

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION 48 OF 2017 OF 31ST MAY, 2017

BETWEEN

PLENSER LIMITED.....APPLICANT

AND

MOI TEACHING AND REFERRAL

HOSPITALPROCURING ENTITY

Review against the decision of the Moi Teaching and Referral Hospital in the matter of Tender No. MTRH/T/9/2016-2017- For Supply, Delivery, Installation and Commissioning of Incinerator Machine.

BOARD MEMBERS PRESENT

1. Paul Gicheru - Chairman
2. Mrs Josephine W.Mong'are - Member
3. Mrs Rosemary Gituma - Member
4. Mr. Nelson Orgut - Member

IN ATTENDANCE

1. Philemon Kiprop - Holding Brief for Secretary
2. Maureen Namadi - Secretariat

PRESENT BY INVITATION

Applicant – Plenser Limited

Victor Arika	- Advocate
Sally Gicheru	- Legal Intern
Jemima Ngure	- Legal Intern
Moses Kamau	- Managing Director
Wangui Kamau	- General Manager

Procuring Entity – Moi Teaching And Referral Hospital

Mr.P Kania C Kiplangat	- Advocate
Mr.Raphael Marete	- Advocate

BOARD'S DECISION

Upon hearing the representations of the parties and 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 Procuring Entity put an advertisement in both the Daily Nation newspaper of 16th September, 2016 and The Standard Newspaper of 14th September, 2016 for the tender, the Procuring Entity published a Tender Notice for TENDER NO. MTRH/T/9/2016-2017 for Supply, Delivery, Installation and Commissioning of Incinerator Machine (Copies of the said Advertisements have been furnished to the Board)

Closing/Opening of Bids

The sealed bids were opened on 4th October, 2016 and the tenderer that had submitted their bids for Tender No. MTRH/T/9/2016-2017 for Supply, Delivery, Installation and Commissioning of Incinerator Machine are and were allocated bid numbers as hereunder;

- a) Plenser Limited- Bidder No. T9 B1(The Applicant herein)
- b) Encarter Diagnostics Limited- Bidder No. T9 B2
- c) Faram E.A Limited- Bidder No. T9 B3
- d) Kenya Medical Engineering Limited—Bidder No. T9 B4
- e) Boiler Technologies Engineering Limited- Bidder No. T9 B5
- f) Aqua Boil Contractors Limited- Bidder No. T9 B6
- g) Flambert Holdings Limited-Bidder No. T9 B7
- h) Total Hospital Solutions-Bidder No. T9 B8

After opening of the tender documents, the process proceeded to evaluation in three stages that is;

- a) Stage 1 - Preliminary Evaluation
- b) Stage 2 – Technical Specifications
- c) Stage 3 - Financial Evaluation

After the three evaluation stages, The committee recommended B1 (Plenser Ltd) for award of the contract being technically evaluated bid at Total cost of Ksh. 29,954,700.00

Professional Opinion was rendered by Head of Supply management stating that the award be made to the lowest evaluated bidder, being M/s Plenser Limited. The same was approved by accounting officer on 21st November, 2016, the approval was as below:

Item Description	: Supply, Delivery Installation and Commissioning of Incinerator Machine.
User	: General Engineering Department
Tender No.	: MTRH T/9/2016-2017
Number of tenders received	: Eight (8)
Funds available	: Capital vote
Firm	: Plenser Limited
Contract Sum Ksh.	: Ksh. 29,954,700.00

The contract was thereafter signed on 17th January 2017 between Plenser Limited on 31st May, 2017 and Moi Teaching and Referral Hospital

REVIEW

The Request for Review was lodged by M/s Plenser Limited on 31st May, 2017; the above-named Applicant, hereby requested the Public Procurement Administrative Review Board (herein after referred as the Board) to review the decision of the Moi Teaching and Referral Hospital in the matter of Tender No. MTRH/T/9/2016-2017 for Supply, Delivery, Installation and Commissioning of Incinerator Machine

During the hearing of the Request for Review, the Applicant was represented by M/s Victor Arika from the firm of and Arika & Company Advocates while the procuring entity was represented by Mr. Pkania C.Kiplangat from the firm of Mulondo Oundo & Company Advocates.

The Applicant seeks for the following orders:

1. *A declaration that the conduct of the Respondent of purportedly terminating the Award and the contract hereof—vide the Respondent's letters dated 22nd February 2017, 8th March 2017 and 13th April 2017 respectively – is not only unfair, but also irregular, illegal and unlawful.*
2. *The Respondent's decision purportedly terminating Award for Tender Number MTSH/T/9/2016-2017 to the Applicant and the contract hereof- vide the Respondent's letters dated 22nd February 2017, 8th March 2017 and 13th April 2017 respectively – to be annulled, cancelled, set-aside and/or revoked.*

