

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 61/2015 OF 11th DECEMBER, 2015

BETWEEN

WITEROSE RADIO ALARMS (K) LIMITED.....Applicant

AND

KENYA PIPELINE COMPANY LIMITED.....Procuring Entity

Review against Kenya Pipeline Company Limited in the matter of Tender No. SU/QT/675N/15 Tender for the provision of security services for the period 1st February 2016 – 31st January 2018.

Board members present

1. Mr. Paul Gicheru - Chairman
2. Peter Ondieki - Member
3. Rosemary Gituma - Member
4. Nelson Orgut - Member
5. Hussein Were - Member
6. Gilda Odera - Member

In attendance

1. Mr. Stanley Miheso - Holding Brief for Secretary
2. Ms. Shelmith Miano - Secretariat

Present by invitation

Applicant – Witerose Radio Alarms Ltd

1. Charles Kiplagat - Advocate
2. Isaac Musomba - Legal Clerk

Procuring Entity– Kenya Pipeline Company Ltd

1. Gloria Khafafa - Advocate
2. Maureen Mwenje - Procurement Officer
3. Hilary Kithinji - Security Manager

Interested Parties

1. Richard Kipngeno - Advocate, Wagara Koyyoko & Company
Advocates
 2. Joash Ochanda - Operations Manager Cornerstone Security
 3. Nicholas Nyamai - Vickers Security
 4. David Keshian - Supervisor, Keshian Security
 5. Leonard Thuo - Assistant Operations Manager Sunrise
Security
 6. Pius Makau - Operations Manager, Gyto Success co. ltd
 7. Julius Kiiwa - Operations Manager, Brink Security Services
 8. Josephine Osanya - Gillys Security
-

The Board's decision

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

Background of the award

The tender no SU/QT/675/N/15 for the Provision of Security Services for the period between 1st February, 2016-31st January, 2018 was advertised in the Daily Nation and the Star Newspapers on Friday 20th November, 2015. The Tender closing date was 8th December 2015.

At the tender opening date of 8th December, 2015, Twenty-five (25) bidders, including the Applicant, submitted their bids.

Neither the Preliminary, the Technical Evaluation nor the financial evaluation of the bids had been carried out by the time this request for review was filed and no award had been made, nor any notifications issued both to the successful and the unsuccessful bidders under the Provisions of Sections 67 or 83 of the Public Procurement and Disposal Act, 2005.

The Applicant obtained the Tender document and a clarification on 7th December, 2015, and submitted its bid by 10.00 am on 8th December 2015.

The applicant filed this request for Review on 11th December 2015, which is exactly two days after the date of tender-opening. The procurement process was accordingly suspended upon the filing of the request for review as required by law.

REQUEST FOR REVIEW NO. 65/2015

This Request for Review was lodged by M/s Witerose Radio Alarms (K) Limited on 11th December, 2015 in the matter of the tender for the Provision of Security Services for the Period 1st February 2016 – 31st January 2018.

The Applicant sought for the following orders from the Board:-

- 1. The entire procurement process in respect of Tender No. SU/QT/675N/15 be annulled and the respondent be ordered to re-tender afresh using a compliant tender document.*
- 2. Any award of Tender be nullified and/or cancelled forthwith.*
- 3. The Applicant be awarded costs of and incidental to this Application and the proceedings herein.*
- 4. The Applicant be granted any further and/or alternative relief that this board may deem fit and expedient to grant.*

Before embarking to consider the arguments made by the respective parties and determine the same, the Board wishes to observe that is the second time that the subject tender is being challenged. The tender was first challenged in case no PPRB Review No.26 of 2015 by M/s Kenya Shield Security Ltd =vs= Kenya pipeline Company which was decided on 8th July, 2015 and which decision the Board will refer to from time to time in this review.

During the hearing of the request for review, the Applicant was represented by Mr. Charles Kiplagat Advocate while the procuring entity was represented by M/s Gloria Khafafa Advocate. Mr. Richard Kipngeno Advocate from the firm of M/s Wagara & Koyyoko & Company Advocates appeared on behalf of M/s Lavington Security Limited, Guardforce Group

Limited, Bedrock Holdings Limited, Riley Falcon Security Limited, Total & Surveillance (K) Limited, Gillys Security and Investigators Limited and Hatari Security Services Limited.

