REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.54 OF 2017 DATED 16TH JUNE 2017

BETWEEN

EDENSWIN TRADERS LTD.....APPLICANT

AND

JUDICIARY OF KENYA.....PROCURING ENTITY

Review against the Decision of the Judiciary of Kenya in the matter of Tender No. JPIP/NCB/07/2016-2017 for the Supply and Delivery of File Folders:

BOARD MEMBERS PRESENT

1. Paul Gicheru — Chairman
2. Nelson Orgut — Member
3. Peter Ondieki — Member
4. Weche Okubo — Member
5. Josephine Mong'are — Member

IN ATTENDANCE

1. Philemon Kiprop - Secretariat
2. Maryanne Karanja - Secretariat

PRESENT BY INVITATION

Applicant – Edenswin Traders Ltd

1. Keith Wesonga Wamalwa &Kariuki Advocates & Associates
2. Erick Mwirigi Director

Procuring Entity– The Judiciary

1. Jane Mukiri Senior Procurement Consultant
2. Isaac kibuchi SPO
3. Michael Obuya Procurement Officer
4. Doreen Mwirigi Procurement
5. Lukhale Joab JPIP Procurement

Interested Parties

Anthony Gitonga	Advocate ,Print fast
Nick Ayieko	Marketing,Print Fast
Daniel Wandera	legal, Ramco Printing
Victor Kingori	Marketing ,Colour Print
Kepher Otieno	Operations, MFI

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 government of Kenya received financing from the World Bank towards the cost of Judicial Performance Improvement Project (JPIP) Credit No.5181-KE and intends to apply part of the proceeds towards the payment under the contracts for the Supply and Delivery of File Folders.

Advertisement

The procuring entity invited bids for the above tender vide the Nation and Standard Newspapers of 20thDecember 2016.

Bid Submission and Opening

TheBid Closing/opening date and time was 26thJanuary, 2017 at 11:00 Hrs, with 24 Number of bids being submitted

Evaluation of bids

The bids were evaluated in four stages namely:-

1. **The preliminary examination of bids**

All submitted bids were subjected to Preliminary Examination, which included the following checks:

a) Verification – This comprised checking to ensure appropriate signatures committing the bidder, letter of attorney, certificate of

incorporation/ registration and legally binding documents (Agreement or Memorandum) in cases of joint venture.

b) Eligibility: This comprised mainly a check to ensure that the bidder and all partners to a joint venture were from an eligible source country as defined in the Guidelines.

c) Bid Security – Ensure that the bid security is in the correct amount and currency as stipulated in ITB 19 of the bidding document and is valid for at least 148 days up to 24 June 2017

d) Completeness of Bid: Unless the bidding documents have specifically allowed partial bids not offering all of the required items should ordinarily be considered nonresponsive. However, under works contracts, missing prices for occasional work items are considered to be included in prices for closely related items elsewhere. If any erasures, interlineations, additions, or other changes have been made, they should be initialed by the bidder.

e) Substantial Responsiveness – Major deviations to the commercial requirements and technical specifications are a basis for the rejection of bids. As a general rule, major deviations are those that, if accepted, would not fulfill the purposes for which the bid is requested, or would prevent a fair comparison with bids that are properly compliant with the bidding documents.

The results of preliminary examination are summarized in the tablebelow

	Bidder *(a)*	Verification *(b)*	Eligibility *(c)*	Bid Security *(d)*	Completeness of Bid *(e)*	Substantial Responsiveness *(f)*	Acceptance for Detailed Examination *(g)*
1.	Ramco Printing Works Ltd, Box 27750-00506 Nairobi.	Yes	Yes	Yes	Yes	Yes	Yes
2.	Aliki Printers & Stationers Ltd, Box 9434-00300 Nairobi.	No[1]	Yes	No[2]	Yes	Yes	No
3.	Scangraphics (k) Ltd, Box 45037-00100 Nairobi.	Yes	Yes	Yes	Ye	Yes	Yes
4.	Possible Ltd, Box 23616-00100 Nairobi	No[3]	Yes	Yes	Yes	Yes	No
5.	Edenswins Traders Ltd, Box 17566-00500 Nairobi	No[4]	Yes	Yes	Yes	Yes	No
6.	Kynet Holdings EA Ltd, Box 104312-00101 Nairobi	Yes	Yes	Yes	Yes	Yes	Yes
7.	Telemart Ltd, Box 21810-00100 Nairobi	Yes	Yes	Yes	Yes	Yes	Yes
8.	Kenafric diaries manufacturers Ltd, Box 10460-00400 Nairobi	Yes	Yes	Yes	Yes	Yes	Yes
9.	Soloh Worldwide Inter-Enterprises, Box 1868-00100 Nairobi	Yes	Yes	Yes	Yes	Yes	Yes

