

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 56/ 2017 OF 23RD JUNE, 2017

BETWEEN

**AAKI CONSULTANTS ARCHITECTS
AND URBAN DESIGNERS APPLICANT**

AND

**KENYA MEDICAL SUPPLIES
AUTHORITYPROCURING ENTITY**

MAESTRO ARCHITECTS LTDINTERESTED PARTY

Review against the decision of the Kenya Medical Supplies Authority in the matter of Tender No. KEMSA/PROC/RFP 01/2016-2017 for Consultancy Services for the Design and Supervision of Construction of KEMSA Modern Warehouse & Office Block.

BOARD MEMBERS PRESENT

1. Mr. Paul Gicheru - Chair
2. Mr. Hussein Were - Member
3. Mrs. Rosemary Gituma - Member
4. Mr. Peter B. Ondieki, MBS - Member

IN ATTENDANCE

1. Philip Okumu - Holding Brief for Secretary
2. Maureen Kinyundo - Secretariat

PRESENT BY INVITATION

Applicant - AAKI Consultants Architects And Urban Designers

1. Susan Maira - Advocate, Maira & Ndegwa Advocates
2. Francis G. Mungai - Architect
3. Charles W. Mwangi - Architect

Procuring Entity - Kenya Medical Supplies Authority

1. Kenneth Akide, SC - Advocate, Akide & Co.
2. Jovia Bagere - Advocate, Akide & Co.
3. Charles Juma - Director, Procurement
4. Edward Buluma - Proc. Manager
5. Khadija Ramadhani - SPO
6. Susan Onyango - SPO
7. Mary Kitaka - SPO

Interested Party - Maestro Architects Ltd

1. Albert Kamunde - Advocate, Albert Kamunde & Co.
2. Betty Irungu - Lawyer, Albert Kamunde & Co.
3. Kimathi Itaru - Architect

The Applicant filed this Request for Review on 23rd June, 2017. The Applicant sought for the following orders:-

- a) **The Respondent's decision awarding Tender No. KEMSA/PROC/RFP 01/2016-2017 to the alleged successful bidder be and is hereby rescinded, set aside and/or nullified.**
- b) **The Respondent's decision notifying the Applicant that he had not been successful in Tender No. KEMSA/PROC/RFP 01/2016-2017 by way of the letter dated 12th June, 2017 be set aside and nullified.**
- c) **The Respondent re-invite successful EOI bidders to re-submit fresh Request for Proposals including Financial Proposals and refer to the appropriate Act of Parliament for remuneration and not the Condition of Engagements and Scale of Fee for Professional Services and Building and Civil Works Second Edition (1987) P1 as they do not continue an act of parliament.**
- d) **The Respondent be ordered to pay the costs of and incidental to these proceedings.**
- e) **Such other or further relief as the board may deem just and expedient.**

Upon being served with the Request for Review, the Applicant filed a replying affidavit sworn by Mr. Philip Omondi the acting Chief Executive Officer of the procuring entity on 3rd July, 2017. The successful bidder M/s Maestro Architects Limited on the other hand filed an affidavit dated 5th July, 2017 sworn by Mr. Kimathi Itaru a director of the successful bidder opposing the Applicant's Request for Review. Both the Applicant and the procuring entity filed written submissions to the Applicant's Request for

Review and all the advocates present also made oral submissions before the Board.

During the hearing of the Request for Review the Applicant was represented by M/s Susan Maira Advocate while the procuring entity was represented by Mr. Kenneth Akide SC. Mr. Albert Kamande Advocate on the other hand appeared on behalf of the successful bidder.

Although the Applicant set out a total of 14 grounds in its Request for Review, Counsel for the Applicant consolidated all the grounds set out in her Request for Review into two grounds which were namely that:-

- 1. The Respondent/the procuring entity erred in its decision contained in the letter addressed to the Applicant dated 12th June, 2017 by stating that the Applicant consortium had introduced a new firm into the consortium at the Request for Proposals stage.**
- 2. The Respondent/procuring entity had contravened the mandatory provisions of the Public Procurement and Asset Disposal Act 2015 in its Request for Review.**

The parties addressed the Board on the above two grounds and the following are the parties respective submissions on the two issues set out above.

