

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 66/2010 OF 10<sup>TH</sup> DECEMBER, 2010**

**BETWEEN**

**JIPSY CONTRACTORS LIMITED .....APPLICANT**

**AND**

**NATIONAL HOUSING CORPORATION.....PROCURING ENTITY**

Review against the decision of the Tender Committee of the National Housing Corporation dated 26<sup>th</sup> November, 2010 in the matter of Tender No. NHC/TECH/282/2010 for Proposed EPS System Factory at Mavoko.

**BOARD MEMBERS PRESENT**

Mr. P.M. Gachoka	-	Chairman
Mr. Joshua W.Wambua	-	Member
Mr. Sospeter Kioko	-	Member
Eng. C. A. Ogut	-	Member
Ms. Natasha Mutai	-	Member

**IN ATTENDANCE**

Mr. C.R. Amoth	-	Secretary
Mr. P. Wangai	-	Secretariat

### **Applicant, Jipsy Contractors Limited**

- Mr. Z. Ngome - Advocate, Wangai Nyuthe & Co.  
Advocates
- Mr. J. K. Ngacha - Director

### **Procuring Entity, National Housing Corporation**

- Mr. K. N. Nyabare - Legal Officer
- Mr. H. K. Ruto - Supervisor
- Mr. J. B. Ogolla - Technical Manager
- Mr. Pius Omullo - Quantity Surveyor
- Ms. Caroline Okul - Procurement Assistant

### **Interested Parties**

- Mr. Andrew Wandabwa - Advocate for Ernie Campbell & Co. Ltd
- Mr. P. L. Haldi - Director, Ernie Campbell & Co. Ltd
- Mr. Gopal Vagjiani - Director, Ernie Campbell & Co. Ltd
- Mr. Rajesh D. Tathad - Finance Manager, N. K. Brothers

### **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**

This tender was advertised by the Procuring Entity on 12<sup>th</sup> August, 2010. The tender was for Construction of the Proposed EPS Factory at Mavoko. The

tender closed/opened on 3<sup>rd</sup> September, 2010 in the presence of bidders' representatives. The tenders were received from the following firms:

S/No.	Tenderer	Tender Sum (Kshs.)
1.	Caltic International Engineering (K) Ltd	275, 748, 590.00
2.	EPCO Builders Ltd	267, 124, 857.00
3.	Ernie Campbell & Co. Ltd	256, 785, 377.00
4.	Jipsy Contractors Ltd	237, 651, 085.00
5.	L. M. Patel & Co. Ltd	274, 258, 372.00
6.	Magic Construction Co. Ltd	309, 000, 000.00
7.	Mavji Construction Co. Ltd	273, 497, 727.00
8.	N. K. Brothers Ltd	309, 909, 101.00
9.	Ongata works Ltd	263, 913, 799.00
10.	Tulsi Construction	279, 830, 872.00
11.	Twiga Construction	275, 000, 000.00
12.	Vishva Builders	260, 800, 000.00
13.	Warren Building & Construction Ltd	361, 667, 592.12

### **Evaluation**

Evaluation was conducted in three stages namely preliminary, technical and financial evaluation stages.

### **Preliminary Evaluation**

This was based on the following mandatory requirements:

1. Proof of current and past factory or like structures
2. Bid bond of Kshs. 2, 000, 000.00
3. Proof of sound financial standing
4. Tax compliance certificate

Seven bidders namely, Vishva Builders, Warren Building & Construction Ltd, Mavji Construction Co. Ltd, L. M. Patel & Co. Ltd, Twiga Construction, N. K. Brothers Ltd and Caltic International Engineering (K) Ltd were disqualified at the preliminary evaluation stage for failing to comply with some of the above requirements. The other six bidders were found responsive and therefore qualified for the technical evaluation.

