REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 53/2011 OF 16TH DECEMBER, 2011

BETWEEN

NYATAMA CONSTRUCTION CO. LTD.....APPLICANT

AND

DISTRICT COMMISSIONER, NDHIWA DISTRICT.....PROCURING ENTITY

Review against the decision of the Tender Committee of Ndhiwa District dated 6th December, 2011 in the matter of Tender No. NDH/HA/CONST/2/2011-2012 for Construction of District Probation office block.

BOARD MEMBERS PRESENT

Ms. J. Guserwa	-	Sitting in for the Chairman
Eng. C. A. Ogut	-	Member
Ms. N. Mutai	-	Member
Mr. A. Okola	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Mr. N.M. Soita	-	Secretariat
Ms. M.K. Namadi	-	Secretariat

PRESENT BY INVITATION

Applicant, Nyatama Construction Co. Ltd

Mr. Fred Gura Oloo - Managing Director

Procuring Entity, District Commissioner, Ndhiwa District

Mr. Solomon Onditi - District Supply Chain Management Officer

Mr. Jacob Opinya - District Probation Officer

BOARD'S DECISION

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

BACKGROUND

Advertisement

The Ministry of Home Affairs through the District Commissioner's office, Ndhiwa advertised tender No. NDH/CONST/2/2011-2012 for construction and completion of Probation office in Ndhiwa Township through Notice Board advertisements at the District Commissioner's notice Board.

Closing/Opening:

The tender closed and opened on 10th November 2011 with the following six tenderers having responded by submitting their tenders:

Table 1: List of Tenderers

S/No.	Tenderer	Bid amount (Ksh)
1	Nyatama Construction Co. Ltd	6,716,510.20
2	Kongoro Enterprises	6,996,250.00
3	Wedewo Machinaries Enterprises	8,334,576.80
4	Magman Ltd	7,823,074.80
5	Hartland Enterprises Ltd	8,234,132.40
6	Elfrenic Building Services	7,261,609.28
Engineer's Estimates		6,569,231.00

EVALUATION

The received tenders were subjected to evaluation on responsiveness based on the following parameters:

1. Proof of experience in similar complexity of works
2. Proof of financial capability
3. Properly filled in form of tender
4. Proof of current registration with Ministry of Public Works in category F and above
5. Valid Tax compliance certificate
6. Deviation of not more than +/- 10% from the official estimates
7. Valid bid security equivalent to Ksh.200, 000.00 from a bank.

Results of the evaluation on responsiveness were as summarized in table 2 below:

Table 2: Results of evaluation on responsiveness

Tenderer	Category F & above	Bid Bond	Form of Tender	Within +/-10%	Tax compliant	Similar projects	Financial report	Scores	Remarks
Nyatama Const. Co. Ltd	√	√	√	√	√	×	√	6/7	Not Responsive
Kongoro Enterprises	√	√	√	√	√	√	√	7/7	Responsive
Wedewo Machinaries Enterprises	√	×	×	×	√	×	√	3/7	Not Responsive
Magman Ltd	√	×	√	×	√	×	×	3/7	Not Responsive
Hartland Enterprises Ltd	√	×	√	×	√	√	×	4/7	Not Responsive
Alfrenic Building Services	√	×	√	√	√	×	×	4/7	Not Responsive

Five tenderers were disqualified at this stage for not meeting all requirements. Only one tenderer M/s Kongoro Enterprises met all the requirements.

RECOMMENDATION

The Evaluation Committee recommended that M/s Kongoro Enterprises be considered for award of the contract at a tender sum of Ksh.6, 996,250.00 inclusive of all government taxes.

THE TENDER COMMITTEE DECISION

The Tender Committee at its meeting held on 6th December, 2011 approved award of the contract to M/s Kongoro Enterprises at Ksh. 6,000,000.00 being the available funds for the project. The Tender

Committee also resolved that the contractor be called for negotiation in order to accept the contract terms.

THE REVIEW

The Applicant, Nyatama Construction Co. Ltd lodged this Request for Review on 16th December, 2011 against the decision of the District Tender Committee of Ndhiwa District in Tender No. NDH/CONST/2/2011-2012 for construction of District Probation office block. The Applicant was represented by Mr. Fred Gura Oloo, Managing Director while the Procuring Entity was represented by Mr. Solomon Onditi, District Supply Chain Management Officer.

