

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD

APPLICATION NO. 62 OF 2ND DECEMBER, 2015

BETWEEN

**ARID CONTRACTORS &
GENERAL SUPPLIERS LIMIT..... APPLICANT**

AND

**MERU UNIVERSITY OF SCIENCE &
TECHNOLOGY.....PROCURING
ENTITY**

Review against the decision of the Meru University of Science & Technology (MUST) 137th Tender Committee of MUST held on 18th November, 2015 in the matter of Tender No. MUST/67/2015 2016 for the Construction of a Dining Hall.

BOARD MEMBERS PRESENT

1. Mr. Paul Gicheru - Chairman
2. Mrs. Gilda Odera - Member
3. Mr. Hussein Were - Member
4. Mr. Nelson Orgut - Member

5. Mrs. Rosemary Gituma - Member

IN ATTENDANCE

1. Mr. Philemon Kiprop - Holding Brief for Secretary
2. Ms. Shelmith Miano - Secretariat

PRESENT BY INVITATION

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Applicant - Arid Contractors & General Suppliers Limited

1. Ahmed Rashid - Advocate
2. James Kagocha - Director

Procuring Entity- Meru University of Science & Technology

1. Kaburia Stella - Ag Legal Officer
2. Rutere Yusuf - Hod

Interested Parties

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- John Ken Muthahi - Operation Director, Fine Eng. Works
Ltd

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 AWARD

The Tender under consideration is for the proposed construction of the Dining hall at the Meru University of Science and Technology. The Tenders were advertised on Tuesday 14th July, 2015 in the Daily Nation.

Closing/Opening

The tenders closed and were opened on 30th July, 2015 at 10.20 am. The tender attracted twenty three (23) bidders;

Tender Evaluation

The tender evaluation process was carried out in three stages, namely, the Preliminary, technical and financial evaluation.

At the preliminary evaluation stage, eleven (12) bidders failed to meet the mandatory requirements set out in the tender documents and were eliminated from proceeding further.

At the technical evaluation stage the Procuring Entity set a minimum technical score of 60% as the pass mark which saw a total of eleven (11) firms pass the technical evaluation stage and proceeded to the financial evaluation stage.

M/s Arid Contractors and General Suppliers Ltd emerged the lowest evaluated bidder at the Tender sum of Ksh.17, 153,280.00 upon financial evaluation.

Recommendation

The Procuring Entity's Tender Processing Committee therefore recommended the award of the tender for the proposed construction of the dining hall to M/s Arid Contractors and General Suppliers Ltd at the tender sum of Ksh.17, 153,280.00

The Tender-Committee's award

The 129th Tender Committee of the Procuring Entity at its meeting held on Tuesday 22nd September 2015 approved the award of the tender for the construction of the Dining Hall to M/s Arid Contractor and General Suppliers Ltd at their tender sum of ksh.17, 153,280.00.

The 137th meeting of the Procuring Entity's Tender Committee held on 18th November 2015 however deliberated and approved the termination of the Tender for the Construction of the Dining Hall to the successful bidder thereby leading to the institution of this Request for Review.

THE REVIEW

This Request for Review was filed by M/s Arid Contractors and General Suppliers Ltd on 2nd December, 2015, challenging the Procuring Entity's decision to terminate the Tender No. MUST/67/2015 - 2016 for the construction of a Dining Hall at the Procuring Entity's premises.

The Applicant was represented by Mr. Ahmed Rashid Advocate, while the Procuring Entity was represented by Ms. Kaburia Stella. The Interested

party M/s Fine Engineering Works Ltd appeared at the hearing of the Request for Review and was represented by Mr. John Ken Mutahi it's Operations Manager. The said interested party did not however make any submissions before the Board in support or in opposition to the Request for Review inspite of having been given an opportunity to do so.

