

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 38/2009 OF 2009**

**BETWEEN**

**ALFATECH CONTRACTORS LIMITED .....APPLICANT**

**AND**

**KENYA NATIONAL  
HIGHWAYS AUTHORITY .....PROCURING ENTITY**

Review against the decision of the Tender Committee of the Kenya National Highways Authority (KenHA), Procuring Entity dated 23<sup>rd</sup> September, 2009 in the matter of Tender No.KeNHA/3/2009 for Proposed Office Partitioning at Blue Shield Towers.

**BOARD MEMBERS**

Mr. P. M. Gachoka	-	Chairman
Ms. Judy Guserwa	-	Member
Eng. C. A. Ogut	-	Member
Amb. C. M. Amira	-	Member
Ms. Natasha Mutai	-	Member

**IN ATTENDANCE**

Mr. C. R. Amoth	-	Secretary
Ms. Kerina A. Rota	-	Secretariat
Mr. Gilbert Kimaiyo	-	Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Alfatech Contractors Limited**

Mr .Nelson A. Havi - Advocate  
Ms. Carol Mwaura - Advocate

### **Procuring Entity, Kenya National Highways Authority**

Mr. Felix K. Koske - Procurement Manager  
Ms. N. Odingo Kajwang' - Legal & Corporate Affairs  
Manager  
Eng. J.O. Otiato - Regional Manager  
Mr. Andrew Lusaka - Procurement officer

### **Interested Candidates, Flooring & Interiors**

Mr. Wahome Gatonga - Director  
Mr. Peter Keya - Director

### **Magic General Contractors**

Ms.Hellen Wanjohi - Operations Manager

## **BOARD'S DECISION**

Upon hearing the representations of the parties and Interested Candidates before the Board and upon considering the information in all documents before it, the Board decides as follows: -

## **BACKGROUND OF AWARD**

The tender No KeNHA/3/2009 for Proposed Office Partitioning for KenHA was advertised by the Procuring Entity on 21st August, 2009. The tender closed/opened on 11th September, 2009 in the presence of the bidders' representatives.

The following bidders submitted their bids:-

- i) M/S Centurion Engineers & Builders.
- ii) M/s Lunao Enterprises
- iii) M/s Alfatech Contractors Ltd
- iv) M/s Tulsi Construction Ltd
- v) M/s Les Amis Ltd
- vi) M/s Flooring Interior Ltd
- vii) M/s Apex Projects Ltd
- viii) M/s Magic General Contractors Ltd
- ix) M/s Vee Vee Enterprises Ltd
- x) M/s Bewa Wholesalers Ltd
- xi) M/s Limelight Creations Ltd
- xii) M/s Newlink General Contractors

## **EVALUATION**

Prior to detailed evaluation, the bids were checked for responsiveness and completeness. The following evaluation criteria were used:-

- i) Registered in Category 'D' & above
- ii) Similar works & proof
- iii) Equipment
- iv) Personnel

- v) Access to credit
- vi) No litigation history
- vii) Filled business questionnaire
- viii) PIN certificate
- ix) VAT certificate
- x) Tax Comp certificate
- xi) Bid security
- xii) Form of tenders

The following bidders were disqualified

- i) M/S Centurion Engineers & Builders
- ii) M/s Lunao Enterprises-
- iii) M/s Alfatech Contractors Ltd
- iv) M/s Les Amis Ltd
- v) M/s Apex Projects Ltd
- vi) M/s Bewa Wholesalers Ltd
- vii) M/s Limelight Creations Ltd
- viii) M/s Newlink General Contractors

### **TECHNICAL EVALUATION**

The following bidders qualified for technical evaluation:

NAME OF BIDDER	BIDDER NO.	TENDER SUM
M/s Tulsi Construction Ltd	7	37,209,624.00
M/s Flooring Interior Ltd	6	40,800,000.00
M/s Magic General Contractors Ltd	11	42,000,000.00
M/s Vee Vee Enterprises Ltd	10	43,477,509.92

The above four responsive bidders were checked for;

- a. Whether on-going projects are behind schedule and if so without any approved extension of time.
- b. Whether the bidder has been served with a default notice on on-going projects.
- c. Authenticity of the submitted documents
- d. Technical compliance

M/s Tulsi Construction Limited was further disqualified, while M/s Flooring & Interior Ltd, M/s Magic General Contractors Ltd, M/s Vee Vee Enterprises Ltd qualified for financial evaluation

### **FINANCIAL EVALUATION**

For the financial evaluation, bidders M/s Flooring & Interior Ltd, M/s Magic General Contractors Ltd, and M/s Vee Vee Enterprises Ltd were subjected to the following:

- i) Comparison in their deviations from the Quantity Surveyor's estimates.
- ii) Checking of arithmetic errors.
- iii) Comparison of unit rates for major items of work.
- iv) Clarification on error adjustment where the bidders were sent letters seeking concurrence on the adjustment procedure.