The Applicant's submissions

While arguing the first ground set out above, M/s Maira advocate stated that in it's letter of notification to the Applicant, one of the grounds which the procuring entity gave for the Applicant's for its bid being declared unsuccessful was that the Applicant consortium had included a new firm

namely M/s Feradon Associates Limited to offer Mechanical Engineering Services at the Request for Proposals stage while the said firm had not signed a consortium agreement at the Expression of Interest stage. The letter of notification further stated that the Applicant firm had put forward the name of Empaq Limited as the firm which was to provide both the Electrical and Mechanical Services in the consortium at the Expression of Interest stage.

Counsel for the Applicant however submitted that the procuring entity was wrong in declaring the Applicant's tender as being non-responsive on the above ground and stated that the firm of M/s Feradon Associates Limited was not introduced in the consortium at the Request for Proposals stage but had been part of the Applicant consortium of firms from the Expression of Interest stage as it had submitted its company profile including its registration particulars, CV's, Certificates and lists of previous works in accordance with the requirements of the procuring entity's Expression of Interest.

Counsel for the Applicant further submitted that Feradon Associates Limited was clearly shown in the documents in support of the Expression of Interest as the firm that would provide mechanical engineering services while the documents submitted by the Empaq Limited showed that the said firm would provide the Electrical/Electronic Services to the consortium. She further submitted that the procuring entity's Expression of Interest documents were well segmented into different sections for ease of identification of the names of the firms that formed the consortium and

that the names of consultants included both Empaq Limited and Feradon Associates Limited. She further submitted that it is on the basis of the said documents that the procuring entity declared the Applicant as successful at the Expression of Interest stage and further that it was therefore improper for the procuring entity to turn back and declare the Applicant unsuccessful at the Request for Proposals stage on account of introducing a new firm at that stage.

Turning to Section 3(3) of the Expression of Interest document headed "**mandatory requirements**" Counsel for the Applicant admitted at page 2 of her submissions dated 10th July, 2017 that the following were mandatory requirements at the Expression of Interest stage.

- i. **That the consortium must comprise all the eight technical expertise.**
- ii. **There had to be a signed agreement between all the firms in the consortium witnessed by a commissioner for oaths.**

Counsel for the applicant while acknowledging at paragraph 1 at page 3 of the Applicant's written submissions that the firm of M/s Feradon Associates Limited did not sign a consortium agreement at the Expression of Interest stage however submitted that the procuring entity ought to have treated this as a minor deviation or an error or an oversight which did not affect the substance of the tender under the provisions of Section 79(1) (2) and (3) of the Public Procurement and Asset Disposal Act.

She further alternatively argued, based on the High Court decision in the case of **Microsoft Corporation -vs- Mitsumi Computer Garage Ltd & Another** [2001] 2 EA 460 and the judgment of Odunga J in the case of

Environment & Combustion Ltd -vs- Kenya Pipeline Company Ltd, Enviroserve Waste Management Ltd and NEMA (Nai HC JR No. 106 of 2016) that rules of procedure were handmaidens and not the mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair, orderly and predictable manner. Counsel for the Applicant therefore urged the Board to find that the omission by M/s Feradon Associates Limited to execute the consortium agreement at the Expression of Interest stage was a mere procedural technicality that did not affect the responsiveness of the tender under consideration.

On the second ground of review, counsel for the Applicant submitted that the procuring entity breached the Provisions of Section 124 of the Public Procurement and Asset Disposal Act by requiring bidders to submit a technical proposal only to the exclusion of a financial proposal.

She submitted that the procuring entity ought to have required bidders to submit a financial proposal since the members of the various consortiums which participated in the subject tender were drawn from different professions some of which were regulated by various Acts of Parliament governing the manner of charging fees. She stated that the members of the consortiums included environment experts, interior designers and both Electrical Electronics, Mechanical, Civil and Structural Engineers. She further stated that the list of the consortium members also comprised of Architects and Quantity Surveyors whose remuneration was governed by various Acts of Parliament that provided for the manner of charging fees by members of the said professions. Counsel for the Applicant therefore

submitted that in view of the diverse nature of the professionals involved, it was therefore wrong for the procuring entity to prescribe that the manner of charging fees by the members of the consortium would be governed by the conditions of engagement and scale of fees for professional services for building works 1987 edition and any amendments thereto prepared by the Ministry of Public Works. Counsel for the Applicant submitted that the Ministry conditions are not an Act of parliament and that not all the firms in the consortium are regulated by an Act of Parliament.

