDS REQUISITION SYSTEM, IN MIGORI COUNTY by signing its part of the contract and proceed with the implementation of the tender within the next fourteen days from the date of this orders.
5. The procuring entity shall file a copy of the signed contract with the Secretary of the Review Board within fourteen (14) days from today's date.
6. The Board awards the costs of this request for review assessed at Kshs.200, 000.00 to the Applicant and the procuring entity is directed and ordered to pay the same to the Applicant within fourteen (14) days from the date of this decision and provide evidence of the payment to the Board on or before the expiry of the fourteen (14) days.

Dated at Eldoret on this 15th day of January, 2016.

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CHAIRMAN
PPARB

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SECRETARY
PPARB