The Applicant requests the Board for the following orders:-

a) *The award of this tender to Kongoro Construction be cancelled.*
b) *Independent evaluation be done a fresh.*

Preliminary Issue

The Board notes that from the documents submitted to it, the contract between the Procuring Entity and the Successful Bidder has been signed; in which case the Board's jurisdiction to hear the application is in question as prescribed by Section 93(2) (c) of the Act.

The Board further notes that the said contract was signed on 22nd December, 2011, despite the Procuring Entity having been notified of the impending review and suspension of the procurement proceedings (under Section 94 of the Act) vide a notification letter dated 19th December, 2011 which was delivered by Fargo Courier as evidenced by

the recorded acknowledgment of receipt by 'Truphena' on 21st December, 2011 at 12.00 noon. At the hearing, the Procuring Entity confirmed that Truphena who signed for receipt of the Board's notification was the District Commissioner's secretary.

Taking into account the foregoing, the Board finds that the contract signed by the Procuring Entity was not in accordance with Section 68 of the Act, and accordingly, the Board had jurisdiction to hear the request for review.

At the commencement of hearing on 12th January, 2012, the Board noted that the Applicant was present but the Procuring Entity's representative was not and adjourned the hearing to 16th January, 2012. On resumption of hearing on 16th January, 2012, the Board inquired why the Procuring Entity was not present on 12th January, 2012 as notified by the Board's Secretary. The Respondent apologized and stated that they had not received the notification.

The Applicant raised three (3) grounds of review which the Board deals with as follows:-

GROUND 1: Breach of Section 66

The Applicant averred that the Procuring Entity breached Section 66 of the Act by not awarding it the tender in spite of it being the lowest tenderer and having met the requirements as set out in the form of invitations to tender.

It argued that the Successful Bidder, M/s Kongoro Enterprises, had been awarded the contract at Kes 6,000,000/= and not its quoted tender figure of Kes 6,996,250.00. The Applicant claimed that this was against Section 5.5 of Conditions to Tenderers in the Tender Documents.

In its response, the Procuring Entity submitted that all the bidders were equally evaluated and that the evaluation of the tenders was done according to the criteria set out in the Tender Document and the advertisement notice and no other criteria was used. It stated that the criteria used were to the extent possible, objective and quantifiable. It further stated that the evaluation committee recommended that the tender be awarded to the Successful Bidder at its tender figure of Kes 6,996,250/=; and that the Tender Committee reviewed the Evaluation Report and agreed with the recommendation to award the contract to the Successful Bidder but at Kes 6,000,000/= because that was what was available in the budget.

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

The Board notes, from the Tender Evaluation Report, that all the bidders were subjected to one evaluation stage namely, Responsiveness Evaluation contrary to what is expected by Regulation 47, 49 and 50 which require that evaluation be conducted in three stages of Preliminary evaluation, Technical evaluation and Financial evaluation. At this stage, bidders were evaluated on a Yes/No basis on seven parameters indicated below:

1. Proof of experience in similar complexity of works

2. Proof of financial capability
3. Properly filled in form of tender
4. Proof of current registration with Ministry of Public Works in category F and above
5. Valid Tax compliance certificate
6. Deviation of not more than +/- 10% from the official estimates
7. Valid bid security equivalent to Ksh.200, 000.00 from a bank.

The Board further notes that the Applicant was found to be non responsive for failure to meet one criterion, namely, the submission of proof of experience in similar complexity of works. In its evaluation report, the Evaluation Committee indicated that the Applicant was the lowest tenderer and met most of the conditions required but provided proof of two (2) similar works (ESP Ratanga Secondary and Pala Health Centre) which were ongoing within the district but which were not yet complete, were 80% completed and behind schedule. The evaluation report indicated that no certificate of completion of similar works was attached. The report further stated that the Applicant submitted a bank statement and not an audited financial report which led to doubts about its financial capability and management.