[1]Tax compliance certificate not valid. Certificate expired on 13 December 2016 while bids closed on 26 January 2017

[2]Bid security from Intra Africa Assurance Co. Ltd instead of a Bank guarantee

[3]Has conflict of interest pursuant ITB 4.2

[4]Letter of bid not signed. No power of attorney

10.	Dajohn Enterprises Ltd, Box 51658-00200 Nairobi	Yes	Yes	Yes	Yes	Yes	Yes
11.	Almodan Investments Ltd Box 2033-00621 Nairobi	No[5]	Yes	No[6]	Yes	Yes	No
12.	Mosmos Ltd Box 104303-00101 Nairobi	No[7]	Yes	Yes	Yes	Yes	No
13.	Grand Traders Ltd Box 103177-00101 Nairobi	Yes	Yes	No[8]	Yes	Yes	No
14.	Armilk Ltd Box 52590-00200 Nairobi	Yes	Yes	Yes	Yes	Yes	Yes
15.	MFI document Solutions Ltd Box 49160-00100 Nairobi	No[9]	Yes	Yes	Yes	Yes	No
16.	Upstream Traders Ltd Box 25142-00100 Nairobi	Yes	Yes	Yes	Yes	Yes	Yes
17.	Colourprint Ltd Box 44466-00100 Nairobi	Yes	Yes	Yes	Yes	Yes	Yes
18.	Soleca Communications Ltd Box 75442-00200 Nairobi	Yes	Yes	Yes	Yes	Yes	Yes
19.	Jomo Kenyatta Foundation Box 30533-00100 Nairobi	No[10]	Yes	No[11]	Yes	Yes	No
20.	Punchline Ltd Box 42897-00100 Nairobi	Yes	Yes	Yes	Yes	Yes	Yes

[5] No letter of bid

[6] No bid security

[7] Conflict of interest pursuant to ITB 4.2

[8] Bid security valid up to 26 May 2017 instead 22 June 2017

[9] Letter of bid signed by Mr. T. Paramsweran, Business Head, Secure print without a valid power of attorney

[10] Letter of Bid not signed. Did not submit a tax compliance certificate

[11] Bid security valid up to 28 May 2017 instead of 22 June 2017

21.	Macros Solution Ltd Box 18888-00500 Nairobi	Yes	Yes	Yes	Yes	Yes	Yes
22.	Hills Coverters (K) Ltd Box 2990-00200 Nairobi	Yes	Yes	Yes	Yes	Yes	Yes
23.	Printfast(K) Ltd Box 48416-00100 Nairobi	Yes	Yes	Yes	Yes	Yes	Yes
24.	Kenya Literature Bureau Box 30022-00100 Nairobi	No[12]	Yes	Yes	Yes	Yes	No

Financial Evaluation:

Bids were examined to determine any arithmetic errors of prices.

