

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 78/2017 OF 28th AUGUST, 2017

BETWEEN

LORDSHIP AFRICA LIMITED.....APPLICANT

AND

NAIROBI CITY COUNTY1ST RESPONDENT

EDERMAN PROPERTY LIMITED.....2ND RESPONDENT

Review against the decision of the Nairobi City County in the matter of Tender No. NCC/UR&H/T/514/2016-2017 for Request for Proposal (RFP) for the Urban Renewal and Redevelopment of Phase 2 – Ngong’ Road Estate through Joint Venture Partnership)

BOARD MEMBERS

- | | |
|------------------------|----------|
| 1. Paul Gicheru | Chairman |
| 2. Hussein Were | Member |
| 3. Rosemary Gituma | Member |
| 4. Peter Bitia Ondieki | Member |

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant –

1. John Mbaluto Advocate
2. Berly Rachier

Lordship Africa Limited

Oraro & Company
Oraro & Company

1st Respondent (PE)–Nairobi City County

1. Erick Abwao Advocate
2. Muchru-Oyatta & Advocates
3. Dr. Patrick Mwangangi

NCC
Advocate
Head of Supply Chain

2nd Respondent: Edermann Property Limited

1. Njeri Mucheru Advocate

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

This was an open tender (RFP) which was advertised in the local dailies ie. The Standard on Monday 27th February, 2017 and The Star on Friday 24thFebruary, 2017 respectively. Only Three (3) bidders responded. The three (3) proposals were received and opened. All the three bidders responded to the RFP document as shown below. Bidder number two (02) – (M/s Goldland Company Limited) submitted:

One original & two copies of the technical proposal and one original and two copies of the mandatory documents.

Both bidder number one (01) M/s Edermann Property Limited & bidder number three (03) M/s Lordship Africa Limited presented

One original & three copies of the technical proposal and one original and three copies of the mandatory requirements

Evaluation process

The evaluation process was carried out in four stages; mandatory requirements, technical, financial and negotiation.

The following mandatory requirements were evaluated:-

1. Bid Security for the Project in accordance with Annex A (Appendix to Instructions to Bidders) and Standard Form IX.
2. A covering letter in accordance with Standard Form I.
3. The Bidders Information Sheet in Accordance with Standard Form II.
4. Bidding Consortium (BC), the Power of Attorney for designating the Lead Consortium Member in accordance with Standard Form V.
5. Power of Attorney to the Bid Signatory in accordance with Standard Form
6. The Certificate of Bidder's visit to site in accordance with Standard Form
7. Format of undertaking in accordance with Standard Form VII.
8. In case of a Bidding Consortium (BC), the Joint Bidding Agreement in accordance with Standard Form VIII.
9. The requisite number of copies of Bid documents as stipulated in the RFP.

OBSERVATIONS

1. Bidder no. 02M/s Goldland Company Limited did not provide certificate of qualified Bidder's visit to site in accordance with standard form IV
2. Bidder No. 03 M/s Lordship Africa Limited provided a Bid Security, whose expiry date is on 14th July, 2017. This Renders the validity of the bid to eighty five 85 days instead of ninety (90) as required in the RFP Clause number 3.11.
3. Bidder number three (03) M/s Lordship Africa Limited together with his proposal included a set of Conditions accompanying the bid which is contrary to clause number 3.14.2of the RFF and therefore the Bid becomes non Responsive.
4. Bidder no. 02 M/s Goldland Company Limited and Bidder No. 03 M/s Lordship Africa Limited Proposal becomes Non- responsive and therefore do not proceed to the next evaluation stage
5. Bidder one (01) M/s Edermann Property Limited proposal becomes Responsive and therefore proceeds to the next evaluation stage. (Technical Bid Evaluation).

TECHNICAL EVALUATION

The eligibility criteria for this stage is as outlined below:-

1. Bidders must prove that they have undertaken project(s) of similar nature on a JV, single Entity or any other partnership agreements (Enclose copy of agreement with the client, which clearly mentions

the total contract value of project or Completion Certificate from the client for the development).

1. Demonstrate the ability to put together a project management team to deliver the project within a maximum period of 24 months. (Provide CV's and Certificates, both professional and educational, of key personnel to be involved in the project and their roles).
2. Bidders shall demonstrate ability to raise equity for deployment to the development of the Project to the extent of USD 30 Million. In case of consortium, the Bidder has to demonstrate the ability of each member's contributions towards the above amount and indicate the equity available for deployment towards the project. (Bidders to attach audited accounts for the last three (3) Years).
3. Demonstrate capacity and ability to raise debt funding to the tune of USD 60 Million besides the minimum equity contribution stated in item (c) above. (Bidders to attach a Letter from the Lender expressing interest to support the Project).
4. Demonstrate ability to arrange competitive end buyer Mortgage schemes.

