

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 80/2017 OF 1ST SEPTEMBER, 2017

BETWEEN

TELEDATA TECHNOLOGIES LIMITED.....APPLICANT

AND

KENYATTA UNIVERSITY.....PROCURING ENTITY

Review against the decision of Kenyatta University in the matter of Tender No. KU/TNDR/SNCV/54/2016-2017 for tender for Structured Network Cabling at Kenyatta University - Various Places.

BOARD MEMBERS PRESENT

- | | |
|---------------------------|------------|
| 1. Mr.Paul Gicheru | - Chairman |
| 2. Mrs.Josephine Mong'are | - Member |
| 3. Eng.Weche Okubo | - Member |
| 4. Mr.Nelson Orgut | - Member |
| 5. Mrs.Gilda Odera | -Member |

IN ATTENDANCE

- | | |
|-------------------|---------------|
| 1. Phillip Okumu | -Secretariat |
| 2. Maureen Namadi | - Secretariat |

PRESENT BY INVITATION

Applicant: Teledata Technologies Limited

1. Morara Omoke - Advocate, Ogeto Otachi
2. Sarah Kariuki - Legal Assistant, Ogeto
3. Josiah Mache - Managing Director

Procuring Entity: Kenyatta University

1. Kibe Mungai - Advocate, Kinoti & Kibe Co. Advocates
2. Gilbert Miano - Kinoti & Kibe Advocate

Interested Parties:

1. Edwin G. Thiong'o Githinji & Koki Advo, Telecommunication
2. Johnson Kisigwa Iconet, Account Manager
3. Darlene Monchari Shonitel Ltd
4. Philip Oyaro Technical Director, Cables Ltd

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

Structured network cabling is required at various places in Kenyatta University. This was an open tender in accordance with the Public Procurement and Asset Disposal Act, 2015.

The procurement is duly budgeted for and included in the approved annual procurement plan for the current financial year.

The tender closed on 27th April 2017 at 10.00 a.m. and opened thereafter by the appointed committee. The committee prepared an attendance register and the minutes. The following bidders submitted their bids at opening.

REGISTER OF BIDDERS

No.	Name of the Firm
01	Office Support Technologies Ltd
02	Telecommunication Today Ltd
03	Africon And Data Solution Ltd
04	Next Technologies Ltd
05	Shonitel Ltd
06	Novel Technologies Ea Ltd
07	Tele Data Technologies Ltd
08	Cables And Accessories Ltd
09	Spacecom Technologies Ltd
10	Iconet Solutions Ltd

The following parameters were assessed during preliminary evaluation YES/No were used if were met or not:-

A1 Bid Bond of Kshs 100,000.00 issued by a reputable bank or Insurance Company approved by PPOA - Yes/No

A2 Provide copy of Company Registration Certificates. (Be a registered company incorporated in Kenya under the companies Act CAP 486)- Yes/No

A3 Copy of Current Trade License / Local Authority permit -Yes/No

A4 Provide a copy of Valid Tax compliance certificate-Yes/No

A5 Communication Authority of Kenya (CAK) telecommunication certificate -Yes/No

A6 Telecommunications contractor certificate from Communication Authority of Kenya (CAK)-Yes/No

A7 Copy of registration certificate National Construction Authority (NCA 6) and above in Electrical Engineering Certificate for Electronic-Telecommunication, structured cabling etc-Yes/No

A8 Provide reports on financial standing of the tenderer, such as profit loss statements, auditor's reports for the last three years. OR 3 Years certified Bank Statement-Yes/No

A9 Copy of Network Switches Manufacturer authorization Certificate

Yes/No

A10 Site Survey form (duly signed and stamped by authorized ICT staff, attach the Original Copy).Yes/No

To Note:

- That after mandatory evaluation, four (4) bidders were successful and therefore qualified for technical evaluation.
- The following six (6) bidders failed the mandatory evaluation due to the following reasons:-

The following four (4) bidders qualified for technical evaluation:-

- Bidder no.1- Office Support Technologies
- Bidder no.2- Telecommunication Today ltd
- Bidder no.6- Novel Technologies EA ltd
- Bidder no.9- Spacecom Technologies

To note:

After technical evaluation, all the four (4) bidders attained above 70% (pass mark) and therefore qualified for price analysis.