On reviewing the tender notice, the Board notes that the criteria for experience read "Proof of works similar Magnitude and Complexity undertaken in the last three years (attach completion certificates)".
On perusing the Applicant's submitted bid document, the Board finds that the Applicant attached a list of 7 works contracts undertaken in the last five years; the contract agreements for the two projects mentioned in the Tender Evaluation Report; a completion certificate from Sony for

painting works to a boiler in 2008; and a letter from Ministry of Health/DANIDA confirming that the Applicant had satisfactorily completed 7 construction works during the period of 1997 to 1998. The Board notes that the completion certificates required were for the last three years meaning 2009, 2010 and 2011. The certificates of completion provided by the Applicant were not sufficient to meet the requirement in the tender document. No completion certificate for similar works carried out in the last three years was submitted.

On perusing the Successful Bidder's submitted bid document, the Board finds that the Successful Bidder attached one completion certificate for construction of workshops at Lunga Youth Polytechnic dated 16th February, 2011.

On the issue of proof of financial capability, the Board finds that the Applicant submitted audited financial statements for 2009 and 2010, as well as bank statements from KCB for the period January, 2011 to 13th August, 2011, whereas, the Successful Bidder attached a cashflow projection for 12 months in the year 2012 without any audited financial statements or bank statements to confirm its financial capability as was required by the Information to bidders in the tender document.

Accordingly, the Board finds that the Procuring Entity did not evaluate the tenders in accordance with the criteria as set out in the Tender Documents and therefore breached Section 66 of the Act.

On the Applicant's allegation that the Successful Bidder was awarded the contract at Kes 6,000,000/= and not its quoted tender price of Kes

6,996,250/=, the Board notes that the Successful Bidder had indeed quoted a tender sum of Kes 6, 996,250/= and that the Tender Committee at its meeting held on 6th December, 2011 approved award to the Successful Bidder at a tender sum of Kes 6,000,000/= despite the Evaluation Committee having recommended that the contract be awarded to the Successful Bidder at its quoted tender sum of Kes 6,996,250/=.

The Board further notes that in awarding the tender at an amount lower than the tender sum, the Tender Committee resolved that the Successful Bidder be made to go for negotiation in order to accept the contract terms.

The Board notes the provisions of Regulation 11 (2)(a) of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the Regulations") which states as follows:-

"The tender committee shall not-

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

By awarding the contract at a tender sum that was not the Successful Bidder's quoted price and against the Evaluation Committee's recommendation, the Tender Committee contravened this Regulation.

In addition, the Board also notes the provisions of Section 59 (3) of the Act which states that a Procuring Entity shall not attempt to have the substance of a tender changed. The Board finds that by awarding the tender at a figure which was not the Successful Bidder's tender sum, the Procuring Entity breached this Section of the Act.

Further, the Board notes the provisions of Section 68(1) of the Act which prescribes that a contract shall be entered into based on the tender documents, the successful tender, any clarifications under Section 62 and any corrections under Section 63 of the Act. On perusing the Tender Evaluation Report, the Board does not find any clarifications sought by the Procuring Entity or any arithmetic corrections made under Section 63 of the Act to justify the changes in the contract award amount.

Accordingly, the Board finds that the Procuring Entity also breached Section 68(1) of the Act.

GROUNDS 2 and 3: Breach of Sections 54 and 55 of the Act

These grounds have been combined because they raise similar issues on the notice period and the mode of tender notice.

The Applicant averred that this being an open tender, the Procuring Entity breached the said Section of the Act by not allowing adequate time for preparation and submission of tenders. It claimed that the tender notice had been put on the District Commissioner's notice board on Saturday 5th November, 2011 because when it had visited the District Commissioner's office on 4th November, 2011, the tender notice was not up.

It averred that with the deadline for submission of bids given as 10th November, 2011, which period was less than the two weeks period required, this period was insufficient for bidders to raise the Kes 200,000 bid bond required.

The Applicant claimed that as a result of this, three companies did not manage to submit bid bonds. The Applicant further claimed that this was deliberate and meant to give unfair advantage to some bidders.
In conclusion, the Applicant submitted that the Procuring Entity breached Section 54 of the Act because the tender advertisement had not appeared in any of the daily newspapers yet the tender amount met the threshold of open tender which required that the tender be advertised in the newspapers.

