

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 8/2014 OF 25TH MARCH, 2014

BETWEEN

SHERIBIZ SUPPLIES LIMITEDAPPLICANT

AND

KENYA AIRPORTS AUTHORITY.....PROCURING ENTITY

Review against the decision of the Tender Committee of Kenya Airports Authority dated 17th March, 2014 as communicated in the letter dated 18th March,2014 in the matter of Tender No. KAA/HQS/203/2013-2014 for Development and Management of an Airport Spa and Beauty Salon at JKIA.

BOARD MEMBERS PRESENT

Josephine W. Mong'are	- Member(in the Chair)
Rosemary K. Gituma	- Member
Nelson Orgut	- Member
Paul Ngotho	- Member

IN ATTENDANCE

Mr. Philemon Kiprop	- Secretariat
Ms. Judith Maina	- Secretariat

PRESENT BY INVITATION

Applicant - Sheribiz Supplies Limited

Paul Momanyi	Advocate
John Chege	Director
Jullian Nyaga	Director

Procuring Entity -Kenya Airports Authority

Margaret Munene	Advocate
Margaret Muraya	Procurement Manager
Bernard Bosire	Procurement Assistant

Interested Parties -Nothing Like it

Mr. Kigen Robinson	Advocate
Bincy Devani	Director
Masara Maxwell	Legal intern

BOARD'S DECISION

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

BACKGROUND

1. The Procuring Entity advertised the tender in dispute on 26th November 2013 and closed/opened the tenders on 10th December, 2013.
2. Five bidders namely; Nothing Like It, Dubai Beauty Centre, Masti Health & Beauty Pvt Ltd, Avena Imani Enterprises and Sheribiz Supplies Ltd responded by submitting their tenders.
3. Only three bidders namely Nothing Like It, Masti Health & Beauty Pvt Ltd and Sheribiz Supplies Ltd were determined to be responsive.
4. On completion of technical evaluation, Sheribiz Supplies Ltd, the Applicant herein, emerged as the highest evaluated bidder. The Evaluation Committee recommended that the Applicant be awarded the contract having submitted the most technically responsive bid and with the highest evaluated concession price and the best proposed Concession Fee of Kshs. 9,600,000per annum.
5. The Applicant was an interested party in Request for Review No. 2/2014 filed on 13th February, 2014 and the Board's decision issued on 10th March, 2014. The Board in its decision dismissed the Request for Review and directed the Procuring Entity to proceed with the Procurement Process.
6. At the time the first Request for Review was filed, the Procuring Entity vehemently defended the award of contract to the Applicant herein.

7. Upon receiving the Board's decision, the Procuring Entity invited the Applicant for a meeting on 17th March, 2014: the Agenda of the meeting was to make reviews on the designs of the plans that it had initially submitted to the Procuring Entity via email.

8. The Procuring Entity's Tender Committee at its 303rd meeting held on 17th March, 2014 deliberated and approved the annulment of the award to Ms. Sheribiz Supplies Ltd and directed that a warning letter be sent to the evaluation committee since they did not disclose the full information.

9. The Managing Director by a letter dated 18th March, 2014 nullified letter of notification of award to the Applicant herein dated 22nd January, 2014 and the letter of offer dated 28th January, 2014.

10. The Procuring Entity purportedly carried out "*Due Diligence*" on the Applicant and a report was prepared by a committee of four Members on 27th March, 2014.

THE REVIEW

The Request for Review was lodged by Sheribiz Supplies Limited on 25th March, 2014 in the matter of Tender No: KAA/HQS/203/2013-2014 for Development and Management of an Airport Spa and Beauty Salon at JKIA.

The Applicant was represented by Mr. Paul Momanyi Nyaosi , Advocate, while the Procuring Entity was represented by Ms. Margaret Munene, Legal Counsel. The interested party present, M/s Nothing Like It Ltd, was represented by Mr. Kigen Robinson, Advocate.

The Applicant requested the Board for the following orders:

- a. To annul the letter of the Respondent dated 18th March, 2014 in its entirety;*
- b. To give directions to the Respondent to continue with the procurement proceedings by awarding the contract to the Applicant as required by the Law;*
- c. To order the Respondent to bear the costs of these proceedings.*

The Applicant raised ten (10) grounds of Review which the Board deals with as follows:

Grounds 1, 2, 3, 4, 5, 6, 7, 8 and 9 ; Breach of Article 227(1) of the Constitution of Kenya, Sections 2, 66 and 100 of the Public Procurement and Disposal Act, 2005(hereinafter referred to as "the Act")

The nine grounds of review have been consolidated as they relate to the issue of the Procuring Entity's letter dated 18th March, 2014 annulling the notification of award letter dated 22nd January, 2014 and letter of offer dated 28th January, 2014 to the Applicant.

