

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION No. 82/2017 OF 13TH SEPTEMBER, 2017

BETWEEN

HIGAWA ENTERPRISES LIMITED APPLICANT

AND

KENYA PORTS AUTHORITY1ST RESPONDENT/PROCURING
ENTITY

AND

YOBESH OYARO2ND RESPONDENT/ACCOUNTING OFFICER

Review against the decision of Kenya Ports Authority in the Matter of Tender
Number KPA/112/2016-2017/MO for Provision of Cleaning and
Landscaping Services (Preference Groups).

BOARD MEMBERS PRESENT

- | | | |
|----|----------------------|-----------------------|
| 1. | Mr. Hussein Were | - Member in the Chair |
| 2. | Mrs. Gilda Odera | - Member |
| 3. | Mrs. Rosemary Gituma | - Member |
| 4. | Nelson Orgut | - Member |

IN ATTENDANCE

- | | | |
|----|------------------|-------------------------------|
| 1. | Philemon Kiprop | - Holding Brief for Secretary |
| 2. | Maryanne Karanja | - Secretariat |

PRESENT BY INVITATION

Applicant - Higawa Enterprises Limited

1. Gikandi Ngibuini - Advocate, Gikandi & Co. Advocates
2. Anthony Hinga - Director, Higawa Ent.

Procuring Entity- Kenya Ports Authority

1. Wamuyu Ikegu - Legal Officer, KPA

Interested Parties:

1. Oscar Owino - Coordinator, Magic Mirrors Enterprises
2. Jane Kimamu - Director, Beryl Homes
3. Doreen Makandi - Coordinator, Beryl Homes

THE BOARD'S DECISION

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

BACKGROUND OF AWARD

Introduction

The Kenya Ports Authority (hereinafter "KPA" or "the Procuring Entity") invited Tenders from eligible suppliers for the Provision of Cleaning and Landscaping Services (Preference Groups).

Tender Invitation

The Tender was advertised in *The Star* and *The Daily Nation* Newspapers and KPA website on 15th March 2017. The tender was closed on 7th April, 2017 at 0900 hours and opened immediately thereafter. Two hundred and twenty five (225) firms submitted bids by the closing time for submission of bids.

Tender Evaluation

The Procuring Entity's tender evaluation committee evaluated the tenders in three stages viz:-preliminary (mandatory), technical and financial evaluation stages. Seven bidders were not evaluated for not having submitted financial bids as stated in the tender opening minutes.

Preliminary Evaluation

During preliminary evaluation, bidders were assessed for compliance with mandatory requirements. Ninety nine (99) tenderers failed to comply with the mandatory requirements at this stage and were disqualified from further evaluation. One hundred and eighteen (118) bidders were declared responsive and hence proceeded to technical evaluation.

Technical Evaluation

Bidders were evaluated for specific experience in relation to the tender; adequacy of personnel; and possession of machinery, tools and equipment. The pass mark at the technical evaluation stage was 75%. Forty one (41) bidders did not attain the minimum score of 75% and were disqualified from further evaluation. Seventy seven (77) bidders attained a minimum score of 75% and qualified to be evaluated at the financial stage.

Financial Evaluation

The financial bids for the seventy seven firms were opened on 30th May, 2017 and evaluated according to their quotations. Their prices were compared and ranked.

Recommendations

After detailed individual zones evaluation, the Committee recommended that the tender be awarded to the lowest evaluated bidders as follows:

Item No.	Zone No.	Description	Bidder Name	Amount in Kshs
1	1	From Portreiz Junction to gate 24	Shirshore Limited	280,952.00
2	14	Mbaraki High/Low Level including the Road Reserves	Rokeen Enterprises	749,705.00
3	15	Kizingo Block 17, Tudor 104/105, KAFOCA and Naval Base	Beryl Homes Company Limited	199,056.00
4	17	Shimanzi, Makande including Road Reserves	Kisanya Limited	425,619.00
5	18	Gorofani, Makupa Welfare Centre including the Access Road	Yadhriba Limited	509,240.00
6	19	Makupa Asian including the Road Reserves	Monyangih Enterprises	552,229.60
7	20	Uhuru Gardens	Lawine Enterprises	357,048.00
8	22	I.C.D. Kisumu, including Estate, Road Reserves and Yards and Kisumu Pier	Magic Mirror Enterprises	533,680.00
9	23	New Lamu Port	Kisawi Limited	326,685.00