[12]Did not attach a tax compliance certificate

Bidders	Unit Prices (Ksh)	Quantity	Total Prices	Taxes	Other Charges	Grand Total
Bidder 6	60	1,500,000	90,000,000.00	Tax Inclusive	100,000 (Transport)	90,100,000.00
Bidder 8	71.20	1,500,000	106,800,000.00	17,088,000.00	None	123,888,000.00[13]
Bidder 9	118.00	1,500,000	177,000,000.00	Tax Inclusive	None	177,000,000.00
Bidder 14	133.62	1,500,000	200,430,000.00	32,068,800.00	None	232,498,800.00[14]
Bidder 16	122.00	1,500,000	183,000,000.00	Inclusive	None	183,000,000.00
Bidder 17	79.70	1,500,000	119,550,000.00	19,128,000.00	None	138,678,000.00
Bidder 18	80.00	1,500,000	120,000,000.00	19,200,000.00	None	139,200,000.00
Bidder 20	66.38	1,500,000	99,568,965.52	15,931,034.48	None	115,500,000.00[15]
Bidder 21	98.00	1,500,000	147,000,000.00	Tax Inclusive	None	147,000,000.00
Bidder 22	Various	1,500,000	70,844,828.00	11,335,172.41	None	82,180,000.00
Bidder 23	Various	1,500,000	66,197,024.00	Tax Inclusive	None	66,197,024.00

Post Qualification Verification

At this stage, bids were evaluated on the basis of the qualification criteria set out in the bid document.

[13]The figure as per the prices schedule was Kshs.123, 888,000.00,however, the figure as per the letter of bid was Kshs. 97,500,900.

[14]Has arithmetic error of 1,200

[15]Total figure is 115,500,000 instead of 115,501,200. Arithmetic error of 1,200

N/B: Pursuant to ITB 29 and 30 of the Bidding Document, the bid evaluation committee recommended for a waiver of the following condition.

The Bidder shall furnish documentary evidence to demonstrate that the bidder has carried out at least three contracts for supply of the items with an average contract value equivalent or above their tender price within the last three (3) years

Consequently, the bidders were subjected to the following post qualification verification criteria

		1	3	6	7	8	9	10	14	16	17	18	20	21	22	23
	Criteria															
	Requirement															
Bidders shall submit Audited Financial Statements for the last three (3) years to demonstrate that the Bidder has annual turnover of not less than the bid price.		N[16]	N[17]	Y	N[18]	Y	Y	N[19]	Y	Y	Y	Y	Y	Y	Y	Y
Qualified for further evaluation		**N**	**N**	**Y**	**N**	**Y**	**Y**	**N**	**Y**	**Y**	**Y**	**Y**	**Y**	**Y**	**Y**	**Y**

[16] Did not submit audited financial statements for the financial year 2013

[17] Audited financial statements provided are not signed, therefore they are not duly certified. Provided two years financial statements 2015 and 2016 instead of 3 years as required. Inserted 2013 audit report in to 2015 financial statements.

[18] Financial statements have been signed (19 June 2014) before the end of financial year (31 June 2014)

[19] Provided financial statements for 2015 only instead of 3 years

Recommendation

The evaluation committee recommended the award of the contract for the Supply and Delivery of File Folders to Printfast (K) Ltd, P.O Box 48416-00100, Nairobi at Kshs.66,197,024.00 against a cost estimate of Kshs. 135 Million

Professional Opinion

Pursuant to section 84 (1), 84(2) and 84 (3) of the Public Procurement and Asset Disposal Act, 2015. The Procurement Unit noted that the Procurement Process was processed as per the law and the World Bank Guidelines.

The procurement unit recommended the award of the tender to the lowest evaluated bidder (no.23) being Printfast (K) Ltd, P.O Box 48416-00100, Nairobi at the sum of Kshs. 66,197,024.00 against a cost estimate of Kshs. 135 Million

The Procurement Unit requested for approval from the Chief Registrar of the Judiciary pursuant to section 84 (1) of the Public Procurement and Disposal Act, 2015.

REVIEW

The Request for Review was lodged by **M/s Edenswin Traders Ltd** on 16thJune, 2017 in the matter of the Tender No. JPIP/NCB/07/2016-2017 for the Supply and delivery of file folders.

During the hearing of the Request for Review the Applicant was represented by Mr.Wesonga Keith, Advocate while the Procuring Entity was represented by Mr.MichaelObuya, a Procurement Consultant with the procuring entity. The 1stInterested Party Ramco Printing Ltd appeared through its in house Legal Counsel Mr. Daniel Wandera, while the 2ndInterested Party M/s Printfast Limited was represented by Mr. Anthony Gitonga Advocate.