The Applicant sought for the following orders from the Board;

1. *That the Board be pleased to make a declaration that the conduct of the Procuring Entity is unfair, illegal and unlawful.*
2. *That the Board be pleased to annul and/or cancel the purported termination of the tender No. MUST/67/2015 FOR THE CONSTRUCTION OF A DINING HALL by the Procuring Entity vide its letter dated 20th November, 2015.*
3. *That the Board be pleased to order the Procuring Entity to avail and execute the contract with the Applicant for the works of tender No. MUST/67/2015 FOR THE CONSTRUCTION OF A DINING HALL pursuant to the Notification of Award dated 24th September, 2015 within fourteen (14) days of the Order.*
4. *That the Board restrains the Procuring Entity from procuring the services in relation to tender No. MUST/67/2015 FOR THE CONSTRUCTION OF A DINING HALL from other tenders other than the Applicant as provided for in the Notification of Award dated 24th September, 2015.*
5. *That the Board be pleased to order the Procuring Entity to pay the costs of these proceedings or in the ALTERNATIVE:*

6. *That the Respondent be compelled to pay damages in the sum of Kenya Shillings Seventeen Million One Hundred and Fifty Three Thousand Two Hundred and Eighty (Ksh. 17,153,280/=).*
7. *That the Board be pleased to make any or such further orders as the ends of justice may require.*

The Board has considered the Request for Review, the response thereto and all the documents submitted to it by the parties to this review including the original tender documents and the evaluation reports which were supplied to the Board pursuant to the Provisions of Regulation 74 of the Public Procurement and Disposal Regulations (2006). The Board has also considered the oral submissions made before it by the parties.

Upon a consideration of all the above factors, the Board finds that this Request for Review raised the following two issues which the Board will proceed to address.

1. *Whether the Board has jurisdiction to hear and determine this Request for Review in view of the Provisions of Sections 36(6) and Section 93 2(b) of the Public Procurement and Disposal Act.*
2. *Depending on the Board's findings on the issue of jurisdiction, whether the termination of the procurement process by the Procuring Entity was proper and in accordance with the Provisions of Section 36 of the Public Procurement and Disposal Act 2005.*

ISSUE NO. 1

Whether the Board has jurisdiction to hear and determine this Request for Review in view of the Provisions of Section 36(6) and Section 93 2(b) of the Public Procurement and Disposal Act.

Counsel for the Applicant submitted that it was not in contention that the Procuring Entity awarded the Applicant tender No. MUST/67/2015 for the construction of a dining hall via a letter dated 24th September, 2015 but that the communication was sent to it on 1st October, 2015. Counsel for the Applicant submitted that upon receipt of the letter of notification, the Applicant visited the Procuring Entity's offices to request for the contract as per the notification letter. This was however not done but instead the Procuring Entity furnished the Applicant with a letter dated 20th November, 2015, via email terminating the award of the tender to it.

It was the Applicant's case that upon the Applicant being notified of the award and accepting the same, the procuring entity could not terminate the procurement process at that point. Counsel for the Applicant therefore urged the Board to find that the purported termination was belated and submitted that the Board has jurisdiction to hear and determine the issue of whether the purported termination was lawfully effected or not under the Provisions of S.36 of the Public Procurement and Disposal Act 2005.

Counsel for the Applicant submitted that both the High Court and the Board had extensively dealt with the issue of the Board's Jurisdiction to deal with the issue of the legality of a termination under the Provisions of Section 36 of the Act and relied on the High Court's decisions by the Honourable Justice J.G. Nyamu where he considered the Preliminary Objection on the issue of the Board's jurisdiction to consider any issue arising from a termination under S.36 of the Act in the case of Selex Sistemi -vs- The Public Procurement Review Board (NAI HC JR 1260 OF 2008) where the High Court held that the Board had jurisdiction to entertain and determine whether a procuring entity had lawfully terminated a procurement pursuant to the Provisions of S.36 of the Act.

Counsel for the Applicant submitted that the decision by the Honourable Justice J.G. Nyamu in the above case was re-affirmed by the Honourable Justice G.A. Dulu who heard the substantive application for Judicial Review when the matter came up for hearing before the High Court.

Counsel for the Applicant also relied on the Board's decision in the case of AON Kenya Insurance Brokers Limited -vs - The Teachers Service Commission (PPRBA NO.8 OF 2015) where the Board considered the issue of its Jurisdiction to inquire into the question of whether a termination of an award of a tender was lawful under the Provisions of Section 36 of the Act and where it similarly held that it has jurisdiction to inquire into a complaint arising from an alleged termination.

