PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 15/2015 OF 16th MARCH, 2015

BETWEEN

SALGAA BUTCHERY GOLICHA GANGE OMAR.....Applicant

AND

MINISTRY OF STATE OF DEFENCE.....Procuring Entity

Review against the decision of the Ministry of State for Defence in the matter of Tender No.MOD 423(01011)2014-2015 for the Supply of fresh meat (beef) on bone to Eldoret based units.

Board Members Present

1. Mr. Paul Gicheru -Chairman
2. Mrs.Gilda Odera -Member
3. Mrs.Josephine W.Mong`are -Member
4. Mr.Peter B.Ondieki -Member

In Attendance

1. Mr. Stanley Miheso -Secretariat
2. Ms. Shelmith Miano -Secretariat

Present By Invitation

Mr. Golicha Gange Omar	-Applicant
Ministry of State for Defence	
Lt. Col.D Odeny	-Legal Officer
Mr. Z.G.Ogendi	-Assistant Director/SCMS

Interested Parties

Mr. Sam Owino	- Advocate Eldoret Standard Butchery
Mr.Felix Ndonye	-Advocate Eldoret Standard Butchery
Mr.Charles Madowo	- Advocate Eldoret Standard Butchery
Mr.Abdi Omar	- Director Eldoret Standard Butchery
Mr.Adan Osman	- Director Eldoret Standard Butchery
Mr. Nicholas Cheruiyot	- Director Avenue Butchery
Mr. Philip Kosgey	- M/S Avenue Butchery
Mr. Antony Kemei	- Representative, Link general Suppliers
Mr.Abdallah Hassan	- Representative, Bismilai Butchery

Board`s Decision

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

BACKGROUND OF AWARD

a) Background of the tendering process.

The subject tender was advertised on 4th December, 2015, closed and opened on 17 December, 2015. Twelve firms responded. The list of

bidders is as shown here below.

TECHNICAL EVALUATION

The following 12 bidders were evaluated and scored as follows:-

S/N	Firms	Existence of Business	Standard of cleanliness	Accessibility	Experience	Storage	Transport	Total points
1.	M/s Eldoret Standard Butchery	10	04	05	10	05	15	49
2.	M/S Salgaa Butcher Golicha Gange omar	10	03	05	10	05	10	43
3.	M/S Mashaic Enterprises (K) Ltd	05	04	05	05	05	15	39
4.	M/S Maxcom Suppliers	05	04	05	05	05	15	39
5.	M/S Peema Investments Co Ltd	10	05	05	05	05	05	35
6.	M/S Avenue Butchery	10	02	05	05	02	10	34
7.	M/S Bismillahi Butchery	10	03	05	05	05	05	33
8.	M/S Linkgen Suppliers	05	03	05	05	00	10	28
9.	MlS Tawakaltu Butchery	10	02	05	05	00	05	27
10.	M/S West Indies Butchery	10	03	05	05	00	00	23
11.	M/S Kipkaren View Butchery	10	03	05	05	00	00	23
12	M/S Nothern wing General Supplies	-	-	-	-	-	-	-

The Evaluation report was signed by all three evaluators and is dated 29th January, 2015.

MARKET SURVEY

HQ KA was tasked to conduct physical evaluation/market survey on 16th January, 2015 and presented the report on 2nd February, 2015.

HQ KA market survey result is as tabulated here below:

S/N	Firms	U/Acc	Price
a.	MIS Highway Butchery	Per Kg	400.00
b.	MIS Silver Butchery		400.00
c.	MIS Manyatta Butchery		400.00
Total			**1,200.00**
Average			**400.00**

COMMERCIAL/ FINANCIAL EVALUATION

In line with Clause 11 of the Appendix to Instructions to tenderers, the bidders scored as tabulated here below:

S/N	Firms	Quoted Prices (Kshs) Per Kg	Financial Score = Lowest Price X 50 / Quoted Price	Rank
1.	M/S Eldoret standard Butchery	320.00	38	10
2.	M/S Salga Butcher Golicha Ganoe omar	280.00	44	4
3.	M/S Mashaic Enterprises (K) Ltd	305.00	40	9
4.	M/S Maxcom Suppliers	350.00	35	12
5.	M/S Peema Investments Co Ltd	280.00	44	4
6.	M/S Avenue Butchery	300.00	41	8
7.	M/S Bismillahi Butchery	290.00	42	6
8.	M/S Linkgen Suppliers	320.00	38	10
9.	M/S Tawakaltu Butchery	295.00	42	6
10.	M/S West Indies Butchery	250.00	49	2
11.	M/S Kipkaren View Butchery	**245.00**	**50**	**1**
12	M/S Northern wing General Supplies	260.00	47	3