The outcome of this evaluation concluded that the bidder, M/s Edermann Property Limited was the only bidder who attained the pass mark of 70% hence qualified for financial evaluation and subsequent negotiation for providing the most responsive bid.

RECOMMENDATION

The evaluation committee recommends that Bidder No. 01 the consortium of M/s Edermann Property Limited and M/s Archihub Africa Limited of P.O Box 42541-00100 were allowed to proceed to the financial evaluation stage for Tender No. NCC/UR&H/T/514/2016-2017 – Request For Proposal (RFP) For Urban Renewal And Redevelopment Of Phase 2 – Ngong Road Estate through Joint Venture Partnership after scoring above the minimum required pass mark of 70% at the technical evaluation stage.

PROFESSIONAL OPINION

The head of Procurement Pursuant to section 84 (1) of the Public Procurement and Asset Disposal Act, 2015, having reviewed the evaluation reports and recommendations made therein, was satisfied that the process was done as per the provisions of the Public Procurement and Asset Disposal Act, 2015, and consequently recommended award of the tender to the firms M/s Edermann Property Limited at tender sum of Ksh.19,698,417,830/=.

REVIEW

The Request for Review was lodged by M/s Lordship Africa Limited on 28th August, 2017 in the matter of the Tender No. NCC/UR&H/T/514/2016-2017 which tender was a Request for Proposal (RFP) for the Urban Renewal and Redevelopment of Phase 2 – Ngong' Road Estate through Joint Venture Partnership.

The Applicant sought for the following orders:

- a) *The decision dated 2nd August, 2017 of the accounting officer of the 1st Respondent be annulled and the Tender be awarded to the Applicant; or*
- b) *In the alternative the procurement proceedings be annulled in their entirety and the 1st Respondent commence a new procurement process;*
- c) *Costs of the Review be provided for;*
- d) *This Honorable Board be pleased to issue such further orders as it may deem fit.*

During the hearing of this Request for Review, the Applicant was represented by John Mbaluto Advocate from the firm of M/s Oraro and Co. Advocates while the Procuring Entity was represented by Mr. Abwao Erick, a Legal Officer with the procuring entity. The interested party present M/s Edermann Property Limited was represented by M/s Njeri Mucheru Advocate.

The Board has considered the Request for Review together with the supporting affidavit sworn by Jonathan Jackson on 28th August, 2017, the Replying affidavit dated 1st September, 2017 sworn by one Patrick Mwangangi on behalf of the Procuring Entity and the one sworn by one Ze Yun Yang on 7th September, 2017 on behalf of the successful bidder herein M/s Edermann Property Limited together with all the documents annexed thereto. The Board has also considered all the original tender documents, evaluation reports and all the other documents submitted to it by the

Procuring Entity pursuant to the provisions of Regulation 74(3) of the Public Procurement and Disposal Regulations which are still in force.

In addition to the above documents, the Board has also considered the submissions made by all the advocates who appeared before it during the hearing of this Request for Review and it is clear from a totality of all the above documents and the submissions made that this Request for Review raised the following issues for determination the first two being issues of jurisdiction:-

- a) **Whether the Board has the jurisdiction to hear and determine the Applicant's Request for Review on the ground that the same was filed out of time contrary to the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act.**
- b) **Whether the Board is precluded from hearing and determining the Request for Review before it under the provisions of Section 167(4) (c) of the Public Procurement and Asset Disposal Act.**
- c) **Depending on the Boards determination on issues (a) and (b) above:-**
 - i. **Whether the evaluation of the subject tender was carried out within the prescribed evaluation period of 21 days set out under the provisions of Section 126(3) of the Public Procurement and Asset Disposal Act and related to this issue whether the evaluation and the award of the subject tender was done within the tender validity period for this tender.**

- ii. **Whether the Applicant was unfairly disqualified at the preliminary evaluation stage.**
- iii. **Whether the Applicant was notified of the outcome of its tender pursuant to the provisions of Section 126(4) of the Public Procurement and Asset Disposal Act.**
- iv. **Who should bear the costs of this Request for Review.**

In the proper order of things the Board will first determine the two issues of jurisdiction set out above and depending on the outcome of the determination of the two issues, the Board will then proceed and determine the Request for Review on its merits.