PROFESSIONAL OPINION

The Head of Procurement, pursuant to Section 84 (1) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter "the Act"), reviewed the evaluation reports and recommendations made therein and expressed to

the Accounting Officer his satisfaction that the process was done in accordance with the Act and consequently, advised the award of the tender as recommended by the evaluation committee, excluding zone 20, for a period of three (3) years.

M/s Higawa Enterprises Limited (hereinafter, "the Applicant") was notified, vide the letter dated 1st September, 2017, that its tender was unsuccessful.

THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s Higawa Enterprises Limited (hereinafter, "the Applicant") on 13th September, 2017 in the matter of Tender Number KPA/112/2016-17/MO for the Provision of Cleaning and Landscaping Services (Preference Groups) for the Kenya Ports Authority (hereinafter, "the Procuring Entity").

The Applicant sought for the following orders.

- 1. That the entire decision of the Respondent made on 1st September, 2017 in respect of Tender No. KPA/112/2016-17/MO be annulled in its entirety.*
- 2. An order of termination of the procurement process of Tender No. KPA/112/2016-17/MO and direct the commencement of a fresh procurement process of the said tender.*
- 3. In the alternative, and without prejudice to prayers (1) and (2) above, Tender No. KPA/112/2016-17/MO in respect to Zones 1, 14, 15, 17, 18, 19 and 20 be awarded to the Applicant herein, Higawa Enterprises Limited at Kshs 274,433.48/=, 327,381.48/=, 189,233.48/=, 397,421.48/=,*

486,681.86/=, 483,181.48/= and 322,081.48/=, respectively, being the lowest evaluated tender for the aforesaid zones.

4. Award of costs to the Applicant

The Applicant was represented by Mr. Gikandi Ngibuini advocate from the firm of M/s Mr. Gikandi Ngibuini, Advocates, while the Procuring Entity was represented by Ms. Wamuyu Ikegu, Legal Officer at Kenya Ports Authority. Interested parties from two firms were present and addressed the Board.

APPLICANT'S CASE

The Applicant averred that it submitted its bid before 09:00 Hours on 7th April, 2017 as per the Procuring Entity's request to all prospective tenderers. It averred further that the tender document did not expressly state the validity period of the tender and that the Respondent did not attach the Tender Data Sheet as required under Clause 17.1 of the Tender Document. The said clause provided as follows:

"17.1 Tenders shall remain valid for the period specified in the Tender Data Sheet after the deadline for Tender submission Specified in ITT Clause 21. A Tender valid for a shorter period shall be rejected by the Procuring Entity as non-responsive."

The Applicant submitted that in Tender No. KPA/114/2016-17, being one of the tenders advertised by the Respondent, it was clear under Clause 17.1 that the tender validity period was ninety (90) days. It further submitted that the Procuring Entity issued a notice on 11th July, 2017 indicating that the tender validity period had been extended by 30 days effective 16th July, 2017.

The Applicant stated that, in its opinion, the tender was not in existence after 7th July, 2017 the tender validity period having lapsed on 7th July, 2017. It went on to state that even if the validity period had been extended by a further 30 days from 16th July, 2017, the extended validity period ended on 16th August, 2017. To the Applicant, the awards made by the Procuring Entity for the subject tender on 1st September, 2017 after the alleged extension had lapsed could not have been lawful. It alleged that the First Respondent's decision to award the tender on 1st September, 2017 when the respondents knew on 1st September, 2017 that the Board would make a determination on the issue of tender validity on 7th September, 2017 in Review Cases Nos. 76 and 77 of 2017 was a cunning attempt by the Respondent to render the determination by the Board on that issue totally useless. To support its argument, the Applicant made reference to the decision in PPARB Appl. Nos. 76-2017 and 77-2017 in which the Board ruled that the validity periods of the subject tenders had lapsed and the decision of the Procuring Entity was declared null and void by the Board.