OVERALL PERFORMANCE

The summary of performance for all the responsive firms is as shown here under:

S/N	Firms	Item Description	TOTAL Evaluation Score	Quoted Prices
			Points	(Kshs)Per Kg
1.	M/S Eldoret standard Butchery	Meat (beef) on bone	87	320.00
2.	M/S Salga Butcher Golicha Ganoe omar Ent		87	280.00
3.	M/S Mashaic Enterprises (K) Ltd		79	305.00
4.	M/S Maxcom Suppliers		74	350.00
5.	M/S Peema Investments Co Ltd		79	280.00
6.	M/S Avenue Butchery		75	300.00
7.	M/S Bismillahi Butchery		75	290.00
8.	M/S Linkgen Suppliers		66	320.00
9.	M/S Tawakaltu Butchery		69	295.00
10.	M/S West Indies Butchery		72	250.00,.
11.	M/S Kipkaren View Butchery		73	**245.00**
12.	M/S Nothern wing General Supplies		47	260.00

EVALUATION COMMITTEE`S COMMENTS

The Evaluation Committee recommended for award to M/S. Eldoret Standard Butchery whose overall score was 87 points for the supply of meat (beef) on the bone to Eldoret based units. Although M/S Salgaa Butcher Golicha Gange Omar Enterprise was also highly responsive at 87 points and a price of Kshs 280.00, the firm's quote is too low below

the average market price of Kshs 400.00. Besides the firm and has a past litigation history over the same tender.

All the bidders quoted below the average market price of Kshs 400.00. The average market price is collaborated by the request for price adjustment by the current supplier (M/S Eldoret standard Butchery) vide their letter dated 15 August, 2014. It is evident that most of the bidders engaged in unhealthy price competition aimed at requesting for price adjustment after award and signing of the contract.

BRANCH RECOMMENDATION

Based on the physical evaluation, quoted and current market prices, the branch requested MTC to award the contract for Supply of Fresh meat (beef) on bone to Eldoret Based Units as follows:

Item: Fresh Meat (Beef) on Bone

Firm: M/S Eldoret Standard Butchery.

Price: @ Kshs 320.00 per Kg delivered.

Quantity: As and when required.

Duration: From 25 March, 2015 to 24 March, 2016.

Reason: Ranked first by the evaluation team.

The branch requested the secretariat to table the matter before the MTC and allow for immediate communication.

TENDER COMMITTEE DECISION

The Ministerial Tender Committee in its meeting No. 29/14/15 held on 26th February, 2015, minute No. 22/29/14/15 discussed the submission from DHQ logs and approved award as follows:-

Item: Fresh Meat (Beef) on Bone

Firm: M/S Eldoret Standard Butchery.

Price: @ Kshs 320.00 per Kg delivered.

Quantity: As and when required.

Duration: From 25 March, 2015 to 24 March, 2016.

Reason: i) Ranked first by the evaluation team.

ii) Firms past performance is good

iii) Prices to remain valid for 90 days after signing of contract agreement.

REQUEST FOR REVIEW NO. 15/2015

The Request for Review was lodged by M/s Salgaa Butchery Golicha Gange Omar on 16th March, 2015 in the matter of the tender for the supply of fresh meat (beef) on bone to Eldoret based units.

The Applicant appeared in person while the Procuring Entity was represented by Lt. Col. D. Odeny, the Procuring Entity's Legal Officer. The Several bidders who are named at the beginning of this decision also appeared at the hearing of this Request for Review.

The Applicant seeks for the following orders:

1. *The decision to award the tender No MoD 423-01011 2014-2015 to Eldoret Standard Butchery be annulled and or revoked.*
2. *The tendering and evaluation process NOT to be repeated since the Applicant had fulfilled all the tendering requirements and repeat*

of the same would be an exercise in futility given past conduct of the tendering entity and Eldoret Standard Butchery firm.

