REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION No. 70/2018 OF 25TH MAY, 2018

BETWEEN

PRESTIGE MANAGEMENT SERVICES LTD.....APPLICANT

AND

MINISTRY OF DEVOLUTION AND ASAL

STATE DEPARTMENT OF DEVOLUTION.....PROCURING ENTITY

Review against the decision of the Ministry of Devolution and ASAL, State Department of Devolution in the matter of Tender No. MODP/SDD/RFP/9/2017-2018 for the Provision of Consultancy Services for Annual Capacity Performance Assessment (ACPA) Financial Year 2018/2019.

BOARD MEMBERS PRESENT

1. Mr. Paul Gicheru - Chairman
2. Mr. Hussein Were - Member
3. Mr. Peter Ondieki, MBS - Member
4. Mr. Paul Ngotho - Member

IN ATTENDANCE

1. Mr. Philemon Kiprop - Secretariat
2. Ms. Maryanne Karanja - Secretariat

PRESENT BY INVITATION

Applicant- Prestige Management Services Ltd

1. Ham Lagat - Advocate, Ham Lagat & Associates Advocates
2. Francis Karanja - Ham Lagat & Associates Advocates
3. Felix Kiprono - Ham Lagat & Associates Advocates

Procuring Entity-Ministry of Devolution

1. Godfrey Ndirangu - SCMO
2. Meggie Mashengu - CSIB
3. Mwangi Jackson - PSC
4. Judith Nyadimo - SSCMO

Interested Parties

1. Wachira Advocate - HEL Advocates

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 DECISION

Tender invitation

The Ministry of Devolution and ASAL, State Department of Devolution (hereinafter, 'the Procuring Entity")advertised tender for the Provision of Consultancy Services for Annual Capacity Performance Assessment (ACPA) Financial Year 2018/2019 on 30th January 2018. A total of sixteen (16) bids were submitted and opened on 20th February 2018 as follows:

Bidder No.	Bidder Name;Address
01	Africa Development Group P.O. Box 9390 – 00100 Nairobi. Tel. 3862340/0735862340
02	Price Water House Coopers P.O. Box 43963 – 00100 Nairobi. Tel. 2855000/01
03	Prestige Management Solutions Ltd P.O. Box 1357 – 00618 Nairobi. Tel. 3343914/784
04	Matengo Githae & Associates P.O. Box 50821 – 00100 Nairobi. Tel. 2699933/0721326764
05	Benson & Associates P.O. Box 28166 – 00200 Nairobi. Tel. 0722874576/0713669807
06	University of Nairobi Enterprises & Service P.O. Box 68251 – 00200 Nairobi. Tel. 2714048
07	Strategic Partners of Kenya P.O. Box 9199 – 00200 Nairobi. Tel. 0722349821/0722453471
08	KPMG P.O. Box 40612 – 00100 Nairobi. Tel. 2215695
09	Ernst & Young LLP P.O. Box 44286 – 00100 Nairobi. Tel. 2886000
10	Parker Randall Eastern Africa

	P.O. Box 25426 - 00100 Nairobi. Tel. 0733255874
11	CDC Consulting Group Ltd P.O. Box 14022 - 00800 Nairobi. Tel. 2342685
12	3D Africa Communications Ltd & Geekan Kenya Ltd P.O. Box 28255 - 00100 Nairobi. Tel. 0723729096
13	Deloitte Consulting Limited P.O. Box 40092 - 00100 Nairobi. Tel. 4448966
14	Apex Consulting Limited P.O. Box 20382 - 00100 Nairobi. Tel. 2013480/488
15	Walubengo & Associates P.O. Box 5264 - 30100 Eldoret. Tel. 0710357671
16	CPF Financial Services P.O. Box 28938 - 00200 Nairobi. Tel. 0720433354

Tender Evaluation

The opened tenders were evaluated by the Tender Evaluation Committee in three stages of Preliminary Examination, Technical Evaluation and Financial Evaluation.