In conclusion the Applicant claimed that, when the financial bids were opened, its tender was the lowest tender in terms of price and had complied with all the terms stipulated in the tender document for various zones. It stated that, to its surprise, it was notified on 1st September, 2017 that its bid was not successful and also stated that the Procuring Entity had awarded the tenders to bidders who had not qualified at the financial stage.

Procuring Entity's response

In response, the Procuring Entity opposed the Request for Review and also raised preliminary issues. In its preliminary objection, the Procuring Entity

averred that the application was vexatious and an abuse of the review process. It stated that the Applicant was in possession of confidential material relating to a tender that was not the subject of the current application and which material the Applicant had relied on in the present application in contravention of the provisions of Section 176 (1) of the Act. It claimed that the offensive material the Applicant had annexed to the Request for Review included letters of notification to unsuccessful bidders as well as an extract of the confidential financial evaluation report relating to Tender No. KPA/114/2014-17/ADM – Provision of Housekeeping Services (Preference Groups).

To support its argument that the Applicant had committed an illegality and ought not to be allowed to benefit from the illegal act, the Procuring Entity cited the Board's decisions in PPARB Appl. No. 11/2016 – Amro Insurance Brokers Ltd =vs= Kenya Wildlife Service and PPARB Appl. No. 21/2015 – Thwama Building Services Ltd =vs= Tharaka Nithi County Government. It also referred to Court of Appeal decision in the case of Kenya Airways -vs - Satwant Singh Flora(Nairobi C.A. No. 54/2005), espousing at page 8 the maxim of *Exturpicausa non orituractio*, which states as follows:

“This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the

illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him."

The Procuring Entity submitted that the Applicant was misleading the Board by stating firstly that the Applicant was the lowest evaluated bidder and, secondly, that some of the bidders who had not qualified at the financial stage were awarded the tender. It argued, through the affidavit of Cosmas Makori that the basis of coming up with the lowest evaluated bidder included factors such as the Ministry of Labour minimum wage guidelines.

On the issue of the parties to the Request for Review, the Procuring Entity stated that Applicant had sued the Second Respondent under the guise that the Second Respondent was the first Respondent's Accounting Officer. It termed the act of the Applicant an affront to Section 2 (1) of the Act, Section 2 (1) and Section 67 of the Public Finance Management Act as well as Section 5 of the Kenya Ports Authority Act. It stated that Section 2 (1) of the Act defined an Accounting Officer as the meaning assigned to it under Section 2 (1) and Section 67 of the Public Finance Management Act and which, under the said section, is the person designated by the Minister. Under Section 5 of the Kenya Ports Authority Act, the Minister designates the managing director as the Accounting Officer for the organization. In the Procuring Entity's submission, Mr. Yobesh Oyaro was, by no means, the Accounting Officer, but an employee of the Procuring Entity. To the Procuring Entity, Mr. Oyaro was therefore being sued in his personal capacity, an act the Procuring Entity viewed as untenable since Mr. Oyaro could leave the organization at any time and wondered what would happen to the case were Mr. Oyaro to leave the employment of the Respondent.

On the alleged contravention of the said provisions of the Act by the Applicant, the Procuring Entity argued that the Applicant ought to be debarred from participating in any tender floated by the First Respondent in accordance with Section 176 (3) of the Act and Regulations 89, 90 and 91 of the Public Procurement and Disposal Regulations 2006 as amended in 2013.