While relying on the Provisions of Section 124 (3) and (5) of the Act Counsel for the Applicant submitted that the said Provisions of the law required bidders to submit both their technical and financial proposals at the same time.

Counsel for the Applicant further submitted that whereas the law allowed the procuring entity to use the Quality Based Selection Method of Procurement under Section 124 of the Act, she stated that the said method was not appropriate in the case of the Procurement the subject matter of this Request for Review. She stated that the said method of procurement was only appropriate under the Provisions of Section 124(7) of the Act for a procurement for:-

- (a) Complex and highly specialized assignments.
- (b) Assignments that have a high downstream impact.
- (c) Assignments and professional services which are regulated by an Act of Parliament which stipulate fees and charges applicable for such assignments.

She submitted that the Provisions of Section 124(7) of the Act were not therefore available to the procuring entity in the matter before the Board since it did not meet any of the requirements set out in the said Section 124(7) of the Act.

Counsel for the Applicant relied on the case of **Environment & Combustion Ltd -vs - Kenya Pipeline Company Ltd & Others** [NAI HCJR 106 of 2016 in support of her submission that contravention of the Constitution or a statute cannot be justified on the plea of public interest and that public interest would best be served by enforcing the Provisions of the Constitution and the Statute.

She therefore urged the Board to allow the Applicant's Request for Review.

The Procuring Entity's Response

Mr. Kenneth Akide SC who appeared on behalf of the procuring entity opposed the Applicant's request for review on the ground that the same lacked merit.

On the first ground of review, counsel for the procuring entity submitted that the tender the subject matter of this request for review was initiated by way of an Expression of Interest (EOI) number KEMSA/EO1/01/2016-2017 for the Provision of Consultancy Services for the Design and Supervision of the KEMSA modern warehouse & office Block which was advertised in the Standard Newspaper of 16th February 2017 and in the Star Newspaper of 20th February, 2017 with a closing date of 2nd March 2017.

Counsel for the Procuring entity further submitted that it was a mandatory requirement under Section 3(3) of the Expression of Interest document that all the firms which wished to participate in the tender as a consortium had to sign a joint venture agreement which was to be witnessed by a Commissioner for Oaths.

Counsel for the procuring entity however stated that inspite of this clear provision in the tender document, the Applicant Consortium in it's Expression of Interest document which was submitted to the procuring entity only forwarded a consortium agreement signed by six firms and that the firm of M/s Feradon Associates Ltd was not part of the Consortium of the firms which executed the consortium agreement at Expression of Interest (EOI) stage. Counsel for the Procuring entity further submitted that instead of sticking to the list of the six firms which executed the consortium agreement at the Expression of Interest stage, the Applicant consortium introduced the name of Feradon Associates Ltd at the Request for proposals stage as the firm which would offer the Mechanical Engineering Services. He stated that this was contrary to the consortium agreement which had been signed at the expression of interest stage which provided that the firm of M/s Empaq Limited was to provide the Electrical and Mechanical Engineering Services to the procuring entity if the Applicant consortium had been successful.

It was the procuring entity's case that it had made it clear at the pre-proposal conference held on 5th May 2017 that only those firms which had signed a consortium agreement at the Expression of Interest stage would be

eligible and that no new member would be allowed at the Request for proposals stage.

Counsel for the procuring entity therefore urged the Board to find and hold that the Applicant consortium had properly been declared as non-responsive at the preliminary evaluation stage of the Request for proposals.

On the second ground of the Request for Review, counsel for the procuring entity while conceding that the procuring entity had invited bidders to submit Technical proposals only submitted that there was nothing wrong with that. He further submitted that under the Provisions of Section 124(6) of the Public Procurement and Asset Disposal Act, it was permissible for a procuring entity while selecting the procurement method to be used to elect to use a Request for Proposals which focuses on quality and selects the highest quality proposal. He additionally submitted that the procuring entity had opted to use the above method and provided for the manner of charging fees in clauses 2.1.2 and 2.14 of the Request for Proposals document both of which provided that the fee payable would be based on the conditions of Engagement and Scales of fees for Professional Services for Building Works, 1987 Edition and any amendments thereto prepared by the Ministry of Public Works.

It was the procuring entity's case that having opted to participate in this procurement process to the end on the basis of a clear criteria in the Request for proposals document, the Applicant was estopped from

challenging the process at the end of the process having voluntarily participated in it to the end.

