

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW 90 /2017 OF 12TH OCTOBER, 2017

BETWEEN

MFI DOCUMENTS SOLUTIONS LTD.....APPLICANT

AND

KENYA RAILWAYS CORPORATIONPROCURING ENTITY

Review against the decision of the Kenya Railways Corporation in the matter of Tender No. KRC/PLM/WB/063/2016-17-LOT 1 for the Digitization of Records/Works for ICT-Document Handling System at Kenya Railways

BOARD MEMBERS

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|--------------------|-----------|
| 1. Paul Gicheru | -Chairman |
| 2. Weche Okubo | - Member |
| 3. Peter B.Ondieki | - Member |
| 4. Gilda Odera | -Member |

IN ATTENDANCE

- | | |
|------------------------|---------------------------------------|
| 1. Mr. Philemon Kiprop | - Secretariat |
| 2. Ms.Maryanne Karanja | -Secretariat (taking the proceedings) |

PRESENT BY INVITATION

APPLICANT – MFI DOCUMENT SOLUTIONS LTD

- | | |
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| 1. Nick Omari | Mangerere Bosire & Associates Advocates |
| 2. Ian Gesura | Intern |
| 3. Harikshin | Product Manager |
| 4. Robert Barasa | Product Manager |
| 5. Bhaji Raj | Product Manager |

PROCURING ENTITY –KENYA RAILWAYS CORPORATION

- | | |
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| 1. G.M Nyaanga | Mwaniki Gachoka Advocates |
| 2. Emily Sopiato | Pupil at Mwaniki Gachoka Advocates |
| 3. John Kanyori | Procurement Officer |

**INTERESTED PARTY- DIGITAL IMAGING & SCANNING
INTERNATIONAL LIMITED**

Nicholas Okemwa	Sifuna & Company Advocates
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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 Invitation to Tender was sent out on 23rd May 2017 to my Gov and uploaded on Kenya Railways website and IFMIS Supplies Portal on 23rd May 2017. The tender closed and opened on 13th June 2017. A total number of 14 bids were returned at tender closing date for both lots 1 and 2.

The Evaluation Committee (EC) was appointed on 27th June 2017 in accordance with World Bank Guidelines and carried out the evaluation process in accordance with the criteria set out in the tender document. The World Bank Guidelines provide for preliminary evaluation, then ranking of the bids according to the financial submissions.

Preliminary Evaluation

The Preliminary Evaluation to determine responsiveness to all the eligibility and other mandatory requirement according to World Bank Guidelines. All the Five (5No.) firms that returned bids in regard to Lot 1 passed this stage and proceeded to the financial evaluation stage. The table below shows the firms and their respective bid prices.

Name	Amount(s) or %
M/s MFI Document Solutions Ltd	Lot 1:Kshs.44,669,163
M/s Plan and Trend (EA) Ltd	Lot 1:Kshs.34,800,000
M/s Coseke Kenya	Lot 1 Kshs.41,760,000
M/s Digital Imaging and Scanning International	Lot 1;Kshs.59,850,000

M/s Systematica Ltd	Lot 1;Kshs.82,940,000
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The first three lowest bids were subjected to technical evaluation and failed to meet the technical requirements. The fourth bidder was evaluated on the technical requirement and passed the stage.

TECHNICAL EVALUATION

The bids were evaluated according to The Word Bank Guidelines from the lowest as follows;

a) M/s Plan and Trend (EA) Ltd

The bidders were required to specify scanning software and models of scanners to use in scanning and Indexing for all types of documents, books and Maps in the registry. The scanning software used must support a wide range of scanner models, driver interfaces and capability to output 240,000 images per day. In addition have Multifeed Detection, Ultrasonic Multifeed featuring.

The bidder provided Ngenuity 9150 which has a capacity of 150,000 per day and which cannot index and does not have Multifeed Detection and separating trays to handle 240,000 specified in the tender document.

The bidders were required to submit a valid service and maintenance agreement for all the equipment proposed to be used.

The bidder did not attach service and maintenance agreement for the equipment.

The bidder failed this stage and therefore did not proceed.

b) M/s Coseke Kenya

The bidders were required to specify scanning software and models of scanners to use in scanning and Indexing for all types of documents, books and Maps in the registry. The scanning software used must support a wide range of scanner models, driver interfaces and capability to output 240,000 images per day. In addition have Multifeed Detection, Ultrasonic Multifeed featuring.

The second lowest bidder provided Ngenuity 9150 and Kodak 3200 and Kodak 730. However they attached brochures for Kodak 730 which has a capacity of 90,000 per day and Ngenuity 9150 which has a capacity of 150,000. Both cannot index and do not have Multifeed Detection and separating trays to handle 240,000 specified in the tender document.