On the issue of the tender validity, the Procuring Entity, through an affidavit sworn by Cosmas Makori, Principal Procurement Officer (Tenders) submitted that the tender was opened on Friday 7th April 2017 and thereafter evaluated for technical responsiveness between 18th April and 13th May 2017. It further submitted that it carried out a comprehensive technical evaluation in which 77 bidders including the Applicant attained the minimum score and progressed to the financial evaluation stage where they were evaluated and a report prepared. It also submitted that the Head of Procurement and Supply instructed the Chairman of the Tender Evaluation Committee to review the evaluation on the basis that the Committee had used the wrong minimum labour wage and had not incorporated the 15% housing allowance per month as directed by the Mombasa County Labour Office in their letter dated 1st November 2016.

The Procuring Entity stated that the Applicant did not submit the lowest evaluated financial bid and as such, was not recommended for award. It stated further that the tender evaluation process was completed within the tender validity period which was extended "*by dint of the letter issued dated 11th July, 2017*" and which was posted on to the Procuring Entity's website. It also stated that the subject tender was targeting preference groups under

Government policy and was not subject to mandatory requirement of a tender security.

The Procuring Entity therefore prayed that the Request for Review be dismissed with costs.

INTERESTED PARTIES' RESPONSES

Mr. Oscar Owino for Magic Mirrors Enterprises and Ms Doreen Makandi for Beryl Homes identified themselves with the submissions made by the Procuring Entity and opposed the Request for Review. Both stated that they were successful and stated that the Applicant did not qualify and wondered why it was complaining.

The Interested Parties urged the Board to dismiss the Request for Review.

APPLICANT'S REPLY

Mr. Ngibuini advocate in response submitted that Mr. Yobesh Oyaro was the one who applied Section 88 (1) of the Act for purposes of extending the tender validity period of the tender in question. He submitted that Mr. Oyaro could not, on the one hand enjoy the powers set out in Section 88 of the Act, and on the other argue before the Board that he was not the right person to be sued. Counsel argued that in PPARB Appl. Nos. 76/2017 and 77/2017, the issue of who was the right party to be sued was very elaborately considered by the Board and that since the Applicant had sued KPA together with Mr. Yobesh Oyaro it could not be said that this review was incompetent on that account.

Counsel for the Applicant stated that the Procuring Entity had conceded that the award was made outside, even the extended validity period but in the same vein wanted the unlawful award to remain simply because the Applicant had committed some illegality. He further stated that assuming that the Applicant had committed an illegality, that illegality could not be used to legalize the illegality of the Procuring Entity arguing that the illegality of the Procuring Entity under *Exturpicausa* means that the Procuring Entity's decision remains a nullity and therefore, in law, the Board had no choice but to declare it as such.

Mr. Ngibuini contended that the Board has powers to look at all the issues raised including the issue of confidentiality of documents. Mr. Ngibuini contended that the Board has the power to order investigations to be carried out under the provisions of Section 35 of the Act and if illegalities are found to have been committed by the Applicant in this Request for Review or in PPARB Appl. Nos. 76/2017 and 77/2017 then criminal prosecution ought to follow and then the authority may take debarment action. He further contended that the material complained of was submitted in PPARB Appl. Nos. 76/2017 and 77/2017 and Mrs. Ikegu had the opportunity to complain then but she did not arguing that this was clearly an afterthought for the purpose of defeating this particular application.

He urged that this application be allowed.

THE BOARD'S FINDINGS

The Board has considered the submissions made by all the parties and has further examined all the documents that were submitted to it and has identified the following issues for determination in this Request for Review:

1. *Whether the Applicant annexed confidential information to its Request for Review contrary to the provisions of Section 67 (5) of the Act.*
2. *Whether the Procuring Entity violated the provisions of Section 87 (1) of the Act by awarding the tender outside the tender validity period.*

The Board will now proceed to determine the issues framed for determination as follows:-

1. As to whether the Applicant annexed confidential information to its Request for Review contrary to the provisions of Section 67 (5) of the Act.

A preliminary issue having arisen, the Board is duty bound to inquire into it first and determine it before going into the merits of the request for review.

