

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 45/2013 OF 12TH NOVEMBER, 2013

BETWEEN

MOTIVATOR ENTERPRISES LTD.....Applicant

AND

MINISTRY OF FOREIGN AFFAIRS.....Procuring Entity

Review against the decision of the Tender Committee of the Ministry of Foreign Affairs dated 18th October, 2013 in the matter of Tender No. MFA/RT/02/2012-2013 for Provision of Consultancy Services for Facilitation of The Ministry of Foreign Affairs in Attainment of ISO Certification as contained in the letter dated 28th October 2013.

BOARD MEMBERS PRESENT

1. Mr. Paul Gicheru - Member (in the chair)
2. Mrs. Rosemary Gituma - Member
3. Mr. Nelson Orgut - Member
4. Mrs. Gilda Odera -Member

IN ATTENDANCE

1. Mr. Philemon Kiprop - Holding Brief for the Secretary
2. Mr. Philip Okumu - Secretariat
3. Ms. Judy Maina - Secretariat

SUMMARY OF COSTS

COSTS	AMOUNT (S) (KSH)
Subtotal	7,225,000.00
Taxes	1,156,000.00
Total Amount of Financial Proposal	8,381,000.00

BREAKDOWN OF PRICE PER ACTIVITY

The tender committee found that the execution plan for the tender was such that many activities would be undertaken concurrently. The costs were therefore distributed per phase. There were no specific re-disbursable costs.

PHASE	ACTIVITIES	COST (KSH)
1.	Conduct GAP audit	1,140,000.00
	Top management training	
	Develop detailed work plan	
	Creation/confirmation of ISO teams and committees	
	Initiate steering committee meetings, Train competent team; Initiate documentation Guide designing and Developing Quality Policy	
	Conduct general staff sensitization 1	
	Conduct training for process owners; Facilitate field trainings level one	
2.	Facilitate identification of processes	1,535,000.00
	Initiate documentation/simultaneous implementation	
	Training of Internal Auditors	
	Continue documentation and implementation of QMS Facilitate field trainings level Two	
3.	Introduce internal audits (1 st Internal Audit- limited scope)	

	Conduct 2 nd Ministry wide ISO sensitization	
	Preparation of draft 1 manuals	1,885,000.00
	Second internal audit	
	Review of draft one manuals	
4.	Produce draft 2 documents	
	Third internal audit	1,110,000.00
	Documentation and implementation review	
	Initiate certifying body selection	
5.	Conduct pre audit	
	Final document review and Produce Issue 1 documents	950,000.00
	Conclude certifying body selection	
6.	Third party certification under Motivator guidance	605,000.00
	Total	7,225,000.00

At the conclusion of the entire evaluation exercise, the Applicant was awarded the tender by a letter dated 7th June 2013 under reference number MFA.PROC/3/4 which it accepted by its letter dated 10th June 2013 under Ref No. ME/OR/23/6/10/1.

THE REVIEW

The Applicant filed the Request for Review before the Board on 12th November 2013. The Review was triggered by the procuring entity's decision to terminate the tender process vide its letter dated 28th October 2013 under Reference Number FS5/91(48) which was contained at page 10 of the Request of Review.

The Applicant set out several grounds in support of its request to the Board and sought the following consequential reliefs:-

- (a) That the board declares that any delay in the signing to the contract was due to negligence on the part of the Procuring Entity and that the Applicant did its part in time and therefore the Procuring Entity retrieves the contract and finalizes the signing.**
- (b) That based on the evidence adduced, the board declares that the Ministry's purported termination of the tender process and restarting the same immediately is null and void and was only aimed at ensuring that the Applicant lost the job.**
- (c) That the Procurement process (closing on 15th November 2013 be stopped) and the Applicant be allowed to continue with the assignment.**

At the hearing of the Request for Review Mrs. Veronica Maina, learned counsel for the Applicant, referred the Board to the letter of award dated 7th June, 2013 at page 4 of the Request for Review which notified the Applicant that it had been awarded the tender for the Provision of consultancy services for facilitation of the Procuring Entity in the

attainment of ISO 9001:2008 certification at a tender price of Kenya Shillings Eight Million, Three Hundred and Fifty One Thousand (Kshs.8, 351, 000/=). The Applicant was in the same letter informed that the contract documents were in the process of preparation. The Applicant was then requested to accept the offer within seven (7) days from the date of the letter.

