

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 46/2020 OF 7TH APRIL 2020

BETWEEN
KING INVESTMENT MANAGEMENT CO.
LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,
RIVATEX EAST AFRICA LIMITED.....RESPONDENT

Review against the decision of Rivatex East Africa Limited dated 26th March 2020 with respect to Tender No. REAL/38/2019-2020 for the Supply and Delivery of Polyester and Viscose Stable Fiber.

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Ms. Phyllis Chepkemboi | -Member |
| 3. Ms. Robi Chacha | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Stanley Miheso | -Holding brief for the Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Rivatex East Africa Limited (hereinafter referred to as “the Procuring Entity”) invited eligible bidders to bid for Tender No. REAL/38/2019-2020 for the Supply and Delivery of Polyester and Viscose Stable Fiber (hereinafter referred to as “the subject tender”) by publishing an advertisement in the MyGov Publication Newspaper, the East African Newspaper, the Procuring Entity’s website (www.rivatex.co.ke) and the Public Procurement Information Portal on 17th December 2019.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received one bid by the tender submission deadline of 15th January 2020. The bid was opened shortly thereafter in the presence of 3 representatives of the bidder (i.e. M/s King Investment Management Co. Limited).

Evaluation

An Evaluation Committee comprising of five (5) members was appointed on 19th December 2019 by the Procuring Entity’s Managing Director. The said Committee evaluated the said bid in the following 3 stages:-

- i.** Preliminary Evaluation;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation.

1. Preliminary Evaluation

At this stage, the Evaluation Committee confirmed whether the bidder provided mandatory documents listed in Section II. Instructions to Tenderers of the Tender Document. At the end of this stage, M/s King Investment Management Co. Limited was found responsive, hence proceeded to Technical Evaluation.

2. Technical Evaluation

At this stage, the Evaluation Committee subjected the bid of M/s King Investment Management Co. Limited to evaluation based on the Technical Evaluation Criteria outlined in the Tender Document. A bidder had an obligation to achieve a minimum technical score of 75% to proceed to Financial Evaluation. At the end of this stage, M/s King Investment Management Co. Limited achieved the minimum technical score required, hence proceeded to Financial Evaluation.

3. Financial Evaluation

At this stage, the Evaluation Committee subjected the bid of M/s King Investment Management Co. Limited to Financial Evaluation, wherein its tender sum was recorded as follows:-

S/No	Bidder's Name	Item Description	Quantity	Tender Sum/Price per Kg (USD)	Total Price (USD) CIF Mombasa
1	Kings Investment Management Co. Ltd	Virgin Polyester stable fiber	52,000	1.96	101,920.00
		Virgin Viscose stable fiber	21,000	2.21	46,410.00

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s King Investment Management Co. Limited at its tender sum of USD 148,330.00

Professional Opinion

In a professional opinion dated 20th January 2020, the Procuring Entity's Head of Procurement Function reviewed the procurement process, including the outcome of evaluation. He opined that the procurement process met the minimum requirements under the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and requested the Managing Director of the Procuring Entity to award the tender to M/s King Investment Management Co. Limited as recommended by the Evaluation Committee.

Notification of Award

In a letter dated 20th January 2020, the Procuring Entity's Managing Director notified M/s King Investment Management Co. Limited that the subject tender has been awarded to it.

THE REQUEST FOR REVIEW

M/s King Investment Management Co. Ltd (hereinafter referred to as "the Applicant") lodged a Request for Review dated 3rd April 2020 and filed on 7th April 2020 together with a Statement in Support of the Review Application seeking the following orders:-

- a) An order setting aside the cancellation of Tender No. REAL/38/2019-2020;***
- b) An order directing the Respondent to honour the contract agreement dated 4th February 2020; and***
- c) An order awarding costs of the Review to the Applicant.***

In response, the Respondent filed a Notice of Preliminary Objection dated 15th April 2020 and a Memorandum of Response dated and filed on 17th April 2020.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority's website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19

pandemic. Through the said Circular, the Board instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the COVID-19 disease. Through this circular, the Board dispensed with physical hearings and directed all request for review applications to be canvassed by way of written submissions.

In compliance with the directions of the Board, the Procuring Entity lodged its written submissions in opposition of the Request for Review on 22nd April 2020.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed before it, including confidential documents filed in accordance with section 67 (3) (e) of the Act together with the written submissions by parties.

The issues that call for determination are as follows:-

I. Whether the Board has jurisdiction to entertain the Applicant's Request for Review.

Depending on the determination of the above issue:-

II. Whether the Board should direct the Procuring Entity to comply with the terms of the contract dated 4th February 2020

It is trite law that courts and other decision making bodies can only act when they have jurisdiction to entertain a matter. This has been the finding of our courts as can be seen in the cases cited hereinbelow:-

In the famous case of **The Owners of Motor Vessel 'Lillian 'S' vs Caltex Oil Kenya Ltd 1989 K.L.R 1**, Justice Nyarangi held that:-

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR**, the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus:

"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question best taken at inception. "

The Procuring Entity cited the decision of the Supreme Court in **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011**, where the court had occasion to interrogate the instruments that arrogate jurisdiction to courts and other decision making bodies. The court held as follows:-