Bidders were required to attach brochures of all equipment's to be supplied. The bidder attached brochures for two machines. However they did not attach a brochures for Kodak 3200.

The bidder did not pass this stage and was dropped.

c) M/s MFI Document Solutions Ltd

The bidders were required to specify scanning software and models of scanners to use in scanning and Indexing for all types of documents, books and Maps in the registry. The scanning software used must support a wide

range of scanner models, driver interfaces and capability to output 240,000 images per day. In addition have Multifeed Detection, Ultrasonic Multifeed featuring.

The third lowest bidder attached DRG 1100 and 1130 which has a capacity of 25,000 images per day and the other one 30,000. Both machines cannot index and do not have Multifeed Detection and separating trays to handle 240,000 specified in the tender document.

The bidder did not pass this stage and was dropped.

d) M/s Digital imaging and Scanning International

The bidders were required to specify scanning software and models of scanners to use in scanning and Indexing for all types of documents, books and Maps in the registry. The scanning software used must support a wide range of scanner models, driver interfaces and capability to output 240,000 images per day. In addition have Multifeed Detection, Ultrasonic Multifeed featuring.

The Fourth lowest bidder attached the following scanning software:

- i. Scanning software: Softrac capture suite V5.69
- ii. Scanners: Imagetrac model II & IV
- iii. Indexing software: DISI records capture application
- iv. Map scanner: Contex SD wide format scanner

The scanning software supports a wide range of scanners including: Image Tracs, Kodaks, Fujitsus, cannon, brother & HP. It also supports both TWAIN & ISIS driver interfaces

The machines can index and have Multifeed Detection and separating trays to handle 240,000 specified in the tender document. The bidder also attached the brochures of the machines.

The bidder passed this stage and proceeded to the next stage.

RECOMMENDATIONS

The Evaluation Committee made a recommendation of award to the lowest evaluated bidder that met the requirements set out in the tender document; M/S Digital Imaging and Scanning International at a total cost of Ksh.59, 850,000.00only, all taxes inclusive.

PROFESSIONAL OPINION

The Procurement Manager in its opinion stated that the evaluation and procurement process was carried out in accordance with the Law and the criteria set out in the tender document. In accordance with Section 44, the Managing Director was requested to consider and approve contract award to the lowest evaluated bidders as follows;

Lot 1; - Bidder M/S Digital Imaging and Scanning International

Bid Amount: Kshs.59, 850,000.00(Kenya shillings fifty nine million eight hundred and fifty thousand cents zero) only, all taxes inclusive.

THE REVIEW

The Request for Review was lodged by M/s MFI Document Solutions Ltd on 11th October, 2017 the above-named Applicant, requested the Public Procurement Administrative Review Board (herein after referred as the Board) to review the decision of the Kenya Railways Corporation in the matter of Tender No. KRC/PLM/WB/063/2016-17-LOT 1 for the Digitization of Records/Works for ICT-Document Handling System at Kenya Railways.

The Applicant seeks for the following orders:

- a) An order quashing the award of the subject tender to any other bidder other than the Applicant.*
- b) An order directing the Respondent to award the subject tender to the Applicant.*
- c) Costs of the request for review to be granted in the Applicant's favour.*
- d) Any other relief that the Review Board deems fit to grant under the circumstances.*

On its part the Procuring Entity prays that the Board dismisses the application with costs.

During the hearing of the Request for Review, the Applicant was represented by Mr. Nick Omari advocate from the firm of M/s Mangerere Bosire & Associates Advocates while the procuring entity was represented

Company Advocates. The Interested Party present Messrs Digital Imaging & Scanning International Limited was represented by Mr. Nicholas Okemwa, Advocate from the firm of E.Sifuna & Associates Advocates.

When the Procuring Entity was served with the Request for Review filed by the Applicant herein it filed a response dated 24th October, 2017 in which it challenged all the grounds of review set out by the Applicant in its Request for Review. In addition to opposing the Request for Review on its merits, the Procuring Entity raised a preliminary objection at paragraph 9 of its response challenging the Board's jurisdiction to hear and determine this matter on the ground that the Request for Review was filed out of the statutory period of 14 days set out in Section 167(1) of the Public Procurement and Asset Disposal Act, 2015.

Being an issue of jurisdiction, the Board will proceed to consider and determine the preliminary objection first before delving into the merits of the Request for Review if it determines that it has the jurisdiction to do so.

The Board has considered the submissions made by Counsel for all the parties who appeared before it in this Request for Review together with the letter of notification and the extract of the email forwarding letter relied upon by the Procuring Entity in support of the preliminary objection.

It is clear from the said documents, a fact which was not disputed by Counsel for the Applicant that the Procuring Entity forwarded the letter of notification dated 26th September, 2017 to the Applicant on 27th September, 2017 via email through its email address Kenya@groupmfi.com.