- Bidder no.1-90%
- Bidder no.2-83%
- Bidder no.6-91%
- Bidder no.9-90%

Note: In lot A, three bidders quoted, in lot B only two bidders quoted and in lot C four bidders quoted.

Evaluation Committee's Recommendation

The Evaluation Committee recommended that the tender be awarded to the lowest bidder per lot:-

1. **LOT A Main Campus-M/s Telecommunication Today Ltd** at a total cost of Kshs. 5,814,848.00.
2. **LOT B Mombasa Campus- M/s Telecommunication Today Ltd** at a total cost of Kshs. 3,340,684.00
3. **LOT C City Campus- M/s Telecommunication Today Ltd** at a total cost of Kshs. 4,080,880.00

Professional Opinion

The Head of Procurement considered the subject procurement and opined that it satisfied the constitutional requirements of Article 227(1) and the statutory requirements of Public Procurement and Asset Disposal Act, 2015 section 84 and that the tender be awarded to the lowest evaluated bidder (M/s Telecommunication Today Ltd) as indicated below.

1. **LOT A Main Campus-at a total cost of Ksh. 2,037,888.00.**
2. **LOT B Mombasa Campus-at a total cost of Ksh. 3,340,684.00**
3. **LOT C City Campus- at a total cost of Ksh. 4,080,880.00**

THE REVIEW

The Request for Review was lodged by M/s Teledata Technologies Limited, have appointed the firm of Messers Ogetto, Otachi & Co. Advocates to represent them in these proceedings, on 1st September, 2017 in the matter of the Tender No. KU/TNDR/SNCV/54/2016-2017 for Structured Network Cabling at Kenyatta University-Variou Places.

The Applicant seeks for the following orders from the Board:

- a) The Respondent's attempt to displace the applicant as the rightful awardee Tender KU/TNDR/SNCV/54/2016-2017 (Lots A, B and C) for supply of Structured Network Cabling at Kenyatta University be set aside and annulled;*
- b) The Respondent be ordered to sign a contract with the Applicant in accordance with the Tender;*
- c) That the tribunal grants the order of injunction to all the ongoing works related to the tender till the case is closed.*
- d) The Respondent be and is hereby ordered to pay the costs of and incidental to these proceedings; and*
- e) Such other or further relief(s) as this Board shall deem just and expedient.*

BOARD'S DECISION

When this Request for Review came up for hearing before the Board on 20th September, 2017, Counsel for the Procuring Entity and the successful bidder raised the following two points of preliminary objection touching on the Board's jurisdiction to hear and determine the Request for Review:-

- a) **That the Board did not have the jurisdiction to hear and determine the Applicant's Request for Review on the ground that the same was filed out of time.**
- b) **That the Board did not have the jurisdiction to hear and determine the Applicant's Request for Review under the provisions of Section 167(4)(c) of the Public Procurement and Asset Disposal Act 2015 in view of the existence of a written contract entered into between the successful bidder and the Procuring Entity.**

The above two objections being objections that touch on the Board's jurisdiction to hear and determine this matter, the Board will consider and determine them first.

ISSUE NO. I

That the Board did not have the jurisdiction to hear and determine the Applicant's Request for Review on the ground that the same was filed out of time.

The first ground of preliminary objection was raised by Counsel for the Procuring Entity and was supported by Counsel for the successful bidder.

Mr. Kibe Mungai advocate who appeared on behalf of the Procuring Entity's argued that under the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act, a bidder who was dissatisfied with the decision of the Procuring Entity was under a duty to file a Request for Review with the Board within fourteen (14) days from the date of notification that its tender was unsuccessful or within fourteen (14) days from the date of the occurrence of any breach of duty on the part of the procuring entity.