3. *The Salgaa-Butchery Golicha Gange Omar be declared the successful winner of tender No. MoD 423- (01011)2014-2015*
4. *The Salgaa Butchery Golicha Gange Omar be awarded tender No. MoD 423-(01011) 2014-2015*
5. *That no supply of meat (beef) on bone should be supplied by Eldoret Standard Butcher to Eldoret based units until such time that the review is resolved*
6. *No tender contract should be written or given out until the review is sorted out.*
7. *Eldoret Standard Butchery be debarred and or banned from further tendering participation to supply meat (beef) on bone to Eldoret Based Units.*

The Board has heard and considered the documents and the oral submissions made to it by the parties and has framed the following issues arising from this Request for Review.

i. **Whether the Applicant's Request for Review is properly before the Board.**
ii. **Whether or not the Procuring Entity acted contrary to the Provisions of Section 38, 42 and 43 of the Act relating to inappropriate influence, collusion and conflict of interest.**
iii. **Whether the award made to the successful bidder was proper.**

ISSUE NO. 1

Whether the Applicant's Request for Review is properly before the Board.

During the hearing of the Request for Review, it transpired that the Request for Review was not signed by the Applicant. This issue was raised by the Board of it's own motion and was taken up by Counsel for the Procuring Entity and Counsel for the successful bidder.

Both advocates urged the Board to find that the said Request for Review was incompetent on that ground and that it ought to have been struck out.

The Board has considered the issue of the competence of the Request for Review and finds that though the Request for Review served on the parties was not signed by the Applicant, the statement which accompanied the request was signed and contained all the grounds that the Applicant relied upon in arguing the Request for Review.

The Board also finds that the parties to the Request for Review opted to argue their cases on merits and no objection was taken by any of the parties to the request.

The Board is therefore hesitant to strike out the Request for Review on the above grounds. The Board also notes that the Applicant in the Request for Review was acting in person and in terms of the Constitutional requirement that justice shall be done to all without undue regard to technicalities, the Board will proceed and determine the Request for Review on it's merits.

This ground of objection is therefore accordingly disallowed.

ISSUE NO. 2

Whether or not the Procuring Entity acted contrary to the Provisions of Section 38, 42 and 43 of the Act relating to inappropriate influence, collusion and conflict of interest.

The Applicant in his submissions before the Board argued that there was collusion, conflict of interest and undue influence in the award of the tender to the successful bidder contrary to the Provisions of Sections 38, 42 and 43 of the Act which prohibits such practices in the procurement process.

Both Counsel for the Procuring Entity and Counsel for the successful bidder disputed that assertion and argued that the tender process in this particular instance was above Board. They further argued that the Applicant did not produce any evidence to back up the said allegations which were of a serious nature.

Lt Col. D. Odeny additionally submitted that if indeed there were such practices, the Applicant ought to have reported the matter to the relevant authority for appropriate action but he did not do so.

The Board has considered the rival submissions on the above issue and has also perused the documents supplied to it by the parties and finds that there was no documentary or other evidence to prove the malpractices which the Applicant alluded to in this issue. All that the Applicant put forward in an effort to support this ground were statements from the bar which were not supported by any document.

As the Board has previously held it is the duty of any Applicant who appears before it to prove all or any allegation made by it on a balance of

probability. The Board reiterates that collusion, conflict of interest and inappropriate influence are all serious offences and they must be strictly proved.

This ground of the Applicant's Request for Review therefore fails and is dismissed.

ISSUE NO. 3

Whether the award made to the successful bidder was proper.

The Applicant's main grievance when this Request for Review came up for hearing before the Board was that he was the lowest bidder after he offered to supply meat (beef) on bone to the Procuring Entity's Eldoret Base units at the price of Kshs. 280 per kilogram as opposed to the successful bidders price of Kshs. 320 per kilogram.

It was therefore the Applicant's case that his price was the lowest evaluated price and contended that the Procuring Entity's Evaluation Committee had infact recommended that the tender be awarded to it as per Section 66(4) of the Act but that the tender committee reversed that decision contrary to the Provisions of Regulation 11 of the Principal Regulations.

The Applicant therefore faulted the decision of the Procuring Entity and stated that the same breached the Provisions of Section 66 of the Act and urged the Board to set aside the decision of the Procuring Entity and substitute the same with a decision awarding the Applicant the tender since it was the lowest evaluated bidder.

