

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 54/2011 OF 21ST DECEMBER, 2012 (RE-APPLICATION)

BETWEEN

MFI DOCUMENT SOLUTIONS LTD.....APPLICANT

AND

MINISTRY OF INFORMATION AND

COMMUNICATION.....PROCURING ENTITY

Review against the decision of the Ministry of Information and Communication dated 1st February, 2012 in the matter of Tender No.MIC/4/2011/2012 for Supply, Delivery, Installation, Testing and Commissioning of Web Press Printing Machine.

BOARD MEMBERS PRESENT

Mr. Joshua W. Wambua - Member (in the Chair)

Eng. Christine Ogut - Member

Mr. Sospeter Kioko - Member

Amb. Charles M. Amira - Member

Mrs. Loise Ruhiu - Member

IN ATTENDANCE

Ms. Pauline Opiyo - Ag. Secretary
Ms. Shelmath Miano - Secretariat

PRESENT BY INVITATION:

Applicant - MFI Office Solutions Ltd

Ms. Kethi Kilonzo - Advocate

Mr. Edwin Kimani - Lawyer

Ms. Alice Nyokabi - Lawyer

Mr. Elivin Signon - Account Manager

Mr. Danny Solanki - General Manager

Procuring Entity - Ministry of Information & Communication

Ms. Judith Nyadimo - Snr. Supply Chain Management Officer

Mr. Noah O. Okech - Supply Chain Management Assistant

Ms. Lilian Moraa - Legal Officer

Mr. Absai M. Shinachi - Senior Printer, MOIC

Mr. Dickson Nyandiga - Undersecretary, MOIC.

BOARD'S DECISION

The Request for award of costs was lodged on 21st December, 2012 against the decision of the Ministry of Information and Communication dated 1st February, 2012 in the matter of Tender No. MIC/4/2011/2012 for Supply, Delivery, Installation, Testing and Commissioning of Web Printing Machine.

BACKGROUND OF THE TENDER

Advertisement:

The tender was advertised on 26th July 2011 in the Local Press alongside seven others. In response to the advertisement, fourteen (14) prospective bidders bought tender documents. Closing date/time was 16th August 2011 at 10 a.m.

Closing/Opening:

Closing / Opening of tenders was conducted on 16th August 2011 at 10.15 a.m. Out of the fourteen (14) firms to whom tender documents were issued, eleven (11) submitted their bids. Three (3) firms listed below did not submit bids by the closing date/time:

- (a) M/S Genisys Computer Engineering Systems Ltd
- (b) M/S Lomar Services
- (c) M/S Global Village Publishers

The Evaluation Committee developed a scoring matrix comprising three progressive stages capturing the relevant aspects against which the bidders were evaluated. These stages constituted the preliminary, technical and financial requirements which were to be met by each bidder.

Bidders meeting the requirements of each stage were considered responsive at the stage under consideration and therefore qualified to proceed to the next stage of the evaluation process. Bidders not meeting the requirements of each stage were considered non-responsive at the stage

EVALUATION

Tenderer	Tenderer Code	Tender Price
1. MIBM	B1	Kshs. 155 Million
2. Secura Trading Limited	B2	Kshs. 160 Million
3. Manugraph Kenya Limited	B3	\$1.508 Million
4. Bytech Engineering Limited	B4	Kshs. 138 Million
5. Equip Agencies Limited	B5	Kshs. 95 Million
6. Rocky Africa Limited	B6	Kshs. 145 Million
7. KiunCommunications Ltd	B7	Kshs. 80 Million
8. MFI Office Solutions	B8	Kshs. 129 Million
9. Gelma Agencies Limited	B9	Kshs. 59 Million
10. Lymasa Enterprise Limited	B10	Kshs 135 Million
11. Ken Afric Diaries/Manyacious Ltd	B11	Kshs. 311 Million

The bids as read out during tender opening were as follows:

FIRMS/ WT	B1	B2	B3	B4	B5	B6	B7	B8	B9	B10	B11
REQUIREMENT											
Business Registration Certificate,	Y/N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Kenya Revenue Authority PIN/VAT Certificate,	Y/N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Kenya Revenue Authority Valid Tax Compliance Certificate,	Y/N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y

Table I - Preliminary Evaluation

The Evaluation Committee considered the mandatory statutory requirements at this stage of the evaluation process. Proof of having bought the tender document through MR receipt and provision of business registration certificate; registration and compliance with tax regime; due filling of form of tender and confidential business questionnaire; tender security by providing a bid bond of 2% of the tender price and confirmation of validity period were considered mandatory prerequisites. Bidders were evaluated on a Yes/No basis whereby Yes and No were denoted by letters Y and N indicating Compliance and Non-Compliance respectively on the Evaluation Matrix below:-

Preliminary Evaluation

under consideration and therefore disqualified from proceeding to the next stage of the evaluation process.

