

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD**

APPLICATION NO. 52/2014 OF 11TH DECEMBER, 2014

BETWEEN

GLOBAL FLUIDS INTERNATIONAL (GFI) S.A.....APPLICANT

AND

ENERGY REGULATORY COMMISSIONPROCURING ENTITY

Review against the decision of the Energy Regulatory Commission in the matter of Tender No: ERC/PROC/RFP/4/3/14-15/020 for Provision of Services for the Marking and Monitoring of Petroleum Products.

BOARD MEMBERS PRESENT

- | | |
|-------------------------------|------------------------|
| 1. Mrs. Josephine W. Mong'are | - Member(in the Chair) |
| 2. Mr. Peter Ondieki, MBS | - Member |
| 3. Mr. Paul Ngotho | - Member |
| 4. Hussein Were | - Member |

IN ATTENDANCE

- | | |
|-----------------------|-----------------------------------|
| 1. Mr. Philip Okumu | - Holding Brief for the Secretary |
| 2. Ms. Shelmith Miano | - Secretariat |

PRESENT BY INVITATION

Applicant – Global Fluids International S.A.

1. Amos Kisilu - Advocate

Procuring Entity – Energy Regulatory Commission

1. Willis Echesa - Advocate
2. Robert Mahenia - Advocate
3. Michael Mwangi - Procurement Officer
4. Ezra Terer - T.O. - P
5. Hamid Mohamed - T.O. - P
6. Eng. Linus Gitonga - Director, Petroleum
7. James M. Kilonzo - Finance Manager

Interested Parties

1. Munge Murage - Advocate, SGS Kenya Limited
2. Ayisi Austin - Advocate, SGS Kenya Limited.
3. Albert Stokell - M.D., SGS Kenya Limited
4. Yusuf Zil - Manager, SGS Kenya Limited
5. Mazera K. Mretu -Country Manager, Intertek Testing Services

BOARD'S DECISION

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

BACKGROUND OF AWARD

The marking process is guided by Legal Notice No. 64 of 2000, which requires all importers to mark Automotive Diesel, Super Petrol and Kerosene meant for export and also mark Kerosene meant for domestic consumption.

The Procuring Entity placed advertisements for Expressions of Interest in the *Daily Nation* and *The Standard* newspapers on 5th August, 2014, inviting interested bidders to submit their interests not later than Tuesday 19th August, 2014 at 2.30 p.m. at the Procuring Entity's premises.

RECEIPT AND OPENING OF BIDS

Responses to the advert were opened on 19th August, 2014 and four (4) bidders had expressed their interest as follows:

- a. M/s Global Fluids International
- b. M/s Intertek Testing Services
- c. M/s SGS Kenya Limited
- d. M/s Kosta Oil Fields Technologies

The Expressions of Interest were then subjected to evaluation by the Procuring Entity.

The evaluation criteria applied in evaluating the Expressions of Interest consisted of the following:-

- A. Qualifications (15 marks)

- (i) Accreditation by a credible body e.g. KENAS and any that relates to inspections and/or monitoring of product quality.
- (ii) Company registration certificates, PIN/VAT, Tax Compliance Certificates
- (iii) Organisation structure that consists of the following key skills:-
 - a. Supervisors
 - b. Laboratory analysts
 - c. Field analysts

B. Experience (30 marks)

- (i) Duration of service (up to a maximum of 5 years, two marks for each year)
- (ii) Experience in petroleum sector e.g. awareness of applicable standards and regulations
- (iii) Similar assignments in Fuel Marking anywhere in the world
- (iv) Similar assignments in Monitoring anywhere in the world

C. Capability and Resources (30 marks)

- (i) Financial capability
- (ii) Appropriate staff skills:-
 - a. Project manager

- b. Field Team Leader/Technicians/Inspectors
 - c. Laboratory analysis specialist
 - d. Data analysts
- (iii) Access to fuel marking technology (Partnering, teaming, or in-house)
 - (iv) Ability to provide retailer self-test kits

D. Equipment and facilities (25 marks)

- (i) Field offices
- (ii) Field vehicles (capability to move staff at short notice)
- (iii) Testing capabilities or access to a testing laboratory.

Following the evaluation of the Expressions of Interest, the Evaluation Committee recommended to the Tender Committee that the following firms, having met the minimum 70 marks threshold and were therefore shortlisted, be invited for Request for Proposals (RFP) for the item:-

- a. M/s Global Fluids International S.A.
- b. M/s Intertek Testing Services
- c. M/s SGS Kenya Limited

The Procuring Entity's Tender Committee met on 18th September, 2014, deliberated on the matter and approved the shortlist as presented to it.