In addition to the above Security firms, the firms of M/s Cornerstone Security Limited, Vickers Security Limited, Keshian Security Limited, Sunrise Security Limited, Gyto Success Co. Ltd and Brink Security Services appeared at the hearing of the review through Mr. Joash Ochanda, Mr. David Keshian, Mr. Leornard Thuo, Mr. Pius Makau and Mr. Julius Kirwa respectively. When the Board sought to know what position the above parties would be taking in the proceedings, they all indicated that they would be taking a neutral position and would neither be supporting nor opposing the Request for Review. Mr. Charles Kiplagat and M/s Gloria Khafafa as would naturally be expected indicated that they would be supporting and or opposing the application. Mr. Richard Kipngeno on the other hand indicated that he would be supporting the request for review on behalf of his clients.

The Applicant's case.

It was the Applicant's case as set out in the 175 page request for review which was supported by the statutory statement of one Stanley Mbilu Okanga dated 11th December 2015 that the Applicant's request for review was based on five grounds. Counsel for the Applicant argued ground 1 separately, consolidated grounds 2, 3 and 4 which he argued together as one and argued ground 5 separately.

Counsel for the Applicant however started his submissions by dealing with the preliminary objection raised in paragraphs 3 and 4 of the Procuring

Entity's memorandum of response which was to the effect that the Applicant's request for review had been filed outside the statutory period of seven (7) days provided for under the provisions of Regulation 73 (2)(c)(i) of the Public Procurement and Disposal Regulations 2006 and whose effect was that the Board did not have the jurisdiction to hear and determine the request for review.

In answer to the above objection, counsel for the Applicant submitted that the Applicant purchased the tender document on 7th December 2015 and submitted it back to the procuring entity on 8th December 2015. The Applicant thereafter filed this Request for Review on 11th December 2015 and counting the number of days from 8th December, 2015, the Request for Review was filed within a period of four days from the date when the Applicant became aware of the existence of the tender document and the Applicant was therefore within the statutory period prescribed by regulation 73 (2)(c)(i) of the Public Procurement and Disposal Regulations 2006. He therefore urged the Board to dismiss the procuring entity's preliminary objection.

While arguing ground 1 of the Request for Review, counsel for the Applicant submitted that this ground related to the none compliance with the Boards decision in PPRB Review Application No.26 of 2015 which he produced and annexed to the request for review at pages 72 – 79.

Counsel for the Applicant specifically referred the Board to the findings at page 97 of the decision by the Board where the Board specifically held as follows:-

In view of all the foregoing reasons, this Request for Review therefore succeeds and in exercise of the powers conferred upon it by the Provisions of Section 98 of the Public Procurement and Disposal Act 2005, the Board makes the following orders:-

- (i) The entire Procurement process in respect of tender No. SU/QT/226N/14 for the Provision of Security Services is hereby annulled.
- (ii) Owing to the nature of the services to be procured, the Procuring Entity shall re-tender and complete the Procurement process for the Provision of Security Services within 30 days from the date of this decision.
- (iii) The Procuring Entity shall prepare a fresh tender document containing requirements and criteria that allows for fair competition and the re-tender document shall be approved by the Director General of the Public Procurement Oversight Authority, who will give prior written approval of the re-tender document in order to ensure reasonableness, fairness, transparency and which will also promote competition and achieve all the other objectives set out in the Constitution, the Act and the Regulations.
- (iv) In view of the above orders and more particularly the order on a re-tender which may involve the participation of the Applicant and the Interested Parties in the fresh tender process, each party shall bear its own costs of the Request for Review.

Counsel for the Applicant submitted that the above decision required the procuring entity to carryout and complete the entire procurement process in respect of the subject tender within thirty (30) days from the date of the Board's decision which according to counsel for the Applicant lapsed on 8th August 2015.

The Applicant however submitted that the procuring entity did not take any step to enforce the thirty (30) days decision until 20th November 2015 when it advertised the tender with an opening and closing date of 8th December 2015 which was several months after the Board's decision had been made.

It was the Applicant's case that the procuring entity's conduct amounted to a flagrant disobedience of the Board's decision.

Counsel for the applicant further submitted that in addition to failing to comply with order no. 2 of the Board's order, the Procuring Entity additionally filed to prepare and submit a fresh tender document for approval by the Director General of the Public Procurement Oversight Authority inorder to ensure reasonableness, fairness and transparency and that would also achieve the objectives set out in the constitution, the Act and the Regulations.

Counsel for the Applicant submitted that the procuring entity had not annexed any written approval by the Director General of the Authority to show compliance with that part of the decision but what the procuring entity had instead did was to annex a letter dated 14th September 2015 where the Authority had raised 9 issues which in it's view the procuring entity ought to

have address in the fresh tender document. This letter did not in the Applicant's view amount to the written approval ordered by the Board.

Taken cumulatively Counsel for Applicant submitted that the procuring entity breached the provisions of Section 100 of the Act which therefore rendered its decision null and void and further stated that this action alone was sufficient to annul the tender process in its entirety.

While turning to the consolidated grounds, 2, 3 and 4, it was the Applicant's alternative case that notwithstanding the Board's decision given on 8th July 2015 on compliance within thirty (30) days and the absence of the authority from the Director General the fresh re-tender process was to be done on the basis of an amended tender document but on the basis of a fresh tender, the Procuring Entity did not in fact effect any amendment to the tender document to make it fair and competitive. Counsel for the Applicant submitted that the procuring entity's action was therefore in contravention of the Provisions of S.2, 31, 34, 39 and 62 of the Act and Article 227 of the Constitution and referred the Board to the several instances which the Applicant saw as contravening the Board's decision.

Counsel for the Applicant referred the Board to the mandatory condition number 4 appearing at the printed page 18 of 69 of the tender document which was repeated under clause 1.1.1 at the printed page 3 of 69 of the tender document which required bidders to as a mandatory of condition attach evidence of certified copies of audited accounts for the last two years (2013 and 2015) and determined it as not achievable because the financial year 2005 had not ended.

The 2nd requirement which was cited by counsel for the Applicant as contravening the Board's decision was the requirement that bidders provide evidence of a certified copy of a valid frequency license from the Communications Authority of Kenya (CAK) which must include both VHF and HF frequencies. It was however the the Applicant's position that CAK can only issue VHF frequencies and not HF frequencies and produced a bundle of documents appearing at pages 100-116 of it's request for review in support of this allegation. He alleged that HF frequencies are only issued to state agencies and not to private security firms. Upon inquiry from the Board whether the Applicant's position was supported by any law, Counsel for the Applicant informed the Board that this was a common practice. He submitted that the only place where this requirement could probably be found was in the CAK regulations which he did not however unfortunately not annex to the request for review.

The third requirement which the Applicant found as being unreasonable and unattainable in the tender document was the requirement at the printed page 25 of 69 of the tender document which required a bidder to confirm the availability of fire fighting equipment in the proximity of at least of the following towns; Mombasa, Nairobi, Nakuru and Eldoret constituencies which would attract one market for each region.

Counsel for the Applicant submitted that what the procuring entity had advertised for was for security services and stated that a fire fighting engine is not a necessary requirement for providing guarding services. He stated that if the procuring entity had intended to procure fire engines, then it

should have advertised for a tender for the provision of security and safety and not for guarding services.

Counsel for the Applicant however conceded at the hearing of the Request for Review that the requirement for the availability of a fire engine was not a mandatory requirement and was only an added advantage and could not disqualify a bidder from proceeding in the tender process if the bidder passed through the other stages of evaluation.

Another provision that counsel for the Applicant faulted in the tender document was the requirement though not mandatory, that a bidder had to demonstrate that it owned 4 motorbikes with a capacity of 175 cc and above which would entitle it to the maximum 4 points assigned to this item.

Mr. Kiplagat submitted in support of the above ground that the only state agency that he was aware of that owned such a capacity of motorbikes was the presidential escort.

He termed the above kind of motorbike as a super racing motor cycle and borrowing from his client's experience, he stated that the applicant's motor bikes were between the ranges 100-125 cc and termed this requirement as being more focused on design rather than performance contrary to the Provisions of Section 34 (3) of the Act.

Mr. Kiplagat while addressing the 5th ground, namely the lack of transparency in the award criteria invited the Board to look at page 19 of the Request for Review (printed page 17 of 69) of the tender document

containing the award criteria and submitted that whereas clause 24.3.1 provided that the procuring entity would award the tender to the three tenderers whose tenders were to be determined to be substantially responsive and have been determined to be the lowest evaluated tenders, the same provision stated that no bidder would be awarded more than one region.

The first point on the lack of transparency in the Applicant's view was that there was no mention of what the regions that were being referred to in the tender document were. He submitted that whereas pages 50-52 of the request for review appearing at pages 48 to 69 of the tender document set out a schedule of areas for the tender for security services, this reference related to the years running between July 2015 – June 2017. He submitted that the tender did not however cover the period of the current tender which was namely from 1st February 2016 – 31st January 2018. He stated that a look at clause 2.24.3 did not state how the 3 lowest evaluated bidders were to be assigned the said regions.

He referred the Board to the letter from the Public Procurement Oversight Authority where the authority had proposed that the procurement be unbundled to enable bidders be able to determine the regions they would bid for.

Counsel for the Applicant urged the Board to allow the request for review and nullify the entire procurement process.

Mr. Richard Kipngeno Advocate who was given the first opportunity to address the Board after counsel for the Applicant on the basis that he supported the submissions made by Counsel for the Applicant fully associated himself with the submissions made by Mr. Kiplagat and stated that once the Board had directed the procuring entity to complete the entire procurement process in respect of this tender within thirty (30) days from 8th July 2015, the Board became *functus officio* and could not revisit the issue under Section 100 of the Act and more particularly extend time. Asked to comment on whether the time fixed by the Board was pursuant to any statutory provision or by a decision of the Board, Mr. Kipngeno conceded that the time fixed for the completion of the exercise was by an order of the Board in the exercise of the powers conferred upon it by the provisions of S.98 of the Act which confers the Board with wide jurisdiction particularly where the purpose of the extension was to give effect to an earlier decision of the Board.

Turning to what consequence would follow if the first ground of the Applicant's request for review was allowed, Mr. Kipngeno conceded that such an order would effectively terminate the entire procurement process and nothing would legally prevent the procuring entity from restarting the process a fresh with even more stringent conditions.

The Procuring Entity's Case

M/s Gloria Khafafa advocate who appeared on behalf of the procuring entity while relying on the procuring entity's response filed with the Board together

with the replying affidavit of Major (Rtd) Harry Kithinji opposed the Applicant's request for review.

The first issue which counsel for the Applicant addressed herself to was whether the procuring entity had complied with the Board's decision given on 8th July 2015 and which formed the backbone of the Applicant's case. She submitted that the Procuring entity had complied with the decision of the Board and that under the Provisions of Section 98 of the Act, where there was a delay in complying with the said decision, the Board had the power and the discretion including the the power to extend time so as to give effect to the order of the Board. Turning to the circumstances of this case, counsel for the procuring entity submitted that the compliance with the decision of the Board involved the participation of third parties such as the public procurement oversight authority which had to play a role and that the whole process would have to first entail the preparation of a tender document which would then be subjected to comments. She further stated upon compliance with the Board's decision the tender must be advertised, evaluated and an award made within thirty (30) days a fact that was not humanly possible to complete within the time fixed by the Board in it's decision given on 8th July 2015.

Counsel for the procuring entity produced the letter marked as annexure HK1 to the Replying affidavit of Major (Rtd) Harry Kithinji dated 31st addressed it to the Director General of the Authority in which it forwarded the fresh tender document to the authority which in turn studied and forwarded back the tender document to the procuring entity raising a total of 9 areas of concern which the authority was of the view that should be

addressed. It was the procuring entity's case that considering all the above factors, there would be no time to prepare the tender document, submit it to the authority, advertise, evaluate and award the tender as directed. She submitted that a look at the decision of the Board did not call for any supervision by the bidders but by the authority before the tender was re-advertised and submitted that the Provisions of S.31 and 34 of the Act place the duty to prepare and set out tender specifications in a tender document on the procuring entity.

Turning to the (9) issues raised by the Authority, counsel for the Procuring Entity submitted that the Applicant met each single requirement as directed by the authority. Counsel for the procuring entity for instance submitted that this tender was unbundled into 3 region as directed by the authority as shown at page 50 of the tender documents which stipulated that the tender would be awarded to the lowest evaluated bidder per region. Counsel for the procuring entity stated that a bidder was free to submit bids for one, two or the three regions but would be awarded only one region if turned out to be the lowest evaluated bidder.

On the Applicant's contention that the procuring entity did not receive the authority's consent before carrying out the re-advertisement of the tender as required under order III of the Board's decision given on 8th July 2015, Counsel for the procuring entity submitted that the last paragraph of the letter dated 14th September 2015 constituted sufficient authority to proceed with the process so long as the concerns raised in the letter were addressed. She therefore submitted that there was no requirement for any other written authority and that the said letter was sufficient.

While largely relying on the Replying Affidavit sworn by Major (Rtd) Harry Kithinji and while commenting on the various issues such as the requirement for fire fighting engines, the requirements on the capacity of motor vehicle and motor bikes, counsel for the procuring entity argued that the procuring entity was a strategic national institution that was charged with the duty of transporting refined petroleum products through a multi-million product pipeline spanning 1221 kms. She further submitted that the product that passed through the pipeline is highly inflammable and urged the Board to take Judicial notice that there had been several previous fires incidences with devastating consequences that had occurred along the petroleum line and that in such incidences it is the security personnel on site that would first detect and report the occurrence of such events.

Counsel for the procuring entity while relying on the explanation contained in the affidavit of Major (Rtd) Harry Githinji submitted that the requirements for safety were as a result of Reports from among the General Service Unit (GSU) which had upon carrying out a survey prepared a risk assessment report which had concluded that guards procured by KPLC were not adequately trained, equipped or supervised and thus exposed the procuring entity to the risk of theft, sabotage and fire. The General Service Unit had also classified fire as the highest threat to KPC on the risk priority index.

The Procuring entity also produced a further survey conducted by the Taita Taveta County which raised the calibre of KPC hired guards.

According to Counsel for the procuring entity the company was currently undertaking two massive projects namely a pipeline from Mombasa to Nairobi (Line 5) and the Sinendet to Kisumu (Line 6) and the requirements for security surveillance and the requirements for guards was likely to be revised.

On the issue of the requirement for financial statements for the year 2015, counsel for the Procuring Entity readily conceded that this was an error and that immediately this error was realized, the procuring entity issued an addendum correcting the error which under the Provisions of the law became part of the tender document.

On the allegation that the CAK was not empowered to issue of H.F frequency the Applicant referred the Board to annexure HK 4 headed The Communications Commission of Kenya, Frequency Spectrum Management and submitted that the allegation by the Applicant lacked basis and therefore ought to be dismissed. Since the CAK could issue both VHF and HF frequencies to bidders including the Applicant.

Counsel for the procuring entity therefore urged the board to dismiss the Applicant's request for review and stated that the Applicant's application had no basis because the subject tender had not even gone through the process of evaluation and the application was therefore based on mere apprehension.

The Applicant's Response to the procuring entity's response

In a short response to the procuring entity's submissions, counsel for the Applicant submitted that there was an apparent contradiction between the passmark for technical evaluation appearing at page 19 of 69 of the tender document and the passmark appearing at page 17 of the tender document.

Counsel for the Applicant submitted that whereas clause 2.20.4 appearing at page 15 of 69 of the tender document entitled a bidder to proceed to financial evaluation upon attaining a technical score of 85%, the requirement at page 19 of 69 of the tender document required that a bidder scores 85% both at the technical and a further 85% at phase 2 namely the due diligence stage. Counsel for the Applicant however conceded that since no evaluation had yet taken place, the Board could give any of the two provisions a purposive meaning. Counsel for the Applicant however reiterated that the letter dated 24th September 2015 from PPOA was not an approval from the authority as directed by the Board in PPARB Application No.26 of 2015.

Counsel for the Applicant therefore reiterated that the request for review be allowed as prayed.

THE GROUNDS OF REVIEW AND THE ISSUES FOR DETERMINATION.

It is clear from the Applicant's request for review that the Applicant raised a total of five (5) grounds of review which the Applicant consolidated into three. Two additional matters arose in the course of the proceedings. Taking all the grounds and the two matters together, this request for review raised the following five grounds/issues which the Board will now proceed to set

out and address one after another having already set out the respective issues parties arguments in the proceeding parts of this decision:-

- (a) Whether the Applicant's request for review was filled outside the statutory period of seven (7) days set out under Regulation 73(2)(C)(1) of the Public Procurement and Disposal Regulations 2006.
- (b) Ground 1: Whether or not in view of the Board's decision given on 8th July 2015 in PPRB No.26 of 2015, the Board can extend any period of time set by it in a decision given by it and which is not limited either by the Provisions of Act and or the Regulations made thereunder.
- (c) Whether or not the Procuring entity breached the provisions of Sections 2, 3, 34, 39 and 52 of the Public Procurement and Disposal Act and Article 227 (1) of the Constitution by importing into the tender document provisions that were unclear, incorrect, inhibitory, unfair, unreasonable and contradictory as alleged in grounds 3, 4 and 5 of the request for review.
- (d) Whether or not the Applicant has suffered or risks suffering further loss and damage as a result of the alleged breach of duty imposed on the Respondent by the Act, the regulations made thereunder and the constitution of Kenya 2010 as claimed in ground 5 of the request for review.

ISSUE NO. 1

Whether the Applicant's request for review was filled outside the statutory period of seven (7) days set out under Regulation 73(2)(c)(1) of the Public Procurement and Disposal Regulations 2006.

The issue of whether the Applicant's request for review is time barred and therefore deprives the Board of the jurisdiction to hear and determine this Request for Review arose from the objection taken up by counsel for the procuring entity in paragraphs 3 and 4 of the procuring entity's memorandum of response which was based on the allegation that the request for review had been filed outside the statutory period of seven (7) days prescribed for the filing of such an application under the Provisions of Regulation 73(2)(C)(1) of the Public Procurement and Disposal Regulations 2006.

Though counsel for the procuring entity did not seriously argue the objection in her oral submissions before the Board, counsel for the Applicant submitted that the Applicant purchased the tender document on 7th December 2015 and submitted it back to the procuring entity on 8th December 2015 and having filed this Request for Review on 11th December, 2015, the Applicant submitted that this Request for Review was filed within a period of four (4) days after the Applicant had knowledge of the contents of the tender document.

The Board has considered paragraphs 3 and 4 of the procuring entity's response and has also looked at the original tender document submitted by the Applicant. The procuring entity did not seriously contest that the Applicant purchased the tender document on 7th December 2015 and submitted it back on 8th December 2015. The request for review which was filed on 11th December 2015. This request for review which was filed on 11th December 2015 was filed four days after the submission of the tender document and was therefore filed within time.

The Board further finds that it is on the date of submitting the tender document to the procuring entity that the Applicant became a candidate under the Provisions of Section 3 of Public Procurement and Disposal Act, 2005 for the purposes of filing any proceedings before the Board.

And as the High Court's stated in the case of Republic =vs= PPRB & Another Exparte & The Kenya Railways Corporation (JR No. 92 of 2011) that a party which decides to participate in a procurement process it knows to be defective cannot after being unsuccessful turn back and challenge the process.

The procuring entity's preliminary objection which was in any event not seriously urged therefore fails and the Board therefore holds that it has the jurisdiction to hear and determine this request for review on its merits.

ISSUE NO. 2

(a) Whether or not in view of the Board's decision given on 8th July 2015 in PPRB No.26 of 2015, the Board can extend a period of time set by it in a previous decision given by it and which is not limited either by the Act and or the Regulations made thereunder.

The first ground raised by the Applicant as framed by the Board under issue number 2 raises the fundamental question of whether the Board can revisit an order issued by it in order to give it effect.

It was not contested by any of the parties to the proceedings that this is the second time that the tender for the Provision of Security Services by the Procuring Entity's is coming before this Board. The first time the request for review challenging this tender was filed was on 11th June 2015 in PPRB Application No.26 of 2015.

The Applicant in that case was M/s Kenya Blueshield Security Ltd =vs= The Kenya Pipeline Company Ltd in which the present Applicant was not the Applicant then and the Board upon hearing all the parties who were entitled to be heard in the said application nullified the entire procurement process and ordered that owing to the nature of the services to be procured the procuring entity re-tenders and completes the procurement process for the provision of security services within thirty (30) days from the date of the Board's decision, which was given on 8th July 2015.

The Board further directed that the retender be undertaken on the basis of a fresh tender document to be approved by the Director General of the Public Procurement Oversight Authority.

It was not contested by any of the parties to this request for review that the time limit set out by the Board for carrying out the re-evaluation, namely the period of thirty (30) days was not met. It was therefore the Applicant's case that the failure made entire process null and void under Section 100 of the Act.

Counsel for the procuring entity however submitted that owing to the steps that were to be complied with before the expiry of the period of thirty (30)

days fixed by the Board it was virtually impossible for the procuring entity to complete the entire process within the said thirty (30) days. Counsel for the Procuring Entity submitted that pursuant to the Board's decision, a fresh tender document had to be prepared which was in turn to be submitted to the authority for comments and approval. Such a process would thereafter require that the tender be advertised, evaluated and awarded within the same period.

This explanation was not contested by Counsel for the Applicant and the issue that the Board now has to decide is whether in spite of this explanation and the circumstances of this case, the Board should terminate the entire procurement proceedings process just because the procuring entity did not complete the process as ordered.

The Board wishes to re-observe that the order to complete the procurement process within a period of thirty (30) days was not made by it pursuant to any statutory limitation stipulated by the Public Procurement and Disposal Act or any other statute but rather in exercise of the powers conferred upon it by the Provisions of Section 98 of the Act.

Under the Provisions of Section 98 of the Public Procurement and Disposal Act 2005, the Act grants the Board powers to make any of the following orders upon the conclusion of a Request for Review:-

(a) Annul anything the procuring entity has done in the procurement proceedings, including annulling the procurement proceedings in their entity;

- (b) Give directions to the procuring entity with respect to anything to be done or redone in the procurement proceedings;*
- (c) Substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings; and*
- (d) Order the payment of costs as between parties to the review.*

The extent of the Board's powers and the matters which it can consider was dealt with by the Court of Appeal in the case of Kenya Pipeline Company Limited –VS – Hyosung Ebara Company Limited & 2 Others [2012]eKLR the court of appeal stated as follows:-

“The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist it in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of the powers given to the Review Board including annulling, anything done by the procuring entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by a procuring entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.”

In the case of Republic –vs – The Public Administrative Review Board and 3 others exparte Olive Communications PVT Ltd (NAI HC J.R. NO.106 of

2014) (Otherwise known as the Laptop Case) the court held as follows at finding No.134 of it's decision:-

134: "From the foregoing, we conclude the issues complained of were pleaded by the parties and were responded to by the Ex parte Applicant as well as the Procuring Entity. Even going by the case of Odds Jobs (supra), if the issues had not been specifically pleaded, they arose in the course of proceedings and were canvassed by the parties. They were, therefore, properly before the Board for determination. Consequently, the framing of issues by the Respondent for determination upon those matters raised in the pleadings and in the trial was in order."

The Board has considered the Provisions of the law and the above authorities and finds that the parties to this review were all allowed to address the Board on each of the issues raised on the extent of the Board's powers under the Provisions of S.98 of the Act.

The Board finds that both Counsel for the Applicant, the Procuring Entity and the Interested Parties were all given an opportunity to address the Board on the question of why the re-tender was not undertaken within the period of thirty (30) days. Counsel for the Procuring Entity explained the difficulty in complying with the order and the reasons given were not factually disputed by the Applicant and the Interested Parties. The Reasons given by Counsel for the Procuring Entity cannot be described as baseless.

In the case of *The Republic =vs= Chairman Retirement Benefits Authority Appeals Tribunal ex-parte Local Authorities Pensions Trust (laptrust) (Misc. Application No.403 of 2012 [2013]eKLR* the Court held that there is nothing wrong in a tribunal entertaining proceedings or arguments whose effect is to ensure its orders are given effect.

The Board therefore finds that it can re-visit an earlier order where the effect is to give effect to an earlier order issued by the Board. That must in the Board's view be the effect of S.98(b) which stipulates that the Board can give directions to the Procuring Entity with respect to anything to be done or redone in procurement proceedings.

Turning to the issue of the Director General's approval, the Board has perused the letter from the Director General and which was signed by M/s P.O. Opiyo on behalf of the Director General, the letter raised a total of 9 issues. The procuring entity submitted before the Board that it complied with each of the issues that had been raised.

The Board has considered all the issues raised in the Board's decision and the efforts at complying with the Board's decision given on 8th July, 2015 and it is obvious that the procuring entity did its best to ensure compliance with the Board's decision.

The procuring entity for instance unbundled the procurement, the procuring entity reviewed the requirement for a firm to have from 300-500 guards to 100-500 Guards. The Procuring Entity also amended the turn over of 2 billion that a bidder would have required to demonstrate in order to earn 5 marks.

The Procuring Entity also deleted the requirement for professional indemnity cover of 100 Million.

This ground of the Applicant's request for review must therefore fail and is hereby disallowed.

ISSUE NO. 3

Whether or not the Procuring entity breached the provisions of Sections 2, 3, 34, 39 and 52 of the Public Procurement and Disposal Act and Article 227 (1) of the Constitution by importing into the tender document provisions that were unclear, incorrect, inhibitory, unfair, unreasonable and contradictory as alleged in grounds 3, 4 and 5 of the request for review.

Both counsel for the Applicant and Counsel for the procuring entity drew the Board's attention to what the Applicant considered to be the provisions of the Constitution, the Act and the Regulations that the Applicant considered as inimical to the Provisions of Section 2, 31, 34, 39, 62 of the Act and Article 227 of the Constitution. One such requirement was the mandatory requirement in the tender document that required bidders to attach audited accounts for the last two years (2013 and 2015) which in the Applicant's view was not achievable.

The second inhibitory condition according to the Applicant was the procuring entity's requirement that every bidder must provide evidence of a certified copy of a valid frequency licence for both the VHF and HF frequencies.

The third requirement that the Applicant found as unreasonable and unattainable in the tender document was the availability of at least one fire fighting equipment in the proximity of Mombasa, Nairobi, Nakuru and Eldoret which would attract one mark per region.

One final requirement that was unreasonable was the requirement that a bidder had to own 175 CC motor bike which in the Applicant's view was only available to the presidential escort and not to the Applicant which only had in its fleet motor bikes with a capacity of 100 – 125 cc motor-cycles.