ISSUE NO. I

Whether the Board has the jurisdiction to hear and determine the Applicant's Request for Review on the ground that the same was filed out of time contrary to the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act.

The first issue of jurisdiction was raised by both Counsels for the Procuring Entity and Counsel for the successful bidder.

Mr. Obwao who argued this preliminary objection on behalf of the Procuring Entity while relying on the Replying Affidavit sworn by Mr. Patrick Mwangangi submitted that the Procuring Entity published a notice inviting members of the public to submit tenders for the Urban Renewal and Redevelopment of Phase 2 for the Ngong Road Estate a Joint Venture

partnership and that three consortia which have already been set out in the background to this decision submitted their bids for evaluation.

Counsel for the Procuring Entity further submitted that the Procuring Entity thereafter fully evaluated the tenders submitted to it and prepared letters of notification dated 2nd August, 2017 under reference NO. NCC/JO/ITEM N. 01 VOL. 01/2017-18/fn/009/2017 which the Procuring Entity dispatched either by physical delivery or registered post to both the successful bidder and the unsuccessful bidders.

The Procuring Entity produced the letter of notification addressed to both the successful bidder and the unsuccessful bidders as a bundle which was marked as annexure PM4 and attached to the Replying affidavit of Mr. Mwangangi. The Procuring Entity also submitted to the Board the original official postal receipt from the Postal Corporation of Kenya dated 4th August, 2017 under reference number RD12311571 KE and based on the letters of notification and the original official Postal Corporation of Kenya receipt, Counsel for the Procuring Entity submitted that under the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act, the Applicant ought to have filed its Request for Review with the Board within a period of fourteen (14) days from 4th August, 2017 and that the Request for Review which was filed by the Applicant on 28th August, 2017 was therefore filed out of time and consequently that the Board did not have the jurisdiction to hear and determine the same.

Counsel for the Procuring Entity therefore urged the Board to strike out the said Request for Review with costs.

M/s Njeri Mucheru advocate for the successful bidder associated herself with the submissions made by Counsel for the Procuring Entity and affirmed that the Applicant's Request for Review was filed out time.

Counsel for the successful bidder submitted that in addition to the grounds argued by Counsel for the Procuring Entity, the Applicant had in its pleadings asserted that it had learnt of the alleged breaches of the provisions of the Act in May 2017 and that under the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act, the Applicant ought to have filed its Request for Review with the Board within a period of fourteen (14) days from the said May, 2017. She therefore contended that the Applicant's Request for Review which was filed with the Board on 28th August, 2017 was filed out of time and that the same should therefore be also struck out on that ground.

Mr. Mbaluto Advocate for the Applicant opposed the first limb of the Procuring Entity and the successful bidder's preliminary objection and asserted that the same lacked any legal basis. He contended that under the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act, a bidder who was aggrieved by the decision of a Procuring Entity was entitled to file a Request for Review within fourteen (14) days either upon learning of the alleged breaches of the provisions of the Act or the

regulations and or within fourteen (14) days from the date of being notified of the outcome of its tender.

Counsel for the Applicant stated while relying on the averment at paragraph 9 of its Request for Review and the one appearing at paragraph 10 of the supporting affidavit of Jonathan Jackson that the Applicant was not notified about the outcome of its tender until 15th August, 2017 and that being the position the Request for Review which was filed with the Board on 15th August, 2017 was therefore filed within time.

It was the Applicant's case in opposition to this ground of preliminary objection as set out at paragraphs 8, 9 and 10 of its supporting affidavit that upon submitting and the opening of its bid on 10th March, 2017, the Applicant did not receive any further communication from the Procuring Entity either within the bid validity period or at all. The Applicant further contended that sometime in July, 2017, the Applicant became aware that the tender had been awarded by the Procuring Entity and further that the successful bidder had entered into a provisional contract.

The Applicant averred that as a result of the discovery of the above facts, it instructed the firm of M/s Oraro & Company Advocates to write to the Procuring Entity inquiring about the certain aspects relating to the tender which the said firm did on 28th July, 2017 in a letter which the Applicant produced as annexure JJ1 appearing at pages 4-5 of the Request for Review.