### **Technical Evaluation**

The technical evaluation was based on the following criteria:

1. Constitution or legal status (Incorporation certificate)
2. Total annual volume of construction works performed in the last seven
3. Work performed as main contractor on works of similar nature and volume over the last 3 years
4. Major items of contractor's equipment proposed for carrying out the works
5. Qualification and experience of key personnel
6. Financial reports for the last 3 years
7. Evidence of access to financial resources
8. Name, address, telephone, telex and facsimile of the banks that they may provide for reference
9. Statement of compliance with Clause 1.2 of the Instruction to Tenderers
10. Proposed program
11. Confidential business questionnaire

A summary of the technical scores was as follows:

<b>S/No.</b>	<b>Tenderer</b>	<b>Technical scores</b>
1.	Ernie Campbell & Co. Ltd	51.3
2.	Ongata works Ltd	48.5

3.	EPCO Builders Ltd	46.6
4.	Tulsi Construction	44.2
5.	Magic Construction Co. Ltd	43.7
6.	Jipsy Contractors Ltd	34.2

Based on the above technical scores, Jipsy Contractors Ltd was the bidder who was disqualified at the technical evaluation stage for failing to attain the cut-off mark which was 40 out of 60 marks.

### **Financial Evaluation**

This involved correction of errors and computation of financial score using the following formula:

$$FM=40 \times LTP/TP$$

Where;

FM = Financial Proposal mark

TP= Tender price under consideration

LTP= Lowest evaluated tender price

40 = maximum marks that can be awarded

The combined technical and financial scores were combined and the results were as follows:

S/No.	Tenderer	TM	FM	COMBINED SCORES	RANKING
1.	Ernie Campbell & Co. Ltd	51.3	40	91.3	1
2.	Ongata Works Ltd	48.5	38.92	87.42	2
3.	EPCO Builders Ltd	46.6	38.48	85.1	3
4.	Tulsi Construction	44.2	36.71	80.91	4
5.	Magic Contractors	43.07	33.24	76.94	5

In view of the above information, the Evaluation Committee recommended the award of the tender to Ernie Campbell Ltd at Kshs. 256, 785, 377.00.

In its meeting held on 28<sup>th</sup> October, 2010, the Tender Committee concurred with the recommendations of the Evaluation Committee and awarded the tender to Ernie Campbell & Co. Ltd.

Notification letters to the successful and the unsuccessful bidders are dated 26<sup>th</sup> November, 2010.

### **THE REVIEW**

This Request for Review was lodged on the 10<sup>th</sup> day of December, 2010 by Jipsy Contractors Limited against the decision of the Tender Committee of National Housing Corporation dated 26<sup>th</sup> November, 2010 in the matter of Tender No.NHC/TECH/282/2010 for Proposed EPS System Factory at Mavoko.

The prayers of the Applicant are that:-

“(1). That the award of the tender to **ERNIE CAMPBELL & COMPANY LIMITED** be nullified and the applicant be declared the winner.

(2). ALTERNATIVELY the tender be advertised and be done afresh.

(2). Costs be awarded to the applicant”.

The Applicant was represented by Mr. Z. Ngome, Advocate while the Procuring Entity was represented by Mr. K. N. Nyambare. The interested candidates present included Ernie Campbell & Co. represented by Mr. Andrew Wandabwa, Advocate.

The Applicant in its Request for Review raised 8 (eight) grounds of review and the Board deals with them as follows:-

**Grounds 1, 4 and 5: Breach of Section 66(4) of the Act**

These grounds have been consolidated as they raise similar issues.

The Applicant alleged that the Procuring Entity breached Section 66(4) of the Public Procurement and Disposal Act (herein after referred to as the Act) by failing to award the tender to the Applicant despite having the lowest priced bid. It argued that it had complied with all the requirements of the tender and was eligible for the award of the tender and, as such, it was incorrect for the Procuring Entity to award the tender to the second lowest bidder.

