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|---------------------------|--------------------|
| 2. Mrs. Njeri Onyango | - Vice Chairperson |
| 3. Ms. Phyllis Chepkemboi | - Member |
| 4. Dr. Joseph Gitari | - Member |
| 5. Mr. Steven Oundo, OGW | - Member |

IN ATTENDANCE

Mr. Stanley Miheso - Holding brief for the Board Secretary

BACKGROUND TO THE DECISION

Tendering Process

Requisition Number 0053375 was made to the Head of supply Chain from Administration Department on provision of cleaning services for NHIF building and Contrast House.

The subject tender was published in the local dailies, Public Procurement Information Portal and the NHIF website on 6th October 2021, closed and opened on 21st October 2021 as scheduled.

Tender Submission deadline and Opening of Tenders

A Tender Opening Committee was appointed by the accounting officer vide Memo REF: HF/PRC/17/3/VOL.IV.004(a). This committee prepared tender opening registers, attendance registers and minutes of the deliberations.

The following Thirty-two (32) tenderers responded to the subject tender;

1. Clean Co Investments

2. Stelarlizar General contractors
3. Nadiah Investments Ltd
4. Freshness Hygiene Services
5. Aimat Company
6. Spec and Glow Leaning Solutions Ltd
7. Colnet
8. Kenma Homecare Services
9. Corpways Limited
10. Fanisi Company Ltd
11. Career Direction Ltd
12. Jepco Services Renovators
13. Volt Cleaning and Gardening
14. Safecony General contractors
15. Ice Clean Care Group co. ltd
16. Taraji Care and Hygiene
17. Formix Cleaners Services ltd
18. Top Image Cleaning Co.
19. Jextreem Logistics co. ltd
20. Grashah Investments Ltd
21. Linic Enterprises Ltd
22. Palmrite Enterprises
23. Rialli General Supply
24. Wenmac Enterprises
25. Hall mark Cleaning Services
26. Spin Africa
27. Liga Holdings Ltd
28. Spriles Enterprises Ltd

29. Precise Pride Cleaning Solutions
30. House of Brands Ltd
31. Phlox Cleaning Services
32. Virgin Clean Ltd

Tender Evaluation Committee

A Tender Evaluation Committee was constituted by the Chief Executive Officer vide memo Ref: HF/PRC/17/3/VOL.IV.004(a) to evaluate the tenders using the criteria provided in the Tender Document. The tenders submitted were subjected to a three (3)-stage evaluation process as follows;

Eighteen tenders did not meet all the mandatory criteria and the reason for their non- responsiveness.

Fourteen (14) tenderers met all the mandatory requirements and were subjected to technical evaluation criteria. The minimum score was 70% for candidates to proceed to the next stage of evaluation. All fourteen (14) tenderers met all the requirements under this stage of evaluation and were subjected to financial evaluation and ranked as shown below.

Summary of Financial Proposal

| No | Bidder's Name | Lot 1 (NHIF BUILDING) | | | LOT 2(CONTRUST HOUSE) | | |
|-----|---------------------------------|-----------------------|--------------|------|-----------------------|--------------|------|
| | | Monthly | Annually | RANK | Monthly | Annually | RANK |
| 1) | Stelarlizar General contractors | 482,000.00 | 5,784,000.00 | 5 | 162,000.00 | 1,944,000 | 11 |
| 2) | Spec and Glow | 509,000.00 | 6,108,000.00 | 7 | 168,000.00 | 2,016,000 | 12 |
| 3) | Colnet | 541,764.59 | 6,501,175.08 | 9 | 98,712.81 | 1,184,553.72 | 2 |
| 4) | Career Direction | 599,159.03 | 7,189,908.36 | 12 | 110,247.70 | 1,322,964 | 6 |
| 5) | Safecony General contractors | 476,200.00 | 5,714,400 | 4 | 148,000.00 | 1,776,000 | 10 |
| 6) | Formix cleaners | 558,000.00 | 6,696,000 | 10 | 119,500.00 | 1,434,000 | 9 |
| 7) | Top Image Cleaning | 726,000.00 | 8,712,000 | 14 | 108,000.00 | 1,296,000 | 5 |
| 8) | Jextreem Logistics | 598,000.00 | 7,176,000 | 11 | 115,200.00 | 1,382,400 | 7 |
| 9) | Linic Enterprises | 399,908.72 | 4,798,904.64 | 3 | 99,825.02 | 1,197,900.24 | 3 |
| 10) | Palmrite Enterprises | 525,000.00 | 6,300,000 | 8 | n/a | n/a | n/a |
| 11) | Spin Africa | 632,000.00 | 7,584,000 | 13 | 240,120.00 | 2,881,440 | 13 |
| 12) | Liga Holdings | 393,120.00 | 4,717,440 | 2 | 118,040.00 | 1,416,480 | 8 |
| 13) | Spriles Enterprises | 315,520.00 | 3,786,240 | 1 | 100,920.00 | 1,319,040 | 4 |
| 14) | Precise Cleaning | 500,000.00 | 6,000,000 | 6 | 98,000.00 | 1,176,000 | 1 |

