

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 33 OF 2013 OF 12<sup>TH</sup> SEPTEMBER, 2013**

**BETWEEN**

**KOCKS KRANES GMBH (GERMANY).....APPLICANT**

**AND**

**KENYA PORTS AUTHORITY .....PROCURING ENTITY**

**(Being a Request for Review of the decision of the Kenya Ports Authority dated the 30<sup>th</sup> August 2013 in the matter of Tender No. KPA/117/2012 - 13 TE - SUPPLY INSTALLATION AND COMMISSIONING OF THREE (3NO.) NEW SHIP TO SHORE CRANES).**

**BOARD MEMBERS PRESENT**

Mrs. Josephine W. Mongare - Chair person  
Mr. Peter Bitu Ondieki - Member  
Eng. Weche R. Okubo - Member  
Mrs. Rosemary K. Gituma - Member  
Mrs. Gilda Odera - Member  
Mr. Hussein Were - Member  
Mr. Nelson Orgut - Member  
Mr. Paul Gicheru - Member  
Mr. Paul Ngotho - Member

## **IN ATTENDANCE**

Ms. Pauline Opiyo - Secretary

## **PRESENT BY INVITATION**

### **Applicant - M/s Kocks Krane GMBH (Germany)**

Mr. Kibet Wisdom - Advocate

Mr. Maur Abdalla Bwanamaka - Agent for the Applicant

### **Procuring Entity -Kenya Ports Authority**

Mr. Stephen Kyandih - Advocate

Mr. Yobesh Oyaro - Head of Procurement and Supplies.

### **Interested Party - Liebherr Container Cranes Ltd**

Felistus Wanjiku Njoroge - Advocate.

## **THE BOARD'S DECISION**

Upon hearing the representations of the parties and the interested candidate and upon considering the information in all the documents before it, the Board decides as follows:-

## **BACKGROUND OF AWARD**

### **INTRODUCTION**

This Request for Review relates to the Tender No. KPA/117/2012-13/TE for the Supply Installation and Commissioning of Three (3 No.) New Ship to Shore Cranes which was advertised by the Procuring Entity in the Standard Newspapers of 22<sup>nd</sup> and 23<sup>rd</sup> April 2013 and the Lloyd's List Intelligence / Classified of Wednesday 24<sup>th</sup> April 2013. The tender closed and opened on 10<sup>th</sup> June 2013 at 10.30 a.m. The following tenders were received and opened on the tender opening date.

- (i) M/s Liebherr Container Cranes Limited
- (ii) M/s Terex Port Solutions.
- (iii) M/s Kocks Kranes GMBH (Germany)
- (iv) M/s Dalian Huarai Heavy Industry (DHHI) Co. Ltd.
- (v) M/s Kalmar.

The Tender Evaluation Committee carried out various evaluations beginning with a Preliminary evaluation of the tenders as required by Clause 12.1 (g) of the Tender Document. The outcome of the Preliminary Evaluation was that all the five tenders qualified to proceed to technical evaluation.

The evaluation committee then carried out the technical evaluation whose results were as follows:-

	<b>Name of Firm</b>	<b>Technical Scores</b>	<b>Overall Scores</b>	<b>Remarks</b>
1	M/s Liebherr Container Cranes Ltd	47.23	93.55	<b>Recommended to proceed to the next stage of evaluation</b>
2	M/s Terex Port Solutions.	24.84	71.28	Did not attain technical pass mark of 45% and overall pass mark of 80%.
3	M/s Kamar	45.29	90.28	Non responsive. Not recommended for further evaluation.
4	M/s Kocks Kranes GMBH	45.10	91.05	<b>Recommended to proceed to the next stage of evaluation.</b>
5	M/s DHIHI	35.72	68.80	Did not attain technical pass mark of 45% and overall pass mark of 80%

According to the available evidence, the Interested Party and the Applicant were thereafter subjected to a financial evaluation whose result was the award of the tender the subject matter of this dispute to the interested party. The basis for the award of the tender was that it was the lowest evaluated bidder.