Counsel for the procuring entity relied on the High Court decision in the case of **Republic =vs= The Public Administrative Review Board & Another Exparte GIBB Africa INC [NAI HCJR No.92 of 2011)** in support of the contention that a party who had participated in a procurement process to the end on the basis of a tender document it considered to be defective could not turn back and challenge the process at the end merely because it had been unsuccessful.

Counsel for the procuring entity therefore urged the Board to dismiss the Applicant's Request for Review.

The interested party's submissions

Mr. Albert Kamunde Advocate who appeared on behalf of the successful bidder/Interested Party M/s Maestro Architects Limited associated himself with the submissions made by counsel for the procuring entity and submitted that it was evident from the response and the submissions made by the Procuring Entity that the firm of Feradon Associates Ltd was not part of the consortium which submitted its Expression of Interest document to the Procuring entity at the Expression of Interest stage. He further submitted that it was clear from the Applicant's submissions and those of the procuring entity that the firm of M/s Feradon Associates Limited did not execute a consortium agreement at the Expression of Interest stage and it was not therefore open for the procuring entity to

include the firm of Feradon Associates Limited as part of the Applicant consortium at the Request for proposals stage.

Turning to his client, Mr. Kamunde submitted that all the members of the interested party consortium had signed a consortium agreement at all stages of this procurement and its members had attended the pre-bid conference held on 5th May 2017 where the procuring entity had made it clear that the composition of the firms in the consortium could not be changed to introduce a firm at the Request for proposals stage which was not a party to the consortium agreement at the Expression of interest stage. Mr. Kamunde therefore submitted that the inclusion of Feradon Associates Ltd at the Request for proposals stage was irregular and that the effect of introducing the said firm at that stage would mean that there would be no firm to provide Mechanical Engineering Services to the Applicant consortium and therefore render the Request for Proposals submitted by the Applicant as non-responsive for failing to provide the Mechanical Engineering Services competent in the consortium.

On the second ground of Review, Counsel for the interested party stated that it was evident from the Request for Proposals document that the procuring entity invited bidders to submit their technical proposals but omitted the submission of a financial proposal. He however stated that clauses 2.1.2 and 2.14 of the Request for Proposals document set out the manner in which members of the consortium would be remunerated. Mr. Kamunde submitted that the Applicant was not in any way prejudiced by the use of the conditions of engagement and scales of fees for professional

services for Building Engineering Works and that in any event the Applicant was aware of this requirement before submission of it's bid since the matter was also clarified at the pre-bid conference on 5th May, 2017. Counsel for the interested party submitted that the Applicant did not raise any objection with the above requirements at the pre-proposal conference or at any other time within the timelines for seeking clarification set out in the tender document. The Interested party therefore submitted that the Applicant was estopped from raising the issue of the absence of the financial proposal at the end of the process having participated in the same without protest to the end.

Counsel for the interested party finally submitted that the prayers sought by the Applicant were inappropriate in the circumstances of this case since what the Applicant was seeking from the Board was for an order of re-tender so that it could rectify the anomalies in it's Request for Proposals document to include the firm of M/s Feradon Associates Ltd.

Counsel for the interested party therefore urged the Board to dismiss the Applicant's request for review with costs.

The Applicant's response to the procuring entity and the interested party's submissions

In a short response to the submissions made by counsel for the procuring entity and Counsel for the interested party, Counsel for the Applicant submitted that there was an admission by counsel for the procuring entity that documents belonging to Feradon Associates Ltd had been

incorporated into the Applicant Consortium's Expression of Interest document. She submitted that the inclusion of the said document in itself meant that there was no substitution of the said company at the Request for Proposals stage since the inclusion of the documents meant that Feradon Associates Ltd was part of the Applicant consortium at the Expression of Interest stage.

On the pre-bid meeting, counsel for the Applicant admitted the existence of the said meeting and that the clarification on the bar against the introduction of a new firm referred to at the said meeting did not affect the firm of Feradon Associates Ltd since it had participated at the Expression of Interest Stage. She clarified that in the circumstances of this case, there was no pulling out or the replacement of a party and that there was no new member introduced into the consortium at the Expression of Interest stage.

Counsel for the Applicant finally reiterated that the Applicant's failure to include the requirement for a financial proposal contravened the provisions of Section 124 of the Public Procurement and Asset Disposal Act as read together with those of Section 86(1)(b) of the said Act.