The 1st , 2nd and 3rd lowest tenderers for lot 1 and the 1st , 2nd and 3rd tenderers for lot 2 were recommended for due diligence.

The Tender Evaluation Committee made the following observations at due diligence;

Lot 1

Spriles Enterprises Quoted Amount Ksh 315,520.00

Physical Location met the stipulated requirements, however they did not meet the requirements stated by the Ministry of Labour having stated that

the firm pays ksh 12,000 per employee per month and the minimum wage bill capped at ksh 13,500.

Liga holdings quoted amount 393,120.00

Physical Location met the stipulated requirements, however payroll submitted in the tender document, upon scrutiny did not match deductions made by the employer in NHIF system.

Example payroll for September 2021;

- Doris Leikari whose id 29315288 read as Wekesa Dennis last paid on Jul2021
- Richard Kivuva id number 34532044 read as Molel Kipngeno
- Samuel Wafula id number 30873879 read as Felistus Mwatu
- Shelmith Wanjiru id number 28737075 read as Harriet Kinya last paid on December 2020

Hence;

The firm failed on integrity,

The person are not current employees of the firm.

The payroll not genuine

Linic Enterprises quoted amount 399,908.72

Physical Location, references and the Payroll submitted met the stipulated requirements.

Lot 2

Precise Pride cleaning quoted amount 98,000.00

Physical Location, references and payroll submitted met the stipulated requirements.

Colnet 98,712,000

Physical Location, references and the payroll submitted met the stipulated requirements.

Linic Enterprises quoted amount 99,825.02

Physical Location, references and the payroll met the stipulated requirements.

The Evaluation committee disqualified Spriles enterprises based on the minimum wage bill and also disqualified Liga holdings due to payroll where names and ID provided did not match in the NHIF system. Therefore, Linic Enterprises was recommended for lot 1 at ksh 399,908.72 monthly totalling to ksh 4,798,904.61 inclusive of VAT for a period of two years' renewable upon satisfactory performance and Precise Pride cleaning for lot 2 at a monthly cost of 98,000 totalling to ksh 1,176,000.00 inclusive of Vat for a period of two years' renewable upon satisfactory performance.

Professional Opinion

In a professional opinion dated 22nd November 2021 the Head of Supply

Chain Management stated that the subject procurement has satisfied the constitutional requirements of article 227(1) and statutory requirements of the Public Procurement and Asset Disposal Act, 2015 and of the Asset Disposal regulations.

Pursuant to Public Procurement and Disposal Act 2015 Section 96 the procedure for open tender was followed as stipulated in the Act and regulations 2020. The procedure met all the provisions of the Act and the process was transparent and fair.

She also confirmed that the budget set aside for this procurement in the Procurement Plan was Ksh. 34,920,000 for the Head-quarters and all the branch offices.

She thus advised the Accounting Officer to approve the award of contract for cleaning services to **M/s Linic Enterprises for lot 1 (NHIF Building) at a monthly cost of Ksh 399,908.72 Translating to an annual cost of Ksh 4,798,904.61 inclusive of VAT; And; to M/s Precise Pride cleaning for lot 2 (Contrust House) at a monthly cost of Ksh. 98,000 totally Translating to Ksh 1,176,000.00 inclusive of VAT.**

The award of these lots was to be **for a period of two years' subject to satisfactory performance.**

THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s Liga Holdings Limited, on 21st December, 2021 in the matter of tender No. NHIF/14/2021-2022 for the provision of Cleaning Services for NHIF Building and Contrust House.