The Applicant was dissatisfied with the award of the tender to the Interested Party and lodged a Request for Review of the Procuring Entity's decision pursuant to the provisions of Regulation 73 of **the Public Procurement and Disposal Regulations, 2006** as amended by **Legal Notice No. 106 of 18<sup>th</sup> June, 2013.**

The Applicant requests the Board for order/orders that:

1. **Annul the award to Liebherr Cranes and the procurement proceedings leading to the award in its entirety.**
2. **Substitute the entire decision.**
3. **The applicant bid that was deemed unsuccessful be reconsidered.**

Though the Applicant had sought prayers 1, 2 and 3 in the filed Request for Review, it withdrew prayers 2 and 3 of the Request for Review and only sought for the annulment of the award to the Interested Party together with the entire procurement proceedings leading to the award.

### **THE PLEADINGS**

For the record and for the reasons which shall become clear in the body of this decision, the Applicant lodged a formal Request for Review dated 12<sup>th</sup> September, 2013 signed on behalf of the Applicant which was accompanied by a statement purportedly filed pursuant to the Provisions of Regulation 73 (2) (b) of **The Public Procurement and Disposal Regulations, 2006** as amended by **Legal Notice No. 106 of 18<sup>th</sup> June 2013**. In addition to lodging the two documents with the Board, the Applicant also lodged a Supplementary Affidavit sworn in the name of one **Uwe Pietryga** and filed with the Board on 20<sup>th</sup> September, 2013.

The Procuring Entity on its part filed a Response to the Grounds of the Request for Review dated 18<sup>th</sup> September, 2013 together with supporting documents and an Affidavit sworn by one **Yobesh Oyaro** in which he sought to rebut and clarify some of the allegations made by the Applicant. The Procuring Entity in addition filed a notice of Preliminary Objection challenging the validity of the Supplementary Affidavit sworn and filed by the Applicant on 20<sup>th</sup> September, 2013.

The Interested Party appointed the firm of M/s F. W. Njoroge & Company Advocates to act on its behalf in the review and in addition to filing a Response to the Grounds of Review dated 7<sup>th</sup> October 2013 also filed an Affidavit sworn by one **Congo Geoffrey Nyansirema** seeking to also rebut and clarify some of the allegations made by the Applicant. The Interested Party also filed a notice of Preliminary Objection challenging the validity of the Supplementary Affidavit sworn and filed by the Applicant on 20<sup>th</sup> September, 2013.

All the three parties who appeared before the Board were represented by Counsel namely; Mr. Kibet Wisdom, Advocate for the Applicant, Mr. Stephen Kyandih, Advocate for the Procuring Entity and Ms. Felistus Wanjiku Njoroge, Advocate for the Interested Party.

When the Review was called out for hearing on 10<sup>th</sup> October 2013, the Board directed that the issue of the Supplementary Affidavit sworn and filed on 20<sup>th</sup> September, 2013 be heard first since the Board was of the view that a decision either way on this issue was likely to affect the nature and

the scope of the evidential material that would fall for consideration by the Board during the hearing of the substantive dispute.

The basic issue touching on the validity of the Supplementary Affidavit was that whereas the Supplementary affidavit had been drawn and had purportedly been sworn in the name of one **Uwe Pietryga of P. O. Box Weserstrabe 64 28757 Bremen**, the signature on the Supplementary Affidavit was actually that of **Maur Abdalla Bwanamaka** and not that of **Uwe Pietryga**.

When this issue was brought to the attention of learned Counsel for the Applicant, the Counsel readily conceded that the Supplementary Affidavit was indeed signed by **Maur Abdalla Bwanamaka** who was not the deponent named in the Supplementary Affidavit. Learned Counsel for the Applicant consequently applied to withdraw the Supplementary Affidavit sworn and filed on 20<sup>th</sup> September, 2013, a request that the Board granted.

After the withdrawal of the Supplementary Affidavit, the Applicant applied for leave to file another Supplementary Affidavit within the next seven days in support of its Request for Review. It urged the Board to consider the overriding objective of the Procurement Law under Section 2 (b), (c), (d) and (e) of the Act as well as the provisions of Article 159 (2(d) of the Constitution in this matter.

