

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION No. 10/2018 OF 9<sup>th</sup> JANUARY, 2018**

**BETWEEN**

**ICONIC DRILLERS &  
CONSTRUCTION LIMITED.....APPLICANT**

**AND**

**THE JUDICIARY ..... PROCURING ENTITY**

Review against the decision of The Judiciary in the Matter of Tender Number JPIP/NCB/WORKS/01/2017-2018 for Borehole Drilling and Equipping Works under Cluster A (Makindu, Garissa, Kigumo & Chuka).

**BOARD MEMBERS PRESENT**

- |                                |            |
|--------------------------------|------------|
| 1. Mr. Paul Gicheru            | - Chairman |
| 2. Mr. Hussein Were            | - Member   |
| 3. Mr. Nelson Orgut            | - Member   |
| 4. Mr. Peter Bitu Ondieki, MBS | - Member   |
| 5. Mrs. Rosemary Gituma        | - Member   |

**IN ATTENDANCE**

- |                     |                               |
|---------------------|-------------------------------|
| 1. Philemon Kiprop  | - Holding Brief for Secretary |
| 2. Maryanne Karanja | - Secretariat                 |

## **PRESENT BY INVITATION**

### **Applicant – Iconic Drillers & Construction Ltd**

1. Edgar Washika - Advocate, Wafula Washika Advocates
2. Nick Omitto - Employee
3. Simiyu John - Lawyer

### **Procuring Entity – The Judiciary**

1. Michael Obuya - Procurement Consultant
2. Nancy Kanyago - Project Coordinator
3. Issac Kibuchi - Senior Procurement Officer
4. Joseph Were - Principal Magistrate-OCRJ
5. Sharon Mwanyuli - Resident Magistrate-OCRJ

## **INTERESTED PARTIES**

1. George Nganga, Adv - Ziyale Investments
2. Charles Ndeto - Director, Ziyale Investments
3. Brian Kimari - Project Manager, Mahathi Infra East Africa

## **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 DECISION**

### **Tender Invitation**

The procurement method was through National Competitive Bidding process as per the World Bank Guidelines. The Tender was advertised in the *Daily Nation* and the *Standard* newspapers and was uploaded in the Judiciary's website. The Bid Submission deadline was extended from 5<sup>th</sup> October 2017 to 19<sup>th</sup> October 2017. Twenty-one bidders responded and the bids were opened public in the presence of tenderers' representatives.

### **Tender Evaluation**

Tenders were subjected to preliminary, detailed technical and post-qualification evaluation to determine their capability, requisite financial capability and experience.

Thirteen tenders were disqualified at the preliminary stage for various reasons. Eight tenders that qualified at the preliminary evaluation stage were subjected to technical evaluation/post qualification verification. All the eight bidders qualified in the post qualification evaluation and were subjected to financial evaluation.

At the financial evaluation stage, bids were examined to determine any arithmetic errors in computation of bills of quantities.

The Tender Evaluation Committee recommended award of the contract for the borehole drilling and equipping under cluster A to M/s Ziyale Investments who was the lowest evaluated bidder at a total cost of Kshs 19,080,696.00 against a total cost estimate of Kshs 22 million.

### Professional Opinion

The Head of Procurement of the Procuring Entity issued a professional opinion dated 4<sup>th</sup> December 2017 in which he stated that the due guidelines were followed in the procurement process; the Evaluation Committee's recommendation was supported; the review by the JPIP Consultant was supported. He supported the award, as recommended, to M/s Ziyale Investment at a total cost of Kshs 19,080,696.00.

### REQUEST FOR REVIEW No. 10/2018

M/s Iconic Drillers and Construction Limited, the above named Applicant, whose address for purposes of the review is care of Wafula, Washika & Associates of P. O. Box 62158 – 00200, Nairobi filed the Request for Review on 9<sup>th</sup> January, 2018 in the matter of Tender No. JPIP/NCB/WORKS/01/2017-2018 for Borehole Drilling and Equipping Works under Cluster A (Makindu, Garissa, Kigumo & Chuka) for The Judiciary (the Procuring Entity herein).