In its response, the Procuring Entity submitted that the time meant for submitting national tenders is twenty one days and those for international tender is thirty days. It further submitted that the prescribed period was strictly adhered to as the advert took exactly 21 days but not two weeks as alleged by the Applicant.
It averred that the Applicant may have read the tender advertisement on 5th December, 2011 and presumed that it had been placed on the notice board on that particular day. It stated that the advertisement had been dispersed and placed at several boards on 20th October, 2011, and therefore there was no deliberate act to create unfair competition to any bidder.

On the issue of the alleged breach of Section 54 of the Act, the Procuring Entity responded that its responsibility was to reasonably bring the invitation of tender to the attention of interested bidders to compete and that it had done so by advertising the works and posting/placing it at a conspicuous place being the District Commissioner's Notice Board, which was reserved for this purpose being the certified place by the procurement unit. It submitted that its understanding of Section 54 was

that the said section allowed it three options, namely, advertising in the newspapers; on the procuring entity's website; or by placing the notice on the district's notice board; to notify the public about the tender. The Procuring Entity further submitted that it had advised the District Probation Office, the beneficiary of the works being procured under tender, of the requirement to advertise in the newspapers, but the response was that there was no budget for this – what was available was the Kes 6,000,000/= for construction only. The Procuring Entity stated that it then decided to take the option of advertising the tender on the district notice board.

The Procuring Entity argued that having participated in the tender, the Applicant had read and found it convenient, reasonable and timely to participate.

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

The Board notes that the time required for preparation of tenders under open tender as provided by Regulation 40 is twenty one (21) days.

The Board has perused the documents submitted, and finds that the Procuring Entity advertised this tender through notice boards at the District Commissioner's office and the closing date given as 10th November, 2011. The Board notes that the advertisement itself was not dated and as such it could not be established conclusively when the advertisement was placed on the notice boards. As such, the actual time period that the bidders were given to prepare their bids could not be established.

With regard to the Applicant's claim that the Procuring Entity breached Section 54 of the Act, the Board notes the provisions of the said Section as follows:-

"If the estimated value of the goods, works or services being procured is equal to, or more than the prescribed threshold for national advertising, ***the procuring entity shall advertise, at least twice in a newspaper of general nationwide circulation which has been regularly published for at least two years before the date of issue of the advertisement****, and on its website in instances where the procuring entity has a website,* ***and the advertisement shall also be posted at any conspicuous place reserved for this purpose in the premises of the procuring entity as certified by the head of the procurement unit".***

The Board finds that the wording of this Section does not give, as alleged by the Procuring Entity, three alternative options of bringing the invitation to tender to the attention of those wishing to submit tenders. On the contrary, these three methods are prescribed as mandatory.

The Board also notes the provisions in the First Schedule on Threshold Matrix provided in the Regulations. The said Schedule provides the minimum expenditure that requires advertising when using this procedure as Kes 4,000,000/=.

Based on the Engineer's estimate given as Kes 6.5mn, the Board finds this tender was supposed to have been advertised nationally in accordance with Section 54; and that further, by not having advertised the invitation to tender in the newspapers, the Procuring Entity had breached the Act.

The Board also observes that the Evaluation Report was compiled and written by one, Mr. Kivati Samson (District Works Officer, Ndhiwa) together with two others. From the Tender Committee minutes, the Board also notes that the said Mr. Kivati is also a member of the District Tender Committee and sat in the meeting that adjudicated this tender under review.

The Board finds that, in this respect, the Procuring Entity contravened Regulation 16(3) and (4) which stats as follows:

Regulation 16(3) ***"An evaluation committee shall consist of a chairman and at least two other members all appointed by the accounting officer or the head of the procuring entity upon recommendation by the procurement unit".***

Regulation 16(4) ***"No person shall be appointed under paragraph (3) if such person is a member of the tender committee of the procuring entity".***

Therefore, taking all the above matters into consideration, the Applicant's Request for Review succeeds and the Board orders, pursuant to Section 98 of the Act, that the award to the Successful Bidder is nullified.

The Procuring Entity may retender using an appropriate method of procurement to address the issue of time remaining to complete the project.

Dated at Nairobi on this 16th day of January, 2012

Chairman, PPARB **Secretary, PPARB**