The Applicant referred the Board to the letter dated 6th October, 2013 at page 5 of the Request for Review showing that the Applicant accepted the award of tender. The Applicant added that a contract was prepared as advised in the letter of award and that it signed/executed and left all the copies of the contract with one Mr. Samuel Muka an Officer of the Procuring Entity. The Applicant was then requested to perform/execute certain obligations under the contract which inter-alia included:-

- (a) The overall review of the activity plan in several meetings held with the Officers of the Procuring Entity.
- (b) The Applicant held several meetings with the Officers of the Procuring Entity to review mandates and operations as a foundation for the QMS process.
- (c) The Applicant introduced its staff to the Officers of the Procuring Entity who included one Mrs. Margaret Gachuru and her immediate boss Ambassador Owuor together with some other key staff members.
- (d) The Applicant reviewed the entire email communication system at the Ministry and gave its advice, a fact that the Applicant's head of ICT was aware of.

- (e) All the senior members of staff of the Ministry were notified of the engagement of the Applicant and were invited to the ISO executive briefing attended by most of them on 27th June, 2013.
- (f) The Applicant's counsel further stated that during the executive briefing training, the Applicant through its Managing Director introduced his staff who would play a key role in the ISO process to the Procuring Entity. They also made presentations.
- (g) The Applicant contented that it spent a lot of time in preparing for the executive brief and produced copies and gave a copy of the documents to the people in attendance.

The Applicant submitted that by a letter dated 28th October, 2013 appearing at page 10 of the Request for Review, the Procuring Entity purported to terminate the Applicant's tender due to lapse of time but promised to re-initiate the process after cancellation and for good measure, the Procuring Entity proposed that the Applicant would be allowed to participate and be considered when the process was re-initiated.

The Applicant was, as would be expected, not happy with this turn of events and expressed that displeasure by a letter dated 1st November 2013, addressed to the Procuring Entity appearing at page 11 of the Request for Review. The Applicant expressed shock and surprise at the procuring entity's decision to terminate the award of tender when all that remained to be done was for the Procuring Entity to execute its part of the contract.

The Applicant contended that the termination of the tender was not valid and that the purported termination was not premised on any valid reason. The Applicant drew the attention of the Board to a letter dated 27th November, 2013 which the Procuring Entity wrote to the Secretary of the Board in answer to the Request for Review. Counsel observed that the reasons given in the letter dated 27th November 2013 signed by Dr. (Eng) Karanja Kibicho, CBS were a complete departure from the reasons given in the letter of termination dated 28th October 2013. Mrs. Maina for the Applicant cited several instances of these contradictions which the Board shall consider in the latter part of this decision.

Mr. Willy Kanana, learned Counsel for the Procuring Entity, defended the decision by the Procuring Entity to terminate the award of tender made to the Applicant. The procuring entity justified the decision to terminate the award principally on the grounds that there was a change of guard at the Ministry of Foreign Affairs arising from the abolition of the title of the Permanent Secretary and its replacement with that of a Principal Secretary. It was Mr. Kanana's submission that whereas the idea for the Ministry to achieve ISO Standards was initiated by Mr. Thuita Mwangi who was the holder of the position of the Permanent Secretary then for what counsel referred to as "a Public relations exercise his Successor found the issue of ISO certification not to be a priority. Counsel further submitted from the bar that in Government, all obligations that have financial implications must fit within the financial budget for the year.

The procuring entity while relying on the letter dated 27th November, 2013 signed by the Principal Secretary in the Ministry of Foreign Affairs stated that one of the reasons why the contract was terminated was because in the view of the author of the letter "*The contract sum appeared exorbitant*".

On the issue of compliance with the provisions of Section 36 of the Act, Mr. Kanana conceded and quite properly so that in purporting to terminate the Applicant's award, the Procuring Entity did not comply with any of the provisions of Section 36 of the Act and more particularly with Sections 36(2), (3) and (7) of the Act. It was further conceded by counsel for the Procuring Entity and again quite properly so that though he had referred to a number of reasons as being the basis for the termination, the only reason given in the letter dated 28th October, 2013 which purported to terminate the award of the contract to the Applicant was lapse of time.

In her brief reply Counsel for the Applicant urged the Board to find that the Procuring Entity had acted in total contravention of the provisions of Section 36 of the Act. The Applicant urged the Board to consider the fact that whereas the procuring entity was now arguing that the issue of ISO certification was no longer a priority, the procuring entity had embarked on a fresh process of procuring the same services, a fact that was confirmed to the Board by Ambassador D. M. Mutemi when the Board sought clarification from him on the issue.