The Procuring Entity opposed the Applicant's request for time to file a new Supplementary Affidavit arguing that it will lead to the bringing in of new

evidence before the Board late in the day. It further argued that the law provides that the Board will have 30 days to enquire into a Request for Review and make a determination and that this is not an issue of technicality. It submitted that the 30<sup>th</sup> day is 11<sup>th</sup> October, 2013 and that it is in the Procuring Entity's interest that the hearing of the Request for Review proceeds. It urged the Board not to allow the request to file a late Affidavit.

On its part, the Interested Party associated itself with the submissions of the Procuring Entity. It averred that the thirty (30) days for this case expires tomorrow, 11<sup>th</sup> October, 2013 and that there is no provision under the law that would allow the Applicant to file a Supplementary Affidavit or any other Affidavit after today. It argued that even if the Board allows the extension requested by the Applicant, it will still be out of the time within which the law requires a document to be filed. It urged the Board to allow the hearing to proceed since the Applicant already had a Request for Review which was properly before the Board.

The Applicant submitted that tribunals are creatures of the Constitution and that the Constitution overrides what is in the Act and the Regulations. It argued that the words in the corridors of justice of this country uphold technicality of whichever substance. He observed that this matter is already in the public domain and it would be in the interest of justice of both the Applicant and the general public that the issue be dispensed with by a formal hearing whereby each party is given the opportunity to file proper papers as it happens in the Courts.



The Board considered the parties' submissions with regard to the Applicant's application for leave to file another Supplementary Affidavit. The Board notes that Section 121 of the Public Procurement and Disposal Act, 2005 requires the Board to hear and determine any application that is filed before it within thirty (30) days from the date of filing. The Board further notes that the Request for Review was received on 12<sup>th</sup> September, 2013 which means that the 30 days within which the review must be heard and determined will lapse on 11<sup>th</sup> October, 2013.

The Board was further guided by **Regulations 73 (2)(b) of the Public Procurement Regulations, 2006 as amended in 2013 by Legal Notice No.106 of 18<sup>th</sup> June, 2013** under which an Applicant is required to file a Request for Review within seven (7) days from the date of notification of the results of a tender. The Board notes that in the matter before it, the seven days expired on 13<sup>th</sup> September, 2013 and the Board has no powers to extend that time to allow for filing of any other document by the Applicant outside that period. It is the finding of the Board that the provisions of Article 159 2 (d) cannot oust the provisions of the statute particularly where that statute sets certain strict timelines for compliance with certain steps. In any event, under Article 159 2 (b), the Constitution directs that justice shall not be delayed.

The Applicant's application for leave to file another Supplementary Affidavit within seven days was therefore declined by the Board and the matter was then ordered to proceed for hearing.

In addition to withdrawing the Supplementary Affidavit sworn and dated on 20<sup>th</sup> September, 2013, the Applicant abandoned Ground 8 of the Grounds of Review. The Applicant further sought to have the references to the annexures referred to in paragraphs 2 and 5 of its statement struck out. The Applicant additionally withdrew the following statement from paragraph 5 of its statement - "**Congo Geoffrey Nyansiremo happens to be the blood brother of Mr. Yobesh O. Oyaro the said Head of Procurement and Supplies at the Procuring Entity.**"

### **THE REVIEW**

Each of the parties to the dispute was allowed to present its case as set out in the Request for Review, the statement accompanying the request, the responses to the request for Review and the various documents accompanying the responses together with all the documents submitted to the Board pursuant to the provisions of Regulation 74 of the Public Procurement and Disposal Regulations, 2006.

The Board has considered the totality of the documents before it and the submissions made by all the parties to the dispute and considers the following as the issues that fall for consideration in this Review:

- (i) Whether or not pursuant to the Provisions of **Regulation 73 (2) (b)** the undated statement accompanying the Request for Review is incompetent having not been signed by the Applicant and whether the defect, if any, renders the entire Request for Review a nullity.

- (ii) Whether or not the Procuring Entity breached the Provisions of **Sections 33 (1) (c) and 43 (1)** of the Act (**Ground 2**).
- (iii) Whether or not the Procuring Entity breached the provisions of **Sections 2, 64, 66 and 82** of the Act (**Grounds 3, 4, 6, 7, and 9**).
- (iv) Whether or not the Applicant was issued with a letter of notification pursuant to the provisions of **Regulation 19 of the Public Procurement and Disposal (Amendment) Regulations, 2013** (**Ground 5**).
- (v) Whether or not the Applicant has suffered loss and damages (**Ground 10**).