In response, the Procuring Entity stated that the Applicant was disqualified at the Technical Evaluation stage after scoring 34.20 marks while the minimum required scores was 40 marks in order to proceed to the Financial Evaluation stage. It averred that the Applicant failed to attain the cut-off score of 40 marks for failing to provide the following information:

- i. Evidence of access to financial resources;
- ii. Statement of compliance under Clause 1.2 of the Instruction to Tenderers;
- iii. Detailed tasks in the program of works;
- iv. Documentary proof of certificates for key personnel;
- v. Necessary documents for work performed as main contractor in works of similar nature in the last three years; and
- vi. Proof of availability of all necessary equipment

It concluded that the Applicant therefore could not have been the lowest evaluated bidder as envisaged under Section 66(4) of the Act. The Procuring Entity contended that the award of the tender was made to the lowest evaluated bidder.

On its part, the interested candidate, Ernie Campbell & Co. Ltd, stated that the lowest bid price offered by a bidder is not of necessity the lowest evaluated bid as envisaged under Section 66(4) of the Act. It argued that upon evaluation, the Procuring Entity awarded the tender to the lowest evaluated bid, who met all the tender requirements. It submitted that the Applicant, having failed to meet the requirements of the technical evaluation stage, could not emerge as the lowest evaluated bidder.

The Board has carefully examined the documents submitted before it and the parties' submissions.

The Board notes that the Tender Documents provided for the evaluation to be done in three stages namely Preliminary, Technical and Financial evaluation stages. The Board further notes that the Tender Document under clause 13.1 of Appendix 'A' provided for the minimum score of 40 marks at Technical Evaluation stage in order to proceed to financial evaluation stage. The make-up of the 40 marks was as indicated in the Qualification Information under Section D of the Tender Documents.

On examination of the Tender Evaluation Report, the Board finds that the evaluation was carried out in these three stages with the following results:- out of the thirteen bidders who submitted their tenders, six bidders including the Applicant and Successful Bidder were found to be responsive at the preliminary evaluation stage and proceeded to technical evaluation. The



Applicant was disqualified at the technical evaluation stage after scoring 34.2 marks which was below the cut-off score of 40 marks.

The Board also notes the Tender Document's Clause 6.1 on Award of Tender provides as follows:-

*"Subject to Clause 6.2, the award of the Contract will be made to the tenderer whose tender has been determined to be substantially responsive to the tendering documents and who has offered the lowest evaluated tender price, provided that such tenderer has been determined to be (a) eligible in accordance with the provision of clause 1.2, and (b) qualified in accordance with the provisions of clause 107 and 1.8".*

The Board finds that this clause requires the award to be made to the lowest evaluated responsive bidder provided that the bidder has been determined to be eligible in accordance with the provisions of clause 1.2 of the Tender Documents. Clause 1.2 of the Tender Documents states that:-

*"All tenderers shall provide the Qualification information, a statement that the tenderer (including all members of a joint venture and subcontractors) is not associated, or has not been associated in the past, directly or indirectly, with the Consultant or any other entity that has prepared the design, specifications, and other documents for the project or being proposed as Project Manager for the Contract. A firm that has been engaged by the Employer to provide consulting services for the preparation or supervision of the Works, and any of its affiliates, shall not be eligible to tender".*

On examination of the Applicant's Original Tender Document, the Board finds that the Applicant did not provide a statement of compliance in accordance with the requirements of clause 1.2 of the Instructions to Tenderers whether in form of a signed Statement or confirmation of compliance under clause 1.9 of the Qualification Information in Section D of the Tender Documents. The Applicant at the hearing confirmed that it had not completed this section under clause 1.9 of the Qualification Information in Section D of the Tender Documents.

Subsequently, the Board finds that even if the Applicant at technical evaluation stage had scored the minimum mark required to proceed to financial evaluation, the tender would not have been awarded to it because it failed to provide a statement of compliance as required under clauses 1.2 and 6.1 of the Tender Documents.

With regard to the technical evaluation in general, the Board finds that that the evaluation was done using the criteria set out at Clause 13 of Appendix 'A' and the Qualification Information as set out at Section D of the Tender Documents.

Accordingly, these grounds of appeal fail.