The Applicant sought for the following orders:

1. *The Board do recede the Procuring Entity decision to award the tender to any other entity /person other than Applicant*
2. *The tender be awarded to the Applicant who is the lowest bidder*
3. *In the alternative the Applicant be compensated the cost of review*
4. *General damages*
5. *Award any other relief the review Board may deem just according to the procurement period.*

PRELIMINARY OBJECTION

Both the procuring entity and the two interested parties filed their responses to the Applicant's Request for Review. The 2nd interested party also filed a notice of preliminary objection dated 5th July, 2017 challenging the Board's jurisdiction to hear and determine the Request for Review filed before it on the ground that the Request for Review was filed outside the period of time stipulated under the provisions of Section 167(1) of the Act and additionally that the application offended the provisions of Section 4(2)(f) of the Act.

Inview of the nature of the preliminary objections and the strict timelines set out under the Act for the hearing and determination of the Request for Review, the Board directed that the 2nd interested party's preliminary objection be heard together with the substantive Request for Review but with the caveat that the Board would first determine the challenge on it's jurisdiction to hear and determine the Request for Review on the grounds set out in Mr. Gitonga's notice of preliminary objection and the Response by the procuring entity.

The Board will therefore proceed to consider the preliminary objection first before delving into the substantive merits of the Request for Review in the event that it finds that it has the jurisdiction to determine this matter on merit.

The Preliminary objection to the Jurisdiction of the Board to hear and determine the Request for Review as filed was raised by the procuring entity and the 2nd interested party. Mr. Michael Obuya for the procuring entity and Mr. Gitonga advocate for the 2nd interested partysubmitted that pursuant to the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act, 2015(herein after referred to as the Act),a Request for Reviewought to be filed with the Board within fourteen (14) days from the date of notification of the outcome of the Applicant's tender. They further stated that the notification of award dated 23rdMay, 2017informing the Applicant of the outcome of it's tender was emailed to the Applicant on 29thMay 2017. Accordingly the Procuring Entityand the 1st interested party submitted that the fourteen(14) days period within which the Applicant ought to have filed its Request for Review therefore lapsed on 12th June 2017 and that the Request for Reviewwhich was filed by the Applicant herein on 16thJune 2017was filed outside the period of fourteen (14) days provided for by the law. In its response to this issue, Counsel for the Applicant submitted that although the letter dated 23rd May 2017 was dispatched to it by the Procuring Entity on 29th May2017, the Applicant became aware of the existence of the said letter on the 4th June 2017 because the Applicant's Principal Director had travelled out of the office for a burial. It therefore argued that the time for the filling of the Request for Review started running from 5th June 2017 and consequently its Request for Reviewwhich was filed on the 16th June 2017 was filed within the time allowed by the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act 2015. The Applicanttherefore urged the Board to

dismiss the Preliminary objection and allow the Request for Review to be heard and decided on merit.

The Board has considered the submissions made by the parties on the first limb of the preliminary objection and has also perused all the documents submitted to it by the said parties. The Boardfinds that the Applicant together with the other bidders who participated in this tender were notified of the tender results by letters dated 23rd May, 2017 which were dispatched to each bidder via email to the bidders on 29th May 2017. The Board notes that the email notification addressed to the Applicant was dispatched from the procuring entity's email address jpipproject@gmail.com and that the letter of notification was forwarded to the Applicantat 10.57 a.m. on 29th May, 2017 through edenswin@yahoo.com which it had provided in the tender document as it's email for purposes of communicating with the procuring entity in relation to the subject tender.

The Board further finds that the Applicant acknowledged in paragraph 26 of the Affidavit in support of the amended Request for Review sworn by ERICK MWIRIGI MBAABU on 3rdJuly, 2017 that the letter of notification to the Applicant was dispatched to it via the above email on 29th May, 2017.