THE DECISION OF THE BOARD

The Board has considered all the documents submitted by the parties for the Board's consideration together with the submissions made by the parties. **The sole issue for determination by the Board in the Review is whether or not in terminating the award of tender made to the Applicant, the Procuring Entity acted within the provisions of Section 36 of the Public Procurement and Disposal Act 2006.**

It was acknowledged by all the parties both in the documents which were submitted to the Board and in the submissions by Counsel that the Applicant was awarded the tender the subject matter of this dispute by a letter dated 7th June, 2013. The Applicant contended that it not only signed a contract pursuant to the award but that it carried out several activities upon receiving the letter of award. The Applicant enumerated the activities which it carried out and which the Board has already set out at pages 6 and 7 of this decision.

The Board heard the submissions made by Counsel for the Procuring Entity and at no stage of the proceedings did the Procuring Entity deny that the Applicant signed and left copies of the signed contracts with the Procuring Entity. The Procuring Entity did not respond to the Applicant's submission that the Applicant rendered all or any of the services which the Applicant stated it had rendered after receiving the letter of award. The Applicant gave the names of the persons it dealt with at the Procuring Entity in relation to the contract, namely Mr.

Samuel Muka and Dr. Margaret Gachuru. The two never rebutted the Applicant's position by way of affidavit or any other evidence.

The dispute between the parties to this Review however arose when the Applicant received the letter dated 28th October, 2013 from the Procuring Entity purporting to cancel the award of tender made by the Procuring Entity to the Applicant.

The letter dated 28th October, 2013 which is brief and which appears at page 10 of the Request for Review reads as follows:-

*"M/s Motivator Enterprises,
P.O. Box 6092-00300,
NAIROBI.*

RE: PROVISION OF CONSULTANCY SERVICES FOR
FACILITATION OF THE MINISTRY IN ATTAINMENT OF ISO
9001:2008 CERTIFICATION

This is in reference to tender No.MFA/RTN/02/2012-2013 for the above mentioned consultancy which you participated.

The Ministerial Tender Committee at its meeting held on 18TH October 2013 decided that due to lapse of time in processing this tender to terminate the proceedings.

Meanwhile the Ministry appreciates the interest you extended and we promise when we re-initiate the process you will be called upon to participate.

*Obiero Makori
FOR: PRINCIPAL SECRETARY."*

The Applicant faulted the decision to terminate the award of the tender made to it on several grounds. The main ground was that the purported termination was not based on any valid reason/reasons and that the termination contravened the provisions of Section 36 of the Public Procurement and Disposal Act. The Applicant made reference to a letter dated 27th November, 2013 addressed to the secretary of the Board by the Procuring Entity in response to the Request for Review and noted that the reasons for termination cited in the said letter were not only new but were also contradictory and amounted to a complete departure from what the procuring entity had stated as being the reason for termination in the letter dated 28th October 2013.

The Procuring Entity as the Board has already stated, attributed the termination of the award to an alleged change of guard at the Procuring Entity. This change of guard, so argued the Procuring Entity, resulted in the incoming Principal Secretary concluding that the issue of ISO certification was not a priority and also that in his view the contract sum appeared exorbitant. The procuring entity however conceded that it had not complied with any of the provisions of Section 36 of the Act while terminating the award of tender made to the Applicant.

The issue before the Board as already set out above is whether or not the tender awarded to the Applicant was terminated in accordance with the provisions of section 36 of the Act.

The Board wishes to state at the outset that the power conferred on a Procuring Entity by the provisions of Section 36 of the Act is not

absolute and should only be exercised in strict compliance with the letter and the spirit of the law.

While exercising power under section 36 of the Act and indeed while exercising any other power conferred on it by the Act or the Regulations, the procuring entity is bound by the Provisions of **Article 227 of The Constitution** and **Section 2 of The Public Procurement and Disposal Act**.

Article 227 of the Constitution reads as follows:-

(1) When a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

Section 2 of the Public Procurement and Disposal Act states the following as the objectives of the Act.

- (a) To promote maximum economy and efficiency;**
- (b) To promote competition and ensure that the competitors are treated fairly;**
- (c) To promote integrity and fairness of those procedures;**
- (d) To increase transparency and accountability in those procedures and;**
- (e) To increase confidence in those procedures.**

The net effect of all these Constitutional and statutory Provisions is that the Procurement process and how it should be conducted is enshrined in

the Constitution and statute. A Procuring Entity while exercising the powers conferred upon it by the Constitution and the Act exercises such power for, on behalf and in trust for the Public. Both the Constitution and the Act impose on a Procuring Entity the duty to act fairly, equitably, transparently, to promote competition and in a manner that promotes maximum economy, efficiency and saves costs. The Procuring Entity is also obliged to promote integrity in the Procurement Process.