3. *The Respondent be stopped from interfering with the subject Award and the contract hereof in any manner whatsoever.*
4. *The Respondent to execute the contract with the Applicant in relation to Tender Number MTSH/T/9/2016-2017 pursuant to Notification of Award dated 23rd November 2016.*
5. *ALTERNATIVELY, AND WITHOUT PREJUDICE TO the above prayers, the Respondent to pay the Applicant Kshs.29, 954,700.00 (being the contract price) plus all monies paid or expended by the Applicant in connection with the Tender herein as may be assessed.*
6. *That costs be awarded to the Applicant.*
7. *Any or such further orders or reliefs as the ends of justice may require, and/or the Board may deem just and expedient.*

SUBMISSION BY PARTIES

Mr. Arika, advocate for the Applicant submitted that the request for review was hinged on to one issue being the purported termination of the award by the Procuring Entity after a contract had been signed. He submitted that and was conceded by the Procuring Entity that there is no dispute about the procurement process, the due process was followed and an award was issued and subsequently, the contract was signed. He submitted that the Applicant only concern is that, the Procuring Entity took a reverse gear, coming back to the award by virtue of the letter dated 8th of March 2017; the Procuring Entity stated clearly that it has terminated the

award. The reason that was provided was by virtue of instructions from the ministry Health, the Procuring Entity was going to get new equipment.

It was the submissions of the Applicant that the purported instructions by the Ministry to stop a process or the implementation of the contract was illegal and that the same had been addressed by this Board in other occasions in the conduct of other cases before it. The Applicant referred the Board to its decision in PPARB Case no.39/2012(Anhui Construction Engineering Limited in JV with Aero -Technology International Engineering Corporation (CATIC) -VS- Kenya Airports Authority, where the Board observed in page 74 as follows:-

" it is clear to the board that in our procurement system all the government agencies mentioned herein have no role to play in decision making process in our procurement. It is also clear to the Board that the Permanent Secretary has no role to play in the decision of another Procuring Entity".

This position of the Board is reinforced, according to the Applicant, by section 44 of the Public Procurement and Asset Disposal Act, 2015. The Applicant urged the Board to apply the same finding in its case and to hold the same in its case since the Line Ministry together with the Accounting Officer of a Procuring Entity cannot be allowed to collude and the fact that there was a contract already in place and purport to terminate an award instead as purported through its letter The Applicant urged the Board to consider Article 227 of the constitution while deciding this matter and find

that the actions of the Ministry of Health and the Accounting officer of the Procuring Entity in purporting to terminate the same was in breach of the said article of the Constitution.

The Applicant further stated that, in any event, the contract had already taken effect after the signing by both parties and the applicant has taken the effort to comply with the contract. The Applicant procured a performance bond and proceeded to import the equipment from the United Kingdom (UK) and was only informed of the decision or offer by the Ministry of Health upon delivery of the same to the Procuring Entities Premises.

By virtue of section 167(4) of the Act, the Applicant argued that the Board had jurisdiction to hear and determine the dispute before it and therefore despite a contract being in place this was the right forum by the parties to have the dispute at hand resolved since in the letter by the Procuring Entity to the Applicant, the Procuring Entity had indicated that it was terminating the Award and not the contract since to terminate the contract, parties would have been guided by section 135 and 153(2) of the Act and the conditions within the actual contract itself.

In its response the Procuring Entity through its advocate Mr. Kiplagat submitted that the Request for Review was defective since it was filed long after the expiry of fourteen (14) days as required by section 167 (1) of the Act which requires that a request for review ought to be filed within 14

days either of notification of award or occurrence of an alleged breach. Accordingly, the request for review as filed was premised on an occurrence of an alleged breach, being the letters from the Procuring Entity informing the applicant that the contract was being terminated and dated 22nd of February, 8th of March and 13th of April 2017 respectively and therefore in line with section 167(1) 14 days started running from the 13th of April 2017 therefore the request for review ought to have been filed not later than the 27th of April 2017, while the current request for review was filed on the 31st May, 2017 more than 14 days had lapsed and for that reason. The Counsel for Procuring Entity submitted that the Request for review was incurably defective and should be dismissed on that ground alone.

The Procuring Entity further submitted that the second reason why the Board could not entertain the Request for Review was that section 167(4) of the PPAD, Act 2015, was couched in mandatory terms, in that its stated that :-

“the following matters shall not,where a contract has been signed in accordance with section 135 of the Act.”

By virtue of the fact that it was not dispute that the contract was signed and therefore the relevant section of the Act was not section 167(4) but section 135, which relates to creation of contracts, the form of contracts and the timelines therefore since the Procuring Entity had complied with section 135 in terms of the form of contract and the timelines which in this

case is 14 days after the award and the contract has been signed an appeal cannot be brought before the board for adjudication.

The Counsel for the Procuring Entity further submitted that the third reason is that the prayers sought by the applicant were incapable of being granted by the board since the Board derives its authority from section 173 which enumerates a ray of reliefs that can be granted upon filing of a review. Looking at the prayers sought in the request for review prayer (e) relates to Board ordering specific performance of the contract and (f) is a prayer for damages, which in the opinion of the counsel for the Applicant are outside the ambit of section 173 from which the board derives its authority.