I	30,000 copies per hour speed or higher	Cut off size of 560mm Maximum roll width 889mm Paper gsm 45 - 80	ii Capability to print 24 pages in Tabloid, all pages in full colour with possible configurations for other publications sizes.	iv The offered machine configuration and design should be up-gradable to suit future requirements Bidders may offer complete printing solutions as per the prevailing industry and market requirements The offered configuration should suit operational best results with a small labour force of ten persons or less.
7(mks)	7	4	0	0
7	7	4	0	0
0	0	0	0	0
7	7	4	5	5
7	7	4	5	5
0	0	0	0	0
7	7	4	5	5
7	7	4	4	0

1.3.8	Installation Materials	1(mks)	1	1	1	0	1	1	1	0	1	0	1	1
1.3.9	Installation, Testing and Commissioning	5(mks)	5	5	5	0	5	5	5	0	5	0	5	5
1.3.10	Manufacturer recommended spares for one year operation period	5(mks)	0	0	0	0	0	0	0	0	0	0	0	0
1.3.11	Training	3(mks)	3	3	3	0	3	3	3	0	3	0	3	3
1.3.12	Mandatory Optional Components	2(mks)	2	2	2	0	2	2	2	0	2	0	2	2
1.3.13	2 Number Machine Service Tool Kits	5mks	5	5	5	0	5	5	5	0	5	0	5	5
C	Brand & Model Statement	5 (mks)	5	5	5	0	5	5	5	5	5	5	5	5
D	Country of Origin Statement	5(mks)	5	5	5	0	5	5	5	0	5	0	5	5
E	Dealership or Agency Proof	5(mks)	5	5	5	0	5	5	5	0	5	0	5	0
F	Delivery Time - 12weeks (120 Days) or Less	5 (mks)	0	0	0	0	0	0	0	0	0	0	0	0
	Total	100	85	61	10	93	93	100	20	95	83			
	Pass mark 75%								digital					

The Evaluation committee set 75% as the threshold at and above which the bidders qualify for the financial evaluation process and below which the bidders do not qualify for the financial evaluation.

Bidders Nos. 2, 5 and 9 scored below the required threshold of 75% and therefore did not qualify to proceed to the Financial Evaluation stage. Bidder Nos.1, 6, 7, 8, 10 and 11 attained the required threshold of 75% and therefore qualified for the Financial Evaluation.

Financial Evaluation

The Evaluation Committee considered the financial aspects of the tender looking at the unit and aggregate costs and prices quoted for each element of services and items to be procured against the specifications spell out in the tender documents.

Based on the analysis of the data received, the following financial evaluation matrix / price comparison schedule was prepared:-

Price Comparison Schedule

Item	Description	Bid 1	Bid 6	Bid 7	Bid 8	Bid 10	Bid 11
Web Press	155,680,000	145,000,000	80,000,000	129,997,089	135,947,088	311,808,000	
Printing Machine			+ V.A.T.				
Brand	Orient	Ronald	Prakash	Pressline	Pressline	Cityline	Manngraph

Recommendation

Based on the analysis of the foregoing evaluation process, the committee observed that since this is a major capital equipment the Ministry of Information and Communications is in the process of procuring for the first time, the following should be carried out:-

Applicant herein and other bidders on the same date. At another meeting, purported to have been held on 1st February 2012, the Tender Committee made a decision to terminate Tender No. MIC/4/2011-2012 after the Board had on 19th January 2012 ordered that the Tender be re-evaluated. The Tender Committee's decision was communicated to the bidder and the unsuccessful bidders via letters dated 2nd December, 2011.

The Tender Committee's decision was communicated to the successful tender and awarded the contract to M/S Kiun Communications Limited of P.O. Box 41545-80100, Mombasa at Kshs 92,800,000.00 inclusive of VAT. The Ministerial Tender Committee (MTC) at its meeting No. MIC 6/2011-2012 held on 1st December 2011 under Minute No. 8 adjudicated on the tender and awarded the contract to M/S Kiun Communications Limited of P.O. Box 41545-80100, Mombasa at Kshs 92,800,000.00 inclusive of VAT.

TENDER COMMITTEE DECISION

The committee further recommended that the bidders that met the requirements set out in (a) and (b) above be subjected to the financial evaluation and the bidder offering the lowest price be considered for the award.

- The committee further recommended that the bidders that met the requirements set out in (a) and (b) above be subjected to the financial evaluation and the bidder offering the lowest price be considered for the award.
- (a) Physical visits to the premises of bidders which have been evaluated and have met the technical requirements of the tender for assessment of both financial capability to supply and technical capacity to maintain and service.
- (b) Physical visits to the manufacturers' premises for technical assessment of the equipments to be procured.

THE REVIEW

The Applicant, MFI Document Solutions Ltd, lodged this Request for Review on 21st December, 2012 against the decision of the Ministry of Information and Communication in the matter of Tender No.MIC/4/2011/2012 for Supply, Delivery, Installation, Testing and Commissioning of Web Press Printing Machine. The Applicant was represented by Ms. Kethi Kilonzo, Advocate while the Procuring Entity was represented by Ms. Lillian Moraa Legal Officer.