The Board has considered the issues raised and finds that the tender document only provided for two mandatory requirements, namely the accounts for two years and the requirements for a VHF and HF and radio frequencies from the CAK out of all the disputed items. It is obvious from a reading of the tender document that the requirements on accounts for the two indicated years was clearly an error. The statement preceding the years 2013 and 2015 shows that accounts were to be supplied for two (2) years.

This error was later clarified by an addendum and under the provisions of Section 53 of the Act the addendum became part of the tender document and no issue can therefore be taken on it at this stage.

On the issue of the requirement of a VHF and HF radio signals these are mandatory conditions in the tender document. The Board has perused all the evidence placed before it and contrary the Applicant's submissions, a perusal of exhibit HK 4 annexed to the affidavit of Major (Rtd) Harry Githinji being a

document from CCK and particularly pages 8 to 12 shows that the Authority has power to authorise and issue HF/VHF/UHC Radio frequencies/Networks.

In view of this clear evidence from the relevant authority, the Applicant's contention cannot therefore stand.

The Board has considered all the other allegations of breach and finds that the requirements are not mandatory. They are added advantages which cannot affect a bidder's participation in the tender process.

Finally and before concluding this matter, the Board has considered the full circumstances of this case and particularly the facts and the circumstances set out in the affidavit Major (Rtd) Harry Githinji which explains the circumstances that led to the floating of this tender and it is clear that the decision to float this tender was occasioned by the risk assessment report of the Procuring Entity's installations as prepared by the Commandant of the GSU on behalf of the Kenya Police Service which stated that the security guards previously used by the Procuring Entity were not adequately trained equipped or supported thereby opening the Procuring Entity to the risk of theft, sabotage and fire.

The report by the General Service Unit also classified fire as the highest threat to the Procuring Entity on the risk priority index and therefore it was imperative that the Procuring Entity procures the services of well trained and equipped guards with the necessary expertise on fire prevention, detection and control.

This report by the General Service Unit was corroborated by a further survey by the Taita Taveta County Security Committee which raised concerns about the calibre of the guards hired by the Procuring Entity and which was produced and annexed to the Supporting Affidavit of Major (Rtd) Harry Githinji as annexure "HK2".

It was also not disputed that the Procuring Entity was and operates approximately 1,221 kilometres of a pipeline network system comprising pipelines, storage, loading facilities, administrative buildings and other purposes. According to the evidence placed before the Board and which was undisputed, the operations of the Procuring Entity traverses 14 Counties of varying terrain some of which are impassable by ordinary vehicles. This terrain must of necessity traverse high risk areas such as game parks and reserves and populated areas which have been experienced human encroachment and therefore the need for a speedily reaction in the case of an emergency.

According to further available evidence, the Procuring Entity has a storage capacity of over 628,000 m³ or 628 Million litres of fuel.

In view of all the above factors taken together, it is the Board's view that the subject Procurement besides being one for security also raises great issues of public safety and importance and ought to be allowed to proceed.

In the case of **Republic -vs- The Public Procurement Administrative Review Board (Nai JR No. 451 of 2012)** the Honourable Justice V. Odunga

recognized that under the Provisions of Article 1 of the Constitution the Board or any other tribunal cannot divorce itself from considering the issue of public or national interest when the circumstances of a particular case require it to do so. The learned judge stated as follows at holding No. 23 of the said decision.

“It is therefore my view and i so hold that in appropriate circumstances, Courts of Law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality forms part of our jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination”.

FINAL ORDERS

Inview of all the foregoing findings and in the exercise of the powers conferred upon it by the Provision of Section 98 of the Public Procurement and Disposal Act 2005 the Board makes the following orders on this Request for Review:-

- (a) The Applicant’s application dated 11th December, 2015 and which was filed with the Board on the same day be and is hereby dismissed.
- (b) For the avoidance of doubt, the Procuring Entity shall complete the evaluation of the subject tender and award the same in terms of the criteria set out under Clause 24.3.1 of the tender document within a period of thirty (30) days from the date of this decision.

(c) In view of the apparent conflict between the Provisions of Clause 2.20.4 appearing at pages 14 and 15 of the tender document and pages 19 and 69 of the same document the Board hereby clarifies based on the totality of the tender document that in order for a bidder to proceed for financial evaluation the bidder should attain 85% of the marks both at the technical evaluation stage and at the due diligence stage.

(d) On the issue of costs, the Applicant successfully resisted the preliminary objection on jurisdiction and having therefore been partly successful in these proceedings the Board orders that each party shall bear its own costs and this Request for Review.

Dated at Nairobi on this 4th of January, 2016.

.....

CHAIRMAN
PPARB

.....

SECRETARY
PPARB