She therefore urged the Board to allow the Applicant's Request for Review as prayed.

THE BOARD'S DECISION

The Board has considered the Request for Review filed by the Applicant together with all the documents annexed thereto and has also considered the original tender documents, the evaluation report and all the other

documents submitted to it by all the parties to this Request for Review. The Board has also considered the oral and the written submissions made and filed before by the advocates who appeared before it during the hearing of the Request for Review.

As rightly submitted by Counsel for the Applicant, this Request for Review raised the following two grounds which have already been set out by the Board in this decision:-

1. **Whether the Respondent/the procuring entity erred in its decision contained in the letter dated 12th June, 2017 addressed to the Applicant by the procuring entity stating that the Applicant consortium had introduced a new firm into the consortium at the Request for Proposals stage.**
2. **Whether the Respondent/procuring entity contravened the provisions of Section 124 of the Public Procurement and Asset Disposal Act 2015.**

The Board will now proceed to consider and give it's determinations on the above two issues in the order they appear above.

ISSUE NO. 1

Whether the Respondent/the procuring entity erred in its decision contained in the letter dated 12th June, 2017 addressed to the Applicant by the procuring entity stating that the Applicant consortium had introduced a new firm into the consortium at the Request for Proposals stage.

As regards the first ground set out above, the Board has perused the Expression of Interest (EOI) document together with the Request for Proposals (RFP) document submitted to the procuring entity by the Applicant and finds that the procurement process herein started with an invitation to bidders to submit an Expression of Interest first to the procuring entity before submitting a Request for Proposals.

It is clear from the Expression of Interest document a fact which was admitted by the Applicant at page 2 of it's written submissions that it was a mandatory requirement under Section 3(3) of the Expression of Interest document that firms which opted to participate in this tender as a consortium had to inter-alia have a signed agreement between all the firms in the consortium witnessed by a commissioner for oaths.

It was additionally admitted by Counsel for the Applicant during the course of her submissions before the Board that the firm of Feradon Associates Ltd which was eventually included in the Request for Proposals as the firm that would provide the mechanical engineering services did not sign a consortium agreement at the Expression of Interest stage but instead provided documents which included it's Registration Certificate and other particulars, CV's, other certificates and lists of previous works it had undertaken which were eventually included in the Applicant consortium's Expression of Interest document.

Counsel for the Applicant stated that the said documents were sufficient to meet the mandatory requirements in Section 3 of the Expression of Interest (EOI) document and further submitted that the procuring entity had

declared the Applicant consortium's bid as successful on the basis of among other documents the documents supplied by Feradon Associates Ltd. Counsel for the Applicant further argued that it was not therefore open for the procuring entity to disqualify the Applicant at the Request for Proposals stage based on the above facts. She alternatively argued that the Board should treat the failure by the firm of Feradon Associates Ltd to sign the consortium agreement as a minor deviation or as an error or an oversight or a technicality which did not go into the substance of the procurement process.

The Board has considered the above submissions against the criteria set out in the Expression of Interest document together with the contents of the said document and finds as a fact that the firm of M/s Feradon Associates Ltd did not execute the consortium agreement at the Expression of Interest stage. The Board further finds that the following six firms executed the said agreement and offered to provide the following services:-

- i. AAKI Consultants-Team Leader and Project Architect.
- ii. Integrated YMR Services-Quantity Surveyor.
- iii. Professional Consultants-Civil/Structural Engineers and Environmental Experts.
- iv. Empaq Ltd-Electrical/Mechanical Engineers.
- v. Lariak Landscapes Ltd-Landscape Architect.
- vi. Revo Design Studios-Interior Design.

The Board further finds that instead of submitting the names of the above six firms which had executed a consortium agreement at the Expression of Interest stage at the Request for Proposals stage the Applicant instead submitted an agreement executed by the following seven firms at the Request for Proposals stage:-

- i. AAKI Consultants-Team Leader and Project Architect.
- ii. Integrated YMR Services-Quantity Surveyor.
- iii. Professional Consultants-Civil/Structural Engineers and Environmental Experts.
- iv. Empaq Ltd-Electrical/Mechanical Engineers.
- v. Feradon Associates Ltd-Mechanical Engineers
- vi. Lariak Landscapes Ltd-Landscape Architect.
- vii. Revo Design Studios-Interior Design

The Board finds based on the above facts that the inclusion of the said firm at the Request for Proposals stage was improper because the said firm did not execute the consortium agreement at the Expression of Interest stage and the Applicant having put forward the name of M/s Empaq Ltd as the firm that would provide both the Electrical and the mechanical engineering services, the Applicant was bound by the consortium agreement executed at the Expression of Interest stage and could not introduce another party into the consortium at the Request for Proposals stage.

