

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 34/2008 OF 29<sup>th</sup> OCTOBER, 2008**

**BETWEEN**

**VAGHJIYANI ENTERPRISES LTD..... (APPLICANT)**

**AND**

**NANDI NORTH DISTRICT TENDER COMMITTEE.....  
(PROCURING ENTITY)**

Review against the decision of the Tender Committee of Nandi North District Tender Committee dated 9<sup>th</sup> October, 2008 in the matter of Tender for the Proposed Erection and Completion of 1 No. Administration Block, 2 No. Blocks of 12 Units each type 'E' Flats at Kaimosi Police Station Nandi North District.

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Eng. C. A. Ogut	-	Member
Mr. S. K. Munguti	-	Member
Mr. Akich Okola	-	Member

**IN ATTENDANCE**

Mr. C. R. Amoth	-	Secretary
Ms. P. K. Ouma	-	Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Vaghjiyani Enterprises Ltd**

- Mr. David Oyatta - Advocate, Oyatta & Associate  
Advocates
- Mr. Kennedy Okoll Aroko - Advocate, Oyatta & Associate  
Advocates
- Mr. Ramesh Vaghjiyani - Director

### **Procuring Entity, Nandi North District Tender Committee**

- Mr. Peter K. Chepkwony - Chairman
- Mr. Evans A. Omuya - Secretary

### **Interested Candidates**

- Mr. Kennedy Mogire - Advocate, Custom General  
Construction Ltd
- Mr. Peter Nyamuaka - Advocate, Custom General  
Construction Ltd
- Mr. Bernard Ratemo - Director Operations, Custom General  
Construction Ltd
- Mr. Martin Okwemba - Director, Richardson Co. Ltd

## **BOARD'S DECISION**

### **BACKGROUND OF AWARD**

The Nandi North District Tender Committee through the Police Department advertised the tender for the proposed completion of an administration block and two blocks of 12 units flats at Kaimosi Police Station on 18<sup>th</sup> August, 2008. The tender closed/opened on 10<sup>th</sup> September, 2008. Nine bids were opened in the presence of bidder's

representatives who chose to attend. The bid prices and bid bonds were read out and they were as tabulated below:-

<b>Lowest Tender No.</b>	<b>Tenderer</b>	<b>Amount of tender</b>	<b>Bid Security</b>
1 <sup>st</sup>	Soskar Building Contractors	Kshs. 132,815,742.80	No bid bond
2 <sup>nd</sup>	Vaghjiyani Enterprises Ltd	Kshs. 133,713,960	Chase Bank
3 <sup>rd</sup>	Custom General Construction Ltd	Kshs. 137, 127, 036	Credit bank
4 <sup>th</sup>	Eldo -Rotsa Construction Co. Ltd	Kshs. 145,648,495	Chase Bank
5 <sup>th</sup>	Richardson Company Ltd	Kshs. 150,968,726	Barclays Bank
6 <sup>th</sup>	Rawford Limited	Kshs. 162,382,550	Chase Bank
7 <sup>th</sup>	Alf Construction Contractors Ltd	Kshs. 169, 541, 795	Chase Bank
8 <sup>th</sup>	Mattan Hardware & Contractors Ltd	Kshs. 172,730,781	Dubai Bank
9 <sup>th</sup>	Tridev Construction Ltd	Kshs. 177,955,487	Oriental Commercial Bank

The bid bond provided by M/s Soskar Building Contractors was found not to be responsive to the bid bond requirements.

## **EVALUATION**

The evaluation was carried out by a committee chaired by the Ag. District Works officer. The committee evaluated the bids for technical and commercial responsiveness. The parameters evaluated were as follows:-

- Registered with Public Works in Category D
- Past performance in similar projects for the last 5 years
- Tax compliance
- Equipments and key personnel
- Financial status and credit facilities

Bidder 8<sup>th</sup> and 9<sup>th</sup> Lowest namely, Mattan Hardware & Contractors Ltd and Tridev Construction Ltd were not evaluated as the bids were far above the engineer's estimate of Kshs. 156,698,912.00. Five firms were lower than the engineer's estimate and four were higher. It was noted that apart from the second lowest M/s Vaghjiyani Enterprises Ltd, the rest had not handled projects of financial magnitude of over Kshs. 80,000,000.