The Applicant sought the following orders of the Board:

- (a) A declaration that the Respondent (Procuring Entity) acted unreasonably and unfairly against the Applicant;*
- (b) A declaration that the tender process and award is void and contrary to the provision of the Act;*
- (c) An order quashing and annulling the Respondent's decision to award the tender on account of an omission that does not affect the outcome of the result and works;*
- (d) An order to substitute the decision of the respondent awarding the tender to the successful bidder;*

- (e) That the Respondent be directed to award the tender to the Applicant being the lowest bidder, most responsive and most qualified;*
- (f) That the Respondent be compelled to pay the costs to the Applicant arising from/incidental to this application;*
- (g) The Board to make such and further orders as it may deem fit and appropriate in ensuring the ends of justice are fully met in the circumstances of this Request for Review.*

During the hearing of the Request for Review, Mr. Edgar Washika, Advocate from the firm of Wafula Washika & Associates, represented the Applicant, Mr. Michael Obuya, Procurement Consultant, represented the Procuring Entity, while Mr. George Ng'ang'a, Advocate represented Ziyale Investments, the Interested Party.

### **THE BOARD'S FINDINGS**

The Board has considered the submissions made by parties and has further examined all the documents submitted to it and has identified the following issues for determination in this Request for Review:

- (i) Whether the Board is deprived of jurisdiction to hear and determine the matter on account of the request for review having been filed out of time contrary to the provisions of Sections 167 (1) of the Act.*
- (ii) Whether the Procuring Entity breached the provisions of Sections 79 (1) and 80 (2) of the Act by failing evaluate the Applicant's tender in accordance with the evaluation criteria set out in the tender document.*

- (iii) *Whether the Procuring Entity failed to duly notify the Applicant that its tender was unsuccessful thereby contravening the provisions of Section 87 (1) and (3) of the Act.*

The Board will now proceed to determine the issues framed for determination as follows:

1. **As to whether the Board is deprived of jurisdiction to hear and determine the matter on account of the request for review having been filed out of time contrary to the provisions of Sections 167 (1) of the Act.**

#### **PRELIMINARY OBJECTION**

The Procuring Entity herein, The Judiciary, submitted in its response that the application was filed out of time and that the Board therefore lacked jurisdiction to hear and determine the application.

A jurisdictional issue having been raised, the Board is duty bound to determine it first before taking any step to inquire into the merits of the request for review. Should the Board find that it has no jurisdiction in the matter it will down its tools and strike out the review. However due to time constraints during which the Board has to hear and conclude the request for review namely within twenty one days, the Board has decided to hear the preliminary objection together with the main review but it will first dispense with the preliminary objection before going on to determine the request for review, if it finds that it has jurisdiction in the matter.

The Board notes based on the uncontested facts evident on the documents presented before it that Tender Number JPIP/NCB/WORKS/01/2017-2018 for Borehole Drilling and Equipping Works under Cluster A (Makindu,

Garissa, Kigumo and Chuka) for The Judiciary was opened on 19<sup>th</sup> October, 2017 and twenty one bidders, including the Applicant herein, responded. The Board further notes that the Procuring Entity's tender evaluation committee evaluated the tenders through three stages of preliminary examination, technical evaluation and financial evaluation and recommended award of the tender to the Interested Party, Messrs Ziyale Investment Limited at a sum of Kshs 19,080,696.00. The successful and unsuccessful bidders were notified by the Procuring Entity of the outcome of the evaluation process *vide* letters dated 19<sup>th</sup> December, 2017.