The Applicant seeks for the following orders:

- a) The award be annulled;***
- b) The Procurement entity be allowed to conclude the procurement process and award the tender to the lowest evaluated bidder;***
- c) Costs of the application be awarded to the applicant; and***
- d) Any other orders that the Honorable Board may deem just and fit..***

In response the Respondents lodged a memorandum of response on 29th December 2021 together with confidential documents relating to subject procurement process as required by Section 67 (3) (e) of the Act.

BOARD'S DECISION

The Board has considered each of the parties' pleadings, authorities and confidential documentation filed by the Procuring Entity pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') and finds that the following issues crystallize for determination:

- I. Whether the notification letter given to the Applicant met the requirements of Section 87 (3) of the Act;**
- II. Whether post qualification evaluation was conducted within the realm of Section 83 of the Act;**
- III. What are the appropriate reliefs to grant in the circumstances?**

The Board now proceeds to address the above issues.

Whether the notification letter given to the Applicant was in breach of Section 87(3) of the Public Procurement and Asset Disposal Act, 2015 (hereafter referred to as "the Act")

The Applicant averred that it submitted the tender as required in the invitation to tender and attached all the mandatory requirements as provided for the tender evaluation criteria and technical evaluation documents.

On 7th December, 2021 it received an email to collect a letter pertaining to the tender from the Procuring entity. The Applicant avers that it collected the said letter which indicated that its tender was unsuccessful for reasons that its payroll was invalid.

The Applicant avers that it immediately queried and requested to be directed as to the parameters or the criteria which the pay roll ought to have met in the tender document and on 15th December, 2021 the Procuring Entity emailed the Applicant indicating that the said letter was as a result of clerical errors and directed to pick a further letter.

The Applicant then collected the letter of notification on 16th December 2021 and which letter again indicated that its bid was unsuccessful due to post qualification.

The Applicant avers that the Procuring Entity breached Section 3 as read together with Section 87(3) of the Act by failing to provide a clear and verifiable reason for its unsuccessful tender.

In response the Respondent avers that the results of the Tender were communicated vide Notification of Intention To Award letters addressed to each of the thirty two (32) tenderers dated 30th November 2021 which were collected from the 2nd Respondent 's offices by each of these tenderers, including the Applicant, the Interested Party and M/s Precise Pride Cleaning Solutions. The reason(s) for the non-responsiveness of the unsuccessful tenders, and for the responsive successful tenders for Lot 1 and Lot 2 were provided.

The Respondent avers that after receipt of the Notification of Intention to Award, the Applicant vide a letter dated 14th December 2021 requested

for a debrief in relation to the results. The Respondent via email to the Applicant sent on 15th December 2021, invited the Applicant for a meeting for a further debriefing on the reason why the Applicant's Tender was unsuccessful. The Applicant was further informed that there was a clerical error in the Notification of Intention to Award of 30th November 2021, the reason for the failure of the Applicant's bid was not at the Technical Evaluation as communicated. This was highly regretted.

Lastly, the Applicant was informed that it may collect the correct letter from the Respondent's offices, and was asked to advise on when the debrief meeting could be held.

The Respondent avers that the Applicant's notification letter dated 30th November 2021 now gave the reason for the failure of the Applicant's tender as failure at Post Qualification. The Applicant did not respond to the request for the debrief meeting in the email of 15th December 2021.

Section 87(3) of the Act requires the 1st Respondent to **"notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.**

The Applicant was notified vide a letter dated 30th November, 2021 that informed it of the following (extract):-

".....This notification of intention to award notifies you of our decision to award the above contract. However, we regret to inform you that your bid was not successful due to the following:-

Your bid failure at the Technical stage. The reason for failure was:

- your payroll submitted was invalid....."