Counsel for the Procuring Entity stated that in this particular case, the Applicant had admitted in its Request for Review and in the submissions made by Counsel for the Applicant during the hearing of the Request for Review that the Applicant was notified of the outcome of its tender on 1st August, 2017 and that counting the number of fourteen (14) days from 1st August, 2017 the Applicant's Request for Review which was filed with the Board on 1st September, 2017 was therefore filed way after the statutory period set out in the Act and the same ought to have been struck out.

Mr. Edwin G. Thiongo advocate who appeared on behalf of the successful bidder associated himself with the submissions made by Counsel for the Procuring Entity and reiterated that in view of the admission in the Applicant's own pleadings and in the submissions made by Counsel for the Applicant, the Request for Review was filed out of time and that as such, the Board lacked the jurisdiction to hear and determine the same.

Counsel for the successful bidder further submitted that the Board did not have the jurisdiction to extend the time within which an Applicant was required to file a Request for Review under the provisions of Section 167(1) of the Act and that any Request for Review which was filed in contravention of Section 167(1) of the Act was incompetent and the same ought to be struck out.

Mr. Morara Omoke advocate who appeared on behalf of the Applicant admitted that the Applicant received the letter of notification dated 12th May, 2017 informing it that its tender was unsuccessful on 1st August, 2017. He however stated that based on the nature of disorganization, miscommunication and the untidy state of the correspondences between the Procuring Entity and various bidders, it was very difficult for the Applicant to establish when the breaches complained of occurred. Counsel for the Applicant reckoned that the breaches giving rise to the Request for Review before the Board occurred on or around 16th August, 2017 and that the Applicant's Request for Review was therefore filed within time.

He further stated that upon receiving the letter dated 12th May, 2017, the Applicant decided to inquire about the reasons why its tender was unsuccessful and in that regard it wrote the letter dated 4th August, 2017 to the Procuring Entity through the firm of M/s Ogetto Otachi & Company Advocates. The Applicant produced the said letter as annexure TTL 9 appearing at pages 62 and 63 of its Request for Review.

Counsel for the Applicant further submitted that it was entitled to seek for information from the Procuring Entity under the provisions of Article 35 of the Constitution and further that it was upon receiving the information that the Applicant could file a proper Request for Review before the Board.

Counsel for the Applicant however submitted that the Procuring Entity failed to respond to the issues raised in the Applicant's letter dated 4th August, 2017. He stated that the Procuring Entity's actions and conduct inter-alia contravened the provisions of Articles 10, 227 and 232 of the Constitution and urged the Board to consider the Request for Review on its merits rather than determining it summarily.

He therefore urged the Board to dismiss the first limb of the Procuring Entity's preliminary objection.

The Board has considered the submissions made by the parties regarding this ground of preliminary objection and finds that the dispute now before the Board was triggered by the Procuring Entity's letter dated 12th May, 2017 on 1st August, 2017, addressed to the Applicant and which informed the Applicant that its tender was unsuccessful.

The Applicant produced the said letter as annexure TTL 8 appearing at page 59 of its Request for Review and asserted at page 1 of the Request for Review that it received the said letter dated 12th May, 2017 on 1st August, 2017. The date of receipt of the letter was also admitted by Counsel for the Applicant during the hearing of the Request for Review.

The Board holds, based on the Applicant's admission in the Request for Review and in the oral submissions by its advocate that having received the letter of notification on 1st August, 2017, the Applicant ought to have filed its Request for Review within a period of fourteen (14) days from the date of receipt of the letter of notification that its tender was unsuccessful under the provisions of Section 167(1) of the Act which provides as follows:-

167(1): "Subject to the provisions of this part, a candidate or a tenderer, who claims to have suffered or risks suffering, loss or damage due to the breach of a duty imposed on a Procuring Entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of the award or the date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed".

