REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 29/2015 OF 30TH JUNE 2015

BETWEEN

DAMAK ENTERPRISES LIMITED.....(APPLICANT)

AND

KENYATTA NATIONAL HOSPITAL ..... (PROCURING ENTITY)

Review against the decision of the Kenyatta National Hospital in the matter of Tender No. KNH/T/12/2015-2016 Supply and Delivery of Beef, Mutton, Chicken and Eggs.

BOARD MEMBERS PRESENT

1. Paul Gicheru - Chairman
2. Josephine W. Monga're - Member
3. Rosemary Gituma - Member
4. Nelson Orgut - Member

IN ATTENDANCE

1. Henock Kirungu - Board Secretary
2. Philemon Kiprop - Secretariat
3. Shelmith Miano - Secretariat

PRESENT BY INVITATION

Applicant – Damak Enterprises Limited

1. B.Mwaniki Kanyiri - Advocate
2. Damaris Kariuki - Director

Procuring Entity – Kenyatta National Hospital

1. Tollo Mududa - Advocate
2. Calvin Kariuki - Corporation Secretary

BOARD'S DECISION

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

BACKGROUND OF AWARD

Introduction

The tender was advertised alongside others on 7th May 2015 in the Daily Nation and on 8th May 2015 in the Standard Newspaper.

Closing/Opening

The Tender Closed/ opened on 20th May 2015. Fifty (56) tenderers submitted their bids for opening:

TENDER EVALUATION:

The Tender Processing Committee carried out Preliminary evaluation in two (2) categories for the 56 bidders who submitted their bid documents. Reasons for failure are as tabulated below.

Results of Preliminary Evaluation.

Bidder no.	Firm	Reason for failing preliminary	TPC observations
1.	M/s Isiait Investment Ltd	1. Tender form not duly completed 2. Business questionnaire not duly completed.	CBQ not duly filled Tender form not duly completed
2.	M/s Tinglinks Enterprises Limited	1. No public health medical certificate	No public health medical certificate
3.	M/s Havilah Springs	1.Documents not securely bound 2.Tender form incomplete 3.bid bond inadequate 4.Business questionnaire wrongly filled 5.No public health medical certificate	
4.	M/s quality Trading Company	1.No public health Medical certificate	No public health Medical certificate
5.	M/s Charpal Enterprises Limited	1.Tender form not duly completed 2.No public Health medical certificate	.Tender form not duly completed 2.No public Health medical certificate
7.	M/s Knicks Enterprises	1.Business questionnaire not duly completed	1.Business questionnaire not duly completed
8.	M/s Sidney Weinberg General Contractors	1.No public health medical certificate	1.No public health medical certificate
9.	M/s Africom Halal Food Supplies	1.Expired public Health Medical Certificate 2..No bid bond	Expired public Health Medical Certificate No bid bond
10.	M/s Wima Suppliers	1.Business Questionnaire not stamped 2.Expired Tax Compliance certificate 3.No public health medical certificate	Business Questionnaire not stamped Expired Tax Compliance certificate No public health medical certificate

11.	M/s Persio Limited	1.Tender form not duly completed(amount both in figures and words not indicated) 2.No bid bond 3.No public health medical certificate	1.Tender form not duly completed(amount both in figures and words not indicated) 3.No public health medical certificate
12.	M/s Fourth Estate Edge Limited	1.Business questionnaire not stamped 2.Expired tax compliance certificate 3.Tender security declaration form missing	.Business questionnaire not stamped 2.Expired tax compliance certificate 3.Tender security declaration
13.	M/s Ketoways General Agencies	1.Business Questionnaire not duly completed nor stamped 2.Tender form not duly completed(amount both in figures and words not indicated) 3.No certificate of incorporation/registration 4.No public health medical certificate	Business Questionnaire not duly completed nor stamped 2.Tender form not duly completed(amount both in figures and words not indicated) 3.No certificate of incorporation/registration 4.No public health medical certificate
14.	M/s Amal General Merchants	1.Tender form not duly completed(amount in words not indicated) 2.Business questionnaire not duly completed and not stamped.	Tender form not duly completed(amount in words not indicated) 2.Business questionnaire not duly completed and not stamped.
15.	M/s Damak Enterprises Ltd	1.Bid bond available but price schedules to validate the bid bond are missing	No price schedule
16.	M/s Vetta Concepts Limited	1. No public health medical certificate	No public health medical certificate
17.	M/s Stratas Concepts Limited	1. No public health medical certificate. 2. Treasury registration certificate not availed	
18.	M/s Lear Links Services	1. Tender form not duly completed (amount in words and figures not indicated)	3. Tender form not duly completed (amount in words and figures not indicated)