Except for M/s Vaghjiyani Enterprises Ltd, Rawford Limited and Alf Construction Co. Ltd who presented detailed account of what they had done and are currently doing with pictorial excerpts of the projects, the rest presented very scanty information on current and past projects to enable judgment on their performance be done prudently.

The Evaluation Committee then recommended the second lowest M/s Vaghjiyani Enterprises as the most responsive and lowest priced at Kshs. 133,713,960.

## **THE TENDER COMMITTEE DECISION**

The District Tender Committee in its meeting No. 2/2008-2009 held on 8<sup>th</sup> and 9<sup>th</sup> October, 2008 deliberated on the tender. It was noted on the first day of the meeting that the user department had not indicated the funds that were set aside for the project. The meeting was differed to the next day so as to allow the committee members to peruse through the evaluation report and allow the user department to indicate the funds allocated for the project.

The Committee reconvened the next day 9<sup>th</sup> October, 2008 and proceeded to do its analysis of the tender. The committee analyzed each bidder and eliminated all other tenderers apart from two firms namely, M/s Vaghjiyani Enterprises and M/s Customs General Construction Ltd. The committee noted that M/s Vaghjiyani Enterprises had three on-going works with the Government and some in the private sector which were far from completion and it felt that if awarded another work it may not finish the works on schedule. It was further noted that the two bidders had given reference to the same works but on different period at Marsh Park Kisii. The committee established that the stated works were done by M/s Customs General Construction and that M/s Vaghjiyani had given false information and it doubted the credibility of the other information in its tender document.

After the analysis, the committee did not reach a consensus on who was to be awarded the tender and they resorted to voting. Custom Construction Company Ltd got six (6) votes while the applicant Vaghjiyani Enterprises got two (2) votes. The Tender Committee then awarded the tender to M/s Customs Construction Company Ltd at Kshs. 137,127,036.

Bidders were notified of the outcome by letters dated 17<sup>th</sup> October, 2008.

### **THE REVIEW**

The review was lodged by M/s Vaghjiyani Enterprises Ltd on 29<sup>th</sup> October, 2008. The Applicant was represented by Mr. David Oyatta, Advocate, Oyatta and Associates Advocates while the Procuring Entity was represented by Mr. Peter Chepkwony, Chairman of the District

Tender Committee and Mr. Evans A. Omuya the Secretary to the Committee. The interested candidates present included Custom General Construction Ltd represented by Mr. Kennedy Mogire Advocate, Mauncho & Co. Advocates and Richardson Company Ltd represented by Mr. Martin Okwemba its director.

The review is based on three grounds which we deal with as follows:-

**Grounds 1, 2 and 3 - Breach of Clauses 1.5 and 1.7 of the Tender Document and Section 64 (1), 66 (4) of the Act and Regulations 47 (f), 48 and 49.**

We combine all these grounds as they raise similar issues.

The Applicant stated that the Procuring Entity acted illegally and/or arbitrarily by awarding the tender to the successful bidder, contrary to the mandatory requirement as stipulated in clauses 1.5 and 1.7 of the tender document and Section 64 (1) of the Act and Regulations 47 (f) 48 and 49. It stated that clauses 1.5 and 1.7 of the tender document set out the mandatory requirements which a bidder had to meet in order for its bid to be considered responsive. It averred that it met all the requirements, which was why its bid moved to the technical evaluation stage. The Applicant further contended that although the successful tenderer did not meet all the mandatory requirements in that it failed to provide financial report and availability of credit facilities, its bid proceeded to the technical evaluation stage. It argued that the Evaluation Committee should have rejected tenders, including that of the successful tenderer, which did not satisfy the mandatory requirements.

The Applicant argued that upon evaluation, its tender was determined to be the one with the lowest evaluated price. The Tender Committee should therefore have awarded the contract to it. By awarding the tender to the successful tenderer, the Tender Committee breached Section 66(4) and Regulation 49. In so doing, it failed to safeguard public funds by awarding the contract to a bidder whose quoted price was four million shillings higher than that of the Applicant. In support of this contention, the Applicant cited the following cases that were before the Board on previous occasions **Application No. 44/2004 between MITS Electrical Company Limited v. the Vice-President and Ministry of Home Affairs;** **Application No. 2/2005 between Hurlingham Butchery Limited v. the Department of Defence;** and **application No. 19/2006 between Howard Humphreys (East Africa) Ltd. v Lake Victoria South Water Services Board.**

The Applicant submitted that on these grounds, the award to the successful candidate should be annulled and the tender be awarded to it.