Counsel for the Applicant therefore urged the Board to find on the basis of the above decisions that it has the jurisdiction to hear and determine the instant Request for Review.

Counsel for the Procuring Entity on the other hand argued that Section 36(1) allows the Procuring Entity to terminate the procurement process before a contract is executed by the parties and stated that paragraph four (4) of the letter of notification of award stated that the Procuring Entity reserved the right to terminate the proceedings before the award of contract. Counsel for the Procuring Entity further submitted that paragraph five (5) of the letter of notification of award provided as follows, *"this notification does not amount to a contract and the university reserves the right to terminate the process before signing the contract"* and that the Applicant proceeded to sign an acceptance of these terms and conditions therefore accepting the contents of the letter of notification. On the issue of jurisdiction, Counsel for the Procuring Entity submitted that the Provisions of S.36(6) of the Act barred the Board from inquiring into a procuring entity's decision to terminate an award of a tender and therefore contended on the basis of the said provision that the Request for Review now before the Board was incompetent since the Board did not have jurisdiction to hear and determine the same.

The issue that falls for the Board's determination under this head is therefore whether the Board has the jurisdiction to hear and determine the issue of whether the procuring entity lawfully terminated the Applicant's

award under the Provisions of Section 36 of the Public Procurement and Disposal Act 2005.

The Board has considered the decisions referred to it by the parties and finds that the issue of the Board's jurisdiction is now well settled based both on the decisions by the High Court and the Board.

One such decision is the case of Selex Sistemi -vs- The Public Procurement Review Board (NAI HC JR 1260 OF 2008) where High Court (both Justices J.G. Nyamu and G.A. Dulu) held that the Board has jurisdiction to hear and determine any grievance arising from the exercise of the power conferred upon a Procuring Entity under the Provisions of Section 36 of the Act. The High Court further held that the Provisions of Section 36(6) of the Act do not oust the jurisdiction of the Court or the Board to hear any grievance arising under the Provisions of Section 36 of the Act. The Board has followed the above decision and has adopted the position taken by the High Court in several of its past decisions as illustrated by the case of Horsbridge Network Systems (E.A) Ltd -vs - Central Bank of Kenya PPARB APPL. NO.65 OF 2012) where the Board held that it has jurisdiction to investigate the circumstances under which a Procuring Entity has exercised the power of termination under Section 36 of the Act.

The Board held similarly in the case of Aon Kenya Insurance Brokers Ltd -vs - Teachers Service Commission (PPARB NO.8 of 2015) where the

Board restated that it has the Jurisdiction to inquire into an issue of termination under the Provisions of Section 36(6) of the Act.

The Board therefore finds and holds on the basis of the above decisions that it has jurisdiction to hear and determine this Request for Review and the Procuring Entity's Objection on the ground that the Board has no jurisdiction to hear and determine this Request for Review therefore fails and is hereby dismissed.

ISSUE NO.2

Whether the termination of the procurement process by the Procuring Entity was proper and in accordance with the Provisions of Section 36 of the Public Procurement and Disposal Act 2005.

The Applicant stated that the Procuring Entity had no justification for the cancellation of tender awarded to it on the alleged premise that some of the works that were included in the tender Bills of quantities had already been executed and stated that pursuant to the Provisions Section 26 of the Public Procurement and Disposal Act, the Procuring Entity ought to have had a procurement plan and a budget prior to floating the tender. The Applicant referred the Board to annexures "JK1" and "JK2" attached to its Request for Review which were an e-mail notifying the Applicant of the award of the tender to it respectively. The Applicant stated that the letter of notification which was dated 24th September 2015 was forwarded and received by it on 1st October 2015. Counsel for the Applicant further stated

that the letter purporting to terminate the award of tender to it was dated 20th November, 2015 and was sent to it via an email dated 27th November, 2015. The Applicant submitted that on the authority of the High Court decision in the Selex Sistemi Case (Supra) the Court held that upon notification and the acceptance of the award a Procuring Entity could not thereafter terminate the award of the tender. The Applicant argued before the Board that it had demonstrated that it had capacity to carry out the works.