#### **ISSUE NO. 1**

**Whether or not Pursuant to provisions of Regulation 73 (2) (b) the statement accompanying the Request for Review is incompetent having not been signed by the Applicant and does such defect, if any, render the entire Request for Review incompetent.**

The issue of the competence or otherwise of a party's case goes to the root of the case and whenever such an issue arises the Board is bound to determine it at the earliest available opportunity. This is more so where the defect is alleged to affect the state of pleadings which form the foundation upon which a party's case must be built.

The issue of the competence of the Applicant's statement to support the Request for Review was raised by the procuring entity and was supported by the interested party.

The Procuring Entity submitted that under the provisions of **Regulation 73 (2) (b) of The Public Procurement and Disposal Regulations**, any Request for Review must be accompanied by such statement as the Applicant considers necessary in support of its request. It was the Procuring Entity's further submission that the Provision was couched in mandatory terms as evidenced by the use of the word "shall" in **Regulation 73 (2) (b)**. It was the Procuring Entity's further submission supported by the interested party that the statement envisaged by **Regulation 73 (2) (b)** is evidential in nature and that since the statement accompanying the Request for Review was not signed by the Applicant, then the statement was incompetent and that consequently the Request for Review lodged by the Applicant was also incompetent and should fail.

The Applicant on its part while conceding that the statement was indeed not signed by the Applicant argued that such an omission amounted to an issue of form and technicality and that the Board should therefore determine the dispute on merits. The Learned Counsel also conceded that the statement envisaged by **Regulation 73(2) (b)** is evidential in nature.

The Board has considered the rival arguments and takes the following view on the matter. The Board finds as a fact that the undated statement lodged on 12<sup>th</sup> September 2013 was not signed by the Applicant and that the only signature on the document is that of the advocate who drew and filed the statement. The Board also finds, based on the admission by the parties that a statement is evidential in nature and that this being the

position the statement can only be signed by the person having knowledge of the facts the subject matter of the dispute.

The Board observes that litigation in law belongs to a party/a client and it is only such a party who can confirm the existence and the truthfulness of any set of facts that supports his/her case. It is not therefore permissible for an advocate to enter into the arena of a dispute by purporting to sign an evidential document.

The Board further finds that the provisions of **Regulation 73 (2) (b)** of the Regulations is couched in mandatory terms and that it is the Applicant and not his / her advocate who ought to have signed the statement. Whereas **Regulation 76** of the Regulations permits a party to be represented by an advocate at any stage of the proceedings, it is the Board's respectful view that **Regulation 76** does not extend to permitting the advocate to execute documents which are of an evidential nature.

The next question which the Board wishes to address is therefore whether or not the Applicant should be denied an opportunity to be heard and the Request for Review struck out on account of the defect in the statement.

In spite of the Board's finding on the issue of the validity of the statement the Board notes that the Request for Review before it is based on both issues of law and fact and whereas the statement is incompetent this should not be used to deny the Applicant the opportunity of being heard by striking out the entire Request for Review. The Board observes that all

the parties to this review were very helpful to the Board and had placed sufficient material before the Board. The Board notes that some of these materials were referred to by the Applicant without objection by the Respondent and the Board wishes to pinpoint the reference by the Applicant to the letter of notification dated 30<sup>th</sup> August 2013 appearing as annexure SK6 to the Procuring Entity's response as one such document.

The Board further notes that Regulation 86 provides that while considering the dispute before it the Board shall not be bound to observe the rules of evidence in the hearing of a Request for Review.

It is therefore the Board's finding that it shall address the issues framed bearing in mind the nature of the issues and the fact that the burden of proof to establish any breach of the provisions of the Act and the Regulations lies with the party applying for review.