		2. No public health medical certificate	No public health medical certificate
19.	M/s Regacy Systems Limited	1.Documents not securely bound 2.Tender security declaration form not signed 3.Treasury registration certificate not availed 4.Business questionnaire not duly completed 5.No public health medical certificate	Document not securely bound CBQ not duly filled Tender security declaration form not signed 3.Treasury registration certificate not availed 4.Business questionnaire not duly completed 5.No public health medical certificate
20.	M/s Leavers Enterprises	1.Tender form not duly completed (tender amount in figures not indicated) 2.Business Questionnaire not stamped 3.No Public health medical certificate 4.Treasury registration certificate not availed	Tender form not duly completed (tender amount in figures not indicated) 2.Business Questionnaire not stamped 3.No Public health medical certificate 4.Treasury registration certificate not availed
21.	M/s Megatalk Investment Limited	1.Business questionnaire not stamped 2. No public health medical certificate	CBQ not dully signed and stamped No public health medical certificate
22.	M/s Farming Africa LLP	1.Business questionnaire not stamped 2. No public health medical certificate	Business questionnaire not stamped 2. No public health medical certificate
23.	M/s Vendours Systems Enterprises	1.Documents not securely bound 2.No public health medical certificate	Document not securely bound No public health medical certificate
24.	M/s Emifag Agencies Ltd	1.Provided only one document i.e original no copy. 2.Tender form not duly completed 3.No public health medical certificate	

25.	M/s Fairtime Med Limited	1.No bid bond	PASSED
26.	M/s Red Lantern Services Limited	1.Tender form not duly completed(tender amount in words not indicated)	Tender form not duly completed(tender amount in words not indicated)
29.	M/s Odanga Investment	1. No public health medical certificate	. No public health medical certificate
30.	M/s Wonders Investments	1.Business questionnaire not duly completed	Business questionnaire not duly completed
31.	M/s Elma Group Limited	1.Tender form not duly completed (tender amount in figures not indicated) 2.No public health medical certificate.	Tender form not duly completed (tender amount in figures not indicated) 2.No public health medical certificate.
32.	M/s Patrimint Suppliers	1.No bid bond	PASSED
33.	M/s Rimuco Enterprises	1.No bid bond	PASSED
34.	M/s Incredible Africa Traders	1.Business questionnaire not filled or signed	Business questionnaire not filled or signed
35.	M/s Tania Systems Management Ltd	1.No bid bond	PASSED
36.	M/s Tender cuts Limited	1.Business questionnaire not duly filled	Business questionnaire not duly filled
37.	M/s Israel Technologies Limited	1.Tender form not duly completed(tender amount in words and figures not indicated) 2.No public health medical certificate	.Tender form not duly completed(tender amount in words and figures not indicated) 2.No public health medical certificate
38.	M/s Jojen butchery	1.Submitted only one document 2.Tender form not duly completed	
39.	M/s	1. Document not	Document not