The said letter then went on to list the successful tenderers, reasons for other tenderers being unsuccessful and stating that there is a standstill period where the tenderer may request a debriefing or submit a procurement related complaint.

The Applicant requested for a clarification vide a letter dated 14th December, 2021 and signed by one Betty K. Mutwiri its Managing Director. In this letter the Applicant stated:-

"...In reference to letter.....dated 30th November, 2021 on the above subject matter, we would like to get a debriefing in relation evaluation process of the tender for te services.

In particular we ask for your clarification on the below reasons why our bid was unsuccessful.

1. The latter said we failed at the technical stage – On 15th November, we received a team from your office (NHIF) who were part of the evaluation committee led by madam Judy who had come for due diligence

an exercise past technical evaluation as per norm of procurement processes.

2. Our payroll was invalid- We would like to know what parameters the evaluation n committee used to authenticate our own document prepared and designed by our office.

Please give us a quick response before we raise a clarification of the same from PPRA.....”

The Procuring Entity responded on 15th December, 2021 inviting the Applicant for a meeting for further debrief on reasons why its tender was unsuccessful and an acknowledgment of a clerical error in the earlier notification letter. The Applicant was then requested to pick a copy of the correct letter.

The corrected letter was also dated 30th November, 2021 and indicated as follows (extract):-

".....This notification of intention to award notifies you of our decision to award the above contract. However, we regret to inform you that your bid was not successful due to the following:-

- your bid failure at the post qualification.....”

In the tender, the notification is found under clauses 42 to 44 on pages 24 to 25 of the blank tender document and require it to be as follows:-

"42 Notice of Intention to enter into a Contract

42.1 Upon award of the contract and Prior to the expiry of the Tender Validity Period the National Hospital Insurance Fund shall issue a Notification of Intention to Enter into a Contract/Notification of a ward to all tenderers which shall contain, at a minimum, the following information:

- a) The name and address of the Tenderer submitting the successful tender;***
- b) The Contract price of the successful tender;***
- c) a statement of the reason(s) the tender of the unsuccessful tenderer to whom the letter is addressed was unsuccessful, unless the price information in(c) above already reveals the reason;***
- d) the expiry date of the Stand still Period; and***
- e) instructions on how to request a debriefing and/or submit a complaint during the stand still period;***

43 Stand still Period

43.1 The Contract shall not be signed earlier than the expiry of a Standstill Period of 14 days to allow any dissatisfied tender to launch a complaint. Where only one Tender is submitted, the Standstill Period shall not apply.

43.2 Where a Standstill Period applies, it shall commence when the National Hospital Insurance Fund has transmitted to each Tenderer the Notification of

Intention to Enter in to a Contract with the successful Tenderer.

44 Debriefing by the National Hospital Insurance Fund

44.1 On receipt of the National Hospital Insurance Fund 's Notification of Intention to Enter into a Contract referred to in ITT 42, an unsuccessful tenderer may make a written request to the National Hospital Insurance Fund for a debriefing on specific issues or concerns regarding their tender. The National Hospital Insurance Fund shall provide the debriefing with in five days of receipt of the request.

44.2 Debriefings of unsuccessful Tenderers may be done in writing or verbally. The Tenderer shall bear its own costs of attending such a debriefing meeting."

The Board has considered the requirements of Section 87(1) and (3) of the Act and Regulation 82 as follows:

"Section 87. Notification of intention to enter into a contract

(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.

(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."

And

"Regulation 82. Notification of intention to enter into a contract.

(1) The notification to the unsuccessful bidder under section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.

(2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.

(3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with section 86(1) of the Act."

In the circumstances, we find the notification letter given to the Applicant was in breach of Section 87(3) of the Act.

Whether post qualification evaluation was conducted within the realm of Section 83 of the Act

The Applicant averred that the Procuring Entity breached Section 83 of the Act by failing to carry out proper and comprehensive due diligence on the applicant despite the applicant having provided all the requirements as provided for in the tender document.

In response the Respondent opined that Section 83 of the Act on post-qualification requirement for due diligence is only permissive and does not impose an obligation on the Respondents to conduct due diligence on the Applicant as alleged. The said provision is permissive, on the basis of the use of the word may.