In response, the Procuring Entity stated that it did not act illegally, or arbitrarily, by awarding the tender to the successful bidder as the documents stipulated in Clause 1.5 were submitted by the successful firm. Clause 1.7 on minimum requirements was further met by the winning bidder. It therefore claimed that there was no breach of section 64(1) of the Act and Regulation 47(f), 48 and 49 of the Regulations. It averred that it could not reject all bids because the tenderers satisfied the technical requirement and those non-responsive were struck out as the advertisement notice required.

It averred further that the Procuring Entity had zeroed in on the two responsive tenderers, namely, the Successful Tenderer and the Applicant. The Procuring Entity further contended that the Applicant had given false information regarding the works which it had performed as required under the tender documents, by stating that it had completed construction in Bungoma, when in fact the work was only ten per cent done. The Procuring Entity therefore felt that the Applicant could not perform the contract in the period stipulated. Further, the Applicant claimed to have performed works in relation to a hotel in Kisii called, Marsh Park Hotel, when in fact, the works had been performed by the successful bidder. In support of this contention, the Procuring Entity produced a letter allegedly written by the proprietor of the hotel, addressed to the District Commissioner, Nandi North District, to the attention of the District Procurement Office. The letter disowns alleged claim by the Applicant that it had constructed the hotel in question and further states that, in fact, the hotel had been constructed by the Successful Bidder. This factor was also taken into account in deciding whether the Applicant should be given the tender.

The Procuring Entity further stated that there was interference from "above" throughout the process, which explains why the lowest bidder, Soskah Building Contractors Ltd, who should have been disqualified at the preliminary evaluation stage, continued in the race.

On its part, the Successful Bidder submitted that it had met the conditions set out in the tender document which was the basis on which a decision was based to award it the tender. It further argued that if



there is a finding as claimed by the Procuring Entity that the Applicant had given false information, then the Applicant should be disqualified. Furthermore if there was interference from "above" this should not be used against it.

In response to the submissions by the Procuring Entity and the Successful Candidate the Applicant stated that, contrary to the averment by the Procuring Entity regarding Mash Park Hotel, it had never included the hotel as one of its referees, and in this regard, pointed to its tender submission which did not refer to Mash Park Hotel as one of its referees. It further argued that the Tender Committee had a duty to give reasons for its rejection of a tender where it felt that false information had been given, and so far it had not done so. As to the works in Bungoma, it stated that it had completed the works and had a copy of the completion certificate.

The Board has carefully considered the submissions of the parties and examined the documents presented before it and decides as follows:-

There are two questions for consideration by the Board in determining the merit of the Applicant's prayers. These are:

1. Was evaluation of the tenders done in accordance with the Act, and the Regulations?
2. If so, was the Applicant the lowest evaluated tenderer in accordance with the Act and the Regulations?

The Board notes that evaluation of tenders is governed by Sections 64; 66; Regulations 47; 48 and 49. Section 64(1) provides that:

*"A tender is responsive if it conforms to all the mandatory requirements in the tender document."*

The plain meaning of this provision of the Act is that for a tender to have any chance of success, it must comply first with everything called for by the Procuring Entity advertising the tender, subject only to minor deviations, or errors or oversight that can be corrected without affecting the substance of the tender. Its function is to ensure that there is maximum transparency in the evaluation of tenders by disclosing to bidders from the very beginning the things that they must provide when submitting their tenders. The first task for the Procuring Entity therefore is to determine compliance by the tenderers with these mandatory requirements, by carrying out a preliminary evaluation of the tenders.

In this case, sections 1.5 and 1.7 of the tender document set out the mandatory requirements to be met by tenderers. Upon carrying out preliminary evaluation of the tenders, the Applicant's tender was found to be responsive in accordance with the mandatory requirements. It was discovered that the tender submitted by Soskah Building Contractors had a bid bond which did not meet the mandatory requirements. This notwithstanding the bidder was not disqualified from proceeding to the technical evaluation stage.