The Board has heard submissions by the Procuring Entity that the Applicant was in possession of confidential material relating to a tender that was not the subject of the current application. It has heard further submissions that the Applicant was in possession of the tender evaluation report for the tender which is the subject of the Request for Review. It has also heard submissions that the said confidential material and extracts of the tender report were annexed to the present Request for Review. It is the averment of the Procuring Entity that the Applicant was misleading the Board on the bidders who qualified for award during the evaluation of the tender. It is the further averment of the Procuring Entity that the Applicant sued the Second Respondent under the guise that the Second Respondent was the First Respondent's Accounting Officer, an act the Procuring Entity termed as an affront to Section 2 of the Act, Section 2 (1) and Section 67 of the Public

Finance Management Act as well as Section 5 of the Kenya Ports Authority Act..

Consequent to the foregoing alleged transgressions, the Procuring Entity argued that the Applicant contravened the provisions of Section 176 (1) of the Act and ought to be denied its prayer and be debarred from participating in any tender floated by the first Respondent in accordance with Section 176 (3) of the Act and Regulations 89, 90 and 91 of the Public Procurement and Disposal Regulations 2006 and as amended in 2013.

The Procuring Entity's preliminary objection raised several issues which the Board wishes to determine. On the limb as to whether the Applicant violated the provisions of Section 2 of the Act, the Board refers to the said provisions which state as follows:

Section 2 *"In this Act, unless the context otherwise requires –*

"Accounting officer" has the meaning assigned to it under section 2 of the Public Finance Management Act, 2012;"

The Board further refers to Section 170 of the Act which states as follows:

Section 170 *"The parties to a review shall be –*

- a) The person who requested the review;*
- b) The accounting officer of a procuring entity;*
- c) The tenderer notified as successful by the procuring entity; and*
- d) Such other persons as the Review Board may determine".*

The Board notes that this Request for Review with the Board on 13th September 2017. It is further noted that the Applicant listed the Respondents in the Request for Review as follows:

“Kenya Ports Authority - 1st Respondent/Procuring Entity”

“YobeshOyaro - 2nd Respondent/Accounting Officer”

It is not in dispute that Kenya Ports Authority, the first Respondent herein, is the Procuring Entity. It is not in dispute either that Mr.Yobesh Oyaro, the Second Respondent herein, is the Head of Procurement and Supply of the first Respondent as exemplified by the various correspondences submitted by it to the Board.

The issue for the Board to determine is therefore whether the Second Respondent was properly brought before the Board as a party to the review. The Board has had occasion in the past to deal with a similar matter. In PPARB No. 76/2017 and 77/2017 (Betoyo Contractors and JonaPestcon - vs- Kenya Ports Authority), the Board made the following finding:

“It therefore follows that the accounting officer of the Procuring Entity is an agent and the principal is the Procuring Entity. Under the principle of vicarious liability the actions of the agent are attributable to the principal. It is also a basic principle of the law of agency that the principal is bound by the actions of its agent. The Board finds and holds that the accounting officer is an agent of the Procuring Entity and where an agent and the principal are known as it is the case here, the principal is the one to be sued and not the agent. The accounting officer acts on behalf of the Procuring Entity but the Procuring Entity does not act on behalf of the accounting officer. It is the firm view of the Board that the Procuring Entity is the party in this Request for

Review and was properly sued and, equally, was properly represented in the proceedings."

It is common knowledge that the Procuring Entity is a legal entity with perpetual succession. As a state corporation, the Procuring Entity discharges its functions through its employees, including the Head of Procurement and Supplies Manager. Employees of the Procuring Entity when performing their duties in accordance with their terms of employment do so as agents of the Procuring Entity.

Arising from the provisions of Sections 2 and 170 of the Act and the Board's determination in PPARB No. 76/2017 and 77/2017 (**Betoyo Contractors and JonaPestcon vs Kenya Ports Authority**), it is the Board's view that the Second Respondent, being an agent of the First Respondent, is not a party to the review in terms of Section 170 of the Act. It is the Board's determination that the Second Respondent has no place in this review and ought not to have been sued in these proceedings. To that extent, it is the Board's view that the application is incompetent.