In considering a matter before it, the Board is therefore bound by the provisions of **The Constitution, The Public Procurement and Disposal Act** and any other relevant law and authorities that it finds necessary.

The Board has considered the facts of this case, the documents lodged with the Board by the parties, the submissions made by both the Applicant and the Procuring Entity and the provisions of the Constitution and the Act and more particularly the provisions of Section 36 of the Act. The Board finds no difficulty whatsoever in finding that the purported termination of the tender for the provision of consultancy services for facilitation of the Ministry's attainment of ISO 9001:2008 certification was done in contravention of the Provisions of Section 36 of the Public Procurement and Disposal Act.

This finding has largely been arrived at on the basis of the Procuring Entity's own admission that it did not comply with the provisions of Section 36 of the Act. The Procuring Entity admitted before the Board that it did not file a written report with the Director General of the

Public Procurement Oversight Authority (PPOA) under Section 36(7) of the Act informing him of the termination of the tender in question.

Section 36(2) of the Act also required that where the Procuring Entity decides to terminate a tender, it shall give a prompt notice of termination to each person who submitted a tender, proposal or a quotation or if direct procurement was being used to each person with whom the Procuring Entity was negotiating. The tender, the subject matter of this dispute, was awarded to the Applicant on 7th June, 2013. A contract was executed by the Applicant which left copies of the signed contract with the Procuring Entity. The Applicant partly performed certain obligations pursuant to the award. The purported termination was effected more than four months later, namely on 18th October, 2013 as notified in the letter dated 28th October, 2013. This delay cannot be considered a prompt notice for the purposes of the Act and particularly in view of the steps the parties had already taken after the notification of the award.

The Board further finds that the decision to terminate the award was a direct consequence of the letter dated 18th October, 2013 by the Applicant to the Procuring Entity and which appears at pages 8 and 9 of the Request for Review in which the Applicant was seeking to know when it was likely to proceed with the assignment started in view of the apparent delay. It is noteworthy from the contents of the letter of termination dated 28th October, 2013 that the Tender Committee met on the same day the letter by the Applicant was written and decided to terminate the award.

Still on the issue of non compliance with the Provision of Section 36 of the Act, Counsel for the Procuring Entity also confirmed to the Board that his client did not notify all the bidders that the procurement proceedings had been terminated in accordance with Section 36(2) of the Act.

All the above were clear breaches of Section 36 of the Act. In view of these unequivocal admissions of breaches of the Act, the Board's hands are tied and the Board does not have any other option but to find that the Procuring Entity's decision to terminate the Applicants tender was not done in accordance with the law.

That is however not the end of the matter because in determining whether the provisions of the Act have been complied with the Board is also required to look at the reasons for the termination of an award of tender in order to determine whether the termination was grounded on valid reasons.

The Procuring Entity gave several reasons why it purported to terminate the Applicant's award. Some of the reasons given by the Procuring Entity inter-alia included the following:-

- (i) That owing to the change of guard at the Ministry, the incoming Principal Secretary considered the issue of ISO certification not to be a priority.

(ii) The incoming Principal Secretary formed the view that the contract sum was exorbitant.

The Board however finds that the above reasons are an afterthought and were not sufficient reasons to warrant the termination of the award of the tender to the Applicant because of the following reasons:-

- (i) The said reasons are new and were not cited as reasons for the termination of the Applicant's tender in the letter dated 28th October, 2013.
- (ii) The allegation that the issue of ISO certification was found not to be a priority is unsupported by evidence. The Board was informed during the course of the submissions that the Procuring Entity had initiated a new process for the procurement of the same services. This fact was confirmed by Amb. Mutemi from the Procuring Entity who was present before the Board when this matter came up for hearing.

The Procuring Entity in its letter of termination in fact intimated that it would re-initiate the process and promised the Applicant that it would be invited to participate in the new exercise.

The Board also rejects the view that a change of guard in the office of the Accounting Officer entitled the Ministry to disregard contracts, processes or any other undertakings by his predecessor. The Government and its entities have perpetual succession. The

Board was not informed that all the other contracts, processes and undertakings by the Government stood terminated immediately there was a change of guard. This argument was therefore quite unhelpful and the Board would be creating a dangerous precedent if it were to accept such a submission.