### **Grounds 2 and 3: Breach of Section 67(2) of the Act**

These grounds have been consolidated as they raise similar issues regarding notification of award.

In these grounds, the Applicant alleged that the Procuring Entity breached Section 67(2) of the Act by failing to notify the Applicant of the award of the tender until 8<sup>th</sup> December, 2010 when it collected a notification letter from the

Procuring Entity's office. The Applicant contended that the delay in notifying it was intended to deny it an opportunity to lodge an appeal within the 14 days appeal window.

In its response, the Procuring Entity denied that it had breached Section 67(2) of the Act. It stated that the Applicant was duly notified that its tender was not successful by a letter dated 26<sup>th</sup> November, 2010 which was sent by post to the postal address given by the Applicant in its bid documents. It further stated that the Applicant was only issued with a copy of the notification letter (when its representative visited the offices of the Procuring Entity) because the original had been posted to it. It concluded by stating that it had no intention of defeating the Applicant's right to appeal.

The Interested Party in its submission stated that under Section 67(2) of the Act, the obligation is to notify the bidders in writing. Having done this, the Procuring Entity had fully discharged its obligation.

The Board has carefully examined the documents submitted before it and the parties' submissions.

The Board notes that all the notification letters to successful and unsuccessful bidders are dated 26<sup>th</sup> November, 2010. The Board also notes the Procuring Entity's admission at the hearing that these letters were dispatched by ordinary post and not by registered post.

As the Board has held severally in its past decisions on the issue of notification, the onus is on the Procuring Entity to demonstrate that notification letters were indeed dispatched and that dispatch either by courier or by registered mail removes doubt as to whether the letters were indeed dispatched.

That notwithstanding, the Board finds that, in this instance, the Applicant was not prejudiced by this allegation because having picked its letter on 8<sup>th</sup> December, 2010, it managed to lodge its appeal on 10<sup>th</sup> December, 2010, which was within the appeal window. This finding is consistent with the Board's decision in Application No. 19/2008 dated 18<sup>th</sup> July, 2008 between Pyramid Construction Ltd and Municipal Council of Eldoret; and Application No.55/2010 dated 3<sup>rd</sup> November, 2010 between Motomo Metal Fabricators Ltd and Kenya National Highways Authority among others.

Accordingly, Board finds that the Applicant has not suffered any prejudice.

### **Grounds 6,7, 8**

These are general statements and not grounds of appeal as they are not supported by any breach of the Act/Regulations as envisaged by Regulation 72(2) of the Public Procurement & Disposal Regulations, 2006.

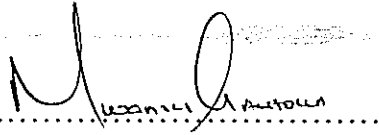
Accordingly, the Board need not make any findings on these grounds of appeal.

The Board notes that the Applicant claimed that it had incurred some costs in anticipation of award of this contract. On this issue, the Board finds that this alleged action by the Applicant was premature and as such the Applicant should bear any costs arising from such premature actions.

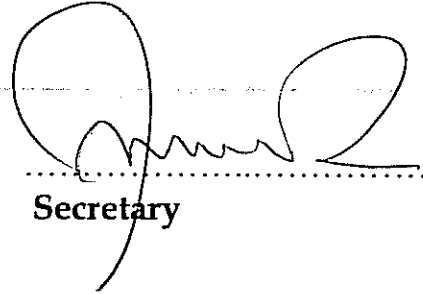
Therefore, taking into account all the foregoing matters, the Application for Review fails and is hereby dismissed.

The Board orders, pursuant to Section 98(2) of the Act, that the procurement process may continue.

**Dated at Nairobi on this 10<sup>th</sup> day of January, 2011**

A handwritten signature in black ink, appearing to be 'M. Mutahi Ngunjiri', written over a horizontal dotted line.

**Chairman**

A large, stylized handwritten signature in black ink, written over a horizontal dotted line.

**Secretary**