On the second limb of preliminary objection regarding the alleged violation of the provisions of Section 67 of the Act, the Board observes that the Applicant annexed at pages 104 to 113 of the Request for Review the following documents:

- a) Letters of notification in respect of Tender No. KPA/114/2014-17/ADM - Provision of Housekeeping Services (Preference Groups) addressed to:
 - i) M/s Zams Group Ltd
 - ii) M/s Zamilmar Enterprises Ltd
 - iii) M/s Samjush Contractors & Suppliers

- b) Extracts of the tender evaluation report of the tender subject of this request for review - pages 2 to 8 containing sections on opening of financial bids, estimated total cost per zone, financial evaluation, observation, recommendations and the evaluation committee members' signatures.

The Applicant admitted that it annexed the cited documents in its application in error. Counsel for the Applicant explained that the appended information was in his possession by virtue of the many similar cases he was handling and that he inadvertently included it in the Request for Review. The Board observes that it is clear from the Applicant's submission that the Applicant intends to demonstrate that the validity period of the tender subject of this Request for Review is similar to the validity period in Tender No. KPA/114/2016-17 found to have been 90 days. It is the Board's view that the two tenders are different. The particulars of one cannot apply to the other unless expressly stated in the tender document.

On possession of confidential information, Section 67 of the Act states as follows:

Section 67 (4) *"Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only a summary referred to in section 67 (2)(d)(iii)."*

Section 67 (5) *"Any person who contravenes the provisions of this section commits an offence as stipulated in section 176 (1) (f) and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years."*

The Board also refers to Section 176 of the Act which states as follows:

Section 176 (1) *"A person shall not—*

(a)

(b) knowingly lie to or mislead a person carrying out a duty or function or exercising a power under this Act;

.....

.....

(f) divulge confidential information under section 67"

Section 176 (2) *"A person who contravene the provisions of subsection (1) of this section, commits an offence and shall be liable upon conviction –*

(a) If the person is a natural person, to a fine not exceeding four million shillings or to imprisonment for a term exceeding ten years, or to both;

(b) If the person is a body corporate, to a fine not exceeding ten million shillings.

Section 176 (3) *"in addition to the penalty under subsection (2), a state or public officer involved shall be subject to internal disciplinary action while any other person who is not a state or public officer shall be debarred."*

It is clear from the above provisions that a bidder is not entitled to confidential information and possession of such information by a bidder constitutes a criminal offence. The Board noted in PPARB Appl. No. 21/2015 - Thwama Building Services Ltd - vs - Tharaka Nithi County Government as follows:

"...the issue of reliance on confidential information is a serious one and bears heavy consequences."

In the case of Amro Insurance Brokers Ltd – vs – Kenya Wildlife Service - PPARB Appl. No. 11/2016 the Board stated as follows:

"The Board has looked at the Applicant's conduct in this application and finds the same to be gross and highly inappropriate. The Applicant's conduct of obtaining evaluation reports and other bidders' tenders and other confidential documents defeats the objectives of Article 227 of the Constitution and the objectives of public procurement and is not capable of any reasonable explanation. Such conduct amounts to impunity and if allowed to recur will adversely affect competition, fair treatment to all bidders, it will diminish integrity and reduce transparency and accountability and erode public confidence in the procurement processes."

The Board notes that the Applicant annexed a significant part of the evaluation report in its application contrary to the provisions of Section 67 (4) of the Act which entitles it to only a summary of the evaluation report. It is the finding of the Board that the action of the Applicant constitutes a possible offence punishable under the provisions of Section 67 (5) and 176 (3) of the Act. The Board however takes into consideration the circumstances of the case and the explanation of the Applicant's advocate that the confidential information was annexed in error and further, takes into account the Advocate's admission of responsibility for the error. The Board does not therefore make any adverse finding against the Applicant for the mistakes of its advocate and shall not therefore order an investigation into this matter.