Based on the admission contained at paragraph 26 of the affidavit of Mr. MBAABU and the admission by the Applicant's advocate during the hearing of the Request for Review that the procuring entity dispatched the letter of notification to the Applicant on 29th May, 2017, the only issue remaining for determination is whether the allegation that the Applicant did not access it's email until 4th June, 2017 affected the timeline set out by the law for filling a Request for Review.

To answer this question, the Board has had occasion to look at the Provisions of the **Kenya Information and Communications Act, Chapter 411A of the Laws of Kenya.**Section 2, (3) (c) (i) and (ii) of the Act specifically state as follows:-

> **2(3)(c) Save as otherwise agreed to between the originator and the addressee:-**
>
> **(i) The dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator;**
>
> **(ii) If the addressee has a designated computer resource for the purpose of receiving an electronic record, receipt occurs at the time when the electronic record enters the designated computer resource;**

The Board finds that on the basis of the above Provisions of the law, the e-mail containing the notification was deemed by operation of law to have been served on the Applicant once the e-mail entered into the computer resource of the Applicant which happened on 29th May, 2017 based on the evidence placed before the Board by the procuring entity and which was admitted by the Applicant.

The Board further finds that upon notification, the decision on when the applicant would open the delivered e-mail entirely lay with it and the Procuring Entity or the 2nd Interested Party did not have any control over what took place thereafter.

Under the Provisions of Section 83 (G) of **The Kenya Information and Communication Act Cap 411A of the Laws of Kenya** as read together with

Section 83(k) of the same Act, the law permits service of any matter that is in writing to be made through an electronic form and that such communication shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic message.

The Board has previously held that communication via e-mail is one of the acceptable means of communication in a Procurement process and as an illustration, the Board held in the case of **Hetero Chain Management Consortium and the Ministry of Public Health and Sanitation PPRB Application no. 24 of 2009** that communication of a written document via e-mail is recognized as an acceptable mode of service.

Based on the above facts and the law, the Board therefore finds that the fourteen (14) days period allowed by the law for filling a Request for Reviewstarted running from 30th May 2017 and therefore lapsed on 13th June 2017 rendering the Request for Review filed by the Applicant on 16th June 2017as having been filed out of time. The consequence of filling a Request for Review out of time is that the Board is deprived of the jurisdiction to hear and determine the same a position that has been stated by the court and the Board in several decisions as illustrated by the following decisions.

The supreme court of Kenya held in the case of **Samuel Kamau Macharia& another –vs.- Kenya Commercial Bank Limited & 2 others (Supreme Court Application No.2 of 2011)** that the issue of time, is an issue of jurisdiction issue and is not a mere procedural technicality as it goes to the root of the matter. This decision was adopted by the Board in the case of **Kleen Homes Security Services Ltd –vs. - Masinde Muliro University of Science and Technology PPRB APPL. No. 31 OF 2014** where the Board held that the time

within which a request for review ought to be filed is a jurisdictional issue and proceeded to strike out the Request for Review on the ground that it was filed out of time.

The Board therefore finds merit in this ground of Preliminary Objection and allows it.

The Board will therefore down its tools at this stage for lack of jurisdiction and will not delve into the second ground of preliminary objection since the Board's finding on the above ground of objection is sufficient to dispose of this matter.

Costs

Costs follow the event. The Board notes that this Request for Review was not determined on the merits but was determined on a preliminary objection. The Board will however not condemn the Applicant to pay the costs of the Request for Review in order not to discourage bidders with genuine grievances from approaching the Board in a bid to address any such grievances.

FINAL ORDERS

In the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act 2015, the Board makes the following orders on this Request for Review:-

1. **The Request for Review filed by M/s Edenswin Traders Ltd against the Judiciary of Kenya on 16th June, 2017 in the matter of the Tender No. . JPIP/NCB/07/2016-2017 for the Supply and delivery file folders be and is hereby struck out for want of Jurisdiction.**

2. **The Procuring Entity is therefore at liberty to proceed with the procurement process herein to conclusion.**

3. Each party shall meet its own costs of the Review.

Dated at Nairobi on this 7th day of July, 2017.

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CHAIRMAN	**SECRETARY**
PPARB	**PPARB**