The Applicant submitted there was a previous Request for Review No.2 of 13th February, 2014 between *Masti Health and Beauty Spa Ltd* and the Procuring Entity in which the Board determined and found that the Tenders were evaluated as per the Tender Document and the Board allowed the Procuring Entity to proceed with the procurement process to its logical conclusion. The Applicant through its Counsel further submitted that the Procuring Entity invited it on 17th March, 2014 for site visit only to be surprised with a nullification letter dated 18th March, 2014 as a result of a *due diligence exercise purportedly* carried out by the Procuring Entity on 17th March, 2014, which the Applicant stated that it was not aware of. In its oral and written submissions, the Applicant stated that as the time of the purported due diligence, the process of evaluation had been completed and hence there was no room for further due diligence exercise or evaluation to be done by the Procuring Entity since that process had already been closed and an award made prior to the filing and determination of the Request for Review Case No.2 of 13th February, 2014. The Applicant averred that the Procuring Entity could not purport to further evaluate the Applicant's tender or carry out any other evaluation as the exercise had come to a close.

It was the Applicant's submission that the nullification letter and the purported *due diligence exercise* report were documents concocted to justify an illegal process. It submitted that due to the disparity in the date of the nullification letter and that of the *due diligence* report, the report could not have informed the decision of the Tender Committee of the Procuring Entity which was communicated in the letter dated 18th March, 2014 whereas the due diligence report is dated 27th March, 2014 which is much later after the decision.

It was also the Applicant's averment that the purpose of the "*due diligence exercise*" was to ascertain or establish the relationship between M/S Sheribiz Supplies Ltd and M/S Millennium Concepts which information the Applicant had already submitted in its bid document and therefore the same was available to the Procuring Entity at all material times and indeed the said information had been relied upon by the Procuring Entity's Evaluation Committee during the process of evaluation and the subsequent award.

Another extrinsic criteria sought to be introduced by the due diligence exercise was the purported requirement by the Procuring Entity for the Applicant to demonstrate experience of 5 years of having been in operation prior to the submission of its tender, a criteria that was not in the Procuring Entity's Tender Document at all. This information the Procuring Entity alleged to have unearthed during the "*due diligence exercise*". The Applicant therefore urged the Board to find that the Procuring Entity breached the provisions of the Act by introducing another stage of evaluation not envisaged or contemplated by the Law at all,

notwithstanding the fact that the Applicant had made payments in satisfaction of the letter of offer pursuant to the award of the contract to it by the Procuring Entity. The Applicant therefore urged the Board to find that the Procuring Entity's conduct contravened Sections 2, 66 and 31 of the Act and Article 227 of the Constitution of Kenya, 2010 .

In its response, the Procuring Entity through its Legal Counsel Ms. Margaret Munene submitted that at the time of the contract preparation, the Legal Department of the Procuring Entity sought for the documentation that had been submitted by the Applicant and observed that the Applicant had relied on a different business entity in order to demonstrate its three years' experience as required by the Tender Document. Legal Counsel Ms . Munene submitted that the request for a further re-evaluation of the Applicant's tender was not informed by any legal provisions but was informed by practice. She went further to state that *the due diligence exercise* was carried out at the behest of the Procuring Entity's Legal Department but she was unable to give an explanation as to why the tender award was nullified on 18th March 2014, long before the Due Diligence Exercise Report which was prepared on 27th March 2014.

The Board has taken note of various provisions of the Law and the Tender Document which are as quoted herein below:

Article 227(1) of the Constitution of Kenya, 2010

"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 66 of the Act"

"66(2) the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used."

The Tender Document

"Eligible tenderers

2.1.3 Tenderers shall provide the qualification statement that the Tenderer (including all members of a joint venture and subcontractors)....."

"Appendix to Instructions to tenderers

2.1.1	Eligibility	The tender is open to all tenderer's running a spa or similar services locally	Bidders to provide Business profile
2.24	award criteria	Successful tenders shall be the one that is eligible to participate in the tender, is responsive to preliminary requirements and shall have the highest score."	Firm with the highest score to be awarded

The Board has considered the submissions of the parties and the documents that were presented before it and notes that this Request for Review is joined with the decision of the Board in Request for Review No. 2 of 13th February, 2014.

The issues that arise for determination by the Board are as follows:

- i. Whether the directives of the Board in Request for Review Application No. 2 of 13th February, 2014 take away the powers of Procuring Entity to annul or re-evaluate the tender at any time before and after entering into a contract?,*
- ii. Whether the Applicant was unfairly treated by qualifying its experience and upon acquisition of Millennium Concept and Whether the 'due diligence exercise' was proper or an illegality under the Act.*
- iii. Whether the Procuring Entity's letter annulling the award to the Applicant is valid and whether the actions of the Procuring Entity amount to an attempt to circumvent the Orders of the Board issued in Request for Review No. 2 of 2014?*

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

1. On 13th February 2013, Request for Review No. 2 of 2014 was filed by M/s Masti Health & Beauty Limited against Kenya Airports Authority in respect of Tender Number KAA/HQS/203/2013-2014 for Development and Management of an Airport Spa and Beauty Salon at JKIA.