Counsel submitted that where a contract had already been signed then Section 153(1) of the Act provided for the power of the procurement management unit of the PE to terminate the contract. In this particular case the reason for termination was that after the conclusion of the contract, the Procuring Entity was informed that the Ministry of Health was going to supply similar equipment, and this was communicated to the applicant accordingly. The procuring entity urged the Board to dismiss the Request for Review with costs.

BOARDS FINDING'S

Preliminary Issue

The Board having heard the parties and perused the documents filed therein has identified a preliminary issue for determination to wit;

“Whether the Board lacks jurisdiction to hear and determine the Request for Review as filed the same having brought to the Board outside the mandatory fourteen days window and by virtue of a contract having been signed in accordance with section 135 of the Public Procurement and Asset Disposal Act, 2015”

The Board notes as follows:-

- i) That the tender was advised in both the Daily Nation newspaper of 16th September 2016 and The Standard Newspaper of 14th September, 2016.
- ii) That all the tender process was conducted and award made to the Applicant including the signing of the contract on 17th January, 2017.
- iii) The instant request for review was filed on 31st May, 2017.

As noted above, a contract was signed between the Applicant and Procuring Entity on 17th January, 2017. However, numerous correspondences between the Applicant and the Procuring Entity have been exchanged and as such it was kept alive all through up to the day 13th April, 2017 when the last correspondence was exchanged. The Board notes that this matter was brought before the Board on 31st May 2017, almost

forty Five(45) days after the last correspondence and therefore agrees with the submission of the Procuring Entity that the matter was filed outside the Fourteen (14) days allowed by Section 167 of the Public Procurement and Asset Disposal Act, 2015. The net effect of such a finding is that the Board lacks Jurisdiction to hear and determine the Request for review as the same is time barred by operation of the law.

The Second issue touching on jurisdiction was the existence of a signed contract between the Parties. The Board noted that both parties acknowledged that after the procurement process was completed, the Applicant was awarded the tender and proceeded to sign a contract with the Procuring Entity. The contract was signed in accordance with section 135 and after the expiry of 14 Fourteen (14) days of the award and hence complied with the requirements set out in the Act. Both parties agreed that the contract signed by both parties was proper and within the law. The Board noted that the letter that the Procuring Entity wrote to the Applicant purported to terminate the Award and not the Contract. A perusal of the Contract provided by the Procuring Entity to the Board does not provides clear guidelines and steps to be undertaken in case of termination or what is envisaged by Regulation 32(1) of the Public Procurement and Disposal Regulations 2006. Section 153 has also set out steps to be followed by parties to a procurement contract in case a party wishes to terminate the same. The Board notes that the Procuring Entity did not provide evidence to indicate how it went about complying with the law in order to set aside the contract it had properly and legally committed to execute. It is notable

that instead of following the laid down procedures both within the contract itself and the Act, the

Procuring Entity chose to hide behind the excuse that the Ministry of Health had offered it similar equipment to the one it was procuring and chose instead to terminate an Award. The Board notes that the Procuring Entity could not do so as the award had been overtaken by events once a contract was entered into under section 135 of the Act. The Board finds that a valid contract between the Applicant and Procuring Entity exists in respect of the tender subject matter of this request for review. In line with the said finding, the Board finds that it lacks jurisdiction to entertain a matter where a contract has been signed as the same is expressly prohibited under section 167(4) of the Act which states as follows:-

“The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) The choice of a procurement method; (b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; “

The Parties have an opportunity to move to the High Court which is the correct forum to determine issues therein and also which has inherent powers to award the reliefs sought.

In view of the above findings, the Board finds and holds that it lacks jurisdiction to hear and determine the matter before it and will dismiss the request for review as filed.

COSTS

As costs follow the event, the Request for review having been found unmerited, it therefore means that the Procuring Entity would have been entitled to costs. However, the Board notes that the Procuring Entity's action for coming out of the contract was irregular and improper. The Board further notes that Applicant went ahead and performed its part of the contract and has incurred costs associated with the Procurement Process post contract. The Board therefore holds that to award costs to the Procuring Entity against the Applicant would be to visit a double punishment on the Applicant and will therefore direct that parties meet their own costs respectively.

FINAL ORDERS

In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, 2015 the Board makes the following orders on this Request for Review.

- 1. The Request for Review by M/s. Plenser Limited filed before the Board on 31st May, 2017 against the decision of the Moi Teaching and Referral Hospital in the matter of Tender No. MTRH/T/9/2016-2017- for Supply, Delivery, Installation and**

Commissioning of Incinerator Machine is dismissed for want of jurisdiction and the Applicant is at liberty to move to the High court to seek relevant orders.

- 2. Each party is ordered to bear its own costs to the Review.**

Dated at Nairobi on this 20th day of June, 2017.



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**CHAIRMAN
PPARB**



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**SECRETARY
PPARB**

