

THE REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 44/2015 OF 3RD SEPTEMBER, 2015

BETWEEN

KALABASHI INVESTMENTS LIMITED..... (APPLICANT)

AND

**NATIONAL OIL CORPORATION OF KENYA
LIMITED (PROCURING ENTITY)**

Review against the decision of National Industrial Training Authority in the Matter of Tender No. NOCK/PRC/03(1044) for Request for Proposal for Provision of Transportation Services for LPG Cylinders & Packaged Lubricants.

BOARD MEMBERS PRESENT

Mrs. Josephine Mong'are - (Member, in the Chair)

Paul Ngotho - Member

Peter B. Ondieki, MBS - Member

IN ATTENDANCE

Mr. Philip Okumu - Secretariat

Ms. Shelmith Miano - Secretariat

PRESENT BY INVITATION

Applicant – Kalabashi Investment Limited

Mwaniki Gachuba - Advocate

Procuring Entity - National Oil Corporation of Kenya

Stephen Gitonga - Advocate

Antoinette Muema - Head of Procurement

Interested Parties

Juddy Gachoka - Operations, Brits Freighters

Ken Muchama - Clerk, Juventud Limited

Ronald Gwaro - Director, Systrust Limited

Ezra Maruria - Director, Systrust Limited

BOARD'S DECISION

Upon hearing representations of 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 National Oil Corporation of Kenya (the "Procuring Entity") invited proposals for the provision of transportation services for LPG cylinders and packaged lubricants on a framework contract of five (5) years based on performance. The tender was reserved for the Youth, Women and PLWDs.

The Procuring Entity advertised for the Request for Proposals (RFP) in the *Daily Nation* of 7th August, 2015. The title of the tender was "Request for Proposal (RFP) for Provision of Bulk LPG Transportation Services". The tender was to close on 24th August, 2015.

The tenders were received and opened on 24th August, 2015 at 15.00 hrs at the Procuring Entity's premises in the presence of tenderers who chose to attend.

The chairman of the Tender Opening Committee was expected to read out the names of the persons submitting the tender, the tender modifications or withdrawals, tender prices (*if available*), discounts and the presence or absence of the requisite tender security.

The Committee opened bids/proposals from the following bidders:

No.	FIRM
1	Fairlane Beauty & Cosmetics Ltd
2	Systrust Ltd
3	Gatwan Enterprises Ltd
4	Ravina Agencies Ltd
5	Deekem Petroleum & Industrial Services Ltd
6	Voxa Africa Ltd
7	Jophic General Suppliers/Agencies
8	Graceme Investments Ltd
9	Malia General Merchants
10	Juventud Logistics

No.	FIRM
11	Futureway Ltd
12	Brits Freighters Ltd
13	Misky General Ltd/ Daqare Joint Venture

~~The bids had not been evaluated by the time this Request for Review~~
was filed with the Board.

REVIEW

The Request for Review was lodged by M/s Kalabashi Investments Limited (the "Applicant"), through its advocates M/S Onyoni Opini & Gachuba Advocates of P. O. Box 79706 - 00200, Nairobi, on 3rd September, 2015.

At the hearing of the Review the Applicant was represented by Mr. Gachuba, Advocate while the Procuring Entity was represented by Mr. Stephen Gitonga, Advocate from the firm of M/S Gitonga Mureithi & Company Advocates.

The Applicant requested the Public Procurement Administrative Review Board (hereafter referred to as the Board) to review the decision of the Procuring Entity and sought the following orders:

- (i) **THAT the procurement process in respect of the Request for Proposals (RFP) for Provision of Transport Services for LPG Cylinders and Packaged Lubricants (Tender No. NOCK/PRC/03/1044) be annulled.**

(ii) THAT the Procuring Entity be compelled to re-tender for the services using the correct procurement procedure and standard tender document.

(iii) THAT the Procuring Entity be compelled to re-tender under the supervision of the Public Procurement Oversight Authority in order to give effect to section 2(f), 39 of the Public Procurement and Disposal Act, 2005, Article 10, 227(1) and 232 of the Constitution.

(iv) THAT the Procuring Entity be compelled to comply with Section 20(1) of the Supplies Practitioners Management Act, 2007; section 26(8)(a)&(c) of the Public Procurement and Disposal Act, 2005 in order to promote the values and principles of public service under Article 232(1)(a) of the Constitution in respect of public procurement.

(v) THAT the costs of the Request for Review plus interest until it is paid in full.

Although the Applicant has filed ten(10) grounds in support of its Request for Review, the Board having perused at the pleadings filed before it and having heard the submissions by all the parties has identified two issues for determination, to wit,

- 1. Whether or not the Applicant has the right to file this Request for Review.***

2. *Whether the Applicant filed this Request for Review within the Seven(7) day mandatory period from the date of Breach as provided in Regulation 73(2)(c)(i)?*

Issue No.1; Whether or not the Applicant has a right to file this Request for Review.

In its submissions as well as in its Statement of Facts forming part of its Application, the Applicant admits that it was unable to competitively fill or submit a proposal in response to the Request for Proposal from the Procuring Entity. This fact is confirmed by the documents filed in response by the Procuring Entity in that the Applicant's name is not among the names in the list of bidders who submitted their bids in response to the Request for Proposals. Furthermore, the Procuring Entity's Attendance Register that was filled and signed by the Bidders' representatives who chose to attend the opening of the proposals, and that has been submitted by the Procuring Entity as part of its bundle of documents, does not indicate the name of any representative of the Applicant. Despite the above scenario the Applicant in its submissions stated that it was legally entitled to file this Request since it stood to suffer loss as a result of the Procuring Entity's refusal to provide the clarifications it had sought before completing its bid Documents.