The Board further wishes to observe that the provisions of Section 167(1) of the Act are couched in mandatory terms the effect of which is that a Request for Review filed outside the statutory period of fourteen (14) days is incompetent. The Board holds the further view that there is no discretion conferred upon it by law to extend the time for the filling of a Request for Review under the provisions of the Act or the Regulations.

Turning to the matter now before the Board and having determined that the Applicant was notified of the outcome of its tender on 1st August, 2017,

the Applicant ought to have filed its Request for Review at least by 15th August, 2017. The Applicant's Request for Review which was filed with the Board on 1st September, 2017 was therefore filed out of time and the same cannot stand.

The above position has been the subject matter of several decisions both by the High Court and by the Board as illustrated by the following decisions:-

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 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 be determined without undue delay. Once a party fails to move the Board within the time set out 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 adopted the above reasoning in the case of **Lordship Africa Limited -vs- Nairobi City County & Another (PPARB No. 78 of 2017)**

where the Board held that it does not have the jurisdiction to hear and determine a Request for Review filed outside the statutory period of fourteen (14) days and further that the Board does not have the jurisdiction to extend such time.

In spite of having admitted that his client received the letter notifying it that its tender was unsuccessful on 1st August, 2017, Counsel for the Applicant contended that time for the purposes of filling a Request for Review started running from 16th August, 2017 and that the Applicant was not precluded from filling a Request for Review because it expended a considerable amount of time in seeking to know the reasons for its disqualification from the Procuring Entity.

Counsel for the Applicant further argued that under the provisions of Article 35 of the Constitution, the Applicant was entitled to receive information from the Procuring Entity and further that that Procuring Entity was under an obligation to observe the objectives of procurement as set out inter-alia under the provisions of Articles 10, 227 and 232 of the Constitution.

The Board has considered the above submissions and wishes to state that whereas the Applicant is entitled to the rights and the protections set out in the above Articles of the Constitution the said Articles of the Constitution do not however alter the requirement that a Request for Review ought to be filed with the Board within fourteen (14) days from the date of

notification of the outcome of a tender process or from the date of the occurrence of any breach of duty on the part of a Procuring Entity.

A bidder who receives such a notification is under a duty to file a Request for Review but not to engage in correspondences with the Procuring Entity as was the case in the matter now before the Board. A bidder who decides to engage in correspondences with the Procuring Entity cannot rely on such correspondences to justify the failure in filing a Request for Review within the statutory period of fourteen (14) days.

Finally on this issue the Board has perused the Applicant's Request for Review and notes that the same is dated 13th August, 2017. The inescapable conclusion based on the above observation is therefore that the Request for Review was prepared before the period of fourteen (14) days provided for by law had lapsed. The Board does not therefore understand why the said Request for Review was not filed on or before 15th August, 2017 when the statutory period for the filling of the Request for Review lapsed.

In conclusion therefore and in view of all the above findings, the Board finds and holds that the Applicant's Request for Review was filed out of time contrary to the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act 2015.

The first limb of the Procuring Entity's preliminary objection as supported by the successful bidder therefore succeeds and the same is allowed.

ISSUE NO. II

That the Board did not have the jurisdiction to hear and determine the Applicant's Request for Review under the provisions of Section 167(4)(c) of the Public Procurement and Asset Disposal Act 2015 in view of the existence of a written contract entered into between the successful bidder and the Procuring Entity.

Turning to the second ground of preliminary objection, the short submissions made by Counsel for the Procuring Entity and Counsel for the successful bidder was that upon the award of the tender in question to the successful bidder, the Procuring Entity and the successful bidder entered into a written contract which the successful bidder produced as annexure number 2 to the successful bidder's bundle of documents which were lodged with the Board on 20th September, 2017.

Both Counsel for the Procuring Entity and Counsel for the successful bidder stated that under the provisions of Section 167(4)(c) of the Act, the Board was precluded from hearing and determining a Request for Review where the Procuring Entity and the successful bidder had executed a contract under the provisions of Section 135 of the Public Procurement and Asset Disposal Act.