The Applicant requests the Board for the following orders:

- (a) That the Public Procurement Oversight Authority supplies a copy of the report issued to it by the Procuring Entity under Section 36 (7) and (8) of the Public Procurement and Disposal Act;
- (b) That the Board considers and reviews the Report issued by the Procuring Entity under Section 36 (7) and (8) of the Public Procurement and Disposal Act;

- (c) That the Board directs that the Respondent complies with its orders in Civil Application No. 54 of 2011 between the parties.
- (d) That costs of the Request for Review in Civil Application No. 54 of 2011 and this Review be awarded to the Applicant.
- (e) That this Request for Review be consolidated with Civil Application No. 54 of 2011 by the Applicant.

At the commencement of the hearing, the Board on its own motion informed parties that it needed to determine whether it had jurisdiction to hear the Request for Review based on whether the Procuring Entity had not filed a notice of Preliminary Objection. The Board noted that the Procuring Entity had not filed a Request for Review to determine whether it had jurisdiction or not. In response, the Procuring Entity on its part had no objection to the Applicant submitting on grounds of review and the issue of jurisdiction. In view of the foregoing and by consent of the parties, it was agreed that the issue of jurisdiction of the Board and the Request for Review would be argued together.

The Applicant has raised seventeen (17) grounds of review which the Board deals with as follows:

Grounds 1, 2, 3, 4, 5, 6, and 7

These grounds are general statements of facts by the Applicant with regard to the previous Request for Review No 54 / 2012 of 21st December, 2011 in which the Board gave a ruling on 19th January 2012. No breach of the Public Procurement and Disposal Act, 2005, hereafter referred to as "the Act" or the Public Procurement Regulations, 2006, hereafter referred to as the Regulations has been cited by the Applicant in these grounds. The Board therefore need not make any findings on them.

Grounds 8, 9, 10, 11, 12, 13 and 14 - Breach of Section 26 of the Act and Regulations 20 and 21

The above grounds of review have been consolidated as they address related issues on procurement planning and cancellation of the tender.

In support of its grounds the Applicant made the following submissions:

1. The tender was the subject of Request for Review No. 54/2011. Upon hearing the parties on 10th January, 2012 the Board made the finding that the Evaluation Committee had not evaluated the tender properly and ordered that a re-evaluation be done and an award be made based on the evaluation criteria set out in the Tender Document within 35 days. The Board's decision was rendered on 19th January, 2012.

2. That in the previous application, the Applicant's name was MFI Office Solutions Ltd. It has since changed its name to MFI Document Solutions Ltd. The certificate of change of name is annexed as document no.1 in its Request for Review.

3. That by a letter dated 1st February, 2012, the Procuring Entity purported to cancel the Tender. The said letter was not copied to the Board nor did it make any reference to the Board's Decision in the Request for Review in (1) above.

5. That Section 26 of the Act and Regulations 20 and 21 requires that the Procuring Entity prepares an annual procurement plan for each year with a detailed breakdown of the goods, works or services required. The Annual Procurement Plan should be within the approved budget of the Procuring Entity. It argued that a Procuring Entity cannot commence any procuring procedure unless it is satisfied that sufficient funds have been set aside in its budget to meet the obligations of the resulting contract. It averred that the Procuring Entity acted in breach of the law in advertising for a tender beyond its annual procurement plan.

The Applicant argued that the above mentioned reasons did not justify the grounds for cancellation of the tender.

December 2011.

2) The purpose for which the procurement was to be made was no longer subsisting since the production of the Kenya Today's Newspaper had ceased on 15th

90,000,000/-;

1) When the Procuring Entity embarked on the process of implementing the decision of the Board it noted that the funds allocated for the procurement under the Annual Procurement Plan was Kshs.

4. That by a letter dated 30th April 2012 from the Public Procurement Oversight Authority, the reasons given for the cancellation of the Tender were as follows:

7. That during the hearing of Request for Review No. 54/2011 on 10th January, 2012 the Procuring Entity did not disclose to the Board that the Publication namely "Kenya Today" had ceased on 15th December, 2011. It submitted that the Procuring Entity took the Board through the process of financial evaluation, and did not confirm that the successful bidders offer had exceeded the amount in the procurement plan. The tender Committee made an award to the successful bidder on 23rd December, 2011. Funds only became an issue after the Board had ordered the Procuring Entity to re-evaluate and award the tender.

6. Immediate communication was requested.

confirmed available.

5. The funds to meet the resultant expenditure were

4.

3.

2.

other publications

newspaper but it can be employed in production of

production of the Ministry's Kenya Today weekly

1. The web press printing machine is required for the

stated that:

6. That during the hearing of Request for Review No. 54/2011 the Procuring Entity, in a letter dated 29th December, 2011

December, 2011.

1. That the award for Tender No 54/2011 was made on 1st December, 2011 contrary to the Applicants allegation on the date of award being 23rd In Response, the Procuring Entity submitted as follows:

Applicant.

11. That the Procuring Entity be ordered to pay costs to the

10. That time, pursuant to Regulation 73, does not run when you are dealing with contempt against the decision of the Board.

made a decision on a tender.