### **RECOMMENDATION**

The Tender Committee awarded the tender to the lowest tender, submitted by M/s Flooring Interior Ltd in the sum of Kshs 40,800,000.00 (Kshs. Forty Million Eight Hundred Thousand Only) .

On 23rd September, 2009, the Procuring Entity notified both the successful and unsuccessful bidders.

### **THE REVIEW**

This Request for Review was lodged by Alfatech Contractors Ltd on 6th October, 2009 against the decision of the Tender Committee of Kenya National Highways Authority in the matter of Tender No. KeNHA/3/2009 for Proposed Office Partitioning at Blue Shield Towers.

The Applicant was represented by Mr Nelson A. Havi, Advocate while the Procuring Entity was represented by Ms. N. Odingo Kajwang, Legal and Corporate Affairs Manager. Interested Candidates, Ms. Flooring & Interiors were represented by Mr. Wahome Gatonga, Director and Ms Magic General Contractors Ltd was represented by Ms. Hellen Wanjohi.

The Applicant has raised seven grounds of Appeal and urged the Board to make the following orders:

1. That the award of the tender dated 23rd September 2009 be annulled;
2. That the Board substitutes the aforesaid decision/award of the tender dated 23rd September 2009 with the Board's decision awarding the tender to ALFATECH CONTRACTORS LIMITED as the lowest evaluated bidder;

3. That the Director-general, or anyone authorized by the Director-General, do inspect, the records and accounts of the 1st Respondent and 2nd Respondent relating to this tender;
4. Any other directions that the Board may deem fit to grant in the circumstances;
5. That the payment of costs of this review by the 1st and 2nd Respondents.

**GROUND 1, 2 and 3: Breach of Section 66 & Regulation 50(3)**

These grounds have been consolidated as they raise similar issues.

The Applicant informed the Board that it had filed this Review on the 6<sup>th</sup> October, 2009 in respect of award of tender No KenHA/3/2009 for the Office Partitioning for KenHA to the 2<sup>nd</sup> Respondent Ms Flooring & Interiors. It alleged that the Procuring Entity rejected its bid on the ground that it did not meet the minimum requirements. It stated that it would demonstrate to the board that its bid met all the requirements.

The Applicant submitted that based on the ranking analysis by the Procuring Entity, its bid of Kshs. 36,717,315.00 was lower than that of the successful candidate which had quoted Kshs. 40,800,000.00 It alleged that the Procuring Entity erred in the award of tender by failing to award the tender to it, despite it having submitted the lowest evaluated bid contrary to Regulation 50(3) of the Public Procurement

and Disposal Regulations, 2006 (Hereinafter referred to as "the Regulations"). It submitted that the Procuring Entity infringed on the objectives of Section 2 of the Public Procurement and Disposal Act, 2005 (Hereinafter referred to as "the Act") in that the tender evaluation process and award lacked integrity and fairness, transparency and accountability. It further submitted that by awarding the tender to the successful bidder, the Procuring Entity did not maximize economy and efficiency. It stated that the Procuring Entity did not demonstrate public confidence in the entire tendering process.

The Applicant further submitted that although it had not filled the name of the addressee and the addressor in the form of tender, it was clear to whom the offer was directed to and by whom.

The Applicant stated that the tax compliance certificate it had submitted with the tender documents was for M/s Mutec General Contractors Limited. It further stated that on 18<sup>th</sup> February, 2009 it changed its name from Mutec General Contractors Ltd to Alfatech Contractors Ltd and it had included the certificate of change of name in its tender document. It argued that the change of name did not change the legal entity. It further argued that the tax compliance certificate was for a period of 6 months, and was valid during the tenure of the subject tender.