The Board observes that the Procuring Entity's letter of notification dated 19<sup>th</sup> December, 2017 triggered the action by the Applicant to lodge this request for review, dated and filed on 9<sup>th</sup> January, 2018. The Board has heard submissions by the Procuring Entity that the request for review was filed outside the fourteen-day mandatory window and that the Board therefore lacked jurisdiction to entertain it.

The Board takes cognizance of the provisions of Section 167 (1) the Act in determining this issue and which states as follows:

**Section 167 (1)** *"Subject to the provisions of this Part, a candidate or a tenderer, 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 within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed."*

It is clear that Section 167 (1) of the Act requires the Applicant to seek administrative review within fourteen days of notification of award. The Board has perused the letter of notification and notes that the same was dated 19<sup>th</sup> December 2017. The Board has further considered the Procuring Entity's submission that it posted the letter of notification on 22<sup>nd</sup> December, 2017 and has also considered the competing submission by the Applicant that it received a Postal Call Notice inviting the Applicant to collect the letter from the post office within seven days which letter was stamped received at the post office on 27<sup>th</sup> December, 2017. Assuming that the date of postage of the letter was also the notification date in this case, the 14-day period for filling a request for review started running on 23<sup>rd</sup> December, 2017 and ended on 6<sup>th</sup> January, 2018. The request for review filed on 9<sup>th</sup> January, 2018 would, inevitably, be out of time. The question that arises, however, is, what is the date the Applicant was notified that its tender was unsuccessful? The Procuring Entity contends that the Applicant was notified on 22<sup>nd</sup> December, 2017, the date of postage of the letter. On the other hand, the Applicant contends that notification occurred on the date the post office received and stamped the letter at the post office, that is on 27<sup>th</sup> December, 2017.

The Board has been shown a list of parcels delivered at the post office by the Procuring Entity and the same shows that it was allegedly received and stamped on 22<sup>nd</sup> December, 2017. Among the parcels is an undisclosed item addressed to M/s Iconic Drillers and Construction Ltd, the Applicant herein. The Board has also been shown an envelope with the emblem of The Judiciary, the Procuring Entity herein, addressed to the Applicant and stamped received at the post office on 27<sup>th</sup> December, 2017.



The Board has severally held in the past that the date of notification is the date the letter of notification is received and stamped at the post office. In the instant case, a list of 22 parcels was delivered at the post office by the Procuring Entity for registration and postage. The Applicant's letter was received and stamped by the postal authorities on 27<sup>th</sup> December, 2017. In the Board's view, notification occurred therefore on the date the letter was received at the post office, on 27<sup>th</sup> December, 2017 and not on the date parcels were delivered at the same office on 22<sup>nd</sup> December, 2017. The Board is of the considered view that when it comes to notification by post, it is not the date the letter is delivered to the post office that matters, rather what matters is the date the letter is received at the post office.

The Board therefore finds that the Applicant was notified on 27<sup>th</sup> December, 2017 and the countdown of 14 days started on 28<sup>th</sup> December, 2017 and lapsed on 11<sup>th</sup> January, 2018. It is the further finding of the Board that the Applicant having filed this Request for Review on 9<sup>th</sup> January, 2018 the same filed was within time. The Board therefore holds that the Applicant complied with the provisions of Section 167(1) of the Act in terms of the time for filing the request for review. Accordingly, this ground of preliminary objection fails and is disallowed.

The Board having found that the application was filed within time holds that it has the jurisdiction to hear and determine this matter on account of the same having been filed within time and will proceed to consider and determine the Applicant's case on merit.