9. That the Procuring Entity did not challenge the decision of the Board by a way of Appeal or Judicial Review. Accordingly, in line with Section 100 of the Act, the decision of the Board on the issue was final and binding. Therefore, the Procuring Entity had no discretion at all to terminate the tender as it purported to do. It argued that Section 36 of the Act cannot be invoked by the Procuring Entity after the Board has

8. That the Procuring Entity purported to terminate the Tender pursuant to Section 36 of the Act. The Applicant argued that this was a blatant disregard of the decision and directives issued by the Board in Request for Review No. 54/2011. The Applicant submitted that the Procuring Entity has failed to re-evaluate the Tender as ordered by the Board, and therefore has acted in breach of the law and in contempt of the Orders of the Board.

4. Upon questioning by the Board, it conceded that during the hearing of Request for Review No. 54/2011 on 10th January, 2012 it did not disclose to the Board that the Publication namely "Kenya Today" had ceased on 15th December, 2011. It stated that the reason the

3. That the intended purchase of the item under contention was covered in the Procuring Entity's procurement plan and budgeted for under Item No. 3111200 Subhead 000 under Heads 653, 654 and 658 of the Development Expenditures for the Financial Year 2011/2012 at page 449. It stated that it had however allocated Kshs 90,000,000 in the procurement plan for the purchase of the printing press out of its total budget. It averred that the estimated cost of goods and services which the procuring entities rely on for their budgetary purposes will invariably vary when the actual tenders are floated. It argued that actual purchase price depends on other parameters which is the essence of evaluation before procurement is made for items of this nature. It further argued that it had sufficient budget to meet this procurement.

2. That it cancelled the said Tender by a letter Ref. No. MIC/A/ 10/3 dated 1st February 2012. It submitted that the decision to cancel the tender was made when it was in the process of implementing the Board's Decision. It averred that the cancellation was communicated to PPOA vide the Procuring Entity's letter Ref. No. MIC/A/10/03 dated 29th March, 2012 and subsequent report on the cancellation forwarded to PPOA vide letter Ref. No. MIC/A/10/4 dated 18th September 2012.

It is clear from the submissions of the parties that this Request for Review is intrinsically enjoined with the decision of the Board in Request for Review No. 54 of 2011. After hearing the submissions by parties, the Board examined the documents presented before it.

The Board has carefully considered the submissions of the parties and for Review for lack of merit and for having been filed out of time.

In this regard, the Procuring Entity urged the Board to dismiss the Request for Review for lack of merit and for having been filed out of time.

6. That the Request for Review as filed by the Applicant on 21st December, 2012 was out of time considering that the Applicant was notified of the cancellation of the tender on 1st February, 2012. Accordingly, the Board has no jurisdiction in view of the provisions of Regulation 73.

5. That currently, it is still producing other publications through other legal entities e.g. Nation Media etc.

Board.
 aforementioned procurement was discussed if so required by the meeting where the issue on financial constraints for the stated that the Procuring Entity would avail minutes of the lower operational level. Further, Ms. Moraa, the Legal officer Procuring Entity and no communication had been made at the of stopping the publication was made at policy level of the disclosure was not made to the Board was that the said decision

is of the view that the whole case turns on the issue as to whether the Board has jurisdiction to entertain this application taking into account the provisions of Sections 36, 93 and 100 of the Act, Regulation 73 and Clause 2.19.15 of the Tender Document.

The jurisdiction of the Board is provided by Section 93 of the Public Procurement and Disposal Act, 2005. The said Section provides as follows;

Section 93 (1):-

"Subject to the provisions of this Part, any candidate 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 as in such manner as may be prescribed."

Further, the procedure for approaching it is as set out in Regulation 73 which provides as follows;

Regulation 73:-

"(1) A request for review under the Act shall be made in Form RB 1 set out in the Fourth Schedule to these regulations.

(2) The request referred to in paragraph (1) shall -

(a)

(b)

(c) Be made within fourteen days of -

(i) the occurrence of the breach complained of where the

request is made before the making of an award; or

(ii) the notification under sections 67 or 83 of the Act

....."

.....

procurement proceedings within fourteen days of the request.

procuring entity shall give its reasons for terminating the

(3) On the request of a person described in subsection (2), the

the procuring entity was negotiating.

if direct procurement was being used, to each person with whom

to each person who submitted a tender, proposal or quotation or,

(2) The procuring entity shall give prompt notice of a termination

proceedings without entering into a contract.

"(1) A procuring entity may, at any time, terminate procurement

Section 36:-

in Section 36 of the Act, which provides as follows:

Further, the procedure for terminating procurement proceedings is set out

Court shall be final."

Board may appeal to the High Court and the decision of the High

(2) Any party to the review aggrieved by the decision of the Review

fourteen days from the date of the Review Board's decision.