The effect of all the above findings is that the first Respondents contention that the 2nd Respondent was wrongly sued in these proceedings is upheld but

the grounds of objection based on the provisions of Section 67 of the Act is disallowed.

2. As to whether the Procuring Entity violated the provisions of Section 87 (1) of the Act by awarding the tender outside the tender validity period.

The Board has considered the Applicant's Request for Review dated 11th September, 2017 and which was filed with the Board on 13th September, 2017 together with the verifying affidavit sworn by Mr. Simon Ndana on 11th September, 2017 and the further affidavits sworn by John Kivunzi and Gikandi Ngibuini. The Board has also considered the Procuring Entity's Response dated 11th September, 2017 together with the documents submitted to it and the oral submissions made by the parties to this Request for Review. It was common ground during the hearing of this Request for Review that the present dispute arose from the letter of notification dated 1st September 2017 to the Applicant where the Procuring Entity stated as follows:-

"Reference is made to your participation in the captioned tender.

This is to inform you that your bid was not successful. Pursuant to section 87 (3) of the Public Procurement and Asset Disposal Act, 2015, your bid was not the lowest evaluated".

It is not in dispute that the Procuring Entity advertised Tender Number KPA/112/2016-2017/MO for Provision of Cleaning of Cleaning and Landscaping Services (Preference Groups) on 15th March 2017. The said tender was closed and opened on 7th April, 2017 with two hundred and twenty five (225) tenderers, including the Applicant, submitting bids. It is further not in dispute that the tender was evaluated in three stages of

preliminary (mandatory), technical and financial evaluation. The Applicant was disqualified at the financial evaluation stage for not being the lowest evaluated bidder.

It is uncontested that the Procuring Entity, *vide* the letter dated 11th July 2017, sought to extend the tender validity period of the subject tender. The letter stated as follows:

“Pursuant to section 88 (2) of the Public Procurement and Asset Disposal Act, 2015, the Authority requests all bidders who participated in the above tenders to extend tender validity by a further 30 days effective from 16th July, 2017 to facilitate completion of tendering process”.

It is also uncontested that the Procuring Entity evaluated the tenders and awarded the tenders to various tenderers based on zones. The letters of award to successful bidders and notifications to unsuccessful bidders were dated 1st September 2017.

The issue for the Board to determine is whether the Procuring Entity awarded the tender to successful bidders outside the tender validity period as alleged by the Applicant and, if that be the case, whether such awards are proper in the eyes of the law.

To determine this issue the Board has looked at the tender document and in particular the following Sections of the document;

- i) Invitation for Tenderers found at Section I;
- ii) Instructions to Tenderers found at Section II.

The Board has further looked at the following provisions of the tender documents;

Section I - Invitation for Tenderers

Clause 5 *Enquiries can be made via email address: ctcsecretary@kpa.co.ke.*

Section II -Appendix to Instructions to Tenderers

Clause 17.1 *"Tenders shall remain valid for the period specified in the Tender Data Sheet after the deadline for Tender submission Specified in ITT Clause 21."*

Clause 17.2 *"In exceptional circumstances, prior to expiry of the original Tender validity period, the Procuring Entity may request that the Tenderers extend the period of validity for a specified additional period."*

Clause 18A.3 *"Any Tender security must be valid for a period of at least 30 (Thirty) days after the expiry of the Tender Validity Period."*

Having looked at the sections of the tender document outlined above, the Board observes that the Tender Data Sheet did not specify the period during which tenders were to remain valid pursuant to Clause 17.1 of the Appendix to Instructions to Tenderers. Clause 18A.3 of the Appendix to Instructions to Tenderers states that any tender security must be valid for at least 30 (thirty) days after the expiry of the tender validity period. The subject tender being a tender reserved for special groups, is exempted from the requirement of

tender security. In the absence of the specification of the tender validity period in the Tender Data Sheet pursuant to Clause 17.1 of the tender document, and in the further absence of the tender security form pursuant to Clause 18A.3 at Section II of the tender document, it is not possible to determine with certainty the period of validity of the tender. In arriving at this conclusion, the Board has considered the argument that the Procuring Entity, *vide* the letter dated 11th July 2017 extended the tender validity period by a further 30 days effective 16th July 2017. It is the Board's considered view that the tender validity period was indeterminate and the Procuring Entity could not possibly extend that which is indeterminate. The purported extension of validity by a further period of 30 days was therefore of no effect.