## **ISSUE NO. 2**

### **Whether or not the Procuring Entity breached the provision of Section 33 (1) (c) and 43 (1) of the Act (Ground 2).**

The Applicant alleged in ground 2 of its grounds in support of the Request for Review that the Procuring Entity breached the provisions of **Sections 33 (1) (c) and 43 (1) (a) of the Act and Article 73 (2) (b) of the Constitution.**

This ground was based on the allegation that one **Congo Geoffrey Nyasiremo** was a blood brother to **Yobesh O. Oyaró** who is the Head of Procurement and Supplies at the Procuring Entity. The Applicant however withdrew this allegation from paragraph 5 of his statement which the Board has already held to be of no evidential value.

The Board therefore holds that this ground has no basis and must fail. The Board's finding on this issue is further fortified by the fact that this ground would require evidence to establish and the Applicant's Supplementary Affidavit sworn and filed on 20<sup>th</sup> September, 2013 having been withdrawn, the Applicant did not and could not prove this ground.

**Yobesh Oyaro** on his part swore an Affidavit on 18<sup>th</sup> September, 2013 which was produced by the Procuring Entity in its Response as annexure SK2 denying the allegation just like did **Congo Geoffrey Nyansimera** in an Affidavit sworn on 8<sup>th</sup> October, 2013 which forms part of the Interested Party's Response dated 9<sup>th</sup> October, 2013.

This evidence stands unchallenged by the Applicant and the Board therefore finds and holds that there is no evidence whatsoever before this Board to prove that the Procuring Entity breached the provisions of Sections 33 and or 43 of the Act.

The Board however notes that, inspite of the Applicant having withdrawn the allegation, the allegation was of a personal and serious nature touching on the integrity of individuals and the responding parties having responded to it, the Board had to make a finding on it because as it is often stated, an individual's name and integrity are much more important even than any property that he/she may have.

The allegation that was made by the Applicant was of a serious nature, touching on the integrity of individuals but rather than provide proof, the Applicant instead applied to withdraw the allegation from its statement.

### **ISSUE NO. 3**

#### **Whether or not the Procuring Entity breached the provisions of Section 2, 64, 66, and 82 of the Act (Grounds 3,4,6,7 and 9).**

These issues arise from grounds 3, 4, 6, 7 and 9 of the Grounds of Review. These grounds of Review have been consolidated as they raise issues regarding the evaluation and the subsequent award of the tender.

The Applicant argued in the said grounds that the Procuring Entity breached the provisions of the above sections of the Act:-

- a) By failing to adhere to the principles of fairness, transparency, competition and accountability as espoused by Section 2 of the Act.
- b) By failing to adhere to the evaluation criteria contained in its own Tender Document.
- c) By applying the evaluation criteria in a discriminatory manner.
- d) And finally, by failing to read aloud the technical scores before opening the financial proposals.

The Procuring Entity however submitted that it observed the principles of fairness, transparency competition and accountability and that it fully adhered to the evaluation criteria contained in its own Tender Document. The Procuring Entity further stated that it did not act in a discriminatory manner and that there was no obligation on its part to read aloud the technical scores before opening the financial proposals.



The Board wishes to observe that the burden to prove all the above breaches of the Act lay with the Applicant. The Board however observes that the allegations made by the Applicant were made from the Bar and were not supported by any affidavit evidence largely because the Applicant had withdrawn its Supplementary Affidavit at the commencement of the proceedings before the Board.

The Board has however perused the totality of all the other documents before it and finds that the tender in issue was duly advertised as required by Section 54 (2) of the Act as read together with Regulation 40 and that the criteria provided in the Tender Document was applied in the evaluation.

The Board further finds that upon receiving the tenders, the Procuring Entity carried out various evaluations leading upto the award of the tender to the Interested Party which was the lowest evaluated bidder. The Board has enumerated the events leading upto the award of the tender at pages 2 to 4 of this decision and finds that the sole reason why the Applicant was not awarded the tender was because it was not the lowest evaluated bidder for the purposes of the award of this tender. The Board also notes that the Applicant did not at any stage of the proceedings deny that the interested party was the lowest evaluated bidder.

The Board has further perused the Tender Document and did not find any condition that either required the bidders to attend the financial opening and/or that the Procuring Entity should read aloud the technical scores

before opening the financial proposals. The Board observes that the Applicant was unable to refer the Board to any such requirement when invited to do so by the Board.