On the applicable prices, the Applicant submitted that to his knowledge the price of meat at the slaughter house was the sum of Kshs. 280/=

which was the wholesale price. He further stated that if awarded the tender, the Applicant would be able to recoup profit from selling the hide, the head and the intestines from what remained of the slaughtered animals. The Applicant however informed the Board that the price of a kilogramme of meat in Eldoret town was Kshs. 400 a fact that was confirmed by the interested parties who appeared before the Board for the hearing of this Request and whose names the Board has set out at page 2 of this decision.

Lt Col. Odeny who appeared on behalf of the Procuring Entity denied that the Procuring Entity's tender Evaluation Committee had recommended the Applicant for the award of the tender and urged the Board to look at the minutes of the tender committee which had evaluated the tender. Lt Col. Odeny further stated that contrary to what the Applicant had stated, the Procuring Entity carried out a market survey in Eldoret town and it's environs and found that the open market price for 1 kilo of beef on bone was Kshs. 400 per kilogramme whereas the Applicant had tendered a bid of Kshs. 280 which was below the sum of Kshs. 320/= per kilogramme which the successful bidder had tendered for. The Procuring Entity submitted that by submitting such a low bid, there was a likehood that there would be disruptions in supply in the event that the tender was awarded to the Applicant since it's price was unrealistically low and that was the main reason why the Applicant had not been awarded the tender. The Procuring Entity therefore denied that the Applicant was the lowest evaluated bidder.

Mr. Owino who appeared in this matter on behalf of the successful bidder associated himself with the submissions made by the Procuring

Entity and stated that the price submitted by the Applicant was unrealistically low and further that it was within the Province of the Procuring Entity to determine who the tender was to be awarded to after taking into account all the relevant considerations including the issue of price.

The Board has considered and taken into account the submissions made by the parties on the last issue framed for determination. As a starting point towards the determination of this issue, the Board has perused the original documents supplied to it by the Procuring Entity and has established the following matters as not having been in dispute.

i. The tenders for the subject procurement were opened on 17th December, 2014; a tender opening register was signed by all members of the committee.
ii. An evaluation report dated 29th January, 2014 recommended M/s Eldoret Standard Butchery for the award of the tender.
iii. The Ministerial tender committee approved the award of the tender to the successful bidder on 26th February, 2015.

It is apparent from all the above documents which are in possession of the Board that at no time did the Procuring Entity recommend the award of the subject tender to the Applicant. The minutes of both the tender evaluation committee and the tender committee recommended and awarded the subject tender to the successful bidder and not to the Applicant.

The Board does not therefore accept the Applicant's allegation that the tender committee reversed the recommendations of the evaluation committee.

On the issue of the market survey, the Board finds from the available minutes that the Procuring Entity carried out a market survey from three establishments, namely; M/s Highway Butchery, Silver Butchery and Manyatta Butchery where the market price of meat per kilogramme was Kshs. 400 per kilogramme.

Under the Provisions of Section 30 (3) of the Public Procurement and Disposal Act, a Procuring Entity is obliged to procure goods, services and works with known market prices at the prevailing market prices. The Applicant and all the interested parties confirmed that the butchery market selling price of meat in Eldoret town ranged between 380 to 400 shillings per kilogramme of meat. The price quoted by the Applicant was therefore unrealistically low and this must have explained the reason why the tender was not awarded the Applicant.

In addition to carrying out a market survey of all the bidders, the available evidence also shows that the Procuring Entity carried out a physical evaluation of all the 12 bidders on predetermined parameters and awarded points. The parameters were; existence of business; standard of cleanliness; accessibility, experience; storage and transport facilities. This was in accordance with the Provisions of clause 9 of the Appendix to instruction to tenderers.

The Board therefore finds that the Procuring Entity acted within the confines of it's mandate in awarding the tender to the successful bidder.

FINAL ORDERS

Arising from all the foregoing facts and in the exercise of the powers conferred upon the Board by the Provisions of Section 98 of the Act, the Board makes the following orders on this Request for Review.

a) **The Applicant's Request for Review be and is hereby dismissed.**

b) **The Procuring Entity is therefore at liberty to proceed with the Procurement process the subject matter of this Request for Review to it's logical conclusion.**

c) **Each Party shall bear his/it's own costs inview of the fact that each party was partially successful this Request for Review.**

Dated at Nairobi on this 10th day of April, 2015.

.....

CHAIRMAN
PPARB

.....

SECRETARY
PPARB