In response to the Applicant's submissions, Counsel for the Procuring Entity submitted that the decision to terminate the award of the tender to the Applicant was made after it was found by the Procuring Entity that the tender was actually supposed to be for the completion of the Dining Hall and not for the construction of the entire dining hall. Counsel for the Procuring Entity further stated that since some of the works had already been executed, the Bill of Quantities used in the tender however included the works already executed. Counsel for Procuring Entity argued that the completed works accounted for 30% of the works quoted for in the tender Bills of Quantities and that the Procuring Entity was therefore entitled to safe-guard public money and could not let the process continue as this would have led to the wastage of public funds. In response to the Board's inquiry as to who made the decision to terminate the award, Counsel for the Procuring Entity stated that an internal investigation team was formed by the Procuring Entity's Board of management and that it was upon the said internal investigation team which recommended that the award be

terminated. The Procuring Entity did not however produce any minutes or a report prepared by alleged internal investigation team and did not include it in the documents produced by the Procuring Entity before the Board. The Procuring Entity instead referred the Board to the minutes of termination marked as annexure "JM MUST C", which indicated that the termination was done by the Procuring Entity's tender committee. Counsel for the Procuring Entity however confirmed from its tender Bills of Quantities under the heading "Proposed Construction of A Dining Hall at Meru University of Science and Technology, Bill of Quantities and Specifications for Tender No. MUST/67/2015-2016", appearing at pages 49, 50 and 51 of the said document, that the Substructure costs, units and quantities were provisional and the Procuring Entity was therefore not bound to make payments for works already executed if that was the case. Counsel for the Procuring Entity conceded that the alleged ground for termination could be catered for by the Provisional items in the Bills of Quantities.

In response to the submissions made by Counsel for the Procuring Entity, Counsel for the Applicant stated that the Procuring Entity had not proved that there would have been any loss of funds by the Procuring Entity if the parties were to sign the contract. Counsel for the Applicant further submitted that the Procuring Entity is supposed to use qualified personnel in its committees and ought to have established exactly what it required prior to floating the tender. The Applicant stated that the Procuring Entity was in breach of Article 227 of the Constitution of Kenya following the

unprocedural termination of the award and requested the Board to allow the Request for Review with costs.

The Board has considered the submissions made by the parties on the second issue framed for determination and has also perused the original tender documents and the evaluation reports together with the tender committee's decision terminating the procurement process. The Board has also looked at the responses filed by the Procuring Entity.

The Board finds that the Procuring Entity did not dispute that it had a budget set aside for this tender and that the Bills of Quantities forming part of the tender document had classified some items of works as provisional. It is the Board's view that where an item of works is designated as provisional, the procuring entity is not bound to expend any funds on such an item if it finds that the particular item has been satisfactorily been previously executed. The Board further finds that the time within which the contract and or negotiations with the Applicant ought to have been carried out lapsed on or about 23rd October, 2015 going by the date when the notification of award was made. The Board additionally finds that negotiations are permissible in a tender process and hence the alleged completed 30% of the project, if indeed that allegation was proved, would have formed a good basis for negotiations with the Applicant if indeed the said works had been executed rather than terminate the award made and accepted by the Applicant without even consulting the Applicant.

Negotiations are envisaged in Regulation 64 of the amended Public Procurement and Disposal Regulations 2006 which stipulates as follows:-

“Regulation 64 of the principal Regulations is amended in paragraph (1) by adding the following new paragraph immediately after paragraph (c) Regulations (d) where competitive negotiations are critical for achieving value for money in the procurement of specialized goods, works or services”.

The Procuring Entity did not furnish the Board with any evidence to demonstrate that there were attempts to negotiate with the Applicant. The Board wishes to observe that the Public Procurement and Disposal Act 2006 sets out strict timelines within which each Procurement process is to be completed and it is clear that the Procuring Entity did not adhere to these timelines and did not therefore comply with the Provisions of Section 68 of the Act by failing to sign a contract with the Applicant within the statutory period provided for by the Act.

Turning to the issue of whether the Procuring Entity could terminate the procurement process once an award had been made and accepted as happened in this case, the Board finds that the legal position is now well settled by case law from the High Court and from the Board.

In the case of Selex Sistemi Intergrati -vs- The Public Procurement Administrative Review Board (JR MISC. Application 1260 of 2007) where

the High Court held that a Procuring Entity could not terminate a tender once an award had been made and accepted.