Preliminary Examination stage

At the Preliminary Examination stage tenderers were analyzed on their compliance to the Tender Mandatory Requirements. Tenderers who were responsive to all the mandatory requirements proceeded to the next stage of tender evaluation. Only **Bidder No. 3, M/S Prestige Management solutions Limited,** met all the mandatory requirements and was subjected to detailed technical evaluation.

Technical Evaluation

At Technical Evaluation stage tenderers who attained the set minimum technical score were allowed to proceed to the final stage of tender evaluation. **Bidder No. 3 M/S Prestige Management solutions Limited** was analysed separately on its responsiveness to the Terms of Reference. The bidder attained a score of 71.8% and was hence recommended for financial evaluation.

Financial Evaluation

The third stage was Financial Evaluation where the prices of the responsive tenderers from the Technical Evaluation stage were analyzed and ranked. The Financial Proposal opening exercise was carried out on 20th March, 2018. **Bidder No. 3 M/s Prestige Management solutions Limited** as stated above was technically responsive and was approved to proceed to the Financial Proposal opening of the Tender Financial Evaluation stage. The **bidder** quoted a total tender sum of **Kenya Shillings Thirty Nine Million, Four Hundred Twenty-Five Thousand, Three Hundred Fifty and Zero Cents Only (Kshs. 39,425,350.00)**. The bidder was then ranked on the basis of combined Technical and Financial scores.

Negotiation

Negotiations were held between the Ministry's evaluation committee officials and the consultants **(Prestige Management Solutions Limited)** on 6th April, 2018. Arising from the negotiations, the following was agreed upon: -

a. That, the consultant will submit to the client a draft Annual Capacity Assessment Report after completion of field visits.

b. That, the consultant will undertake the works as per the tender amount sum of Kshs. 39,450,325.00 all Government taxes inclusive and without compromising the quality of work output as envisaged in the technical proposal and the terms of reference.

c. That, deliverables, timelines and payment schedules shall be adhered to without compromising work outputs including but not limited to reports.

d. That, The State Department of Devolution will provide linkages with various stakeholders and that the forums' to be held will be organized at the cost of the State Department.

e. That, the project period is 60 days.

f. That, the consultant will conduct a pilot test there will be a pilot test done within Nairobi - Kenya county to test drive the respondents understanding of the tool and at least 4 days training on the consultants in order to understand the KPIs; MACs; MPCs; PMs, and also uniformity in scores.

g. That, the contracts will be signed upon completion of the whole process as stipulated in The Public Procurement and Assets Disposal Act, 2015.

Recommendation

Prestige Management Solutions Limited of P. O. Box 1357-00618 NAIROBI - KENYA ~ KENYA being the technically responsive evaluated bidder with

the highest combined technical and financial score of **77.44%** was recommended for award of the tender for Consultancy Services for Annual Capacity Performance Assessment (ACPA) Financial Year 2018/2019 for (KDSP) at their quoted total sum of **Ksh. 39,425,350.00 (Kenya Shillings Thirty Nine Million, Four Hundred and Twenty Five Thousand, Three Hundred and Fifty only).Inclusive of all applicable Government taxes.**

PROFESSIONAL OPINION

The Head of Procurement opined that the tender process was undertaken in adherence to the Act and Disposal Regulations and concurred with the recommendation of the tender evaluation committee.

The Accounting Officer adopted the recommendations of the tender evaluation committee and awarded the subject tender to **M/S Prestige Management Solutions Limited** *vide* letter dated 18th April, 2018 at a sum of Kshs 39,450,350.00.

THE REQUEST FOR REVIEW

The Request for Review was lodged before the Public Procurement Administrative Review Board (hereinafter, "the Board") by M/s Prestige Management Services Limited, through the firm of Ham Lagat & Associates Advocates, P. O. Box 9153-30100, Landmark Plaza, 13th Floor, Argwings Kodhek Road, Nairobi on 25th May, 2018 in the matter of Tender Number MODP/SDD/RFP/9/2017-2018 for the Provision of Consultancy Services

for Annual Capacity Performance Assessment (ACPA) Financial Year 2018/2019(hereinafter "the tender").