Having established that the tender validity period for the tender which is the subject of this Request for Review was unknown, the question that arises is whether the tender was validly awarded. The Board is cognizant of the provisions of Section 87 (1) the Act, which states as follows:

Section 87(1): *"Before the expiry of the period during which tenders must remain valid, the accounting officer of the Procuring Entity shall notify in writing the person submitting the successful tender that his tender has been accepted."*

On extension of tender validity, Section 88 (1) of the Act provides as follows:

Section 88(1): *"Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period."*

The principle that a tender can only be awarded during the tender validity period has been established by various decisions as illustrated by the case of

Bricks Security Services Limited -vs- Egerton University PPARB Appl. No. 23 of 2008; Vulcan Limited -vs- Ministry of Health (PPARB Appl. No. 45 of 2004; and Transcend Media Group Ltd -vs- Kenya Power & Lighting Company Ltd (PPARB Appl. No. 70 of 2017.

In the case of Vulcan Limited -vs- Ministry of Health (PPARB Appl. No. 45 of 2004 the Board stated as follows:-

"...The Board considers that with regard to its validity, a tender must be valid on the date it is opened and thereafter for the requisite duration indicated by the tender conditions. As such, the duration of the validity of a tender should be counted commencing from and including the date of tender opening and expiring on the last day indicated in the tender conditions."

The Board notes based on the Vulcan case cited above, that the duration of the validity of a tender should be counted commencing from and including the date of tender opening and expires on the last day indicated in the tender conditions. As already observed by the Board, the last day of validity for this tender was not specified in the tender conditions. It is not in doubt that the tender subject of this Request for Review was opened on 7th April 2017. It is further not in doubt that the Procuring Entity, *vide* the letter dated 11th July 2017, sought to extend the validity period of the subject tender. It is not contested that the tender was awarded on 1st September, 2017. It is the finding of the Board that the tender validity period having been indeterminate, it cannot be said that the tender was awarded outside the tender validity period. This ground of review therefore fails and is disallowed.

The Board has also considered the Applicant's contention that it was the lowest evaluated bidder. The Applicant stated that it based its submissions on this issue on the tender sums which were read out during tender opening. The Procuring Entity opposed this ground and submitted that there was no evidence placed before the Board to demonstrate that the Applicant was the lowest evaluated bidder and stated that the Applicant was in fact, not the lowest evaluated bidder.

The Board has considered the arguments for and against this issue and finds that there was no evidence which was placed before the Board by the Applicant to show that it was the lowest evaluated bidder. The Applicant's case is indeed solely based on the results read out at the tender opening. The Board finds that a successful bidder can only be determined upon the evaluation of tenders and an award made as provided for under Section 86 (1) of the Act. The Board further finds that even based on the results read out at the tender opening, the Applicant's price was not the lowest unevaluated price. The Board therefore has no other option but to dismiss this ground of review.

FINAL ORDERS

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

1. The Request for Review dated 11th September, 2017 and filed with the Board on 13th September, 2017 by the Applicant, M/s Higawa Enterprises Limited in respect of Tender Number KPA/112/2016-

2017/MO for Provision of Cleaning and Landscaping Services (Preference Groups) to Kenya Ports Authority be and is hereby disallowed.

2. The Procuring Entity is at liberty to proceed with the procurement process of the subject tender to its logical conclusion.
3. Each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 4th day of October, 2017.



CHAIRMAN
PPARB



SECRETARY
PPARB