The Board further notes that, the Evaluation Committee met on October 10<sup>th</sup>, 2008, to evaluate the tenders. The meeting consisted of among

others, Mr. D. M. Kamau, the Acting District Works Officer and Mr. E.A. Omuya, the District Procurement Officer. The committee evaluated the tenders using the stated parameters and ranked the bidders from lowest to highest quoted bidders.

As pointed out before, Soskah Building Contractors, who were ranked first, had failed to present a satisfactory bid bond, but were nevertheless allowed to proceed to the technical evaluation stage. The minutes of the evaluation paint a grim picture of the firm's ability to perform the tender, should it be awarded to it. According to the minutes, ***"the bidder gave scanty information about their past performance for the last five years... hence it is difficult to judge their performance. The company did not submit a company profile."*** Moreover, they are a sole proprietorship and were able to provide only a letter of introduction from a bank. Furthermore, the firm managed only to raise a bid bond of questionable authenticity: it was not even printed on the bank's letterhead with a reference, nor did it have a seal or signatures!

The question which arises is how a bidder with such obviously poor prospects of performance made it to the technical evaluation stage. Mr. Omuya, when pressed, gave the answer. Apparently there were orders from "above" that the company should be given the tender. Mr. Omuya did not give any further details as to the origins of the order, and the Board chose not to press the point.

According to the minutes of the meeting, the successful bidder, Custom General Constructions Ltd did not present adequate information on key personnel to be availed to the works; hence its bid could not be

commented on adequately. They also failed to present evidence of possession of equipment necessary for the works. Further they failed to present financial report and evidence of availability of credit. Moreover, as regards completed projects, the minutes indicate that ***"this bidder presented a profile with very scanty information on completed and on-going projects with respective client references or copies of photos to show current status of on-going projects. It is therefore difficult to assess this firm expertise and capability from information given for the last five years."***

The response filed by the Procuring Entity and its oral submissions before the Board, contradicts these minutes. It claims in its written response that:

***1."Total value of construction work performed for each of the five years was submitted with the tender documents."***

***2."That experience in works of a similar nature and size for each of the last five years, and details of work underway or contractually committed, and names and addresses of clients who may be contacted for further information on these contracts were submitted along with other tender documents."***

***3."That major items of construction equipments proposed to carry out the contract and undertaking that they will be available for the contract were attached to the tender documents and indicated as owned by the company."***

The entire written response is a contradiction of the minutes of the evaluation committee report. In their oral submissions, both Mr.

Chepkwony and Mr. Omuya persisted in pursuing the claim that the Successful Bidder had indeed been evaluated and found to be the appropriate bidder for the tender. When questioned by the Board about the contradictions between the tender documents and their oral submissions, Mr. Omuya claimed that after the decision by the tender committee to award the tender to Custom General Constructions Ltd, the tender documents were taken to the OCPD (who was the client) for preparation of the contract. When this application was filed, and it became necessary for the tender documents to be returned to Mr. Omuya to prepare the necessary response, he discovered that the documents had been tampered with. In particular, reference by the Applicant to construction of Mash Park Hotel and Kisii Mattress, had been plucked from the bundle of tender documents. Mr. Omuya claims to have reported the matter to the District Commissioner, the OCPD and the Quantity Surveyor, but so far nothing had happened.

It is significant to note that Mr. Omuya is the District Procurement Officer. In this capacity he is the technical adviser in matters relating to procurement in the Nandi Central District. He attended the tender closing/opening meeting of September 10th, 2008. He also attended the tender evaluation committee meeting of October 3<sup>rd</sup>, 2008, at which the tenders submitted regarding this application were evaluated. The committee came to the conclusion that the third lowest bidder, Custom General Constructions Ltd, did not have the qualifications to handle the tender based on a number of parameters which are documented in the minutes of that meeting. They also came to the conclusion that the first ranked bidder, Soskah Building Contractors, did not possess the necessary qualifications, either. In their view, the most suitable bidder

was the second lowest bidder, Vaghjiyani Enterprises Limited, the Applicant in this matter. Accordingly, they recommended to the Tender Committee that the award should be made to the Applicant.