The Applicant sought for the following orders of the Board:

a) ***That the Board annuls the decision of the Procuring Entity contained in a letter dated 21st May, 2018 terminating the award of Tender No MODP/SDD/RFP/9/2017-2018 for the Provision of Consultancy Services for Annual Capacity Performance Assessment (ACPA) Financial Year 2018/2019 to the Applicant.***

b) ***That the Board directs the Procuring Entity to cause the signing of the Contract in respect of the Tender No MODP/SDD/RFP/9/2017-2018 for the Provision of Consultancy Services for Annual Capacity Performance Assessment (ACPA) Financial Year 2018/2019 forthwith.***

c) ***That the costs of this Application be awarded in favour of the Applicant.***

The Applicant was represented by Mr. Ham Lagat, Advocate from the firm of Ham Lagat & Associates Advocates while the Procuring Entity was represented by Mr. Jackson Mwangi, PSC in the Ministry of Devolution and ASAL State Department of Devolution. The Interested Party was represented by Mr. Wachira, Advocate from the firm of HEL Advocates but elected not to say anything when he was given an opportunity to address the Board.

THE APPLICANT'S CASE

The Applicant submitted that it participated in the subject tender where it emerged the winner and was notified of the award *vide* the Procuring Entity's letter dated 18th April, 2018. It submitted further that what remained was the signing of the contract but, to its astonishment, the Procuring Entity communicated *vide* letter dated 21st May, 2018 that there was a letter of dissatisfaction on the evaluation process from one of the bidders and that the Procuring Entity had cancelled the tender as a result.

The Applicant averred that it had legitimate expectation that the contract would be signed not later than 30 days after award as advised by the Procuring Entity in the letter of 18th April, 2018. It averred further that the letter of dissatisfaction from the bidder, M/s Ernst and Young LLP, came in long after the 14 days' period within which the law provides for a dissatisfied bidder to lodge a complaint after the award. The period for any objections by any interested bidder or party had already lapsed and the letter by Ernest and Young was, in its view, inadvertent and misleading and it therefore ought to be disregarded and the cancellation of the tender be reversed. It also urged the Board to direct the Procuring Entity to cause the signing of the contract that was supposed to be signed within the period not later than 30 days with the Applicant.

Commenting on the Procuring Entity's argument at paragraph 9 and 10 of the response that its decision was based on its own failure, the Applicant stated that the Procuring Entity's mistake should not be visited on an innocent successful bidder. It commented further that by the Procuring

Entity conceding that an oversight or a mistake occurred should not be visited on the Applicant's right to participate in a tender and also benefit from the contract therefore.

The Applicant argued that the Procuring Entity had not tendered anything prejudicial if the contract was to be awarded to the Applicant. It argued further that the process of participation in an IFMIS tender was not clarified and to what extent it affected the process adding that the argument was anchored at trying to scuttle a process that was correctly and properly conducted. It therefore urged the Board to dismiss the response and disregard the contents that were raised therein.

PROCURING ENTITY'S RESPONSE

The Procuring Entity, in response, opposed the Request for Review submitting that there was indeed an inadvertent or a mistake in failing to evaluate the bid by Ernest and Young. The mistake occurred at the stage of tender evaluation and it was the Procuring Entity's position that failure to evaluate the bid by Ernst and Young was sufficient reason to cancel the entire process.

It was the Procuring Entity's position that once a mistake has happened in the process of evaluation of a tender it is likely that the end product of that evaluation would be compromised adding that the decision to cancel the tender was premised on the Procuring Entity's desire to give all parties a fair and equitable opportunity to have their bids evaluated.