Section 100:-

Section 100 of the Act, which provides as follows:

Further, the procedure for contesting the Board's decision is set out in

"(1) A decision made by the Review Board shall, be final and binding

on the parties unless judicial review thereof commences within

(5) The procuring entity shall not be liable to any person for a termination under this section.

(6) A termination under this section shall not be reviewed by the Review Board or a court.

(7) A public entity that terminates procurement proceedings shall give the Authority a written report on the termination.

(8) A report under subsection (7) shall include the reasons for the termination and shall be made in accordance with any directions of the Authority with respect to the contents of the report and when it is due."

Further the requirements for terminating the tender are set out in Clause 2.19.15 of the Tender Document which provides as follows:

"the Procuring Entity may at any time terminate procurement proceedings before contract award and shall not be liable to any person for the termination."

In view of the foregoing, the issues that arise for determination by the Board are as follows:

1. Was this Request for Review filed out of time?
2. What directives were issued by the Board in Request for Review No. 54 of 2011?
3. Could the directives of the Board in Application No. 54 of 2011 take away the powers of the Procuring Entity to terminate the tender at any time before entering into a contract?

4. Has this tender been terminated pursuant to Section 36 of the Act and Clause 2.19.15 of the Tender Document? and if so, does the Board have jurisdiction to hear and determine this matter?
5. Was the procurement in line with the Procuring Entity's Procurement Plan and Budget?

To answer the above questions it is necessary to set out the background of this Request for Review which is as follows:

1. On 23rd December, 2011 the Applicant filed a Request for Review challenging the award of the Tender No. MIC/4/2011/2012 for Supply, Delivery, Installation, Testing and Commissioning of Web Printing Machine to another bidder.

2. The Orders sought in the Request for Review were as follows;

- a. To cancel or set aside the award of tender to the Successful Tenderer and award the tender to the Applicant.
- b. To direct the Respondent to provide a summary of the evaluation and comparison of tenders to the Applicant as provided under Section 45(3) of the Public Procurement and Disposal Act.
- c. Costs of the Request for Review.

3. On 19th January 2012, the Board delivered the decision in this matter and made the following orders;

- a. Nullified the award of the tender to Kiun Communications with no orders as to costs.

b. Ordered for a re-evaluation of the bids and award of the tender in line with the criteria set out in the tender documents within 35 days.

4. No Judicial Review or Appeal was filed and therefore this case was closed as no further action was required on the part of the Board.

5. By a letter dated 1st March, 2012, the Applicant's Advocate, Ms. Kethi D. Kilonzo, informed the Secretary to the Board and the Director General, Public Procurement Oversight Authority (PPOA) that the Applicant had received a letter dated 1st February, 2012 from the Procuring Entity stating that the tender had been cancelled under Clause 2.19.5 of the Tender Document. In the said letter, the Applicant's Advocate requested that action be taken against the Procuring Entity, as provided for under the law, for contravening the Orders given by the Board.

6. By a letter dated 20th March, 2012 to the Applicant's Advocate, PPOA acknowledged receipt of the Advocate's letter of 1st March 2012 on behalf of the Applicant. The PPOA informed the Advocate that the issues raised in their letter were being addressed.

7. In a letter dated 29th March 2012, the Procuring Entity informed the Public Procurement Oversight Authority that as it was in the process of implementing the Board's decision of 19th January, 2012, it was noted that the funds allocated for procurement of the subject machine as per the Procuring Entity's procurement plan was Kshs 90,000,000 and the purpose for which the procurement was to be made was no

b) Further the Purpose of for which the procurement was to be made was no longer subsisting, since the production of the Kenya Today Newspaper had ceased on 15th December, 2011. Therefore due to the aforesaid developments that were beyond the control of the Ministry, it was prudent to cancel Tender No. MIC 4/2011-2012 which issue was discussed and approved by the MTC at its meeting No. MIC 8/2011-2012 (Minute No. 10) held on 1st February, 2012. This communication was then issued to all the tenderers as per clause 2.19.5 of the tender documents.

a) The PPARB having given its decision on the matter on 19TH January 2012, the Procuring Entity embarked on the process of implementing the said decision. However, during the process it was noted that the funds allocated for the procurement of the subject machine herein as per the Ministry's Procurement Plan is Kshs 90,000,000.

8. By a letter dated 30th April 2012, the Public Procurement Oversight Authority informed the Applicant's Advocate that the Procuring Entity had since responded as follows regarding the subject matter:

longer subsisting as the production of Kenya Today Newspaper had ceased on 15th December 2011. Due to the aforesaid developments that were beyond the control of the Procuring Entity, it was prudent to cancel the tender.

9. On 16th May, 2012, the Applicant's advocate wrote to the Public Procurement Oversight Authority and the Secretary to the Board on the subject of Application for Review No. 54 of 2011 stating as follows, in part:

"....."

The above matter refers.

We have now taken instructions on your letter dated 30th April 2012.

We wish to draw you attention to the Public Procurement and Disposal Act and Regulations that stipulate that before advertising for invitation to tender, the Procuring Entity must ensure that they have the requisite funds for the procurement.

The law also requires the purpose for which the goods subject of the tender is required to be certain and no speculative.

Our instructions are that the tender was cancelled because our client successfully challenged the successful tenderer and the Public Procurement Administrative Review Board ordered a fresh evaluation and award of the tender.

We therefore write to request that this matter be placed before the Procurement Administrative Review Tribunal at a date to be conveyed to us, for directions and for appropriate actions against the Procuring Entity.

If we do not hear from you in the next (14) day we have instructions to move to the Public Procurement Administrative Review Board on our own motion.

"....."

15. The Orders sought in the Request for Review as filed were as follows:
 a. That the Public Procurement Oversight Authority supplies a copy of the report issued to it by the Procuring Entity under

54 of 2011 in respect of this tender.

14. On 21st December, 2012, the Applicant filed Request for Review No.

13. By a letter dated 10th October 2012, the DG, PPOA, advised the Applicant's Advocate that they could pursue the matter of obtaining the records of the procurement proceedings from the Procuring Entity who is mandated under the Act to provide such information.

12. By a letter dated 18th September, 2012, the Procuring Entity submitted to PPOA a report on the termination of Tender No. MIC/ 4/2011-2012.

11. By a letter dated 3rd September, 2012, the Applicant's advocate requested the DG, PPOA to avail to her a copy of the report that the Procuring Entity had submitted to the DG on the cancellation of the subject tender.

10. On 4th June 2012, the Director General, PPOA responded to the letter from the Applicant's advocate dated 16th May, advising her to liaise directly with the Board Secretariat if she intended to pursue the matter further.

a. The Board finds as a matter of fact that the Procuring Entity did not re-evaluate the tender as ordered by the Board in its decision of 19th January 2012 and hence the award for this tender has not been made by the body empowered by statute, namely, the Tender Committee, to make an award to date.

Upon hearing the parties in this matter, the Board makes a number of salient observations and findings as follows:

16. The Procuring Entity filed its Response on 15th January 2013 and by a letter referenced item: Review against tender no. MIC/4/2011-2012 for Supply, delivery, installation, testing and commissioning of Web Press Printing Machine.

- Application No. 54 of 2011 by the Applicant.*
- e. *That this Request for Review be consolidated with Civil Application No. 54 of 2011 and this Review be awarded to the Applicant.*
 - d. *That costs of the Request for Review in Civil Application No. 54 of 2011 and this Review be awarded to the Applicant.*
 - c. *That the Board directs that the Respondent complies with its orders in Civil Application No. 54 of 2011 between the parties.*
- Procurement and Disposal Act;*
- b. *That the Board considers and reviews the Report issued by the Procuring Entity under Section 36 (7) and (8) of the Public Procurement and Disposal Act;*

- b. The Procuring Entity has not adduced evidence of the minutes of the Tender Committee Meeting No. 8/2011-2012 held on 1st February 2012 that cancelled tender No. MIC/4/2011/2012 for Supply, Delivery, Installation, Testing and Commissioning of Web Printing Machine.
- c. That the Applicant was notified of the termination of the tender vide a letter dated 1st February, 2012 and filed this Request for Review on 21st December, 2012.
- d. The reasons given for termination of the tender were that:
- i. "The Ministry had noted the funds allocated for the procurement of the subject machine herein the Ministry's procurement plan is Kshs. 90,000,000. Going by the PPARB's decision, the second lowest bid of Kshs. 129,997,098 was way above the funds allocated for the procurement.
 - ii. Further, the purpose for which the procurement was to be made was no longer subsisting, since the production of Kenya Today Newspaper had ceased on 15th December, 2011.
- Therefore due to the aforesaid developments that were beyond the Ministry's control, it was prudent to cancel the tender."
- e. As earlier stated in a letter dated 29th December, 2011, the Web Press Printing Machine was required for the production of the Ministry's Kenya Today weekly newspaper but it can be employed in production of other publications. At that time the funds allocated for the procurement were adequate.

Review. This may be:-

The first issue to be determined by the Board is whether the Request for Review was lodged within 14 days pursuant to Regulation 73(2) (c) (ii) and Sections 67 or 83 of the Act? The Board has noted that Regulation 73(2) (c) gives an aggrieved bidder discretion as to when to make a Request for Review. This may be:-

As earlier noted the Procuring Entity has not provided minutes of the meeting that cancelled the tender which is the basis for the notification letter dated 1st February, 2012. In this regard, the authenticity of the decision of termination is not verifiable.

- (i) That the Applicant filed this Request for Review against the decision of the Procuring Entity on 21st December, 2012.
- (ii) The Applicant was notified of the purported cancellation of the tender vide a letter dated 1st February, 2012.
- On issue of time, the Board notes the following issues are not in dispute:

forementioned report.

- g. A report has been filed with the Director General of the Public Procurement Oversight Authority (PPOA) on the purported termination as required by Section 36(8) of the Act on 18th September, 2012. Minutes of the Tender Committee Meeting No. 8/2011-2012 held on 1st February 2012 were not attached to the aforementioned report.
- f. At the hearing on 10th January, 2012, the Procuring Entity through its State Counsel and the Officers present never mentioned that the publication "Kenya today" had ceased publication on December 15, 2011.