The Procuring Entity wrote to the shortlisted firms on 22nd September, 2014, informing them of the outcome of the EOI process and that they would be invited to collect the Request for Proposal documents not later than seven days therefrom.

A soft copy of the Request for Proposal (RFP) document was sent via email to the three shortlisted firms.

Bidders were invited for a pre-proposal conference on 27th October, 2014 to clarify any issues that might not be clear to them. Only two (2) of the three bidders attended the pre-proposal conference. These were:-

- a. M/s Intertek Testing Services
- b. M/s SGS Kenya Limited

Several queries raised during the pre-proposal conference were clarified in writing to all the three bidders and sent out on 29th August, 2014.

The opening of the Requests for Proposal was done on 6th November, 2014 and one bidder submitted its proposal which was subsequently evaluated. The sole bid was from M/s SGS Kenya Limited.

A Technical Evaluation report was prepared on 12th November, 2014, in which the Evaluation Team recommended that M/s SGS Kenya Limited, having attained 95.8 marks in the technical evaluation and being the only responsive bidder, be invited for the opening of the financial proposal.

A combined Technical and Financial Evaluation report was prepared on 18th November, 2014, in which the Evaluation Committee recommended that M/s SGS Kenya Limited, having attained a combined (technical and

financial) evaluation score of 96.4 marks be declared the successful bidder in the tender for provision of petroleum products marking and monitoring services at an evaluated annual financial price of US\$ 2,250,967.00 (exclusive of V.A.T) subject to negotiations.

THE TENDER COMMITTEE'S DECISION

The Procuring Entity's Tender Committee had not met and sat to adjudicate on the matter by the time the Request for Review was lodged at the Secretariat

THE REVIEW

The Request for Review has been lodged by M/s Global Fluids International (GFI) S.A of C/O Kisilu & Company Advocates, P. O. Box 29294 - 00100, Nairobi, against the decision of the Energy Regulatory Commission in the matter of Tender No. ERC/PROC/RFP/4/3/14-15/020 for Provision of Services for the Marking and Monitoring of Petroleum Products

The Applicant was represented by Mr. Kisilu Advocate from the firm of M/s. Kisilu & Company Advocates while the Procuring Entity was represented by Mr. Echessa from the firm of Ochieng , Onyango, Kibet & Ohaga Advocates, the Interested Party appeared through its advocates Mr. Peter Munge of the firm of Muriu Mungai & Company Advocates.

The Applicant requested the Board for the following orders:-

1. That ERC be forthwith estopped from proceeding with the tender pending the hearing and determination of this Application;
2. That ERC be stopped from opening the request for proposal in relation to the tender pending the hearing and determination of this Application;
3. That ERC be stopped from awarding the tender complained of herein pending the hearing and determination of this Application;
4. That ERC be compelled to re advertise the tender;
5. That ERC be compelled to redraft its RFP in a manner which complies with the Act;
6. Cost of this Application;
7. Any other orders which the Review Board may deem necessary

The Applicant has filed four Grounds in support of its Request for review.

PRELIMINARY ISSUE

The Board notes that the Procuring Entity has raised a Preliminary Objection that touches on the issue of whether or not the Review Board is seized with jurisdiction to hear the matter, based on the following grounds:-

1. *That the Applicant, having not submitted any bid to the Procuring Entity in respect of the subject tender, is not a 'candidate' in consideration of the tenor of Section 3 of the Public Procurement & Disposal Act, 2005 read together with Section 39 of the Act thus lack locus standi to make the present Request for Review;*
2. *That the Applicant has not alleged or given evidence of having suffered or risk suffering, loss or damage due to the brach of any duty imposed on the Procuring Entity by the Public Procurement & Disposal Act, 2005 or the Regulations thereunder in terms of Section 93 of the Act and thus lack locus standi to make the present Request for Review;*
3. *The Request for Review is in any event time-barred by dint of the provisions of Regulation 77(2)(c) of the Public Procurement & Disposal Regulations, 2006 having been made 14 days from the date of the breach complained of.*

At the hearing of the matter the Board directed that the parties to argue the Preliminary Objection together with the main Request for Review.

The Board notes that it is a common ground that the Applicant participated in the original phase of this tender by submitting an Expression of Interest pursuant to the advert by the Procuring Entity for the same. Subsequently, upon evaluation of the said Expression of Interest by the Procuring Entity, the Applicant, together with two other entities were invited to submit a Request for Proposal for the services.

The Procuring Entity submitted, in its support of the Preliminary Objection, that despite the fact that a Request for Proposal had been sent

to the Applicant via email, the Applicant did not return the same. It further submitted that this therefore meant that the Applicant ceased to be a candidate as envisioned by Section 3 of the Public Procurement and Disposal Act, 2005.

The Board notes that Section 3 of the Public Procurement & Disposal Act, 2005 defines a 'candidate' as:-

".....

"candidate" means a person who has submitted a tender to a procuring entity;

....."

This therefore meant that, according to the Procuring Entity, the Applicant lacked any *locus standi* to bring the current Request for Review in respect of this tender. It was further submitted by the Counsel for the Procuring Entity that a party must be able to demonstrate that it stood to suffer loss or damage as a result of the breach complained resulting from the actions of the Procuring Entity, in accordance with the provisions of Section 93(1) of the Act. The Procuring Entity further submitted that the Applicant having not returned the Request for Proposal suffered no loss or stood to suffer no loss as it had chosen to abandon the tender at that stage.

Section 93(1) of the Public Procurement & Disposal Act, 2005 states that:-

"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"

Finally, the Procuring Entity in its submission invited the Board to find that it lacked Jurisdiction to hear the Request for Review on the basis of the same having been brought to the Board out of time .

The Procuring Entity submitted that the parties were invited to submit Request for Proposals on 22nd September 2014 and the said letters were send to parties on 7th October 2014 via email. The Procuring Entity further submitted that the Applicant was invited for a pre-proposal conference meeting which was to be used to clarify any issues not clear in the Request for Proposal. However, instead of attending the meeting, the Applicant chose to write a protest letter on 29th October 2014 to the Procuring Entity. It was the submission of the Procuring Entity's Counsel that the Cause of Action arose on that date and that indeed time ought to have started running on that day since the Applicant became aware of the breach now complained of in the current Request for Review. Accordingly, the Procuring Entity urged the Board to find that Seven (7) days for filing a Request for Review should have then lapsed on 6th November, 2014. The Procuring Entity submitted that therefore the Request for Review filed on 11th December 2014 was late by a period of two months. Accordinly and going by the finding in the *Lillians case*, the Board should then find that it has no jurisdiction and down its tools at this point since a tribunal or court can only entertain applications or hear matters if it is clothed with jurisdiction in accordance with law.

In its Response to the Preliminary Objection, the Applicant opposed the said grounds. As to whether it was a candidate in accordance with Section 3 of the Act, it was the Applicant's submission that since it had participated in the Expression of Interest stage of the procurement process, it was a candidate as envisioned by Section 3 of the Act. Indeed the Applicant submitted that the tender document is not one set of documents but the entire process. In this case the Applicant stated that the Expression of Interest and the Request for Proposal was one process amounting to one tender and not two tenders as submitted by the Procuring Entity.

On the second issue as it relates to whether the Board had Jurisdiction to hear the Request for Review on account of the fact that the same had been filed out of time, the Applicant submitted that after it received the letter of invitation to attend a pre-proposal conference, it wrote a protest letter to the Procuring Entity pointing out issues that it considered not necessary in the Request for Proposal Document. By its own admission, the Applicant stated that its protest letter was sent out on 29th October, 2014 and that having not received any response whatsoever from the Procuring Entity, the Applicant then instructed its Advocates to issue a demand letter to the Procuring Entity demanding that the anomalies in the Request for Proposal Document be addressed on or before the 2nd December, 2014. The Applicant then conceded that indeed and according to its calculations the time would then run upon the lapse of its demand notice to the Procuring Entity. It argued therefore that its Request for Review was filed within the time allowed by law. The Applicant further submitted in the alternative that indeed time was a technical issue which

should not fetter the administration of substantive justice and urged the Board to find that in tune with Article 159 of the Constitution of Kenya , 2010, Justice must be dispensed without due regard to technicalities and procedural issues. The Applicant therefore urged the Board to uphold substantive Justice and find that the Request for Review as filed was properly before the Board.

The Interested Party associated itself with the submissions of the Procuring Entity in support of the Preliminary Objection and urged the Board to also find that the Request for Review was filed out of time and should therefore be dismissed as the Board lacked Jurisdiction to hear it. The interested Party urged the Board to find that in accordance with Regulation 73(2) (c) as amended, a Request for Review ought to have been filed within 7 days from the date when the breach complained of occurred. It stated that by virtue of the fact the Applicant having chosen not to attend the pre-proposal conference, it meant that the Applicant was no longer interested in the procurement process and cannot therefore be heard to complain because subsequently it did not even return its Request for Proposal.

The Board having heard the submissions of all the parties and read the documents filed by the parties in support of and opposition to this Request for Review must then address the pertinent issue of Jurisdiction before it can deal with the merits of Request for Review. The Board has identified the issue for determination as follows;

" whether the Board lacks Jurisdiction to hear the Request for Review having been filed outside the mandatory 7 days period from the date of the occurrence of the breach complained of".

The Board notes the following;

1. That the Applicant participated in the tender by having submitted an Expression of Interest as advertised by the Procuring Entity and was shortlisted and invited to participate in the Request for Proposal on 22nd September 2014.
2. That the Applicant instead of submitting the Proposal instead sent a protest letter to the Procuring Entity on 29th October 2014.
3. That the Procuring Entity held a pre-proposal conference on 29th October intended for all the parties invited to submit Proposals but the Applicant chose not to attend.
4. The Counsel for the Applicant sent a second letter (Demand Letter) to the Procuring Entity on 24th November, 2014 giving it upto 2nd December, 2014 in which to respond to the issues raised therein and further to its letter of 29th October 2014.

The Board observes that the operative provision of the law that it must determine whether or not was breached is Regulation 73(2)(c) of the Public Procurement and Disposal Regulations, 2006, as amended in 2013, which states that:-

"73(2) The request referred to in paragraph (1) shall-

(a).....

(b)

(c) be made within seven days of-

(i) the occurrence of the breach complained of where the request is made before making of an award; or

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

Accordingly the Board holds that the breach complained of was within the knowledge of the Applicant as early as 29th October, 2014. It therefore follows that the Applicant ought to have filed its Request for Review before the Board within 7 days of the said date and not waited to do so two months later. Be that as it may, even if the Board was to agree with counsel for the Applicant that it was only after it issued the second demand letter of 24th November 2014 giving the Applicant a timeline of 2nd December, 2014 to respond then seven (7) days would have still lapsed on the 8th of December, 2014 and not 11th December when this Request for Review was filed.

The Board has previously held that time is indeed a jurisdictional issue and not a technical or procedural issue. The Board therefore finds that the arguments advanced by Counsel for the Applicant under Article 159 of the Constitution of Kenya 2010, cannot be applicable here. Indeed Article 159 requires courts and tribunals not to be bound by procedural technicalities but to dispense substantive Justice. However Justice can

only be substantive if its applied equally to all parties present and not selectively.

On the issue of jurisdiction the Board is guided by the decision of Justice Nyarangi in the case of Owners of the Motor Vessel "Lillan S" v. Caltex Oil (Kenya) Ltd(1989)KLR C.A1)pg.1 at 14.15.

Nyarangi J A, stated as follows;

" I think that it is reasonably plain that a question of Jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Where a court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A court of law must down tools in respect of the matter before it the moment it holds the opinion that it is without Jurisdiction. Before I part with this aspect I refer to the following passage which will show that what I have already said is consitsnet with the aauthority.

" By Jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters in a formal way for its decision. The limits of this Authority are imposed by the statute, charter, or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance , or as to the area over which the jurisdiction shall extend , or it may partake of

both these characteristics. If jurisdiction of an inferior court or tribunal(including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”(see words and phrases legally defined volume3;1-N page 113)

It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined.

I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of the issue without further ado”.

In light of the above, the Board finds that indeed the cause of action complained of in the Request for Review arose upon issuance of the Request for Proposal to the Applicant which was confirmed to have been the 7th October 2014 and the Board is persuaded that the Applicant ought

to have filed a Request for Review within 7 days from the said date as it was seized of the issues it now wishes the Board to determine. The delay by the Applicant for a period of over two months is inordinate and cannot be wished away even if the Board was to invoke the Constitutional provisions contained in Article 159 of the Constitution of Kenya, 2010.

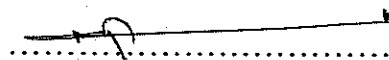
The Board therefore finds and holds that it lacks Jurisdiction to hear this matter and must accordingly down its tools forthwith.

Having found that the Board lacks Jurisdiction to hear this matter the Board cannot therefore proceed to address this matter any further.

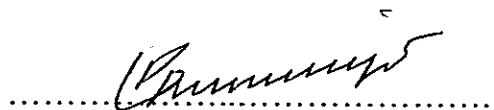
Consequently the Board therefore makes the following orders:

1. *The Request for Review filed by the Applicant on 11th December 2014 in respect of Tender No. ERC/PROC/4/3/14-15/020 is hereby dismissed.*
2. *The Procuring Entity is directed to proceed with procurement process to its logical conclusion.*
3. *The Board makes no orders as to cost.*

Dated at Nairobi on this 9th day of January, 2015.


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CHAIRMAN
PPARB


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SECRETARY
PPARB