- (iii) The view formed by the Procuring Entity that the contract sum was exorbitant is not supported by any evidence. In awarding the tender, the subject matter of this dispute, the Procuring Entity conducted a financial evaluation which resulted in the award of the tender to the Applicant. The Procuring Entity must have carried out due diligence and the Board has no reason to doubt the competence of the members of the Tender Committee. The Board was not shown any financial analysis or other document to support the Procuring Entity's view that the contract sum was excessive. In any event and if this was indeed one of the reasons why the tender was terminated, then this reason ought to have been one of the reasons set out in the letter of termination dated 28th October, 2013, but it was not.

The Board has previously had occasion to consider the issue of termination in its previous decisions.

In the case of **Tudor Services Ltd =vs= National Oil Corporation (Application No.21 of 2009)** the Board held that the powers conferred upon the Procuring Entity under section 36 of the Act must be exercised in good faith and in full compliance with the requirements set out under

the Act. The Board proceeded to nullify the termination of an award of tender by the Procurement Entity for failure to comply with the provisions of Section 36 of the Act.

In the case of **Horsebridge Network Systems (EA) Ltd =vs= The Central Bank of Kenya Limited (PPOARB No. 65 of 2012)** the Board nullified the termination of an award of a tender inter-alia on the ground that the procurement entity had not filed a report of the termination with the Director-General of the Public Procurement Oversight Authority (PPOA) as required by the provisions of Section 36(7) of the Act.

In the case of **Muema Associates =vs= Turkana County Council (Application No. 35 of 2008)**, the Board held that while exercising the power to terminate an award of a tender under the Provisions of Section 36 of the Act, the Procuring Entity must inter-alia:-

- (i) Give sufficient notice to all bidders of the decision to terminate the Procurement Proceedings.
- (ii) The Procuring Entity must give reasons for its decision.
- (iii) The Procuring Entity must give a report to the Authority regarding its decision to terminate procurement proceedings as per Section 36(7) of the Act.

Before the Board concludes this matter, there is one last but interesting argument that the Procuring Entity made which was that it would be in the public interest for the Board not to nullify the termination of the

award of the tender to the Applicant because no contract had so far been signed and that upholding the termination would save public resources.

The Board however respectfully disagrees with this submission on the basis of the facts and the circumstances of this case because what the Procuring Entity is asking this Board to do is to ignore the fact that an award of tender was made in favour of the Applicant which must have expended resources in going through the entire tender process. This Board will be promoting impunity if it was to refuse to exercise the jurisdiction conferred upon it by the Act even on the face of what are admitted breaches of the provisions of Section 36 of the Act. The Board would also be failing to uphold the objectives set out in Article 227 of the Constitution, and Sections 2 and 36 of the Public Procurement and Disposal Act.

The Board further holds that in purporting to restart the procurement process for the same services afresh having already procured and awarded the tender to the Applicant and after expending public resources is in itself a waste of public resources. A fresh process of procuring services on the basis of a termination of a previous award for the supply of the same services is a needless waste of public funds particularly where the subsequent process for the supply of the same services is as a result of a termination which is not based on any valid reasons.

The Board finally wishes to observe that a Procuring Entity which fails to comply with the provisions of The Constitution and the Act by

terminating a procurement process unlawfully and without any valid reason/reasons sets itself up for intervention by the Board and to the further risk of unnecessary legal proceedings and costs.

Considering all the above facts and circumstances and in exercise of the powers conferred upon the Board by the Provisions of Section 98 of the Act, the Board makes the following orders:-

- (a) The Applicant's Request for Review dated 12th November, 2013 succeeds.**
- (b) The decision made by the Procuring Entity on 18th October, 2013 as contained in the letter dated 28th October, 2013 terminating the award of the tender for the provision of consultancy services for facilitation of the Procuring Entity's attainment of ISO 9001:2008 is hereby declared illegal, null and void and the same is set aside and the award of the said tender to the Applicant as notified in the letter dated 7th June, 2013 is hereby affirmed.**
- (c) The procurement process/proceedings for the same services commenced by the Procuring Entity after the purported termination of the Applicant's tender are hereby declared null and void and the Procuring Entity is directed to stop the said process/proceedings forthwith.**
- (d) In exercise of the powers conferred upon the Board by the Provisions of Section 98(2)(b) of the Act, the Board directs the**

Procuring Entity to take steps to immediately complete the procurement process in respect of the award of the tender to the Applicant in accordance with the law.

- (e) The Board makes no order as to costs on this Request for Review.
- (f) The Secretary of this Board is directed to forthwith serve copies of this decision upon the Procuring Entity which was not represented when this decision was made in order for the Procuring Entity to comply with the orders and the directions given by this Board.

Dated at Nairobi on this 9th day of December, 2013.



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CHAIRMAN
PPARB



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SECRETARY
PPARB

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