The Applicant further submitted that on 17th August, 2015 it requested the Procuring Entity to clarify or amend the Request for Proposal(RFP)

to promote fair competition. It was the Applicant's submissions that the Procuring Entity refused to respond to the request for clarifications at all, prompting it to write again on 27th August, 2015 requested a response by the Procuring Entity to confirm by close of business on the 28th August, 2015 whether the RFP was ever opened, which the Procuring Entity did not respond to, once more.

The Board has noted the requirements of the following Sections of the Public Procurement & Disposal Act, 2005, that define who can lodge a Request for Review with the Board:-

"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."

.....

"3.(1) In this Act, unless the context otherwise requires —

.....

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

The meaning of Section 3.(1) of the Act is very simple: once a tender closes, only a party which has submitted a tender can apply for Request for Review. Interestingly, the section does not require a candidate to submit a completely filled-up tender. Therefore, the Board notes, this

Applicant could have safeguarded its position, and qualified as a candidate by merely submitting the tender documents if only in order to be able to lawfully file a Request for Review. Alternatively, it could have filed a Request for Review prior to the tender closing date.

In this case, the Applicant did not submit a tender. The Board finds that the Applicant is not a "candidate" as stipulated in Section 3.(1) of the Act and that, therefore, the Applicant has no right to file a Request for Review of this tender.

Issue No. 2: Whether the Applicant filed this Request for Review within the Seven(7) day period from the date of Breach as provided in Regulation 73(2)(c)(i)?

In its oral and written submissions before the Board, the Applicant averred that the Procuring Entity violated Sections 2 and 27(1) of the Act, Regulation 43 of the Regulations, and Article 10, 47(1), 227 and 232(1)(c),(e)&(f) of the Constitution and clause 2.2 of the Request for Proposals (RFP) by failing to respond to the Applicant's request for clarifications.

The Applicant further stated that they requested for clarification from the Procuring Entity to which they did not receive any response up to the time of lodging this Request for Review. The Applicant avers that they are unaware of the status of the Request for Proposal, as at the time of filing this Request for Review.

In its response, the Procuring Entity admits that it received the Applicant's request for clarification and that it did not respond. It further submitted that the Tender/RFP Document stated in clauses 2.2.1 and 2.2.3 that the clarification should have been sought not later than seven (7) days before the deadline for the submission, and that the Tender document stated that the responses should be made within three (3) days of receiving the request for clarifications. The Procuring Entity further stated that it did not responds to the request for clarification in its opinion, none of the issues raised in the said request constituted a clarification but that rather the Applicant sought to compel the Procuring Entity to abide by terms other than those provided in the Tender Document.

The Board's notes the provisions of Regulation 73(2)(c)(i) of the Public Procurement & Disposal Regulations, 2006, and as amended in Legal Notice No. 106 of 2013, which states as follows:-

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

.....

.....

(c) be made within seven days of-

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

The finding on this issue is, of course, of utmost importance because it determines whether or not this Board has jurisdiction to hear this reference. This issue emerged during the hearing and was not the subject of a preliminary objection as is the normal practice.

The Board notes that the Procuring Entity had 3 days from 17th August 2015 to respond to the Applicant's request for clarification. Those 3 days expired on 20th August 2015. The 7-day window for the Applicant to file a Request for Review for the Procuring Entity's apparent failure to respond to that letter expired on 28th August 2015. The Board further notes that the Applicant's letter of 27th August 2015 did not extend the subject 7-day period because it was a mere follow-up letter with little substance. In any case, accepting the notion that an Applicant can possibly extend the period by sending a follow-up letter would ridicule the above statutory provision, which is meant to ensure that a Request for Review is filed without delay. The Applicant filed this Request for Review on 3rd September 2015 several days past the statutory deadline. Therefore, the Board has no difficulty in finding, as it hereby does, that it lacks jurisdiction to determine this Request for Review.

Issue No. 3 – Costs

Both sides have pleaded for costs. Costs follow the event. In this case the Procuring Entity has prevailed and would, under normal circumstances, be entitled to recover its costs from the Applicant. However, the Youth, Women and PLWDs have been identified as marginalised groups in the public procurement. Awarding costs against

the Applicant might discourage aggrieved tenderers in those groups from filing merited Requests for Review. Furthermore, the Procuring Entity, having failed to even acknowledge receipt of the Applicant's request for clarification and follow-up letters, the Board notes, has not come to equity with clean hands. It could be that the Procuring Entity's response would have averted this Request for Review and saved time and the attendant costs for itself, the Applicant, the other bidders and even the Board. In the circumstances, the Board will not award costs to the Procuring Entity.

THE BOARD'S DECISION AND FINAL ORDERS

The Board's decision, in view of the above findings, is that this Request for Review fails and the Procuring Entity prevails. The Board's Final Orders are as follows:

1. **THAT** the Request for Review filed by M/s Kalabashi Investments limited against the National Oil Corporation of Kenya in the matter of Tender No. **NOCK/PRC/03(1044)** for **Request for Proposal for Provision of Transportation Services for LPG Cylinders & Packaged Lubricants** is hereby dismissed.
2. Pursuant to section 98 of the Public Procurement and Disposal Act, 2005 the Board orders and directs the Procuring Entity to proceed with the procurement process to its logical conclusion of the known as **Tender No. NOCK/PRC/03(1044)** for **Request**

for Proposal for Provision of Transportation Services for LPG
Cylinders & Packaged Lubricants and in accordance with the
law.

(ii) Each party shall bear its own costs.

Dated at Nairobi on this 24th day of September, 2015

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CHAIRMAN
PPARB

Stanley Nduku
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for SECRETARY
PPARB