Counsel for the Applicant submitted that the letter dated 28th July, 2017 from the Applicant's advocates did not elicit any response but that on 15th August, 2017 the Applicant received a notification dated 14th August, 2017 from the Postal Corporation of Kenya asking it to collect a letter from the said Corporation and that it is upon collecting the said letter that the Applicant became aware that its tender was unsuccessful. The Applicant produced a copy of the notification from the Postal Corporation of Kenya, a copy of the envelope containing the letter dated 2nd August, 2017 together with a copy of the letter of notification. All these documents appear at pages 6-8, 9 and 10-11 respectively of the Request for Review.

Counsel for the Applicant therefore urged the Board to find that the Procuring Entity's preliminary objection lacked merit and dismiss the same.

The Board has considered the submissions made to it by all the parties regarding the first ground of preliminary objection together with all the documents which were put forward by the said parties in support or in opposition to this ground of preliminary objection.

Before proceeding to examine the said evidence, the Board wishes to restate that under the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act, a bidder who is aggrieved by the decision of a Procuring Entity must file a Request for Review against the said decision within a period of fourteen (14) days either from the date of

becoming aware of the alleged breaches of the Act, the Regulations or the tender documents or from the date it is notified of the outcome of its tender.

The Board further wishes to observe that it does not have the power to extend the statutory period for the filing of a Request for Review under the provisions of Section 167(1) of the Act. This legal position has been stated in several decisions given both by the High Court and the Board and one such decision is the case of **Republic -vs- The Public Procurement and Administrative Review Board and 2 Others (2015) eKLR** where the Honourable Justice W. Korir while dealing with a similar provision contained in the repealed Public Procurement and Disposal Act (2005) stated the law as follows:-

“The jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender has not been concluded (emphasis added)..... The timelines in the Public Procurement and Disposal Act were set for a purpose. Proceedings touching on procurement matters ought to be heard and be determined without undue delay. Once a party fails to move the Board within the time set by the Act or by the Regulations, the Jurisdiction of the Board is extinguished in so far as the particular procurement is concerned”.

The Board has examined the evidence placed before it by the parties and particularly the evidence placed before it by the Procuring Entity and the Applicant and finds that the Postal Corporation of Kenya receipt number RD12311571 KE dated 4th August, 2017 an original copy of which was availed to the Board by the Procuring Entity establish that the letters notifying the unsuccessful bidders that their tenders were unsuccessful were both delivered to the Postal Corporation of Kenya on 4th August, 2017.

The Applicant however alleged that it received the letter of notification from the Postal Corporation of Kenya on 15th August, 2017 upon being notified by the said Corporation to collect a registered mail from the Corporation.

The Board wishes to state that under the provisions of the law an addressee of a letter which is delivered through registered mail is deemed to have received the said letter upon the same being delivered by the party sending it to the mail box of the addressee which in this case was done on 4th August, 2017. It cannot therefore be a defence by the addressee that it collected the letter long thereafter as the decision on when or whether to collect the letter at all lies with the addressee.

Having delivered the letter of notification to the Postal Corporation of Kenya on 4th August, 2014, the Procuring Entity had therefore effectively discharged its obligation regarding service of the letter of notification and

the Applicant therefore ought to have filed it's Request for Review within fourteen (14) days from the date of notification.

The Board and the court have additionally severally held that for the purposes of computing time in order to determine when a Request for Review should be filed, therefore started running time starts running from the next day after the date of service of a notification. Time in case therefore started running from 5th August, 2017, counting the number of fourteen (14) days from 5th August, 2017, the Applicant ought to have filed it's Request for Review at least by 18th August, 2017 and that the Request for Review which was filed by the Applicant herein with the Board on 28th August, 2017 was therefore filed out of time and the same is clearly incompetent.

Further and in addition to what the Board has stated above, the Applicant admitted at paragraphs 8 and 9 of the supporting affidavit of Jonathan Jackson that the Applicant become aware that the tender in issue had been awarded to the successful bidder in July, 2017. The Applicant further stated that as a result of this knowledge, it instructed its advocates to write a letter dated 28th July, 2017 to the Procuring Entity inquiring about certain aspects relating to the tender in question.

It is therefore the Board's further view based on the above admissions that the Applicant was aware of any alleged breaches of the Act, the Regulations and the tender document at least by 28th July, 2017 this being

the date when its advocates wrote the letter of the same date to the Procuring Entity.

The Applicant was therefore obliged by law to file a Request for Review with the Board challenging the alleged breaches by the Procuring Entity within Fourteen (14) days from 28th July, 2017 or so soon thereafter but not to wait until a month had lapsed.

The Board therefore additionally finds based on this second reason that the Applicant's Request for Review contravened the provisions of Section 167(1) of the Act.