The Applicant admitted that the certificates of completion attached to its Request for Review were not part of the original tender documents submitted together with its bid document. However, it stated that it had given a list together with photographs of its past projects. In



conclusion, the Applicant argued that its bid was responsive and should have been awarded the tender if the evaluation was done in accordance with the tender documents, the Act and the Regulations.

In response the Procuring Entity stated that the evaluation of the bids was done using the provisions and criteria set out in the tender document at Section II and in accordance with Sections 52 and 66 of the Public Procurement and Disposal Act 2005. It further submitted that the Applicant was disqualified as it did not satisfactorily fill the Form of Tender which was a mandatory requirement. This indeed was contrary to 64(1) of the Act and Regulation 47(1) (c). It stated that the Form of Tender did not have the details of the addressee, addressor and was not dated. It submitted that the Applicant also failed to provide proof of works of similar nature and complexity previously undertaken. In addition, it submitted that the Applicant had attached copies of certificates of completion of works in the Request for Review which were not in its original tender document. The Procuring Entity argued that the Applicant did not provide evidence of adequate equipment as required. It submitted that the Applicant failed to attach a valid Tax Compliance Certificate in the name of Alfatech Contractors Ltd. Instead it had included the Tax Compliance Certificate for Mutec General Contractors Ltd.

The Interested Candidates, M/s. Flooring & Interiors and M/s. Magic General Contractors who attended the hearing did not make any submissions on the matter but left it to the Board to determine.

The Board has considered the submissions of all parties and examined the documents presented before it. The issue to be determined by the Board is whether the Applicant's bid was properly evaluated pursuant to regulation 47 (1) which provides as follows:

*Upon opening of tenders under section 60 of the Act, the Evaluation committee shall first conduct a preliminary evaluation to determine whether-*

- (a) The tender has been submitted in the required format;*
- (b) .....*
- (c) The tender has been signed by person lawfully authorised to do so;*
- (d) .....*
- (e) .....*
- (f) All required documents and information have been submitted; and*
- (g) .....*

The Board notes that the Applicant was disqualified at the preliminary stage due to the following reasons: it did not demonstrate that it had adequate equipment; its Form of tender was not filled properly; no proof of similar magnitude and complexity of works done; and the authenticity of Tax Compliance Certificate.

The Board has examined the Form of Tender submitted by the Applicant. The Board notes that the Applicant partly filled the Form of Tender, making an offer to undertake the works at Kshs. 36,717,315.00. However the Board notes that the Applicant's form of tender did not

have details of the addressee, the addressor and was not dated. The Board further notes that the Instruction to tenderers required bidders to fill in all details. The Board holds that the Form of Tender is the document through which the offer is communicated to a specified employer. It is the offer that the Procuring Entity would consider and either accept or reject. The Board finds that the Form of Tender is a very vital document which communicates very essential information, based on which a contract is created. In this case the Applicant did not fill in the Form of Tender the name of the Procuring Entity, in its name as the addressee nor did it fill in the date. Consequently, the Board finds that these omissions were serious and hence the Procuring Entity was right in disqualifying the Applicant at the Preliminary Evaluation stage.

With regard to the issue of provision of proof of similar magnitude and complexity of works done, the Board notes that this was a requirement in the tender advertisement of 26<sup>th</sup> August, 2009 and under clause 1.7 (c) of the instructions to tenderers. Bidders were required to list the Project name, name of the client, contact person, type of work performed, the year of completion and the value of the contract. The Board has examined the Applicant's tender document and noted that the Applicant submitted information covering a list of works of similar nature, volume over the last three years and other details of ongoing works or committed works, including expected completion date only. The Board notes that the Applicant attached certificates of completion of works in its Request for Review and which it did not submit with its bid at the appropriate time. The Board notes that although the bidder

listed its past completed projects, it failed to provide evidence to prove such claims.

The Board has examined the Tax Compliance Certificate submitted by the Applicant with its bid. The Board observes that it bears the name "M/s Mutec General Contractors Ltd" and not Alfatech Contractors Ltd. The Board further notes that on 18th February, 2009 M/s Mutec General Contractors Ltd changed its business name to Alfatech contractors Ltd. The Board notes that this tender was floated on 26th August, 2009. The Board further notes that the Tax compliance certificate submitted by the Applicant is dated 23<sup>rd</sup> April, 2009 in the name of "Mutec General Contractors Limited" and was valid up to 23<sup>rd</sup> October, 2009. The Board observes that since the change of name had already been done on 18<sup>th</sup> February, 2009, the Applicant had time to apply for the appropriate tax compliance certificate from Kenya Revenue Authority in its own name.