The Board therefore finds and holds that the Procuring Entity therefore complied with the provisions of Sections 2, 64, 66, and 82 of the Act and grounds 3, 4, 6, 7 and 9 of the Grounds of Review therefore fail.

#### **ISSUE NO. 4**

#### **Whether or not the Applicant was issued with a notification pursuant to the Provisions of Regulation 19 of the Public Procurement and Disposal (Amendment Regulations 2013) (Ground 5)**

The Applicant argued based on ground 5 of its Request for Review that the Procuring Entity failed to issue the Applicant with a letter of notification immediately and that in any event the letter of notification issued to it did not state the reason why its tender was unsuccessful.

The Procuring Entity however submitted that all the bidders were informed of the outcome of the tender evaluation simultaneously and produced a letter dated 30<sup>th</sup> August 2013 as annexure SK6.

The Applicant who was allowed to rely on that letter by the Board inspite of having not produced any document in support of its case confirmed that the notification was indeed received by its agent. The document, annexure SK6 which speaks for itself shows that the letter is dated 30<sup>th</sup>

August 2013 and that the letter was received by the Applicant's agent on 5<sup>th</sup> September, 2013.

The letter specifically notified the Applicant that its bid was not successful as its financial bid was not the lowest evaluated bid.

**Regulation 19 (2) of the Public Procurement and Disposal (Amendment) Regulations, 2013 which is relevant to the issue at hand provides as follows:-**

*"A Procuring Entity shall immediately after tender award notify an unsuccessful tenderer in writing and shall in the same letter provide reasons as to why the tender, proposal or Application to be prequalified was unsuccessful"*

The Board finds and holds that the provisions of Regulations 19 are plain and only required the Procuring Entity to notify unsuccessful tenderers of the reasons as to why their tenders were unsuccessful. The provision further enjoins the Procuring Entity to give such a notification immediately but does not specify the number of days within which the notification should be given.

The Board therefore takes the view and holds that the Applicant was notified in writing that its tender was unsuccessful and further that the notification contained the reasons why its tender was not successful and that the notification was given within a reasonable period.

The Applicant readily conceded that it filed the present Request for Review pursuant to the letter of notification and that the Request for Review was filed within time.

In addition to finding that the Applicant was notified of the reasons why its tender was not successful within a reasonable period of time, the Board further holds that the Applicant did not suffer any prejudice having been able to file the Request for Review within time and finally that if the Applicant found the reasons insufficient he was at liberty to inquire further which it did not do.

#### **ISSUE NO. 5**

#### **Did the Applicant suffer any loss and damages as a result of the alleged breaches of the Act and the Regulations made thereunder.**

The Board wishes to observe that learned Counsel for the Applicant did not tender any submission on this Ground of Review. The Board notes that Counsels for the Procuring Entity and the Successful Bidder however tendered submissions on the issue and the Board will therefore consider the issue.

It was the Interested Party's submissions that a party who elects to participate in a tendering process elects to participate in the process fully aware that he is taking a commercial risk as there is no guarantee that such party's tender would be accepted.

The Board accepts this submission and affirms that any loss and/or damage incurred by tenderers at the time of tendering is a commercial risk borne by people in business. The Board's finding on this issue is not without support: in a previous decision of the Board, it was held in the case of Alliance Technologies Solutions Ltd - vs - The Public Procurement Oversight Authority (Application No. 34 of 2010) and in the case of Riley Falcon Security Limited - vs- The National Cereals and Produce Board (Application No. 27 of 2008) that *"the tendering process is a business risk and in open competitive bidding there is no guarantee that a particular tender will be accepted. An unsuccessful bidder cannot therefore seek to recover loss and damage as a result of its bid being unsuccessful.*

*The grant of any remedy must further be premised on proof of breach of a particular statutory Provision. Where a party such as the Applicant fails to prove its claim there would be no basis for any award of loss or damages."*

Taking into account all the foregoing matters and the reasons set out in the Board's decision, the Request for Review is hereby dismissed and the Procuring Entity may proceed with the procurement process.

The Board makes no orders as to costs.

Dated at Nairobi on this 11<sup>th</sup> day of October, 2013.

  
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CHAIRMAN  
PPARB

  
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SECRETARY  
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