2. The Procuring Entity filed its Response on 19th February 2014 and submitted all the documents in respect of this tender which included original bid documents, Minutes of the Tender Opening Committee and the minutes of the Evaluation Committee, amongst other documents.
3. Upon hearing the parties, the Board made a number of observations and findings; the salient ones the board noted are highlighted as follows:
 - I. The Board specifically held that tenders were evaluated using criteria provided for in the Tender Document, in compliance with Section 66(4) of the Act.
 - II. That the Procuring Entity awarded the Tender to the highest evaluated Bidder in line with its Tender Document Clause 2.24 as this was concessionary tender and therefore the Procuring Entity action is in line with Article 227(1) of the Constitution and Section 2 of the Act as awarding to the highest evaluated it guaranteed maximum return to the Procuring Entity and in it promoted competition and maximum economy.
 - III. The net effect of the grounds of appeal for Request for Review No. 2 of 2014 failed and the Board directed the Procuring Entity to proceed with the procurement process which it had already commenced by issuing a letter of offer to the Applicant and accepting payments from it.

The Board notes that the current Request for Review has been necessitated by the Procuring Entity's decision to interpret its previous order to allow it to renege the contractual process that it already initiated prior to the filing of the previous appeal. The Board recalls that the Procuring Entity in that case vehemently defended its decision to award the tender to the Applicant herein and stood by its evaluation processes at that point in time. The Board had carefully considered the manner the evaluation process was done and held that the evaluation process was conducted properly. It had directed the Procuring Entity to proceed with the Procurement process to the end. The only way it could finalize the process was to ensure that the contract is executed. Since the Board had held that the Evaluation Committee acted properly, it was therefore not open to the, Managing Director, Due Diligence committee or the Tender Committee on its own motion to search for alternative reasons to reject the recommendations of the Evaluation Committee which had been adjudicated by the Tender Committee.

The Board finds mischief in the arguments of the Procuring Entity that the reason why it opted to cancel the notification of award was because it discovered that the Applicant did not have the requisite experience as required by the Tender Documents. According to the Procuring Entity, the acquisition of Millennium Concepts by the Applicant was not binding as there was no evidence showing the acquisition. The Procuring Entity further argued that it did realize this during contract preparation. The burden of proving how they discovered this entirely rested on the Procuring Entity. Unfortunately, no evidence was adduced and no arguments were made in support of the Procuring Entity's allegations. Suffice it note at this point that a technical evaluation was conducted by the Procuring Entity's Evaluation

Committee and the same done using the documents that the Procuring Entity sought to challenge.

The Board further notes that at all material times prior to the cancellation of the Award, the Procuring Entity and the Applicant had already commenced the necessary steps towards formation of a valid contract and a consideration had passed. For the Procuring Entity to turn back and allege that the Applicant lacks capacity can only be construed to be acting in bad faith on the part of the Procuring Entity.

From the submission by the parties, the Board observes that the "due diligence" carried out by the Procuring Entity on the 27th March, 2014 was not provided for in the Tender Documents apposition admitted by the Procuring Entity and therefore the action of the Procuring Entity goes against the provision of Section 66(2) of the Act as read together with Clause 2.24.3 of the Tender Document. The Board notes that the above exercise was carried out when the instant Request for Review had already been filed by the Applicant herein contrary to provision of Section 94 of the Act where procuring entities are required to suspend procurement proceedings upon being notified of the filing of a Request for Review.

The Board further finds that the Procuring Entity's 303rd Tender Committee Meeting of 17th March, 2014 approving the annulment of the Applicant's award based on the "due diligence" report of 27th March, 2014 creates an impression that its decision was based on a non-existent report. The Board

notes that Regulation 10 as read together with Regulation 11 2(a) of the Public Procurement and Disposal Regulations, 2006 clearly spell out the functions of the Tender Committee and what to and what not to do. The Board further note that, as the Tender Committee was adjudicating the annulment, the Applicant on the other hand had been invited by the Procuring Entity to make reviews on the designs of the site. The Board further observe that the Managing Director's letter of 18th March, 2014 nullifying the letters of notification and offer is a communication not envisaged by the Act and Regulations and which also goes against the Procuring Entity's Tender Document Clause 2.26; which in normal circumstances provides for either a letter of notification (Section 67 of the Act) or termination of tender as envisaged by Section 36 of the Act and therefore the said letter is invalid and a nullity. The Above observation is reinforced by The High Court Decision in *R v PPARB & Another ex parte Selex Sistemi Integrati (JR No. 1260 of 2007)*, in which the Procuring Entity purported to terminate a tender under Section 36 of the Act, after awarding it to the Applicant and acceptance of the same.