## **THE SUBMISSIONS**

## **THE APPLICANT'S CASE**

The Applicant submitted in support of the Request for Review that the Procuring Entity acted unfairly and unreasonably, when it disqualified the Applicant on the basis that the Bill of Quantity was incomplete because of not quoting for 50mm diameter galvanised steel bend (Item No. 22). It submitted further that pursuant to Article 14 of the tender document it was not mandatory to indicate prices in all items in the BQ to wit clause 14.2 and that the Procuring Entity was in breach of Sections 79(1) and 81 of the Public Procurement & Asset Disposal Act, 2015 (hereinafter referred to as "the Act")

The Applicant alleged that the Procuring Entity acted unfairly and unreasonably with partiality for failing to notify the Applicant of the results of the bidding process and the successful bidder. It alleged further that the Procuring Entity acted unfairly by informing the Applicant that its bid was unsuccessful on 19<sup>th</sup> December, 2017 but dispatched the letter on 27<sup>th</sup> December, 2017 with the intention of denying the Applicant the opportunity for filing a request for review. The Applicant added that the letter was received at the Post Office on 27<sup>th</sup> December, 2017, dispatched to the Applicant's Post Office Box on 2<sup>nd</sup> January, 2018 and collected by the Applicant on 4<sup>th</sup> January, 2018. It also alleged the notification of award was made in breach of the provisions of Section 87(1) of the Act.

The Applicant submitted that the Procuring Entity's letter of notification dated 19<sup>th</sup> December, 2017 neither disclosed the successful bidder nor the price contrary to Section 87(3) of the Act.

### **THE PROCURING ENTITY'S RESPONSE**

In its Response to the Request for Review the Procuring Entity submitted that the bid evaluation process was conducted in four stages and that the Applicant was disqualified at the Preliminary Stage for not filling in prices for all the items in the Bills of Quantities. It denied that it breached Sections 79(1) and 81 of the Act and referred to Clause ITB 14.2 in the tender document that stated as follows;

*“The Bidder shall submit a bid for the whole of the works described in ITB 1.1 by filling in prices for all items of the Works, as identified in Section IV...”*

Turning to allegation on notification, the Procuring Entity averred that the Applicant was duly notified under Section 87(3) of the Act that its bid was unsuccessful and that all the letters of notification were dated 19<sup>th</sup> December 2017 and posted on 22<sup>nd</sup> December, 2017. It averred further that the 14 days window for lodging a request for review lapsed on 5<sup>th</sup> January 2018 and contended that the request for review filed on 9<sup>th</sup> January 2018 was filed out of time.

#### **THE INTERESTED PARTY’S RESPONSE**

The Interested Party and who was also the successful bidder, opposed the Request for Review stating the Interested Party complied with all the procedures and the regulations in making an application for the tender. It submitted further that *vide* letter dated 19<sup>th</sup> December 2017 the successful

bidder was notified of its success and a result it had already secured a performance security for the works and would suffer losses if the award was cancelled.

### **THE APPLICANT'S REPLY**

The Applicant, in reply to the preliminary objection, submitted that the Procuring Entity had failed to answer to the issue of notification as per Section 87 (3) of the Act and reiterated that the Procuring Entity's letter of 19<sup>th</sup> December did not disclose the successful tenderer as appropriate and the reasons thereof. Further, it submitted that the Applicant would not have any knowledge of notification until the letter arrived at his postal address. To the Applicant, the letter having been received at the Applicant's postal address on the 2<sup>nd</sup> of January 2018 meant that the time should be counted as of the 2<sup>nd</sup> when it had actual notice of contents of that letter. Counsel for the Applicant urged the board to allow the request for review.

2. **As to whether the Procuring Entity breached the provisions of Sections 79 (1) and 80 (2) of the Act by failing evaluate the Applicant's tender in accordance with the evaluation criteria set out in the tender document.**

The Board has observed this decision that the Applicant's tender was disqualified for failure to quote for 50 mm *diameter galvanised steel bend* (Item No. 22) as conveyed in the Procuring Entity's letter to the Applicant dated 19<sup>th</sup> December, 2017. The letter read, in part, as follows:

*"We regret to inform you that your bid was unsuccessful. Your bill of quantity was incomplete. You did not quote for 50 mm diameter galvanised steel bend (Item No. 22).*

*"We take this opportunity to thank you for your interest and look forward to your participation in future tenders."*

In its submission before the Board, the Applicant protested that the Procuring Entity acted unfairly and unreasonably when it disqualified the Applicant on the basis that the Bill of Quantity was incomplete by not quoting for 50mm diameter galvanised steel bend, arguing that pursuant to Article 14 of the tender document it was not mandatory to indicate prices in all items in the Bill of Quantity. As a consequence, the Board heard, the Procuring Entity had breached the provisions of Section 79 (1) of the Act.

To determine this issue, the Board has perused the tender document and has found that the following provisions are relevant to the determination of this issue:-

**Section I – Instructions to Bidders at Clause 14.2**

**Clause 14.2**      *"The Bidder shall submit a bid for the whole of the works described in ITB 1.1 by filling in prices for all items of the Works, as identified in Section IV. Bidding Forms. In case of admeasurement contracts, the Bidder shall fill in rates and prices for all items of the Works described in the Bill of Quantities. Items against which no rate or price is entered by the Bidder will not be paid for by the Employer when executed and shall be deemed covered by the rates for other items and prices in the Bill of Quantities."*

Clause 35.1 *“The Employer shall use the criteria and methodologies listed in this clause. No other evaluation criteria or methodologies shall be permitted.”*

Clause 35.2 *“To evaluate a bid, the Employer shall consider the following:*

*(a).....*

*(b).....*

*(c).....*

*(d).....*

*(e) Price adjustment for nonconformities in accordance with ITB 30.3;*

*(f) The additional evaluation factors are specified in Section III (Evaluation and Qualification Criteria)*

Clause 30.3 *“Provided that a bid is substantially responsive, the Employer shall rectify quantifiable nonmaterial nonconformities related to the Bid Price. To this effect, the Bid Price may be adjusted, for comparison purposes only, to reflect the price of a missing or non-conforming item or component. The adjustment shall be made using methods specified in Section III (Evaluation and Qualification Criteria).”*

The Board has also looked at the Bid Evaluation Report and Recommendation for Award dated November, 2017 at Clause 1 – Preliminary Examination of Bids – item d which states as follows:

**d) Completeness of Bid:**

*".....However, under work contracts, missing prices for occasional work items are considered to be included in prices for closely related items elsewhere..."*

The Board has further noted that the Applicant's bid was disqualified at the preliminary stage of the evaluation for lack of completeness of the bid. The Board's attention is drawn to Section 79 (1) of the Act which states as follows:

**Section 79 (1)** *"A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents."*

The Board has also considered Section 80 (2) of the Act, which deals with evaluation and it states as follows:

**Section 80 (2)** *"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents..."*

It is not in contention that the Applicant did not quote for 50 mm diameter galvanised steel bend (Item No. 22) in the Bill of Quantities. The matter for the Board to establish is whether, the Procuring Entity, in disqualifying the Applicant's bid on account of failure by the Applicant to quote for the 50 mm diameter galvanised steel bend, acted in accordance with the evaluation criteria set out in the tender document and the law.

As the Board has indicated above, the Board notes that the Applicant's bid was disqualified for lack of completeness of its bid which is essentially a matter for financial evaluation. The Board further notes that the Applicant submitted a tender based on the completed Bills of Quantities but without

having filled one item. The Board further notes that the tender document at Clause 14.2 provided that *items against which no rate or price is entered by the Bidder will not be paid for by the Employer when executed and shall be deemed covered by the rates for other items and prices in the Bill of Quantities*. The Board is of the respectful view that failure to quote for 50 mm diameter galvanised steel bend in the Bill of Quantities did not render the Applicant's bid document as incomplete. In any case the Procuring Entity's own tender document allowed for a process that would adequately remedy the omission in the Applicant's tender document at Clauses 14.2 and 30.3 without having to disqualify the tender. It is the further respectful view of the Board that the Applicant's tender was substantially responsive in this regard and ought to have been subjected to financial evaluation on the basis of the price quoted.

In view of all the foregoing the Board finds that the Procuring Entity breached the provisions of its own tender document and Sections 79 (1) and 80 (2) of the Act in regard to the evaluation of the Applicant's tender. Accordingly, this ground of review succeeds and is allowed.

**3. As to whether the Procuring Entity failed to duly notify the Applicant that its tender was unsuccessful thereby contravening the provisions of Section 87 (1) and (3) of the Act.**

The Board has heard arguments of the Applicants that the Procuring Entity failed to adhere to the provisions of Section 87 (1) and (3) of the Act on notification of award by acting unfairly and unreasonably with partiality for failing to notify the Applicant of the results of the bidding and the successful bidder. The Board has further heard the opposing argument of the Procuring



Entity that the Applicant was duly notified under Section 87(3) of the Act as his bid was unsuccessful and that all the letters of notification of outcome of the tenders were dispatched to all bidders.

The Board wishes to observe that the bids were opened on 19<sup>th</sup> October, 2017 with a tender validity period of 120 days, which ends on 17<sup>th</sup> February, 2018. The Board further observes that all the letters of notification to the successful and unsuccessful tenderers were dated 19<sup>th</sup> December, 2017 but the one addressed to the Applicant was received from the Post Office on the 27<sup>th</sup> December 2017.

The said letter read in part as follows:

*"We regret to inform you that your bid was unsuccessful. Your bill of quantity was incomplete. You did not quote for 50 mm diameter galvanised steel bend (Item No. 22).*

*"We take this opportunity to thank you for your interest and look forward to your participation in future tenders."*

It is clear from the letter of notification that the reason for the Applicant's bid being unsuccessful was stated as follows "... your bill of quantity was incomplete. You did not quote for 50mm diameter galvanized steel bend (Item 22) ....". further, it is clear that the letter does not indicate who the successful tenderer was.

The Board notes the requirements of Section 87 of the Act which states as follows:-

**Section 87 (1)** *"Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity*

*shall notify in writing the person submitting the successful tender that his tender has been accepted.*

**Section 87 (3)** *“When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.”*

Section 87 (3) of the Act is unambiguous that the Procuring Entity shall, in all tender processes, disclose the successful tenderer and give reasons as to why an unsuccessful bidder's tender was unsuccessful. The Board finds that whereas the reason as to why the Applicant's tender was unsuccessful was given, the Procuring Entity did not disclose the successful tenderer. In the Boards' view, the Procuring Entity did not strictly abide by the provisions of Section 87 (3) of the Act. The Board however notes that the Applicant was able to come before the Board and was able to be heard and did not therefore suffer any prejudice.

In the circumstances, this ground of review fails and is disallowed.


### **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 dated 9<sup>th</sup> January, 2018 and filed with the Board on the same date by the Applicant, M/s Iconic Drillers & Construction Limited, in the Matter of Tender Number JPIP/NCB/WORKS/01/2017-2018 for Borehole Drilling and Equipping Works under Cluster A (Makindu, Garissa, Kigumo & Chuka) for The Judiciary be and is hereby allowed.
2. The award of the subject tender to the Interested Party, M/s Ziyale Investments Limited be and is hereby annulled and set aside.
3. The Procuring Entity is directed to carry out a financial evaluation of the Applicant's tender and that of the successful bidder and award the same to the lowest evaluated bidder and complete the procurement process including the making of an award within seven days from the date of this decision
4. The Parties to this review are directed to appear before the Board on 5<sup>th</sup> February, 2018 at 2.30 pm for a mention to ascertain compliance with the orders issued herein and or for further orders.
5. Since the procurement process herein is not complete, and since the procuring entity was successful in the last issue, each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 29<sup>th</sup> day of January, 2018.

  
.....  
**CHAIRMAN**  
**PPARB**

  
.....  
**SECRETARY**  
**PPARB**