	Mountain spot suppliers	securely bound 2. Tender form not duly completed(amount in words not indicated) 3. Expired Tax compliance certificate	securely bound Tax compliance certificate expired in April
41.	M/s Kenbill Investments Limited	1.Tender form not duly completed(amount in words and figures not indicated) 2.No public health medical certificate	Tender form not duly completed(amount in words and figures not indicated) 2.No public health medical certificate
42.	M/s Kewaan International	1.Tender security declaration form not signed	Tender security declaration form not signed
44.	M/s	1.Tender form not duly completed 2.Business questionnaire not duly filled	Tender form not duly completed 2.Business questionnaire not duly filled
45.	M/s Daka Baricha Holding Ltd	1.Business questionnaire not duly completed 2.No tax compliance 3.Tender security declaration form not signed 4.No registration 5.No Public health medical certificate	Business questionnaire not duly completed 2.No tax compliance 3.Tender security declaration form not signed 4.No registration 5.No Public health medical certificate
46.	M/s Neema Livestock & Slaughter	1.Tender form not duly completed (tender amount in words and figures not indicated) 2.No bid bond 3.No public health medical certificate.	Tender form not duly completed (tender amount in words and figures not indicated) 2.No bid bond 3.No public health medical certificate.
47.	M/s Melpet General Merchants Ltd.	1.No public health medical certificate	
48.	M/s Pure Commodities Supplies Ltd	1.Form of tender not filled 2.No public health medical certificate	1.Form of tender not filled 2.No public health medical certificate
49.	M/s Faraja	1.wrong medical	wrong medical certificate

	Unga Limited	certificate attached(not for food handlers)	attached(not for food handlers)
50.	M/s Yusuf Abdi Ali Company Ltd	1.Business questionnaire not correctly filled 2.No certificate of incorporation/registration 3.No public health medical certificate	Business questionnaire not correctly filled 2.No certificate of incorporation/registration 3.No public health medical certificate
53.	M/s Fairness Enterprises	1.Business questionnaire not correctly filled 2.No public health medical certificate	
54.	M/s Mayner Enterprises	1.Business questionnaire not correctly filled 2.No public health medical certificate	No public health medical certificate
56.	M/s Prudent Ventures Ltd	1.Document not securely bound 2 No public health Medical certificate	.Document not securely bound No public health Medical certificate

The Tender Processing Committee noted that there were issues that were encountered. Eleven (11) bidders passed the Preliminary Evaluation stage. Ten (10) for reserved groups and one (1) for both open and groups to enjoy reservations.

Observations

It was noted that though one (1) bidder (Bidder No. 15) passed in all aspects of the criteria, they had no price schedules to validate the bid bond, the rest of the bidders were declared non-responsive for various reasons.

RECOMMENDATIONS

Market Survey

The Committee did not conduct the market survey as only one bidder would have been visited. It was considered as a waste of resources and

the Committee recommends re-advertisement or any advice the Tender Committee may deem appropriate.

Scheduling

Price Scheduling was done for the bidders who passed the preliminary evaluation stage which was only for one bidder.

Recommendation:

Based on the above, the committee recommended the award to M/s Wandering Warrior as per the quoted price for various items being the only responsive bidder and recommended re-quote for the items that the recommended bidder did not quote.

Tender Committee

In its meeting held on 19th June, 2015 the Tender Committee No.52/2014-2015 concurred with the recommendation of the Evaluation Committee and awarded the tender to **M/s Wandering Warrior** for Supply and Delivery of Beef, Mutton, Chicken and Eggs at Ksh 69,163,300.00

THE REQUEST FOR REVIEW

The Request for Review was lodged by Messrs Damak Enterprises Limited on 30th June, 2015 against the decision of Kenyatta National Hospital in Tender No. KNH/T/12/2015-2016 for Supply and Delivery of Beef, Mutton, Chicken and Eggs.

The Applicant was represented by Mr. B. Muriuki, Advocate, from the firm of M/S. B.M.Kanyiri and Company Advocates while the Procuring

Entity was represented by Mr. Tollo Mududa, Advocate, from the firm of M/S. Omulele and Tollo Advocates.

The Applicant requested the Board for the following orders: -

1. ***The procuring entity, Kenyatta National Hospital's Decision and tender proceeding be and are hereby annulled.***
2. ***Alternatively, the Procuring Entity be and is hereby ordered to review and revise the Evaluation of all the applicants in strict compliance with the Constitution, the Act and Regulations and thereafter Re-advertise the tender.***
3. ***That the procuring entity be and is ordered to pay all legal costs, filing fee and all other incidentals to this request for review.***
4. ***That the Board be at liberty to grant any other orders it deems just and fit.***

The Applicant raised six grounds in support of the Request for Review which the Board will now proceed to consider.

Ground 1, 2 3,4, 5 & 6 - These grounds have all been consolidated as they are interrelated and challenge the Procuring Entity's decision to declare the Applicants tender as unsuccessful on the grounds that crucial documents, namely the pricing schedule was missing and that the Confidential Business Questionnaire Form part 3 was not duly completed as per the criteria at page 31 of the tender documents. The Applicant alleged that the reasons given to it by the procuring entity for having adjudged its tender as being unsuccessful were baseless as the Applicant had submitted a complete bid document which included the documents required and set out in the tender document among them the price schedule and the duly completed Business Questionnaire in

compliance with the terms and conditions set out in tender document. It was the Applicant's case that the applicant being the current supplier of the same items, namely Chicken and eggs and having participated in several tenders for the supply of these items previously the Applicant was quite conversant with the tendering process and especially the documentation required in the exercise and it was therefore inconceivable that it would submit a tender document and leave out the most important document upon which its tender was to be adjudged.

The Applicant therefore stated that it submitted the price schedule alongside all the other accompanying documents as required in the tender document and submitted that the only way its price schedule could have gone missing was if only a member of the procuring entity's tender opening committee willfully and deliberately removed it. The Applicant further submitted that the Procuring Entity, in the instructions to tenderers had required that the tender be submitted in two separate envelopes and one envelope was to contain the price schedule and a copy thereof. These instructions, the applicant submitted, were to be found in section VI of the tender documents titled- **Presentation of Documents.** The applicant therefore reiterated that it complied with all the instructions in the tender document.

It was the Applicants further case that the fact that the Procuring Entity did not capture the absence of its price schedule in the minutes of the tender opening register meant that it was part of the documents submitted otherwise the same would have been noted in the remarks contained in the said minutes as was the case for the other bidders who had submitted incomplete documents in their bids.

The Applicant further submitted that upon receipt of the letter of notification, it wrote to the Procuring Entity protesting the decision to declare it's tender as unsuccessful and that the Procuring Entity wrote back and in addition to the first reason, the Procuring Entity gave an additional reason that the Applicant did not submit a duly filled Confidential Business Questionnaire as well. The applicant therefore submitted that this response made it to believe that the Procuring Entity was biased and involved in fraudulent activities since it had also submitted a confidential business questionnaire alongside the rest of the documents which was properly filled out with the relevant information as required by the tender document.

In an effort to show that it had provided the required documents and particularly the price schedule, the Applicant produced the form of tender and the attached price schedule as annexture No. DKW3 to the Supporting Affidavit sworn by Damaris W. Kariuki a Director of the Applicant Company.

Counsel for the applicant further submitted that although the winning bidder was scored 100% in the items it had tendered for, its, bid price at the tender opening was set at Kshs 89 Million. He however stated that the award made to the winning bidder was Kshs. 69 Million and no explanation was offered as to what led to this price difference. This therefore led the applicant to believe that there was collusion between the Procuring Entity and the Successful bidder and this is the only thing that could explain the reasons as to why effort was made to deliberately

deny the applicant the opportunity to participate in the tender by interfering with its bid document.

In his response to the Applicant's submissions, counsel for the procuring entity submitted that it had dealt with the applicant's tender in the normal way and that it was immaterial to the Procuring Entity that the Applicant was the current supplier of the items being sourced for the next financial year and as such the procuring entity evaluated the Applicant's tender in the same manner as it did to all the other bidders. The Procuring Entity reiterated that although it was not noted at the tender opening that the price schedule was missing, during the tender evaluation process, the evaluation team conducted a thorough examination of the bid documents and established that indeed the price schedule was not included in the applicant's tender document. It went further to submit that it complied with the requirements of section 60 of the Public Procurement and disposal Act and made a tender opening register which contained the requisite ingredients as provided for by the law. It was the Procuring Entity's submissions that the bid price offered by the Applicant was discerned from the document known as the form of tender and not from the Price schedule which was expected to give an itemized breakdown of the itemized goods to be supplied, the quantities and the price for each item.

Counsel for the Procuring Entity submitted that although this tender was one, there were items set aside under the preference scheme for women, youth and people living with disabilities (PWD). The tender for the supply of meat (Beef and Mutton) was open, while the tender for the supply of Chicken and eggs was for the preferred groups. Counsel for

the Procuring Entity further stated that bidders were free to choose which items to bid for and according to the Procuring entity, the tender for all the items was awarded to a Company owned by a Person within the preference scheme who is living with disabilities. The Procuring entity reiterated that the tender evaluation process was carried out in strict compliance with the criteria set out in the tender document and that no extrinsic evaluation criteria was introduced at the evaluation stage.

The Board has perused the documents filed by the parties to the request for review and has considered the submissions made by both Counsel for the Applicant and Counsel for the Procuring Entity and has also looked at the original tender documents.

The Board has from a totality of the said examination identified the following issue as falling for determination in the Request for Review:-

i) ***Whether the Procuring Entity's decision to declare the Applicant's tender as unsuccessful on the grounds that the Applicant did not provide a price schedule and that the Confidential Business Questionnaire provided by the Applicant was incomplete are valid.***

On the first issue framed for determination, the Board finds as follows; firstly; the procuring entity advertised the tender for the supply of beef, mutton , chicken and eggs in the local daily and in the said advertisement indicated that the items" chicken and eggs" were set aside under the preference scheme for women , youth and people living with disabilities(PWD). Subsequently the applicant among other bidders

put in their bids for these items and the tenders were opened on 20th May 2015. The Board has established from the tender opening minutes submitted to it by the Procuring Entity that no observation was made in respect of the Applicant's bid on the issue of the missing price schedule.

The tender opening minutes signed on 2/5/2015 appearing at page 65 of the Respondent's response show that the tender opening committee members were indicated to have appended their signatures on the following documents:-

a) The form of tender
b) Business Questionnaire
c) The Tax Compliance Certificate
d) The Bid Bond.
e) The price schedules.

Members of the tender opening committee then proceeded to make various observations on the missing items from bidders but the minutes show that no price list was missing from the Applicant's tender document. A perusal of page 61 of the Procuring Entity's response infact shows that the Applicant's tender price of Kshs. 103,969,940 was captured in the tender opening register.

Further, the Board finds that although the Applicant's complaint was captured in an affidavit in which the form of tender and the attached price schedule were annexed, the Procuring Entity did not swear an affidavit from any member of the tender opening committee or the tender evaluation committee to rebut the Applicant's assertion.

Under Board wishes to observe that under the Provisions of Section 60(5) of the Public Procurement and Disposal Act 2005, a Procuring Entity is enjoined to follow the following procedure at the tender opening meeting:-

Read out aloud and record in a document called the tender opening register:-

a) ***The name of the person submitting the tender;***
b) ***The total price of the tender; including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed and finally;***
c) ***If applicable, what has been given as tender security.***

The members of the tender opening committee are thereafter required to sign on each tender or more pages and initial in each tender against the quotation of the price and any modification or discounts.

The Board holds on the basis of the Provisions of Section 60 of the Act that it is at this stage of the process that any omissions or defects in the form of tender or the price schedule should be noted which was not the case in this Request for Review.

On the second reason given, the Board has perused the original tender document and finds that the Applicant provided the required confidential Business Questionnaire with all the particulars required of a limited liability Company. The only portions which were not filled in

were those that were not relevant to the applicant as a limited liability company.

The Board therefore finds on the basis of the Applicant's tender document that this second reason for the Applicant's tender being declared unsuccessful was also not valid.

The Board has further perused the Request for Review and finds that the Procuring Entity issued two notices dated 22nd June, 2015 and another one dated 26th June, 2015 informing the Applicant that it's bid was unsuccessful. The only reason give in the first notice was that the Applicant had not provided a price schedule. The Procuring Entity in it's second letter of notification added another reason, namely that the Confidential Business Questionnaire Form part 3a was not duly completed as per criteria 4 at page 31 of the tender document.

The Board wishes to observe that the Provisions of Section 67 of the Public Procurement and Disposal Act 2005 only contemplates the issuance of one notice containing all the reasons and this act on the part of the Procuring Entity shows the great length to which the Procuring Entity was willing to go to ensure that the Applicant's tender was declared unsuccessful.

In addition, the Board notes that although several items were set aside for the groups meant to benefit from the preference regulations, the tender document issued by the Procuring Entity was one and it also included items which were being competed for by everyone. The board is aware that the law seeks to treat tenders available for the groups

which enjoy preference differently from those offered in a tender which is open to all bidders in that under Regulation 21 of the Public Procurement and Disposal Regulations (as amended) Procuring Entities are expected to offer such items for competition amongst the preferred groups and that the law does not require a bid security to be provided. Regulation 19 of Legal Notice No.114 requires Procuring entities to unbundle tenders set aside for the groups meant to benefit from the scheme in small lots to allow for maximum participation of those eligible. The Board is therefore surprised that the procuring entity instead of doing so sort to consolidate and lump together items meant for women, youth and persons with disabilities together with other general items meant in one tender document hence requiring tenderers to comply with the conditions for open tenders and not enjoy the benefits of the preference scheme.

The Board therefore finds that for a procuring entity to combine in one tender document items under the preference scheme with those which are open to everyone defeated the purpose for which the scheme was set up.

Finally the Board has taken cognizance of the Provisions of Clauses 1, 2 and 3 appearing at page 30 of the tender document under **Section VI – presentation of documents**. The three clauses provide as follows:-

"Section VI – Presentation of Documents

a) The "ORIGINAL TENDER" and "COPY OF TENDER" documents must be securely bound no loose documents or papers will be accepted.

b) *The "ORIGINAL TENDER" and "COPY OF TENDER" documents to be submitted shall contain information detailed in Section 4 below.*

c) *The "ORIGINAL" of the Schedule of Prices" and the "COPY" of the schedule of prices" should be submitted in separate envelopes as detailed under clause 2.16.1 of Section II of instructions to tenderers".*

It is clear from the above clause that the Procuring Entity contemplated the submission of tenders in two separate envelopes. The Board has however observed from the tender documents supplied to it that some bidders submitted only one combined tender document containing all the items that were to be contained in the two envelopes yet the Procuring Entity proceeded to evaluate the tenders in disregard of these clauses. The tender document did not also distinguish between what requirement bidders under the special categories namely, the youth, women and persons with disabilities were required to comply with *vis-avi* the criteria and conditions which were to apply to the other tenderers.

The Board therefore finds that the Applicant's Request for Review has merits and it is accordingly allowed.

FINAL ORDERS

Pursuant to the powers conferred upon it by the Provisions of Section 98 of the Public Procurement and Disposal Act, 2005, the Board directs and makes the following orders;

1. The request for Review dated 29th June 2015 and filed on 30th June 2015 by M/S Damak Enterprises Ltd against Kenyatta National Hospital in respect of tender No. KNH/T/12/2015-2016 in respect of the tender for the supply of Beef, Mutton, Chicken and Eggs is hereby allowed;
2. The procurement process and the award of the said tender made pursuant to the said process to the successful bidder M/s Wandering Warrior is hereby annulled in it's entirety.
3. That the Procuring Entity M/S Kenyatta National Hospital is directed to re-tender for the goods the subject matter of this procurement on the basis of a tender document that complies with the Board's observations within the next Fifteen (15) days from the date of this decision and ensure that it complies with the provisions of the Public Procurement and Disposal (Preference and Reservations) Regulations as amended via Legal Notice No.114 of 2013.
4. Inview of the fact that the Board has ordered a retender in which the Applicant is likely to participate, this Board directs that each party shall bear it's own costs of this request for review.

Dated at Nairobi on this 17th July, 2015

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CHAIRMAN
PPARB

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SECRETARY
PPARB