The upshot of all the above findings is that the first limb of the Procuring Entity's preliminary objection as supported by the successful bidder succeeds and the same is allowed.

ISSUE NO. II

Whether the Board is precluded from hearing and determining the Request for Review under the provisions of Section 167(4) (c) of the public Procurement and Asset Disposal Act.

Turning to the second ground of preliminary objection it was admitted by all the parties during the hearing of the Applicant's Request for Review and this was also evident from the documents filed that the Procuring Entity and the successful bidder entered into a contract under the provisions of Section 135 of the Public Procurement and Asset Disposal Act upon the conclusion of the evaluation process.

The successful bidder produced the contract agreement dated 17th August, 2017 as annexure ZYY1 which was annexed to the Replying affidavit of Ze Yun Yang sworn on 7th September, 2017.

Notwithstanding the obvious fact that there was a contract in force between the Procuring Entity and the successful bidder, Counsel for the Applicant urged the Board to find that the said contract was invalid because the same was executed without seeking the authority of the Attorney General since the tender sum herein was above the sum of Kenya Shillings five Billion.

The Board has read the relevant provisions of the law and has also perused the original contract agreement entered into between the Procuring Entity and the successful bidder.

It is plainly clear from the provisions of Section 167(4) (c) of the Act that the Board is precluded from hearing any dispute where a contract has been entered into between the Procuring Entity and the successful bidder.

The said Section 167(4) (c) of the Act provides as follows: -

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

(a)

(b).....

(c) Where a contract is signed in accordance with Section 135 of this Act.

Turning to the Applicant's contention that the said contract was illegal for want of authority and or the consent of the Attorney General, the Board is of the respectful view that the said argument cannot stand for the reason that the same was not pleaded by the Applicant as a ground of challenge in its Request for Review.

The Board has read through all the 17 grounds of review set out by the Applicant in its Request for Review and nowhere in those 17 grounds did the Applicant challenge the contract entered into between the Procuring Entity and the successful bidder.

A look at the three prayers which the Applicant sought before the Board and which have already been set out in this decision also shows that the Applicant did not seek to have the contract entered into on 17th August, 2017 annulled or set aside.

While the Board appreciates that the issue of the existence of the contract dated 17th August, 2017 arose during the course of the hearing of the Request for Review, the Applicant ought to have applied to amend its Request for Review and raise any issues of illegality as a basis for seeking any remedy against the contract.

In the absence of any pleadings before it setting out the grounds and the prayer for the nullification of the said contract, the Board would clearly be acting contrary to the law if it were to grant any relief against the contract.

The fact that the Board cannot hear and determine procurement disputes where a contract has been entered into by parties has been the subject matter of several decisions as illustrated by the case of **TeamEngineering SPA= vs=Kenya Railways Corporation**(PPARB Application No.21 of 2014)where the Board declined to hear a request for review on among other grounds that there was a contract in existence entered into between the procuring entity and the successful bidder.

Consequently this ground of preliminary objection similarly succeeds and is allowed.

The effect of a finding that the Board does not have the jurisdiction to hear a particular dispute is that Board cannot consider the merits of the issues placed before it for consideration. The Board must therefore immediately down its tools upon finding that it has no jurisdiction to consider the issue further. The best and the often quoted decision to support the above proposition is the Court of Appeal decision in the case of the **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi JA held as follows;

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has

no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law draws tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

The upshot of all the foregoing findings, is therefore that both limbs of the Procuring Entity and the successful bidder’s preliminary objection succeed and are allowed with the result that the Applicant’s Request for Review dated 25th August, 2017 and which was filed with the Board on 28th August, 2017 is hereby struck out in terms of the following final orders.

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:-

- a) **The Applicant’s Request for Review dated 25th August, 2017 and which was filed with the Board on 28th August, 2017 in respect of tender number NCC/UR &H/T/514/2016 – 2017 for the Urban Renewal and Redevelopment of Phase 2 – Ngong Road Estate through Joint Venture Partnership be and is hereby struck out.**

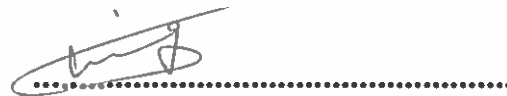
- b) The Procuring Entity is therefore at liberty to proceed with the procurement process herein to conclusion.
- c) Each party will however bear its own costs of the Request for Review.

Dated at Nairobi on this 11th day of September, 2017.



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CHAIRMAN
PPARB



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SECRETARY
PPARB