- *The main issues were whether (i) section 36 was available to a Procuring Entity after award and acceptance of a tender; and (ii) whether the Review Board had jurisdiction.*
- *The Review Board held that it had no jurisdiction, leading to judicial review proceedings against its decision.*

The High Court held (upon Judicial Review): it quashed the decision of Review Board and allowed Judicial Review on the grounds that (inter alia)–

Section 36 was not available to a Procuring Entity after the award and acceptance of a tender (error of law/jurisdictional error);

The Board further finds that the dates as submitted in the letter(s) of 18th March, 2014 by the Managing Director, the timing of Tender Committee meeting of 17th March, 2014, site visit of 17th March, 2014 and due diligence report of 27th March, 2014 are not adding up given the timing and dates of letter and report .

From the forgoing the Board finds that the action of the Procuring Entity goes against the provisions of Article 227(1) of the Constitution of Kenya, 2010 as read together with Section 2(c) of the Act in that the Constitution and the Law require the Procuring Entity and the bidders to promote the integrity and fairness of the procurement procedures. In view of the foregoing, the Board holds that the Procuring Entity and specifically the letter dated 18th March, 2014 is outrageous. In the premises, the Board holds as follows:

- i. Since the Board issued a decision on 10th March, 2014 giving directions pursuant to Section 98 (b) of the Act, Section 36 or any other nullification process was not available to the Procuring Entity as it has to be read together with Sections 93 and 100 of the Act.
- ii. The entire tender process was carried out in accordance with the Act and the Applicant emerged as the highest evaluated Bidder and that the Applicant was rightfully awarded the contract
- iii. That neither the Act nor the tender documents provides for post-notification due diligence.

- iv. That the purported due diligence having been conducted by the Tender Committee and the Procuring Entity's legal department is null and avoid.

In view of the foregoing all the nine grounds of review succeed.

Ground 10-Statement on Loss

The Applicant through its counsel submitted that by the conduct and actions of the Procuring Entity, it stands to suffer loss and damage, by reason of the fact having been awarded the tender and in that it had already made substantial investments towards the commencement of the Contract in that it had made substantial payments to the Procuring Entity in satisfaction of the Award therein and had already started preparation to move to the site and commence performance of the tender.

The Applicant urged the Board that Section 98 of the Act allows the Board to award it costs and went further to submit that the quantum therein was left by the law to the Board's discretion.

The Board finds that the Applicant has already made payment to the Procuring Entity in relation to the Tender and the delay by the Procuring Entity in facilitating the execution of the Legal Contract with the Successful Bidder, is unwarranted, and awarding costs to a successful litigant/applicant would be a measure to deter such a conduct by Procuring Entities in future especially when the stage at which the procurement process has reached is no longer a risk associated with tendering but execution of the Contract.

Section 98 empowers the Board to award costs. The Board notes that this is the second Request for Review in respect to the said tender. The Board further notes that in both instances, the Applicant has contracted the services of counsel to represent it in the proceedings and put measures in place to execute the contract. In ordinary civil proceedings, costs normally follow the event. In the celebrated case of Joreth Ltd v Kigano & Assoc. Civil Appeal No. 66 of 1999 (unreported), the court held as follows;

“We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

In light of the above, the Board finds in this case that it is proper to award costs to the Applicant.

The net effect of the above is that the Request for Review succeeds.

Consequently, the Board holds and directs as follows:

1. That the purported letter of annulment dated 18th March, 2014 from the Managing Director of the Procuring Entity to the Applicant purporting to cancel and annul the Procuring Entity’s Letter of Award dated 22nd January 2014 and the subsequent

letter of offer dated 28th January 2014 is declared null and void and is hereby set aside.

2. That the Procuring Entity is hereby directed to formalize the Contract with M/s Sheribiz Supplies Limited (the Applicant herein) and have the same executed in accordance with its Letter of Offer dated 28th January 2014 forthwith but not later than 14 days from the date of this order.
3. Pursuant to the powers granted to it by Section 98 of the Act, the Board hereby direct and order the Procuring Entity to pay Legal Costs incurred by the Applicant in this Request for Review amounting to Kshs. 100,000/- and disbursements incurred in bringing the Request for Review to the Board of Kshs.40,000/= . The Board directs that same to be paid to the Applicant within fourteen days from the date of the order herein.

Dated at Nairobi on this 23rd day of April, 2014

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CHAIRMAN
PPARB

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SECRETARY
PPARB

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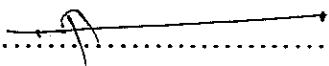
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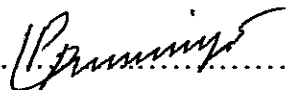
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