One of them is on the orders that the Board issued; It is clear that the Procuring Entity totally ignored the decision of the Board. The Board had can only make observations.

Having found that the Request for Review was filed out of time, the Board

The Board finds that the Applicant's argument that the appeal window was not running due to contempt of the Board's Orders has no basis in the Act or Regulations. As the Board has already found, there was notification as required by the Act and therefore the Request for Review should have been made within 14 days of notification of the occurrence of the breach as stipulated in Regulation 73(2)(c)(i).

As already noted, no minutes have been placed before the Board on the cancellation of the said tender, and as such the Board cannot make a determination on whether the letters of 1st February, 2012 can be a basis for termination of a tender. In view of the foregoing, the Board holds that the letters of notification as provided were for purposes of stopping the procurement process.

- (a) Within fourteen days of the occurrence of the breach in cases where the aggrieved party chooses to make its Request for Review before the award or;
- (b) Within fourteen days of notification required under Section 67 or 83 of the Act.

Board or High Court shall be in breach of this Act and any action by
 (3) " A party to the review which disobeys the decision of the Review

fourteen days from the date of the Review Board's decision.... "
 on the parties unless judicial review thereof commences within
 (1) " A decision made by the Review Board shall, be final and binding

follows:

binding as provided in Section 100 (1) and (3) of the Act which states as
 Review if it was dissatisfied. It did not do so and therefore the decision is
 Procuring Entity and the only option open to it was to seek a judicial
 Upon rendering the said decision, the decision became binding on the
 when it heard the case and delivered the decision on 19th January, 2012.
 Further, the Board was properly seized of the mater on 10th January, 2012

assumed. It has to be exercised judiciously.
 law, such discretion is not absolute as the Procuring Entity in this case
 tender. It is trite law that once a body is conferred with discretion by the
 Entity on its own motion to search for alternative reasons to reject the
 criteria set out in the tender document, it was not open to the Procuring
 held that the Evaluation Committee did not evaluate the tender as per
 award is as set out in Regulations 10, 11 and 16(1). Since the Board had
 tender document within thirty five days. The only way it could finalize the
 Entity to re-evaluate and award the tender based on criteria set in the
 and held that the evaluation process was flawed. It directed the Procuring
 carefully considered the manner in which the evaluation process was done

in its budget to meet the obligations of the resulting contract." (6) A procuring entity shall not commence any procurement procedure until it is satisfied that sufficient funds have been set aside

.....
.....

procurement plan; (a) within the approved budget of the procuring entity and shall be planned by the procuring entity concerned through an annual

(3) All procurement shall be -

.....
..... (1)

Section 26:-

state as follows:

With regard to the issue of whether the procurement was provided for in the Procuring Entity's procurement plan and the budget, the Board notes the provisions of Section 26 of the Act and Regulations 20 and 21 which

imposed on it by the Act.

The Board further observes that the Procuring Entity failed to discharge a duty in Section 36 and Clause 2.19.15 of the Tender Documents at this stage. The Board observes that the Procuring Entity cannot purport to seek refuge

Court shall be null and void"

such party contrary to the decision of the Review Board or the High

Regulations 20:-

"20. (1) A procuring entity shall prepare a procurement plan under section 26(3) (a) of the Act for each financial year as part of the annual budget preparation process.

(2) Annual procurement planning shall be integrated with applicable budget processes and based on indicative or approved budgets, as appropriate.

(3).....
.....
....."

Regulation 21:-

"21(1) The annual procurement plan for each procuring entity shall include-

(a) a detailed breakdown of the goods, works, or services required;

(b).....

....."

The Board has perused extracts from the Procuring Entity's budget for the financial year 2011-2012 and notes that under Heads 653, 654 & 658, Subhead 000, Item 3111200 of the Revised Development Expenditure Estimates 211-2012 (page 449) funds totaling Kshs 105,646,670 were allocated for Rehabilitation and Renovation of Plant, Machinery and

Equipment. The amount which had been allocated for the same item in the initial printed estimates was Kshs 131, 646, 670.

The Board has also perused an extract of the Procuring Entity's procurement plan and notes that the Procuring Entity had planned to procure a Printing Press for Kenya Today at an estimated cost of Kshs 90,000, 000. The Board further notes that the Tender for the printing press was advertised on 26th July 2011.

From the foregoing the Board observes that the Applicant's allegations that the Procuring Entity's procurement plan was not within the approved budget and that the Procuring Entity commenced a procurement process without being satisfied that it had sufficient funds is untenable owing to the fact that as at 26th July 2011 when the tender was advertised, the Procuring Entity had an allocation of Kshs 131, 646, 670 in its budget for Rehabilitation and Renovation of Plant, Machinery and Equipment which the Board assumes includes the printing press and other equipment. Further, the procurement of a printing press was in the Procuring Entity's Procurement Plan and its estimated cost was Kshs 90,000,000 which was within the allocation for the item in the Printed Estimates. The Board further observes that in practice, it is rare for the actual cost at which an item is bought to be the same as its estimated cost in the procurement plan due to exogenous factors that may cause price fluctuations during the period between the preparation of estimates and the actual procurement.