As has already been stated above, the requirement that all firms to a consortium execute a consortium agreement at the Expression of Interest stage was a mandatory requirement. A mandatory requirement by it's

very nature must be complied with and where there is non-compliance with such a requirement, a procuring entity does not have any other option but to declare the party failing to comply with the mandatory requirement as being non-responsive.

A failure to comply with a mandatory requirement in any tender process can also not be described as a minor deviation, an error an oversight or a legal technicality since it is a matter of substance that goes to the root of the procurement process. The Board is therefore unable to agree with the submissions made by Counsel for the Applicant that the failure by Feradon Associates Ltd to execute a consortium agreement at the Expression of Interest stage can be cured by the provisions of Section 79 of the Public Procurement and Asset Disposal Act.

Having established that the Applicant consortium had failed to adhere to a mandatory requirement stipulated in the Expression of Interest document, the Board agrees with the submissions made by Mr. Akide SC Counsel for the procuring entity and Mr. Kamunde advocate for the interested party that owing to the omission of Feradon Associates Ltd at the Expression of Interest stage, the Applicant could not satisfy the requirement that a consortium wishing to participate in this tender had to have a firm that would be responsible for providing Mechanical Engineering Services to the procuring entity.

Turning to the other arguments put forward by Counsel for the Applicant, the Board finds that the mere fact that the Applicant consortium's bid was declared as successful at the Expression of Interest stage cannot of itself

render the Applicant's Request for Proposals responsive. A look at the firms which executed the consortium agreement at the Expression of Interest stage shows that the firm of M/s Empaq Ltd offered to provide both the electrical and Mechanical Engineering Services on behalf of the consortium and the Board believes that it is on the basis of this offer that the procuring entity proceeded to declare the Applicant's consortium bid as responsive at that stage.

Instead of maintaining the parties as set out in the consortium agreement signed and submitted at the Expression of Interest stage, the Applicant decided to take away the mechanical engineering function from Empaq Ltd and instead shifted it to the firm of M/s Feradon Associates Ltd which was not a party to the consortium agreement at the Expression of Interest stage.

Having held that the omission by the firm of Feradon Associates Ltd to sign a consortium agreement was fatal, the Board finds that the Applicant consortium was rightly declared as non-responsive at the Request for Proposals stage.

This ground of the Applicant's Request for Review therefore fails and is dismissed.

ISSUE NO. II

Whether the Respondent/procuring entity contravened the provisions of Section 124 of the Public Procurement and Asset Disposal Act 2015.

The second ground of review raised by the Applicant was to the effect that the procuring entity contravened the provisions of Section 124 of the Public

Procurement and Asset Disposal Act 2015 in that the Request for Proposals document only required bidders to submit a technical proposal only but did not include a requirement for them to submit a financial proposal. Counsel for the Applicant stated that the absence of a requirement for bidders to submit a financial proposal was contrary to the law since not all the firms in the consortium were regulated by an Act of Parliament and that the requirement that the amount of remuneration payable be based on the conditions of engagement and scales of fees for professional services for Building Works 1987 Edition and any amendments thereto prepared by the Ministry of Works was improper.

Counsel for the Applicant relied on the Provisions of Section 124(3) &(5) of the Public Procurement and Asset Disposal Act.

The Board has considered the contents of the Request for Proposals document and finds that the manner of determining the remuneration to be paid to the members of the successful consortium was *inter-alia* provided for in clauses 2.1.2 and 2.14 of the Request for Proposals document. The two clauses of the said document provide as follows:-

“2.1.2: The consultants are invited to submit a Technical Proposal and a Financial Proposal or a Technical Proposal, as specified in the Appendix “ITC” for consulting services required for the assignment named in the said Appendix. A Technical Proposal only may be submitted in assignments where the client intends to apply standard conditions of engagement and scales of fees for professional services which

are regulated as is the case with Building and Civil Engineering Consulting Services. In such a case the highest ranked firm of the technical proposal shall be invited to negotiate a contract on the basis of the scale fees. The proposal will be the basis for contract negotiations and ultimately for the signed contract with the selected firm”.