The Board notes that the Tender Committee met on October 8<sup>th</sup> and 9<sup>th</sup>, 2008, to consider the recommendation of the Tender Evaluation Committee. The meeting of the 8<sup>th</sup> deferred consideration of the matter to the following day so as to allow members to be informed whether there were funds for the project; and to allow members who did not have copies of the technical and commercial evaluation, to receive and read it.

The Tender Committee resumed its meeting on October 9<sup>th</sup>, 2008. At this meeting the committee embarked on additional evaluation exercise of all the bids. After scrutinizing the bids, the race came down to a contest between the Successful Bidder and the Applicant. The committee was not able to reach a consensus on which of the two bidders to award the contract to, and consequently decided to vote on the matter. As a result of the voting, in which the Applicant received two, and Custom General Construction Ltd six votes, it was resolved that the award should be given to Custom General Constructions Ltd.

The Board notes that according to the minutes of the meeting Mr. Omuya, who was a member of the Evaluation Committee, participated in the meeting of the Tender Committee. Mr. D.M Kamau, the Acting District Works Officer, who had also participated in the Evaluation Committee meetings, also attended the meeting.

The Board finds that both these officers contradicted the recommendations which they had made. In the case of Mr. Omuya, he presented information regarding the Applicant's role in the Mash Park Hotel, which was not part of the tender documents. In the case of Mr. Kamau, he informed the committee that he did not feel that the Applicant could not complete the works on schedule, whereas, in his capacity as a member of the evaluation committee, he had recommended that the Applicant be awarded the contract.

The Board further finds that the Tender Committee acted contrary to the Regulations by carrying out evaluation of the tenders. The function of evaluating bid is given to evaluation committees in accordance with Regulation 16.

In addition, Regulation 11, which defines the role of tender committees, provides as follows:

***"11(1) In considering submissions made by the procuring unit or evaluation committees, the tender committee may-***

***(a) approve a submission; or***

***(b) reject a submission with reason; or***

***(c) approve a submission, subject to minor clarifications by the procuring unit or evaluation committee.***

***(2) The committee shall not-***

***(a) modify any submission with respect to the recommendations for contract award or in other respect;***

***(b) reject any submission without justifiable reasons."***

The Board further finds that the Tender Committee used the wrong procedure in coming to the decision to award the contract to the Successful Bidder. Section 12(3) provides that the decisions of the committee are to be reached by consensus, and where that is not possible, then they may resort to voting. The decision whether it is by way of consensus or voting can only be in relation to the recommendation referred to it by the Evaluation Committee in respect to an award, and not as to a choice between two bidders.

The Board finds the decision, wrong in terms of procedure as it was based on criteria that were not included in the tender documents. In particular, consideration of incomplete works by the Applicant was not a criterion to be used in evaluating bidders. If at all, the bidders were required to indicate if they were undertaking works of a similar nature, which would help the Procuring Entity to determine the ability of the bidder to carry out the proposed contract.

The Board further finds that the evaluation committee acted correctly in evaluating the tenderers, using parameters which were disclosed in the tender documents. However, this action was compromised by their decision to allow a bidder who should otherwise have been disqualified at the preliminary stage to proceed to the technical evaluation stage. Moreover, by admission of the District Procurement Officer that they were under "orders from above," the whole process cannot be seen to have been transparent. Furthermore, the fact that the District Procurement Officer and the District Works Officer, participated in the tender evaluation and the tender committee meetings, in which they

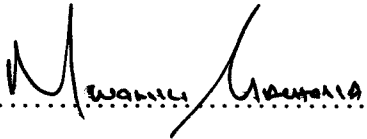


gave contradictory decisions their actions are not just in breach of regulations, but as well, makes the whole process opaque.

After carefully considering this matter the appeal succeeds and the award of the tender is hereby annulled.

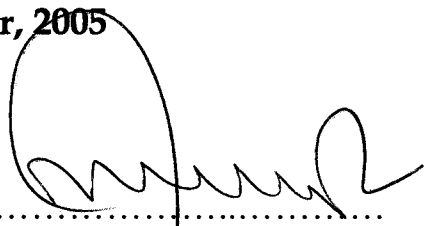
The Procuring Entity may retender.

**Dated at Nairobi on this 25<sup>th</sup> day of November, 2005**



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**Signed Chairman**



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**Signed Secretary**