The Procuring Entity strongly opposed the Applicant's prayers that it be reimbursed its costs of the tender process and the review costs on the grounds that this will set a bad precedence and encourage frivolity in review cases. It submitted that Section 36(6) of the Public Procurement and Disposal Act on termination of procurement proceedings stipulates that

The Applicant therefore prayed that it be reimbursed its costs of the tender,

Civil Application No. 54 of 2011, and this review.

Costs of the tender process	- Kshs. 2,055,716/-
Legal costs of Review No. 54 of 2011 and this review	- Kshs. 600,000/-
Total	- Kshs. 2,646,657.70/-

and this review:

The Applicant submitted that it incurred the following costs in applying for the tender and in the filing of Application for Review No. 54 of 2011,

relating to claims of loss by the Applicant.

The above grounds have been consolidated as they raise similar issues

Grounds 15 and 16 - Statement of Loss

With Regard to the prayer that the Board directs the Procuring Entity to over, the tender is dead. Board has ruled on several occasions that once the tender validity period is parties, the Board notes that the tender validity has since expired. The comply with its orders in Civil Application No. 54/2011 between the

(i) The Board rendered its decision in the initial Request for Review on 19th January 2012. The instant Application was filed on 21st December, 2012 which is about eleven (11) months from the date of the Board's decision in Application No. 54/2011. The question which arises naturally is why the Applicant took no steps to protect its rights under Section 93(1) of the Act by seeking the review of the

However, in this case the Board notes as follows;

The Board agrees with the Applicant that it has powers to award costs.

(d) order the payment of costs as between parties to the review.

.....

(a)

more of the following –

"Upon completing a review the Review Board may do any one or

Section 98:-

of the Act which provides as follows;

It is clear that the Board has powers to award cost as provided in Section 98

the termination.

proceedings before contract award and shall not be liable to any person for states that the Procuring Entity may at any time terminate procurement Section 36. It stated that Clause 2.19.5 of the Tender Document explicitly a Procuring Entity shall not be liable to any person for termination under or a Court. It further submitted that Section 36(5) of the Act stipulates that termination under the section shall not be reviewed by the Review Board

At the hearing the Applicant produced the Decision No. 54/2011 of the Board where the Procuring Entity was ordered to re-evaluate the tender and award based on criteria set out in the Tender Document. It is trite law that a party is bound by its pleadings. The Applicant did pray for the Board to either cancel or set aside the award of the tender to the Successful Bidder and award the tender to it, to direct the Procuring Entity to provide a summary of the evaluation and comparison of tenders as provided under Section 45(3) of the Act and award costs of the Request for Review when it Applicant.

In view of the foregoing, even assuming for purposes of argument that the Board had jurisdiction and powers to review its decision on costs, a fundamental question arises as to whether there are proper grounds or reasons, as to why such discretion should be exercised in favor of the Applicant.

(iii) The Board has held in the past that a Request for Review must be filed within fourteen days of notification or breach. That remains the position. Accordingly the Board holds that it has no jurisdiction.

73. The Board notes that the Applicant has attempted to explain the long delay in filing the Application by attaching various correspondences between it, the Procuring Entity and Director General, Public Procurement Oversight Authority. As earlier established, it is apparent that this Request for Review was filed long after the statutory period allowed under Regulation 73 had lapsed.

filed its Request for Review. The Applicant succeeded and the Board granted part of the prayers that the Applicant had sought. The Board did not award any costs. The Applicant has now prayed for the Board to order the Procuring Entity reimburse it costs of the tender process of Kshs. 2,055,716/- and Legal costs of Review No. 54/2011 and this review of Kshs. 600,000/.

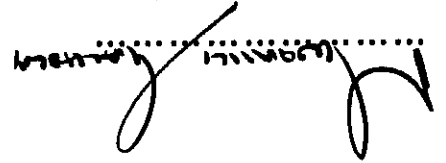
The Board observes that it is now too late for the Applicant to try to revive the issue of costs as the Board had already ruled on it on 19th January, 2012. In view of the foregoing, the Applicant cannot claim the loss associated with the tendering process.

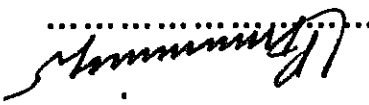
Ground 17

Ground number 17 is not a ground of review but a general statement informing the Board of the Applicant's change of name from MFI Office Solutions Limited to MFI Document Solutions Limited. The Board therefore need not make any findings on it.

Taking into account all the above observations by the Board, the only Order that is available in this matter is the dismissal of the Application. The Board so orders. In the premises, this Application is hereby dismissed and each party shall bear its own costs.

Dated at Nairobi on this 21st day of January, 2013.


CHAIRMAN
PPARB


SECRETARY
PPARB