“2.14: The consultants are invited to submit a Technical Proposal only as specified in the Appendix “A” for consulting services required for the assignment named in the letter of invitation (Section I). The highest ranked firm of the technical proposal shall be invited to negotiate and enter into a contract on the basis of Conditions of Engagement and Scales of Fees for Professional Services for Building Works, 1987 Edition and any amendments thereto prepared by the Ministry of Public Works. The proposal will be the basis for contract negotiations and ultimately for a signed contract with the selected firm”.

A reading of the invitation to tender and the above two clauses shows that the Request for Proposals required bidders to submit a Technical Proposal only although the tender document also provided for the basis on which the successful consortium would eventually negotiate the fee payable to its members.

The Board has looked at the above clauses in the Request for Proposals document and the Provisions of Section 124 of the Public Procurement and

Disposal Act 2015 and is unable to find any provisions of the said Act which contravene or contradict any of the provisions of any other statute relating to the charging of fees by professional bodies. Counsel for the Applicant did not both in her oral and the written submissions point out the Sections of any statute which had been contravened by the procuring entity. The Board further finds that all that Counsel for the Applicant did in her submissions was to quote various Acts of Parliament without setting out any specific provisions which contravened the provisions of Section 124 of the Public Procurement and Asset Disposal Act.

Further, Counsel for the Applicant did not demonstrate that all the firms of the Applicant consortium were members of professional bodies and that their fees was therefore governed by any particular Act of Parliament. The above being the case, the provisions of Section 5 of the Public Procurement and Asset Disposal Act would come into play and the procurement process herein was therefore entirely governed by the provisions of the Public Procurement and Asset Disposal Act and the criteria set out in the tender document.

The said Section 5 of the Act provides as follows:-

“Section 5:

- 1. This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services.*

In addition to the above the Board has read the provisions of Section 124(6) of the Act and finds that the said provision allows a procuring entity to use a Quality Based Selection method which focuses on quality and selects the highest quality proposal.

The said Section 124(6) (a) of the Act provides as follows:-

“(6) Subject to prescribed restrictions, a procuring entity may use any of the following alternatives in the selection methods to evaluate proposals and shall state the selection method in the Request for Proposals.

(a) Quality Based Selection (QBS), which focuses on quality and selects the highest quality proposal”.

The Act therefore envisages a situation where a procuring entity may decide to structure its tender document in a manner that is geared towards achieving quality and such a document cannot be faulted merely because it does not require bidders to submit a financial proposal.

The Board has looked at this procurement process and finds that the procuring entity was well within its right to select the method it selected for the reason that the value of the construction works the consortium will oversee has not yet been determined. There was therefore no amount on the basis of which the successful consortium would base its financial proposal on at the closing date of the tender in question.

A number of other factors militate against granting the Applicant the reliefs sought in the Request for Review.

The first additional factor which militates against allowing this ground of review is that the Applicant ought to have raised an objection to any irregularity in the contents of the tender document immediately it obtained the document instead of waiting upto the end of the procurement process.

According to the evidence placed before the Board, the Expression of Interest in this tender was advertised in the Standard Newspaper on 16th February 2017 and in the Star Newspaper on 20th February, 2017.

The Expression of Interest closed on 2nd March 2017 while the Request for Proposals closed on 18th May, 2017. The Applicant was therefore aware of the contents of the Expression of Interest and the Request for Proposals document at least by 2nd March, 2017 and 18th May, 2017 respectively and was therefore bound by the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act to file a Request for Review within 14 days upon learning of the alleged breaches of the provisions of the law, the Regulations or the tender documents.

The court and the Board has severally held that where a party to a procurement process learns that there has been any breach of the provisions of the Act or the Regulations or an irregularity in the contents of the tender document at any stage in the procurement process, such a party is bound to file a Request for Review immediately and that a party who elects to proceed with the procurement process to the end inspite of the breach cannot be heard to complain at the tail end of the process merely because it has been unsuccessful in the process.