In addition to the above submissions, Counsel for the successful bidder stated that following the award of the subject tender, the successful bidder had carried out all the works set out in the subject tender and the only

issue that was pending between the successful bidder and the Procuring Entity was payment for the services already rendered.

Counsel for the Procuring Entity and the successful bidder therefore urged the Board to allow the second ground of preliminary objection.

In his response to the submissions made by Counsel for the Procuring Entity and Counsel for the successful bidder, Counsel for the Applicant stated that the existence of a written contract between the Procuring Entity and the successful bidder did not preclude the Board from hearing the Applicant's Request for Review.

He further submitted that it was clear from the materials submitted before the Board that there was a complete lack of transparency by the Procuring Entity in the process.

He stated that one of the aspects of the lack of transparency was the Procuring Entity's failure to disclose to the Applicant the existence of the contract and the fact that the same had been performed. He additionally submitted that the Procuring Entity was duty bound to disclose the above allegations in response to the Applicant's letter dated 4th August, 2017 seeking for information from the Procuring Entity.

Counsel for the Applicant therefore urged the Board to disregard the contract entered into between the Procuring Entity and the successful bidder and instead hear the Applicant's Request for Review on its merits.

The Board has considered all the documents placed before it and finds that upon the award of the subject tender to the successful bidder, the Procuring Entity and the successful bidder entered into a contract under the provision of Section 135 of the Act. The said contract was produced as annexure number 2 to the successful bidder's bundle of documents which were lodged with the Board on 20th September, 2017.

The Board has read the provisions of Section 167(4)(c) of the Act and it is clear from the wording of the said provision 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 the procurement proceedings under subsection (1)

(a).....

(b).....

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

The Board wishes to note that the Applicant did not seek to challenge the validity of the contract entered into between the Procuring Entity and the successful bidder both in its pleadings and in its submissions which were made before the Board and in the absence of any such challenge, the said contract remains valid and deprives the Board of the jurisdiction to hear and determine the Applicant's Request for Review.

The law on the proposition that the Board cannot hear and determine a Request for Review where a contract has been entered into between the Procuring Entity and the successful bidder is well established as illustrated by the case of **Team Engineering SPA -vs- Kenya Railways Corporation (PPARB Appl. No. 21 of 2014)** where the Board held that it does not have the jurisdiction to hear and determine a Request for Review where a contract has been entered into between a Procuring Entity and the successful bidder pursuant to an award of tender.

The Board adopted the same reasoning in the case of **Lordship Africa Ltd -vs- Nairobi City County (PPARB Appl. No. 78 of 2017)** which has been cited above.

In view of all the above findings therefore the second ground of the Procuring Entity and the successful bidder's preliminary objection also succeeds and is also allowed.

The net effect of all the above findings is that the Board cannot consider the substantive grounds of review placed before it in this application having come to the conclusion that it does not have the jurisdiction to hear and determine the Request for Review now before it.

In coming to the above conclusion, the Board wishes to rely on the court of appeal decision in the case of the **Owners of the Motor Vessel "Lilian S" -vs- Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi JA stated the correct position 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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

The above holding is as much applicable to proceedings pending before the Board and other tribunals as it is to suits pending before courts of law. The upshot of all the above findings is therefore that both limbs of the Procuring Entity and the successful bidder’s preliminary objections succeed and are allowed with the result that the Applicant’s Request for Review dated 13th August, 2017 and which was filed with the Board on 1st September, 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 13th August, 2017 and which was filed with the Board on 1st September, 2017 in respect of**

Tender Number KU/TNDR/SNCV/54/2016-2017 be and is hereby struck out.

- b) As costs follow the event, the Procuring Entity and the successful bidders are awarded the costs of this Request for Review which are assessed at the sum of Kshs. 100,000 each. The said costs shall be paid within fourteen (14) days from today's date

Dated at Nairobi on this 21st day of September, 2017.



CHAIRMAN

PPARB



SECRETARY

PPARB