In the circumstances, the Board finds that the Procuring Entity acted appropriately by disqualifying the Applicant at the preliminary evaluation stage pursuant to Regulation 47.

Accordingly, these grounds fail.

**GROUND 4: Breach of Sections 30(3) and 42(1) of the Act**

The Applicant alleged that the sum awarded in the tender in question was not procured at the prevailing real market price. It further alleged that the amount of tender awarded was higher than it would have been

contrary to Section 30(3). The Applicant further argued that there was collusion contrary to Section 42(1) of the Act.

In response the Procuring Entity stated that the awarded tender price was 10.38 % below the engineers estimate, and that this estimate was prepared professionally by Chief Quantity Surveyor. It stated that Section 30(3) provides as follows:

***“Standard goods, services and works with known market prices shall be procured at the prevailing real market price”***

Further it reiterated that Section 30(3) of the Act could not be breached since this was a complex purchase not envisaged by Section 30(3) of the Act. It concluded that there was no collusion as alleged by the Applicant since the onus was on the Applicant to prove this issue.

The Board has carefully examined the documents before it and the parties' submissions. The Board observes that this was an open tender where each bidder quoted its price hoping that it was the best price. The Board notes that the Applicant as it has been observed was disqualified at the preliminary evaluation stage for failure to comply with mandatory requirements and therefore its price could not have been the lowest evaluated price. With regard to breach of Section 42(1) of the Act, the Board notes that the Applicant has not provided any evidence on the allegation of collusion before the Board.

Accordingly this ground fails.

## **GROUND 5 AND 6- Breach of Section 64 of the Act.**

These grounds have been combined as they raise similar issues.

The Applicant alleged that it conformed to all the requirements in the tender documents and that if there were any deviations, they were minor deviations that do not materially depart from the requirements set out in the tender documents. It submitted that the same could be corrected without affecting the substance of the tender in accordance with Section 64 of the Act.

In response, the Procuring Entity stated that the Applicant was non-responsive as per Regulations 47(1) and the Evaluation Committee rejected its tender in accordance with Regulation 47 (2) and 48(1), due to lack of proof of works of similar magnitude and complexity and failure to demonstrate possession of adequate equipment which was crucial for the performance of the works.

As the Board has already held in grounds 1,2 and 3, the Applicant was disqualified at preliminary stage of evaluation for failure to meet the mandatory requirements. The omissions in the Applicant's tender documents were material deviations and not minor deviations as argued by the Applicant.

Accordingly this ground fails.

**GROUND 7**

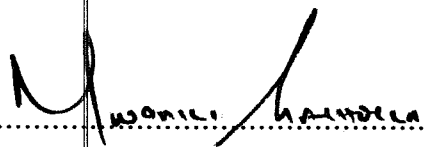
The Applicant alleged that in participating in the tender, it suffered loss of business and incurred costs due to the decision arrived at by the Procuring Entity.

In response, the Procuring Entity stated that it evaluated and ranked the bidders in accordance with Regulation 50(3). It argued that the award was made to the right candidate pursuant to Section 66(4) of the Act. It submitted that this was an open tender in which bidders were aware of the costs involved. It further submitted that Clause 1.10 of the tender documents provided that bidders would meet all costs associated with the preparation and submission of their tenders.

The Board notes that the costs incurred by tenderers at the time of tendering are commercial risks borne by people in business; this being an open tender where risks are involved, each bidder carries its own costs.

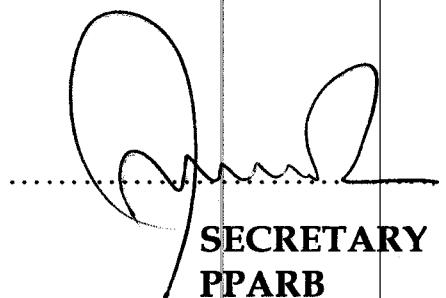
Taking into considerations all the above, this Request for Review fails and is hereby dismissed. The Procurement Process may proceed.

**Dated at Nairobi on this 26<sup>th</sup> day of October, 2009.**



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**CHAIRMAN  
PPARB**



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**SECRETARY  
PPARB**