The best illustration of the above position is provided by the High Court decision in the case of **Republic -vs- The Public Procurement Administrative Review Board and Another Exparte Gibb Africa INC** (Nai HC JR 92 of 2011) which was relied upon Counsel for the procuring entity and where the High Court stated as follows:-

“Finally it is now well established that judicial review remedies are discretionary in nature. The Applicants have admitted that the procurement documents had two different scores for the technical evaluation parameters. They nevertheless went ahead to submit their bid in a procurement process, which in their view, was founded on a flawed document. It is only after they failed to attain the minimum technical evaluation marks that they started complaining. The document had clearly provided room for seeking clarification but they did not take this opportunity. Even if they had established grounds of review of the decision, I think they would not have been entitled to the orders sought”.

The Court held similarly in the case of **Republic -vs- Public Procurement Administrative Review Board exparte Kenya Power and Lighting Company Ltd** (Nai HC Misc. Application No. 202 of 2016) where it stated that an Applicant is under an obligation to file a Request for Review with the Board once it discovers that there has been a breach of duty by a procuring entity at any stage of the procurement process even before an award of the tender has been made to the successful bidder and the outcome of the process notified to unsuccessful bidders.

The Board was of a similar view in the case of **Fedha Electrics Limited -vs- National Transport and Safety Authority and Flex Communication Limited (PPRB Appl. No. 53 of 2017)** where the Board struck out a Request for Review on the basis that the Applicant failed to move the Board within a period of fourteen (14) days of becoming aware of the breach of the Act by the procuring entity.

The second additional factor which militates against granting the orders sought by the Applicant is that what the Applicant is seeking to do is to challenge the procuring entity's decision to adopt the quality based selection procurement method in this tender process.

The Board however finds that under the provisions of Section 167(4)(a) of the Public Procurement and Asset Disposal Act neither the Board nor the Applicant can challenge the choice of a procurement method by the procuring entity.

Section 167(4)(a) of the said act provides as follows:-

“Section 167 (4)“The following matters shall not be subject to the review of procurement proceedings under subsection (1)-

- (a)The choice of a procurement method;*
- (b)*

The Board while interpreting a similar provision in the repealed Public Procurement and Disposal Act 2005 held as follows in the case of **Riley**

Falcon Security Services Ltd & Another -vs- The Kenya Pipeline Company Ltd [2008- 2010] PPRB Report

"The Board has noted that the Applicant is challenging the method of procurement used by the procuring entity...

The Board further notes that Section 93(2) (a) clearly states that the choice of a procurement procedure pursuant to part IV of the Act shall not be subject to review. In the circumstances these grounds of appeal fail".

The Board adopts the same reasoning in this case and finds that the attempt by the Applicant to challenge the procurement method adopted by the procuring entity contravenes the provisions of the law.

Finally having elected to participate in this tender, the Applicant was aware and was bound by the criteria set out in the tender document and under the Provisions of the Public Procurement and Asset Disposal Act 2015, the best that the Applicant could do if it felt that the criteria set out in the tender documents contravened any law was to raise the matter immediately or refuse to participate in the procurement process all together. It is however now too late in the day for the Applicant to challenge the contents of the tender documents.

In view of all the above findings, the Board therefore holds that the second ground of the Applicant's Request for Review lacks merit and the same is similarly dismissed.

Costs

The general principle on costs is that costs follow the event and that a successful party is entitled to the costs of any proceedings unless there are factors that militate against an award of costs.

The Board has looked at all the circumstances of this case and has not found any reason why it should deny the procuring entity and the interested party the costs of this review. Such costs must however be reasonable in order not to discourage bidders with genuine grievances from seeking a remedy before the Board.

The Board will therefore take into account the above principle while considering the issue of costs.

Overallly therefore, the Applicant's Request for Review dated 23rd June, 2017 is dismissed in terms of the following final orders.

FINAL ORDERS

In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, the Board makes the following orders on this Request for Review.

- a) **The Applicant's Request for Review dated 23rd June, 2017 and which was filed with the Board on the same date in respect of Tender Ref: No.KEMSA/PROC/RFP 01/2016-2017 for the provisions of Consultancy Services for the Design and Supervision of**

Construction of KEMSA Modern warehouse & office Block be and is hereby dismissed.

- b) The procuring entity is therefore at liberty to proceed with the procurement process herein to conclusion.
- c) For the reasons set out above, the procuring entity and the interested party are awarded costs of Kshs. 100,000 each to be paid by the Applicant within fourteen days from today's date.

Dated at Nairobi on this 13th day of July, 2017



CHAIRMAN
PPARB



SECRETARY
PPARB