The Respondent avers that as per the framing of Section 83(1) of the Act, the purpose of due diligence is to "confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with the Act. The Applicant was not the lowest responsive tenderer for either Lots of the Tender. The Applicant ranked 2nd in Lot 1 and 8th in Lot 2 of the Tender. Both the tenders by Spriles Enterprises Limited (who ranked 1) and the Applicant were determined to be non-responsive for Lot 1 of the subject tender. The due diligence prior to the award of Lot 1 was only conducted on the 1st Interested Party which was the next lowest but responsive tender.

The Respondent avers that the due diligence was still carried out on the Applicant's tender. Furthermore, the Applicant itself in its letter dated 14th

December 2021 concedes that due diligence was conducted, as such, the Applicant cannot now purport that no due diligence exercise was carried out on it.

The Board is cognisant of the fact that the Applicant was apparently taken through a due diligence exercise. The due diligence report was part of the evaluation report and stated as follows seen on page 19 of the evaluation report:-

"..Recommendations by Tender Evaluation Committee

The Evaluation committee recommended Three lowest bidders for lot 1 and 2 and three were recommended for due diligence before Award..."

After the exercise the committee noted the following on the Applicant as seen on page 20 of the evaluation report:-

"Liga holdings quoted amount 393,120.00

Physical Location met the stipulated requirements, however payroll submitted upon scrutiny did not match submission to NHIF.

Example payroll for September 2021;

- Doris Leikari whose id 29315288 read as Wekesa Dennis last paid on Jul2021***
- Richard Kivuva id number 34532044 read as Molel Kipngeno last paid apr 2020***

- ***Samuel Wafula id number 30873879 read as Felistus Mwatu***
- ***Shelmith Wanjiru id number 28737075 read as Harriet Kinya last paid on December 2020***

Hence;

The firm failed on integrity,

The person are not current employees of the firm.

The payroll not genuine”

The requirement for post qualification was found on page 35 of the blank tender document and states (extract):-

".....7 Post qualification and Contract ward (ITT 39), more specifically,

a) In case the tender was subject to post-qualification, the contract shall be awarded to the lowest evaluated tenderer, subject to confirmation of pre-qualification data, if so required.”

Section 83(1) of the Act and Regulation 80 provide as follows:-

"83. Post-qualification

(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in

writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act."

And

"Regulation 80. Post-qualification.

80. (1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act.

(2) If the bidder determined under paragraph (1) is not qualified after due diligence in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer—

(a) who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or

(b) who emerges as the lowest evaluated bidder after recomputing financial and combined score for consultancy services under the Quality Cost Based Selection method."

The Procuring Entity conducted due diligence on the 1st, 2nd and 3rd lowest evaluated bidders as opposed to the lowest evaluated tenderer recommended for award and where the lowest evaluated tenderer is found non-responsive at this stage, to proceed to conduct due diligence to the next lowest evaluated tenderer and this procedure is repeated until a successful tenderer is found at due diligence stage.

The Board's finds that due diligence in Section 83 (1) of the Act and Regulation 80 of Regulations 2020 also known as post qualification evaluation, is to be conducted sequentially starting with the lowest evaluated tenderer and if they fail then the next lowest evaluated tenderer is considered and should they fail too then the next (third) lowest evaluated tenderer is then subjected to Due Diligence and **NOT** contemporaneously as was done by the Procuring Entity under this tender.

In the circumstances, the Board will allow this review with respect to the following specific orders:

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review:

1. The letter of Notification dated 30th November 2021 re-issued to the Applicant be and is hereby cancelled and set aside.
2. The Accounting Officer of the Procuring Entity is hereby directed to issue a new letter of notification to the Applicant in line with the Act and Regulations.
3. The Accounting Officer of the Procuring Entity is at liberty to proceed with the subject tender to its logical conclusion including the making of an award to the lowest evaluated responsive tenderer(s) in the two lots of the subject tender subject to a due diligence already undertaken within fourteen (14) days from the date of this decision.
4. Given that the procurement proceedings of the subject tender are not complete, each party will bear its own costs.

Dated at Nairobi this 11th day of January 2022



CHAIRPERSON

PPARB



SECRETARY

PPARB

