

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO.20/ 2017 OF 27<sup>TH</sup> FEBRUARY, 2017**

**BETWEEN**

**MISORT AFRICA LIMITED ..... APPLICANT**

**AND**

**THE NATIONAL TREASURY ..... PROCURING ENTITY**

Review against the decision of The National Treasury in the matter of Tender No. TNT/021/2015-2016 for the Proposed Rehabilitation, Expansion and Upgrading of Herufi Data Centre Infrastructure.

**BOARD MEMBERS PRESENT**

- |                           |            |
|---------------------------|------------|
| 1. Mr. Paul Gicheru       | - Chairman |
| 2. Mr. Paul Ngotho        | - Member   |
| 3. Mr. Nelson Orgut       | - Member   |
| 4. Mrs. Rosemary Gituma   | - Member   |
| 5. Mr. Peter Ondieki, MBS | - Member   |

**IN ATTENDANCE**

- |                  |                                |
|------------------|--------------------------------|
| 1. Philip Okumu  | - Sitting in for the Secretary |
| 2. Evelyne Abuga | - Secretariat                  |

**Present by invitation**

**Applicant – Misort Africa Limited**

1. Alex Thangei - Advocate, Waruhiu & K'Owade Advocates
2. Beatrice Kwamboka - Advocate, Waruhiu & K'Owade Advocates
3. Martin Ng'ang'a - Director

#### **Procuring Entity– The National Treasury**

1. P. N. Momanyi -Procurement Officer
2. P. M. Mulavu - Procurement Officer

#### **THE 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 THE PROCESS**

The National Treasury initiated the procurement of the Proposed Rehabilitation, Expansion and Upgrading of Herufi Data Centre on 13<sup>th</sup> May 2015 and used the Restricted Procurement method to invite nine (9) firms to quote through the IFMIS portal; Negotiation No. RFQ 264532 on 13<sup>th</sup> May, 2016 which was to remain open for 14 days and close on 26<sup>th</sup> May, 2016 at 10.00 a.m. The opening date was extended to 3<sup>rd</sup> June, 2016 at 10.00 a.m.

Upon opening no bids were found in the Procuring Entity's Tender Box but were later found to have been delivered to the Ministry of Lands, Housing and Urban Development; Directorate of Public Works Offices located in Industrial Area, Machakos Road.

The National Treasury terminated the Tender on 12<sup>th</sup> October, 2016 and made a report on the same to the Public Procurement Regulatory Authority on the same date.

M/s Misort Africa Ltd, on receiving the notification of termination lodged a Request for Review on 21<sup>st</sup> October, 2016 before the Board contending that the termination was unprocedural.

The Appeal No. 85 of 2016 of 21<sup>st</sup> October, 2016 was determined on 11<sup>th</sup> November, 2016 instructing the Procuring Entity, inter alia, to open the tenders and be at liberty to proceed with the procurement processes in accordance with the Law.

The Tender documents were then opened on 25<sup>th</sup> November, 2016 and the following bidders had responded:-

No.	Firm	Amount Quoted(Kshs)	Security (Kshs.)	Bid
1.	M/s Misort Africa Ltd	1,022,876,452.50	9,400,000.00	
2.	M/s G R Services Ltd	1,054,137,144.95	10,500,000.00	
3.	M/s Eletroserve Ltd	1,509,639,770.14	15,000,000.00	
4.	M/s Hypertech Electrical Services Ltd	1,674,262,471.74	Not Attached	
5.	M/s Air Touch Cooling Systems Ltd	1,555,882,891.74	Not Attached	
6.	M/s Wideview Traders Ltd	1,581,966,721.34	16,000,000.00	
7.	M/s Diadem Ltd	1,094,870,074.95	10,900,000.00	
8.	M/s Blackwood Ltd	1,335,865,970.14	13,000,000.00	
9.	M/s Power Technics Ltd	1,123,214,124.95	11,000,000.00	

The estimated cost of the Tender was Kshs. 840,872,000.00 while from the opening the lowest bidder had quoted Kshs. 1,022,867,452.50.

The National Treasury then sought for clarification from the Attorney-General's office on determination of the bid validity. Based on the response of the A-G the Procuring Entity terminated the tender on 7<sup>th</sup> February, 2017.

## REVIEW

The Request for Review has been lodged by M/s. Misort Africa limited on 27<sup>th</sup>February, 2017 in the matter of the tender No.TNT/021/2015-2016 for the Proposed Rehabilitation, Expansion and Upgrading of Herufi Data Centre.

The Applicant seeks for the following orders:

- 1. A declaration that the purported termination of the tender is irregular, illegal and in breach of the Act and the Regulations therein;*
- 2. Recall and annul the decision to terminate the tender process and direct the Procuring Entity to proceed with the tender evaluation and award;*
- 3. Costs be awarded to the Applicant.*

## THE PARTIES ARGUMENTS

The Applicant in this Request for Review was represented by Mr. Thangei Advocate from the firm of Waruhiu & Kowade Advocates while the Procuring Entity was represented by Mr. P. N. Momanyi Head of supply Chain. The Applicant raised 3 grounds of review which it argued as follows:-

Counsel for the Applicant argued that there was no sufficient reason given by the procuring entity to terminate the tender the subject matter of this Request for Review. The Applicant further argued that the only reason given by the procuring entity in their letter as the basis for termination was that the tender had died a natural death.

Counsel for the Applicant further argued that the right to terminate a tender under the Provisions of Section 63 of the Public Procurement and Asset

Disposal Act is not absolute. He argued that the right to terminate must be exercised reasonably and without malice or bad faith.

Counsel for the Applicant further submitted that the Procuring Entity had approached the Board in bad faith. Counsel for the Applicant argued that an order had been made by the Board directing it to open the tenders on 25th November, 2016 yet in their present argument the Procuring Entity was saying that the tender was dead. He argued that the procuring entity ought to have raised that issue in the first instance and was now estopped by its conduct from saying that the tender was dead. Counsel for the Applicant further stated that the procuring entity's conduct was thus dishonest and it was thus estopped from taking the position that there was no tender in existence as a ground for seeking the termination.

Counsel for the Applicant additionally argued that the Applicant would suffer loss and prejudice. Counsel for the Applicant additionally argued that the Applicant had paid the sum of Kshs. 2.8 Million Shillings as commission to the Bank and that the Applicant would suffer if the tender was terminated illegally.

Counsel for the Applicant therefore prayed that the Request for Review be allowed with costs.

Mr. P. N. Momanyi for the procuring entity agreed that they opened the tender on the last day being the fourteenth day. He argued that the bidders were requested to attend and in the minutes of the bid opening they did not raise any issue on anything touching on the tender document. Mr. Momanyi

further argued that no issue arose on the bid bond and that meant that the Applicant accepted what was in the bid document.

Mr. Momanyi further argued that the Board had earlier given directions to open the bid documents and that the direction was subject to the validity period. He argued that the National Treasury is the body which deals with Fiscal Monetary and Economic Affairs, Accounts, Procurement and Finance and that they could be able to determine as the National Treasury the tender validity period.

Mr. Momanyi further referred the Board to a letter dated 5<sup>th</sup> December, 2016 which indicated that the National Treasury only had the sum of Kshs. 180 Million remaining against the Applicant's bid price of Kshs. 1,022,876,452.50. He therefore urged the Board to dismiss the Applicant's Request for Review with costs.

In a brief response to the procuring entity's submissions, Counsel for the Applicant reiterated his earlier submissions and stated that the bid validity period started running from the date when the tender was opened and that under the law, the procuring entity was under an obligation to ensure that it had enough budgetary allocation before floating the tender. He further submitted that the Board had dealt with this issue in its earlier decision and the procuring entity could not therefore revisit the same.

He therefore urged the Board to allow the Request for Review.

## THE BOARD'S DECISION

The Board has carefully considered the Request for Review and the annexed supporting affidavit of Mr. Martin Ngángá together with the Response filed by the procuring entity. The Board has also considered the submissions made by the parties and finds that this Request for Review raises the following issues for determination:-

- i) Whether the procuring entity complied with the Board's orders issued on 11<sup>th</sup> November, 2016.**
- ii) Whether at the time the tender was opened the tender validity period had lapsed.**
- iii) Was the termination of the tender process by the procuring entity in compliance with the law.**
- iv) Who should pay the costs of this Request for Review.**

### ISSUE NO. I

**Whether the procuring entity complied with the Board's orders issued on 11<sup>th</sup> November, 2016.**

On the first issue framed for determination, it was not disputed by any of the parties that this was the second time the dispute between the parties was coming up for hearing. In its decision given on 11<sup>th</sup> November, 2016 in Public Procurement and Review Board case No. 86 of 2016 the Board made the following orders:-

- a) The Applicant's Request for Review dated 19<sup>th</sup> October, 2016 is hereby allowed to the following extent.**
- i) The procuring entity's decision to terminate the tender process before opening the tenders submitted by the bidders who participated in this tender is hereby set aside.**

- ii) The procuring entity is directed to open the tenders submitted to it by the bidders within fourteen (14) days from the date hereof following the procedure set out under Clauses 20.1, 20.2, 20.3, 20.4 and 20.5 of the tender document.**
- (iii) Before opening the tenders, the procuring entity shall constitute a tender opening committee and notify all the bidders who submitted tenders in this procurement process of the date, time and the venue of the tender opening to enable the said bidders elect whether to attend or not.**
- b) Upon the opening of the said tenders and subject to the determination of the issue of whether the tender is still within the tender validity period, the procuring entity is at liberty to proceed in accordance with the law.**
- c) In view of the fact that some of the issues raised by the Applicant were premature, the Board directs that each party shall bear its own costs of this Request for Review.**

The minutes of the tender opening committee marked as appendix 4 to the procuring entity's response which are dated 25/11/2016 show that the procuring entity appointed a tender opening committee which opened the tenders on the 6<sup>th</sup> Floor of the Treasury Building and read out all the prices and the nature of the tender securities submitted by all the bidders.

This fact was not disputed by the Applicant and the Board therefore finds that the procuring entity complied with the Board's orders made on 11<sup>th</sup> November, 2016.



## **ISSUE NO. II**

**Whether at the time the tender was opened the tender validity period had lapsed.**

On the issue of the tender validity period, the Board finds as a matter of general law, the tender validity period begins to run from the date of tender opening which in this case was 25<sup>th</sup> November, 2016.

Clause 12.1 of the tender document stated that the tender would be valid for a period of (120) day from the date of tender opening.

Counting the number of days therefore, the 120 days from the date of tender opening the tender validity period lapsed on 5<sup>th</sup> March, 2017. The procuring entity's assertion that the tender died on 5<sup>th</sup> October, 2016 cannot therefore stand and is not correct both in law and fact.

## **ISSUE NO. III**

**Was the termination of the tender process by the procuring entity in compliance with the law.**

On the third issue framed for determination, the Board finds that lack of sufficient budgetary allocation is one of the grounds on the basis of which a procuring entity can terminate a tender process.

The Board infact recognized that fact at page 15 of it's decision in Review number 86 of 2016 when it stated as follows:-

**"During the course of the hearing of this Request for Review, an issue arose as to whether the procuring entity complied with the Provisions of Section 53(8) and (9) of the Act and whether the procuring entity was justified in using the restricted tendering method of procurement.**

Owing to the Board's finding that the tenders have not been opened and owing to the fact that Section 63(1)(b) allows for the termination of a procurement process inter-alia on the ground that there is inadequate budgetary allocation, the Board would be pre-empting the outcome of the procurement process before the opening of the tenders if it were to make a final finding on the issue at this stage. The Board will therefore leave the issue for determination in future should the issue arise.

Finally under the provisions of Section 167(4)(a) of the Act, the Board has no jurisdiction to determine any question relating to the choice of the procurement method a procuring entity elects to use in any procurement process".

Contrary to what Counsel for the Applicant stated therefore, the Board did not finally determine that issue in Review No. 86 of 2016 since doing so would be premature as the tenders had not been opened.

The Board has looked at the price submitted by the Applicant namely the sum of Kshs. 1,022,876,452.20 against the available sum of Kshs. 180 Million and finds that the procuring entity's contention that it does not have a sufficient budgetary allocation to be correct. The Board further finds that the sum of Kenya Shillings One Billion for the proposed rehabilitation, expansion and upgrading of a building is too high for such a project. The money is enough to construct a new building.

The Applicant therefore had a sufficient basis for terminating the tender in question.

The Applicant's Request for Review is therefore dismissed on the following terms.

**FINAL ORDERS**

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

1. The Request for Review dated 27<sup>th</sup> February 2017 filed by M/S Misort Africa Limited against the decision of The National Treasury to terminate the Tender No. TNT/021/2015-2016 for the Proposed Rehabilitation, Expansion and Upgrading of Herufi Data Centre is hereby dismissed.
2. Since the Applicant was successful in issue No. II each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 20<sup>th</sup> day of March, 2017

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**CHAIRMAN**  
**PPARB**

  
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**SECRETARY**  
**PPARB**