Under the provisions of the Public Procurement and Asset Disposal Act 2015, a Procuring Entity is entitled to use email as a means of notifying both the successful and the unsuccessful bidders of the outcome of their tenders.

Once a Procuring Entity notifies a bidder of the outcome of its tender through email, the bidder is under an obligation to file a Request for Review challenging the decision of the Procuring Entity within a period of fourteen (14) days from the date of such notification.

During the course of the hearing of the preliminary objection, Counsel for the Applicant urged the Board to find that if there was any delay on the part of the Applicant in filling the Request for Review, then the said delay was for only one day and that the same was therefore excusable because the email was dispatched at 04.26 p.m. on 27th September, 2017 which was proximate to the office closing hour of 05.00 p.m. and that the only time that the Applicant could have therefore opened its email was on the next day, namely 28th September, 2017.

On the issue of when an addressee of an email is deemed to have received it, the law is clear that this happens when the email record is dispatched by the person sending the email known as the originator and the same enters into the computer resource outside the control of the originator.

In the case of **Geomaps Africa Limited –vs- National Land Commission (PPARB No. 3 of 2015)** the Board reiterated the above legal position and stated that time for filling a Request for Review starts running once a

Procuring Entity dispatches the letter of notification to a bidder. The time of dispatch is also deemed to be the time when the email communication is received by the person it is addressed to.

In the above decision, the Board further held that upon notification, the decision on when the Applicant would open the delivered email entirely lies with it.

It is clear, based on the uncontroverted evidence placed before the Board that the Applicant in the matter now before the Board received the notification dated 26th September, 2017 at 04.26 p.m. on 27th September, 2017 according to the email notification produced by the Procuring Entity.

Under the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act 2015, the Applicant was bound by law to file its Request for Review within a period of fourteen (14) days from 28th September, 2017. The period of fourteen (14) days for the purposes of the filling of the Request for Review therefore lapsed on 11th October, 2017. The Request for Review which was filed by the Applicant with the Board on 12th October, 2017 was therefore filed one day out of time.

As the Board has severally held, the requirement that an Applicant must file its Request for Review within fourteen (14) days from the date of notification of the outcome of its tender is a mandatory one.

Where a requirement of law is couched in mandatory terms, the Board cannot waive it or grant indulgence to an Applicant based on extraneous considerations such as the reasons and the length of the delay.

Where the Board therefore determines, as it has done in this case that the Request for Review was filed out of time, the only option open to it is to strike it out.

The High Court held in the case of **Republic –vs- The Public Procurement and Administrative Review Board and 2 Others (2015) eKLR** that a bidder who wishes to challenge the decision of a Procuring Entity declaring its tender as unsuccessful must do so within the period set out in the Act failing which the Request for Review is incompetent. The Court stated the requirement 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 is 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 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 Court of Appeal on the other hand stated as follows on the effect of lack of jurisdiction in the case of **Kakuta Maimai Hamisi –vs- Peris Pesi Tobiko & 2 Others (Nai CA 154 of 2013):-**

"Being of that mind, we cannot venture into any consideration of this ill-fated appeal on its merits for to do so would be to embark on a meaningless misadventure, the net result of which would be a nullity and a barren nothing for want of jurisdiction".

The Board appreciates that the Applicant and all the other parties who appeared before it spent a considerable amount of time in arguing the substantive merits of the Request for Review before it. Unfortunately however, the law prohibits the Board from delving into the merits of the review once it makes a finding that it does not have the jurisdiction to hear and determine the Request for Review.

The Board hopes that advocates and their clients will exercise some level of diligence in computing the time within which a Request for Review ought to be filed because any delay however short it may be is fatal to a Request for Review.

Based on all the foregoing findings and reasons, the Board consequently holds that it does not have the jurisdiction to hear and determine the Applicant's Request for Review which was filed with the Board on 12th October, 2017.


Accordingly the Procuring Entity's preliminary objection which was supported by the interested party succeeds and the same is allowed in terms of the following orders:-

FINAL ORDERS

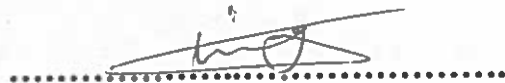
In view of the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act 2015, the Board makes the following orders on this Request for Review:-

- a) The Applicant's Request for Review dated 12th October, 2017 and which was filed with the Board on the same day in respect of Tender No. KRC/PLM/WB/063/2016-2017 Lot 1 for the digitization of records/works for ICT – Document handling system at Kenya Railways be and is hereby struck out.
- b) The Procuring Entity is therefore at liberty to proceed with the procurement process herein.
- c) Each party shall however bear its own costs of the Request for Review.

Dated at Nairobi on this 2nd day of November, 2017.



**CHAIRMAN
PPARB**



**SECRETARY
PPARB**