During the hearing Mr. Mwangi for the Procuring Entity posed a question as to what happens if a Procuring Entity determines towards the end of a procurement process that there is a flaw in the process. Does the outcome of that process become invalid or should the Procuring Entity proceed disregarding the flaw that would have occurred in the course of the evaluation? It was the Procuring Entity's position that once the Accounting Officer has determined that there is an error in the process, then he should take the first opportunity to correct that error and that proceeding to execute a contract fully aware that there is an error in the process, would invalidate the product of that procurement process. It added that a flawed process is as bad as its outcome.

The Procuring Entity observed that under Section 63 of the Act one cannot cancel a process after a letter of notification of award has been issued and asked to be guided by the Board on what option a Procuring Entity has when faced with the situation where the process is flawed.

The Procuring Entity averred that once the tender was cancelled, a fresh process would begin in which all the parties herein would be allowed to participate. To that extent it requested the Board to decline this Application so that the procurement process could begin afresh or in the alternative order a fresh evaluation for all the bidders.

Responding to inquiries from the Board as to who should come before it under Section 67 of the Act if there is a grievance and whether the Board can order for a fresh evaluation where Ernst and Young had no application before the Board, the Procuring Entity stated that it should be the affected bidder to approach the Board but that nothing limits the Board's powers to order for a re-evaluation based on the facts presented in this case.

THE APPLICANT'S REPLY

In a brief response, Mr. Lagat, Advocate on behalf of the Applicant contended that the reason given by the Procuring Entity in its letter of notification dated 18thApril, 2018 to Ernst and Young was not sufficient enough to upset the process that had reached an advanced stage. He argued that the Board had not been moved appropriately since Ernst and Young, by conduct, were satisfied with the process because there was no dispute that was brought by them within the 14 days of notification of award as required by the law. The Procuring Entity could not fit into the shoes of an interested bidder who is not interested in pursuing the case in accordance with the law.

THE BOARD'S FINDINGS

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

Whether or not the Procuring Entity could terminate a tender after the notification of tender award on account of a mistake in the evaluation of a tender submitted by a tenderer.

The Board now proceeds to determine the issue framed for determination as follows:

The Board, upon perusing the documents placed before it and hearing the submissions made by the parties, notes evident facts in this Request for Review. The Ministry of Devolution and ASAL, State Department of Devolution (hereinafter, 'The Procuring Entity") invited proposals from eligible Consulting Firms for the procurement of Provision of Consultancy Services for Annual Capacity Performance Assessment (ACPA) Financial Year 2018/2019 on 30th January 2018. Sixteen (16) tenderers, including the Applicant, submitted tenders and were opened on 20th February 2018.

It is further noted, a fact not in dispute, that the Procuring Entity's tender evaluation committee carried out the evaluation of the returned bids and upon finalization of the evaluation, recommended M/s Prestige Management Services Limited for the award of the tender at its bid price of Kshs 39,450,350.00, inclusive of all government taxes. The letter of notification stated as follows:

> *"I am pleased to inform you that your tender for Consultancy Services Annual Capacity Performance Assessment (ACPA) Financial Year 2018/2019 Tender No. MODP/SDD/RFP/9/2017-2018 is hereby accepted.*

.... Please acknowledge receipt of this letter of notification, signifying your acceptance within a period of seven (7) days.

The contract shall be signed by the parties concerned at the expiry of a period of fourteen (14) days but not later than thirty (30) days from the date of this letter."

By the letter dated 20th April 2018 the Applicant acknowledged receipt of the letter of notification and signalled its readiness to enter into a signed contract. The Procuring Entity however informed the Applicant through the letter dated 21st May 2018 that the tender stood cancelled in the face of glaring inadvertence identified in the tender evaluation process. The letter of cancellation of the tender read in part as follows:

"Subsequent to the said letter of award, M/s Ernst & Young LLP submitted a letter of protest to the effect that their bid was irregularly disqualified on the basis that they did not submit their bids through the IFMIS system as required. Upon deliberations and internal inquiry over this complaint, it was indeed verified that the disqualification of the said firm was based on an erroneous misrepresentation of fact and was indeed inadvertent.

Arising from the above facts, we have come to a regrettable conclusion that to the extent that a bidder was not evaluated as required, the evaluation process did not meet the criteria set out in the Public Procurement and Asset Disposal Act.

Subsequently, notwithstanding the provisions of section 63 (1) of the Public Procurement and Asset Disposal Act, and in the face of the

glaring inadvertence identified above we regret that this subject contract stands cancelled to ensure fairness to all parties and compliance with the relevant laws. It is the intention of the State Department of Devolution to commence a fresh process wherein you will be encouraged to apply."

The Procuring Entity's letter dated 21st May 2018 informing the Applicant that it's tender had been cancelled, undoubtedly, precipitated this Request for Review. The issue confronting the Board for its determination is whether the Procuring Entity was justified in terminating the procurement proceedings of the subject tender after the notification of tender award on the basis of glaring inadvertence identified in the tender evaluation process.

All the parties to this Request for Review did not dispute the fact that the Procuring Entity notified the Applicant *vide* letter dated 18th April, 2018 that its tender of Kshs 39,450,350.00 had been accepted following the recommendation by the Procuring Entity's tender evaluation committee. The parties further did not dispute the fact that the contract was not signed after fourteen days and before expiry of 30 days as stated in the letter of award. It is upon inquiry by the Applicant on the status of the tender that the Procuring Entity cancelled the tender *vide* letter dated 21st May 2018 citing inadvertence in tender evaluation process as the reason for the cancellation.

In a recent case, **PPARB No. 27 of 2018 - Komberell Contractors Ltd vs Muserechi Secondary School,** the Board re-stated the dictates of the law with regard to termination of procurement proceedings as follows:

> *"Whereas it is not in doubt that the Procuring Entity is afforded an opportunity to terminate procurement proceedings at any time before the award of the tender, that leeway can only be exercised in accordance with the provisions of Section 63 of the Act and no other."*

In the letter of termination dated 21st May 2018, the Procuring Entity made reference to Section 63 of the Act whose provisions read as follows:-

Section 63 *(1) "An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—*

(a) the subject procurement has been overtaken by—

(i) operation of law; or

(ii) substantial technological change

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer."

(2) "An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days."

(3) "A report under subsection (2) shall include the reasons for the termination."

(4) "An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination."

In the tender subject of this Request for Review, the Board observes that the Procuring Entity cancelled the tender after, and not prior to, notification of tender award as required under Section 63 (1) of the Act. The termination of the subject tender after notification of award is not backed by the provisions of the Act and clearly this Board cannot sustain it.

Assuming, for arguments sake, that the Procuring Entity was entitled to terminate procurement proceedings as it did, the Act at Section 63 permits termination only under the circumstances identified at Sub-section 1 (a) to (i) and, further,give the Director-General of the Public Procurement Regulatory Authority a written report on the termination pursuant to sub-

section (2). In the tender subject of this inquiry, the circumstances permitting termination and which are spelt out under Section 63 (1) (a) to (i) were absent. Further, no written report was filed with the Director-General of Public Procurement Regulatory Authority on the termination pursuant to sub-section (2).

In the **Komberell Contractors** case **(PPARB No. 27 of 2018)** which has been cited herein, the Board further held as follows:

> ***"Any termination or cancellation of a tender done outside the strictures of the law as laid out under Section 63 of the Act is null and void."***
>
> ***"In the absence of evidence that the Procuring Entity followed the law in the termination of the procurement proceedings, it is the firm view of the Board that no termination took place and that the subject tender is still alive."***
>
> ***"The Board having found that the tender subject of this Request for Review is still alive, goes on to find that the Procuring Entity was not in a position to commence fresh procurement proceedings for the tender."***

The Board wishes to observe that the facts in the **Komberell Contractors** case are similar to the facts in the instant Request for Review. This tender like the one in the cited case was terminated after the notification of award contrary to the provisions of Section 63 (1) of the Act. The reasons given for the termination did not fall under any of the grounds for termination under the provisions of Section 63 (1) (a) to (i) of the Act. No written report was given

to the Director-General of Public Procurement Regulatory Authority on the termination pursuant to the provisions of Section 63 (2) of the Act. The Board has perused all the documents annexed to the Procuring Entity's response and has not come across any letter of notification given to the Director-General of the Authority regarding the termination herein.

The Board therefore finds that the cancellation of the tender the subject matter of this Request for Review is null and void since the same was not done in compliance with the law as elaborately laid out under the provisions of Section 63 of the Act. The upshot of the Board's finding is that no termination of the subject tender took place and therefore the tender is still alive and accordingly, the Procuring Entity is not in a position to commence fresh procurement proceedings for the tender as contemplated. This ground of review accordingly succeeds and is allowed.

During the hearing of this Request for Review, an issue arose as to the nature of the orders the Board should give in this matter. The Procuring Entity urged the Board to order a fresh evaluation of all the tenders as an alternative plea. The Board however notes that the party that was not satisfied with the evaluation process was not before it. Ernst & Young which was the bidder that complained to the Procuring Entity that its tender was not fairly disqualified did not lodge any Request for Review with the Board. The Board is of the view that it is only an aggrieved bidder who can file a request for review and such a bidder cannot hide behind a Procuring Entity to lodge, what in essence is, a collateral attack on the result of a tender process though the back door.

The provisions of Section 167 (1) of the Act are clear on what a dissatisfied bidder can do and it provides as follows:

Section 167 (1) *"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk 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 award or 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 action of Ernst & Young was therefore that of a bidder which was not interested in pursuing the matter through the laid down law and procedure. The Board cannot therefore grant relief to a bidder who did not file a request for review and neither can the Procuring Entity secure those reliefs on behalf of a bidder which has not sought any relief from the Board.

The danger in allowing the Procuring Entity to entertain complaints from bidders is that the Procuring Entity may end up sitting as a judge in its own course which is not permissible under the rules of natural justice as any decision made by it will obviously affect the rights of other bidders

who participated in the tender process without according such bidders a hearing.

Still on this issue, the courts have held that the power to determine the legality of an evaluation process or a determination and whether the reasons given are sufficient or not lies with the Board and the courts.

This was the holding of the High Court in the case of **Republic -vs- the Public Procurement Administrative Review Board, The Kenya Civil Aviation Authority Ex-parte Selex Systemi Intergrati (Nai HC Misc. Application No. 1260 of 2007)** and by the Court of Appeal in the case of the **Energy Regulatory Commission -vs- SGS Kenya Ltd & 2 others (Nai CA No. 341 of 2017)**.

An accounting officer of a cannot therefore sit and determine that an evaluation Procuring Entity outcome was based on a wrong evaluation process particularly after a notification of award as that is not within his powers under the Public Procurement and Asset Disposal Act.

The Board wishes to further observe that so long as the provisions of Section 63(1) and 167(1) are still part of the Act they remain good law and must be complied with by a Procuring Entity unless Parliament amends the said provisions.

In the end therefore this Request for Review succeeds and is allowed in terms of the following orders:-

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.

a) **The Request for Review filed by the Applicant in respect of tender No. MODP/SDD/RFP/9/2017-2018 for the Provision of Consultancy Services for Annual Capacity Performance Assessment (ACPA) Financial Year 2018/2019 be and is hereby allowed.**
b) **The Procuring Entity's cancellation of the subject tender vide the letter dated 21st May 2018 be and is hereby annulled and the same is set aside.**
c) **The Procuring Entity is directed to complete the procurement process herein including entering into a written contract with the Applicant within fourteen (14) days from the date of this decision.**
d) **In view of the fact that both parties will have an opportunity to work together in the subject tender, each party shall bear its own costs of this Request for Review.**

Dated at Nairobi on this 12th day of June, 2018.

.....	.....
CHAIRMAN	**SECRETARY**
PPARB	**PPARB**