The above decision which is binding on the Board was adopted by the Board in the case of AON Kenya Insurance Brokers Limited -vs- The Teachers Service Commission PPRBA NO. 18 of 2015 where the Board observed as follows:-

“The Board therefore finds on the basis of the above decision which is binding on the Board that the Applicant could not lawfully terminate the award made to the successful bidder on 17th November, 2015 via the letter dated 16th January, 2015. The decision of the Procuring Entity was therefore a decision made in vain since it is not allowed by law”.

In addition to the above finding and the authorities the Board further finds that the Procuring Entity issued the letter of notification of award to the Applicant on 24th September 2015 but sent it out to the Applicant on 1st October, 2015. It is not clear why it took the Procuring Entity seven days to email the said letter to the Applicant. The Board further finds that the Procuring Entity did not proceed to sign a contract with the Applicant after issuing the letter of notification of award but instead proceeded to terminate the award vide the letter dated 20th November 2015 which it sent out to the Applicant via e-mail on 27th November, 2015. The Board wishes to bring to the attention of the parties the Provisions of Sections 27 (1) and (2) of the Public Procurement and Disposal Act 2005 which state as follows:-

27 (1) The person submitting the successful tender and the procuring entity shall enter into a written contract based on the tender documents, the successful tender, any clarifications under section 62 and any corrections.

27 (2) The written contract shall be entered into within the period specified in the notification under section 67(1) but not until at least fourteen days have lapsed following the giving of that notification.

The Board notes that the procuring entity stated as follows in the notification letter dated 24th September, 2015:-

"The Contract shall be signed after fourteen days but not more than thirty (30) days from the date of this notification".

The Board however finds that no contract was infact signed.

Based on all the above findings the Board therefore holds that the purported termination of the Applicant's award was founded on the wrong premise and is not supported by the law. The purported termination was therefore unlawful and cannot stand. At any rate the existence of Provisional sums covering the substructures and the absence of evidence from the alleged technical committee which made the belated findings on the existence of foundations was not produced before the Board and the allegation about the existence of the foundations was not therefore proved.

FINAL ORDERS:-

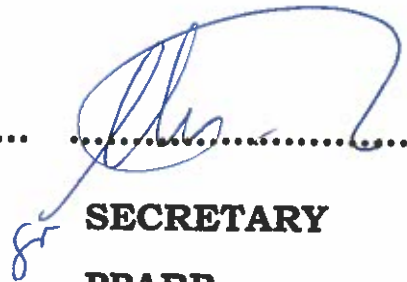
In the exercise of the powers conferred upon it by the Provisions of Section 98 of the Public Procurement and Disposal Act 2005, the Board therefore finds that the applicant's Request for Review has merit and is hereby allowed in the following terms:-

- a) *The decision of the Procuring Entity terminating the award to the Applicant of the tender NO. MUST/67/2015- 2016 for the construction of a dining hall as communicated vide the Procuring Entity in its letter dated 20th November, 2015 be and is hereby annulled.*
- b) *The Procuring Entity is directed to prepare a contract, execute the same and forward the contract to the Applicant for execution in respect of the subject tender within Seven (7) days from today's date.*
- c) *The contract to be executed by the parties shall be as per the letter of notification of award to the Applicant dated 24th September, 2015.*
- d) *The Procuring Entity is further directed to supply to the Board with a copy of the executed contract by the close of business on 30th December, 2015.*
- e) *In view of the orders made above and in view of the fact that the Board is not empowered by law to award damages, prayer 6 of the Applicant's Request for Review is declined.*
- f) *Since the costs of any action follow the event and the Applicant having been successful in this application, the Procuring Entity will pay the Applicant costs of this request for review assessed at the sum of Kshs. 100,000 and shall reimburse the Applicant the filing fees of*

Kshs. 62,900 which the Applicant paid to the Board as filling fees for this Request for Review. The assessed costs and the filing fees shall be paid within fourteen (14) days from today's date.

Dated at Nairobi on this 22nd day of December, 2015.

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**CHAIRMAN
PPARB**

**SECRETARY
PPARB**
