

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 09 OF 2018 DATED 8TH JANUARY,2018

BETWEEN

INTEGRITY CONCERN INTERNATIONAL.....APPLICANT

AND

NATIONAL IRRIGATION BOARD..... PROCURING ENTITY

Review against the decision of the National Irrigation Board in the Matter of Tender No. NIB/T/011/2016-2017 for the funding, design, build and transfer of the new Gogo dam project, Migori and Homabay Counties in the Republic of Kenya.

BOARD MEMBERS PRESENT

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| 1. Paul Gicheru | -Chairman |
| 2. Nelson Orgut | - Member |
| 3. Gilda Odera | - Member |
| 4. Hussein Were | - Member |
| 5. Rosemary Gituma | - Member |

IN ATTENDANCE

1. Mr. Philemon Kiprop - Secretariat
2. Ms. Maureen Namadi - Secretariat (taking the proceedings)

PRESENT BY INVITATION

PROCURING ENTITY – NATIONAL IRRIGATION BOARD

6. Lilian Kimani - Advocate.
7. Boaz Okoth - PSO

APPLICANT – INTERGRITY CONCERN INTERNATIONAL

1. Fred Maina - Advocate
2. Nyaari Martin - Legal

THE BOARD'S DECISION

The Board has considered the submissions made by all the parties who appeared before it on the issue of the Applicants *locus standi*. Counsel for the Procuring Entity argued that, the Applicant lacks the *locus standi* to institute the present application on the ground that it was not a “candidate” or a “tenderer” as it did not participate in this procurement process.

Counsel for the Applicant which described itself as a non-governmental organization a fact that was not rebutted by way of any evidence by counsel for the Procuring Entity did not dispute the fact that it did not buy

or return the tender document to the Procuring Entity and as such was not a candidate or a tenderer for the purposes of the Act.

As the Board has previously held it is only a candidate or a tenderer who can lodge a complaint before it under the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act 2015.

The said Section 167(1) of the Act provides as follows:-

167(1): Subject to the provisions of this part, a candidate or a tenderer, who claims to have suffered or risks 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 the award or the 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".

In order for an applicant to have the necessary standing to present a grievance before the Board, the Applicant must demonstrate that it is either a "candidate "or a "tenderer "as defined by the provisions of Section 2 of the Act.

Section 2 of the Public Procurement and Asset Disposal Act 2015 defines a candidate and a tenderer as follows:-

"Candidate "means a person who has obtained tender documents from a public entity pursuant to an invitation notice by a Procuring Entity.

“Tenderer “means a person who submitted a tender pursuant to an invitation by a public entity.”

In the case of *Cathy International Limited –vs- Office of the President, Police Department (PPARB APPL. No. 31 of 2009)* which dealt with a similar provision contained in the repealed Public Procurement and Disposal Act 2005 (now repealed) the Board summarized the above requirement as follows:-

“A procurement process is a race governed by rules set out in the Act, the Regulations and the Tender document. A bidder enters the race by buying the tender documents and submitting the tender documents before the set deadline. It is only a bidder who has entered the race in accordance with the rules and the required format, who can lodge a complaint. A complaint by any person standing on the sidelines cannot be properly be lodged before the Board. The Board is a creature of statute and it can only exercise the powers donated by the Act and the Regulations. The Applicant may well have genuine grievances but it failed to return its tender documents therefore locking itself from the race”.

Based on the above facts, the provisions of section 2 and 167 of the Act and the above cited authority it is therefore clear that the Applicant instituted its Request for Review in the wrong forum and the Board will not determine the grounds raised on their merits save to state that the Board has looked at all the fourteen (14) grounds of review raised by the Applicant and the said grounds cannot be described as being frivolous.

The said grounds appear *prima facie* weighty in nature and raise serious factual and legal issues.

The Applicant is not however without a remedy because the Constitution and other laws have put in place legal mechanisms which can enable an aggrieved member of the public to ventilate its, his or her grievance in a procurement matter in a forum other than the Review Board. The High Court and the Court of Appeal have recognized such alternative forums for the resolution of procurement disputes as illustrated by the High Court and the Court of Appeal decisions in the case of **Al Ghurai Printing and Publishing LLC -vs- The Coalition for Reform and Democracy, Independent Electoral and Boundaries Commission and The Public Administrative Review Board [Nai CA 63 of 2017 arising from Nai HC JR Appl. No. 637 of 2016]** where both the High Court and the Court of Appeal were unanimous that any member of the public can file proceedings before the court where it is not a candidate or a tenderer in any procurement process where it has grievance regarding a procurement process owing to the constitutional underpinnings of the procurement process.

The court further accepted the legal position that Section 167(1) of the Public Procurement and Asset Disposal Act is only available to a candidate or a tenderer before the Review Board and further that the latitude provided for citizens and members of the public to file Constitution or judicial review proceedings is much broader.

The Board further notes that the issues raised by the Applicant include allegations that can properly be dealt with by the Director General of the Authority, the Ethics and Anti-Corruption Commission among other independent offices.

The Board will not therefore usurp the functions of the court or those other bodies.

The above being the position, this Request for Review fails on the sole ground that the Applicant was not a tenderer or a candidate in the procurement process and is disallowed on the following terms:-

FINAL ORDERS

In view of 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:-


- a) **The Applicant's Application dated 8th January, 2018 and which was filed by the Applicant with the Board in respect of Tender No. NIB/T/011?2016-2017 for the funding, design, build and transfer of the new Gogo dam project, Migori and Homabay Counties in the Republic of Kenya be and is hereby struck out on the sole ground that the Applicant was not a candidate or a tenderer in the said procurement process.**

- b) The Applicant is however at liberty to pursue its claim or any remedy before the right forum.
- c) This matter being a matter of public interest the Board orders that each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 29th day of January, 2018.


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CHAIRMAN
PPARB


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SECRETARY
PPARB

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