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. "

This Board is a creature of statute owing to the provision of Section 27 (1) of the Act which provides that:-

"27. Establishment of the Public Procurement Administrative Review Board

(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

Further, Section 28 of the Act provides as follows:-

"28. Functions and powers of the Review Board

(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

The Board studied the grounds upon which the Request for Review filed by the Applicant is based on, with a view of determining the cause of action as understood by the Applicant in order to establish whether the Applicant

rightfully invoked the jurisdiction of this Board and we proceed to note the following:-

The Applicant submits that it was awarded the subject tender by the Respondent through a letter of notification of award dated 20th January 2020. Upon receipt of the said letter, the Applicant sent an acceptance letter dated 23rd January 2020 to the Respondent. Subsequently thereafter, the Respondent prepared a contract agreement which the Applicant and the Respondent duly executed on 4th February 2020.

The Applicant further submits that the Respondent proceeded to terminate the tender award contrary to section 63 of the Act, despite the Applicant having informed the Respondent that production of the fibers (i.e. Polyester and Viscose Stable Fiber) to be supplied in the subject tender was almost complete by the time the Applicant received the contract termination letter. In the Applicant's view, it had already incurred huge costs to meet its obligations under the subject tender and would suffer great financial loss if the contract is terminated.

In response to this contention, the Respondent filed a Notice of Preliminary Objection urging the Board to strike out the Request for Review on grounds that the Board lacks jurisdiction under section 167 (4) (c) of the Act to entertain the Request for Review since a valid contract was signed on 4th February 2020. In the Respondent's view, the Applicant's prayer urging the

Board to set aside cancellation of the subject tender has no basis, since the subject tender was never cancelled but it is the contract dated 4th February 2020 that was terminated. In the Respondent's view, the Applicant's further prayer that this Board should direct the Respondent to honour the contract dated 4th February 2020 is a prayer for specific performance, which cannot be granted by the Board as it lacks jurisdiction to grant the same.

Having considered parties' submissions on the nature of the cause of action by the Applicant, this Board observes that section 63 of the Act, cited by the Applicant deals with termination or cancellation of procurement and asset disposal proceedings by the accounting officer of a procuring entity prior to notification of award, without entering into a contract. The introductory sentence of the said section explains as much as can be seen below:-

"An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies-

....."

This means, the accounting officer of a procuring entity can only exercise the discretion to terminate or cancel procurement or asset disposal proceedings, without entering into a contract, before notifying the successful

bidder of an award. Once such accounting officer notifies the successful bidder of the award to it, it cannot exercise the discretion to terminate or cancel procurement or asset disposal proceedings in question, since what remains is for parties to execute a contract in accordance with section 135 (3) of the Act, which states as follows:-

"The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period"

In the instant case, all parties are in agreement that the Applicant was notified of award of the subject tender vide a letter dated 20th January 2020 and signified its acceptance of the award on 23rd January 2020. Further, this Board was furnished with the contract dated 4th February 2020 and there is no dispute as to the manner in which the contract was created.

The cause of action by the Applicant, as the Board understands it, is a review of the Respondent's decision terminating the contract dated 4th February 2020, which contract was entered into pursuant to section 135 (3) of the Act, wherein the Respondent submitted that the bid prices at which award of the tender was made to the Applicant are higher than prevailing market prices, leaving it with no option but to terminate the said contract and not termination of the procurement proceedings envisaged under section 63 of

the Act. As a result, the Applicant would like this Board to compel the Respondent to comply with its obligations under the said contract.

Section 167 (4) (c) of the Act clearly provides that:-

- "167 (1)**
- (2)**
- (3)**
- (4) *The following matters shall not be subject to the review of procurement proceedings under subsection (1)—***
 - (a);**
 - (b); and**
 - (c) *where a contract is signed in accordance with section 135 of this Act"***

Section 135 of the Act referenced in the above provision deals with creation of procurement contracts. The Applicant does not challenge the manner in which the contract dated 4th February 2020 was formed, but would like the Board to examine the terms of the said contract to arrive at the decision whether or not to compel the Respondent to perform its obligations under the said contract.

The Act does not donate jurisdiction under section 167 (1) of the Act or powers under section 173 of the Act to interfere with a contract that was duly executed in accordance with the conditions set out in section 135 of the Act, more specifically, subsection 3 thereof.

This Board can only exercise the jurisdiction that is conferred upon it by the 2015 Act since this Board is a creature of the said statute. Section 167 (4) (c) of the Act is clear that where a contract is executed in accordance with section 135 of the Act, the Board cannot interfere with such instances, moreso in this case where the Applicant does not challenge the manner in which the contract dated 4th February 2020 was created.

Accordingly, the Board finds that it lacks jurisdiction to entertain the Applicant's Request for Review and the same is hereby struck out for want of jurisdiction.

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board proceeds to make the following orders in the Request for Review:-

- 1. The Applicant's Request for Review dated 3rd April 2020 and filed on 7th April 2020, with respect to Tender No. REAL/38/2019-2020 for the Supply and Delivery of Polyester and Viscose Stable Fiber, be and is hereby struck out.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi, this 27th day of April 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB