

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 23/2015 OF 30<sup>TH</sup> APRIL, 2015**

**BETWEEN**

**WANJOHI MUTONYI CONSULT LIMITED.....Applicant**

**AND**

**KIRINYAGA COUNTY GOVERNMENT.....Procuring Entity**

Review against the decision of the County Government of Kirinyaga in the Matter of Tender No. CGKSCM/MLHUD/06/2014-15/VOL.1 for Consultancy Services for Survey Works, Detailed Designs, Preparation of Tender Documents and Operations and Maintenance Manuals for Storm Water Drainage, Road Improvement and Security Lighting in Kerugoya/Kutus/Wang'uru Townships

**BOARD MEMBERS PRESENT**

- |                          |            |
|--------------------------|------------|
| 1. Mr. Paul Gicheru      | - Chairman |
| 2. Mr. Hussein Were      | - Member   |
| 3. Mrs. Gilda Odera      | - Member   |
| 4. Eng. Weche Okubo, OGW | - Member   |
| 5. Mr. Paul Ngotho       | - Member   |

## **IN ATTENDANCE**

1. Mr. Philip Okumu - Secretary
2. Ms. Shelmith Miano - Secretariat

## **PRESENT BY INVITATION**

---

### **Applicant – Wanjohi Mutonyi Consult Limited**

1. Isaac G. Wanjohi - Chairman, WMC Ltd
2. Isaac K. W. Mutonyi - Managing Director
3. Eng. P. M. Kuria - Director
4. Albert K. Mwaniki - Engineer

### **Procuring Entity - County Government of Kirinyaga**

1. Mwangi Kibicho - Advocate
2. Esther Muritu - Lawyer
3. Tom Ogora - Director, SCM
4. Murimi Murage - CEC - F & Economic Planning
5. Phylis Mugure - Advocate
6. Adisi Hezekiah - Lawyer

### **Interested Parties**

1. Mugisha Benard Advocate, Witts Consultancy Ltd
2. Duncan Wachira Lawyer, Witts Consultancy Ltd
3. Eng. Evans M. Kinyua Director, Witts Consultancy Ltd

## **BOARD'S DECISION**

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

## **BACKGROUND OF AWARD**

The County Government of Kirinyaga needed to procure consultancy services for carrying out survey works, detailed designs, preparation of tender documents and operations and maintenance manuals for storm water drainage, road improvement and security lighting in Kerugoya/Kutus/Wang'uru townships. The tender was processed through the Request for Proposal procurement method.

The tender was advertised in the *Daily Nation* Newspaper on 18<sup>th</sup> February, 2015. Fourteen tender documents were purchased out of which ten bids were submitted on the date of tender opening on 4<sup>th</sup> March, 2015 at 12.00 noon.

## **TENDER EVALUATION**

The Tender Processing Committee carried out the evaluation of the submitted tenders on 19<sup>th</sup> and 20<sup>th</sup> March, 2015 in three stages namely; the preliminary evaluation, the technical evaluation and the financial evaluation.

### **Preliminary Evaluation**

The preliminary evaluation was to determine proof of the following:-

- a) Certificate of Incorporation
  - b) Tax Compliance Certificate
  - c) Valid Trade Licence/EBK Registration
  - d) VAT & PIN Certificate
  - e) Audited Accounts
- 
- f) Similar Works
  - g) Technical Personnel
  - h) Receipt of Purchase of Tender

The outcome of the preliminary evaluation was as in the table below:

No	Bidder Name	a	b	c	d	e	f	g	h
1	Max & Partners Ltd	√	√	√	√	√	√	√	√
2	Bhundia Associates Consulting Engineers	X	√	√	√	√	√	√	√
3	Monaco Engineering Ltd	√	√	√	√	X	X	X	√
4	Stroutel Africa Ltd & Metrocom Consultants Ltd	√	X	X	√	√	√	√	√
5	Civotech Associates Ltd	√	√	√	√	√	√	√	√
6	Witts Engineering Consultancy Ltd & Firix Consulting Ltd	√	√	√	√	√	√	√	√
7	Uniconsult (Kenya) Ltd	√	√	X	√	√	√	X	√
8	Lujo Consulting Engineers Ltd	√	√	√	√	√	X	√	√
9	Tripple Systems Consultants & Moti Consultants	X	√	√	√	X	X	√	√
10	Wanjohi Mutonyi Consult Limited	√	√	√	√	√	√	√	√

Four bidders met all the requirements at preliminary evaluation stage and proceeded for technical evaluation. The four bidders were:-

- a) Max & Partners Ltd
- b) Civotech Associates Ltd
- c) Witts Engineering Consultancy Ltd & Finix Consulting Ltd
- d) Wanjohi Mutonyi Consult Limited

### **Technical Evaluation**

The bidders were evaluated on the basis of their responsiveness to the Terms of Reference, applying the evaluation criteria at the technical evaluation stage which was as follows:-

- a) Specific Experience of the Consultant related to the assignment
- b) Adequacy of the proposed work plan and methodology in responding to the terms of reference
- c) Qualifications and competence of key staff for the assignment
- d) Suitability to the transfer of Technology Programme (Training)

Based on the above requirements, the Tender Processing Committee ranked the bidders in terms of the following scores:-

No.	Name of Bidder	Average Points
1	Max & Partners Ltd	80.5
2	Civotech Associates Ltd	87.5
3	Witts Engineering Consultancy Ltd & Finix Consulting Ltd	89.5

4	Wanjohi Mutonyi Consult Limited	92.8
---	---------------------------------	------

The minimum technical score for a bid to proceed to the next stage was 80 points. The four bidders met the threshold and were thus recommended to proceed to financial proposals opening.

### Financial Evaluation

The Tender Opening Committee pointed out in the minutes of the opening of the financial proposals that M/s Wanjohi Mutonyi Consults Limited had indicated their name on the envelope of its financial proposal contrary to the instructions to the bidders. For this reason, the bidder was disqualified at that stage.

Further, the following was noted at the financial opening:

No.	Name of Bidder	Amount Quoted	Tax	Remarks
1	Max & Partners Ltd	30,065,000.00	-	Exclusive of Tax
2	Civotech Associates Ltd	29,992,911.82	4,127,298.18	Inclusive of Tax
3	Witts Engineering Consultancy Ltd & Finix Consulting Ltd	29,551,000.00	4,076,000.00	Inclusive of Tax

The Tender Processing Committee observed that the tender sum for M/s Max & Partners Ltd was exclusive of tax which was against Section 4.2 of the Financial Submission form in the tender document. The bidder was therefore disqualified on this basis.

### Final Evaluation

Weight of Technical Proposal, T = 80%

Weight of Financial Proposal, P = 20%

Lowest Financial Bid, FM = 29,551,000

No.	Bidder Name	Technical Score, St	Financial Bid, F	Financial Score (100xFM/F)%	(StxT)x (SfxP)	Ranking
1	Civotech Associates Ltd	87.5	29,999,911.77	98.76	89.75	2
	Witts Engineering Consultancy Ltd & Finix Consulting Ltd	89.5	29,551,000.00	100	91.60	1

### Recommendation for Award

The Tender Processing Committee recommended M/s Witts Engineering Consultancy Ltd & Finix Consulting Ltd of P. O. Box 70584 - 00100 Nairobi, for award of the tender being the evaluated bidder with the highest combined score of 91.60%.

### TENDER COMMITTEE DECISION

The Tender Committee, at its meeting held on 14<sup>th</sup> April, 2015 approved the recommendation of the Tender Processing Committee and awarded the tender to M/s Witts Engineering Consultancy Ltd at their quoted amount of Kshs. 29,551,000.00.

## **REQUEST FOR REVIEW**

The Request for Review was lodged by M/s Wanjohi Mutonyi Consult Limited of P. O. Box 21714 - 00505, Nairobi, against the decision of the County Government of Kirinyaga in the matter of Tender No. CGK/SCM/MLHUD/06/2014-15/VOL.1 for the provision of Consultancy Services For Carrying Out Survey Works, Detailed Designs, Preparation of Tender Documents and Operations and Maintenance Manuals for Storm Water Drainage, Road Improvement and Security Lighting in Kerugoya/Kutus/Wang'uru Townships.

---

The Applicant sought the following orders:

- 1. Set aside the decision of the Procuring Entity to award this tender to another tenderer;**
- 2. Recommend the award of this tender to the Applicant;**
- 3. The Applicant be reimbursed the cost of preparing this appeal by the Procuring Entity.**

The Applicant raised the following eight grounds in support of the request for review.

1. Grounds 1, 2, 3 and 4 were to the effect that the Applicant's tender was the most advantageous and that it should be the one to undertake the project.
2. Grounds 5 and 6:- The Applicant challenged the process for contravening the procurement regulations which stipulate that *any award by the procuring entity shall be made to the candidate whose*



*proposal is most advantageous, determined in accordance with the criteria and procedures for evaluating proposals set forth in the request for proposals.*

3. Grounds 7 and 8 were statements of loss the Applicant was likely to suffer if it was not awarded the tender but did not disclose any breach.

## **THE APPLICANT'S CASE**

Eng. Isaac G. Wanjohi, who appeared in person, argued the Applicant's case. He submitted that the Applicant noted differences between the advertisement and the tender document. He further submitted that Clause 2.5.3 of the Instructions to Consultants stipulated for three envelopes whereby two were to be placed inside an outer envelope which would be placed in the tender box while the advertisement stipulated that the tender documents in plain sealed envelopes clearly marked both financial and technical would be put in the outer envelope. He further stated that it was clear to the Applicant that the procedure in the advertisement anticipated that the technical and financial proposals, being in different envelopes, would both be placed in one outer envelope which would in turn be put in the tender box.

The Applicant averred that the bid which failed to attain a score of 80% and above at the technical evaluation stage would be returned unopened. The instructions did not however provide that the address of the bidder would not be indicated on top of the envelope.

---

The Applicant argued that the standard tendering document for the procurement of works for small works issued by the Public Procurement and Disposal Authority (PPOA) provides that the two envelopes should have the name of the bidder on it. The Applicant submitted that the advertisement appearing in the *Daily Nation* of 18<sup>th</sup> February, 2015 indicated that the envelope containing the tender should not bear the name of the bidder adding that this caused difficulty in the sense that it would be difficult to match the technical and financial bids. The Applicant averred that the letter of invitation took precedence over the advertisement.

The Applicant stated that it visited the site on 23<sup>rd</sup> February 2015 and subsequently was outside the seven day window provided for the tenderer to seek clarification. Mr. Wanjohi further stated that he submitted the technical and financial proposals in two envelopes

inside an outer envelope without the name of the Applicant and as per the stipulation in the tender document all responsive technical proposals would be evaluated first. It added that the Applicant's technical proposal scored 92.8 marks and was thereafter invited to the opening of the financial proposal which took place on 31<sup>st</sup> March 2015. The Applicant concluded its submission by stating that it complied with the requirement for the submission of tenders as provided for under Regulation 47 (1) (a) of the Public Procurement and Disposal Act 2005 (hereinafter "the Act").

#### **THE PROCURING ENTITY'S RESPONSE**

In response, the Procuring Entity submitted that the tender was processed fairly, competently, procedurally, lawfully and in full compliance and adherence with the tender document and the law and that nothing untoward could be pointed out by the Applicant. It further submitted that the Applicant's Request was frivolous and vexatious and was made solely for the purpose of delaying the procurement process adding that the same ought to be dismissed with costs.

Counsel for the Procuring Entity submitted that the Applicant had marked the envelope that contained the financial proposal a fact which the

Procuring Entity maintained, was made known to the Applicant since it was represented at the tender opening. According to Counsel for the Procuring Entity the advertisement required tenders to be submitted in plain sealed envelopes adding that the same is replicated at Clause 2.1.2 of the Appendix to Instructions to Consultants and that the Applicant did not mark the technical proposal. Counsel further submitted that the financial score tabulated by the Applicant in the Request for Review was imaginary. He added that the Applicant's bid was evaluated for technical compliance but was not evaluated for financial compliance because it's bid was disqualified once it was realised that the Applicant's financial proposal was marked.

#### **INTERESTED PARTY'S RESPONSE**

The Interested Party associated itself with the submissions made by Counsel for the Procuring Entity. Counsel for the Interested Party submitted that by awarding itself a score, the Applicant evaluating itself. The Interested Party averred that it did not mark its identity on any of the envelopes for the tender and that it complied with all the requirements of the tender adding that the award made to it should be sustained.

## APPLICANT'S REPLY

In reply to both submissions, the Applicant stated that tender opening meeting was not the right forum and time to make observations on tenders submitted. He further stated that the advertisement did not indicate the number of envelopes and that this was contained in the Instructions to Consultants. He also stated that even if the three documents were in conflict the one that carries the day is the tender document and not the advertisement. In conclusion, the Applicant submitted that Clause 2.1.2 of the Appendix to Instructions to Consultants was irrelevant in the matter at hand and urged the Board to grant its prayers.

## THE BOARD'S FINDINGS

The Board has carefully considered the oral and the written submissions made by the parties and has also examined all the documents that were submitted to it by the parties and has consolidated all the grounds and has identified the following one issue for determination in this Request for Review:-

- (i) Whether the evaluation of the Applicant's tender was flawed and not done in accordance with the evaluation criteria set out

in the tender document contrary to the Provisions of Section 66 (2) of the Act on account of the format for the submission of tenders.

1. **As to whether the evaluation of the Applicant's tender was flawed and not done in accordance with the evaluation criteria set out in the tender document contrary to the provisions of Section 66 (2) of the Act on account of the format for the submission of tenders.**
- 

The Board finds the following facts evident in the documents and the submissions presented before it:

- a) The County Government of Kirinyaga invited bids in Tender No. CGK/SCM/MLHUD/06/2014-15/VOL.1 for provision of Consultancy Services For Carrying Out Survey Works, Detailed Designs, Preparation of Tender Documents and Operations and Maintenance Manuals for Storm Water Drainage, Road Improvement and Security Lighting in Kerugoya/Kutus/Wang'uru Townships.
- b) The tender was advertised on 18<sup>th</sup> February 2015 in the *Daily Nation* newspaper.
- c) The tenders were opened on 4<sup>th</sup> March, 2015 in the presence of the bidders or the bidders' representatives.
- d) Ten firms including the Applicant submitted bids for the tender.
- e) The bids were evaluated by the Procuring Entity's Tender Processing Committee in three stages namely; the preliminary

evaluation, the technical evaluation and the financial evaluation stages.

- f) Six firms were found to have been non-responsive and were therefore disqualified at the preliminary evaluation stage.
- g) Four bidders, including the Applicant, were evaluated for technical responsiveness and were allocated scores above the minimum 80 points required for a bidder to proceed to the financial evaluation stage.
- h) Four bidders, including the Applicant were invited to the opening of financial proposals which took place on 31<sup>st</sup> March 2015.
- i) Three bids were subjected to Financial Evaluation.
- j) The Procuring Entity's tender evaluation committee recommended the award of the tender to Messrs Witts Engineering Consultancy Limited at their quoted price of Kshs 29,551,000.00.
- k) On 14<sup>th</sup> April 2015, the Procuring Entity's Tender committee approved the recommendation of the evaluation committee and awarded the tender to Messrs Witts Engineering Consultancy Limited at a price of Kshs 29,551,000.00.
- l) The Procuring Entity notified the Interested Party vide a letter dated 14<sup>th</sup> April 2015 that its bid was successful, and the Interested Party confirmed acceptance of the award to it vide a letter dated 16<sup>th</sup> April, 2015.
- m) The Procuring Entity on the other hand notified the Applicant vide letter dated 17<sup>th</sup> April 2015, that the Applicant's bid was not successful and did not give reasons.

- n) The Applicant requested vide a letter dated 24<sup>th</sup> April 2015 for the reasons why it's proposal was unsuccessful.
- o) The Applicant filed this request for review on 30<sup>th</sup> April 2015.

In determining this issue the Board is guided by the format for submission of bids appearing in the tender advertisement and in the tender document.

---

The Board observes that the tender was processed using a two envelope method. The *Daily Nation* advertisement of 18<sup>th</sup> February, 2015 stated as follows:

*“Original and copy of completed tender documents in plain sealed envelopes clearly marked ... ..(both financial and technical) bearing no indication of the tenderer, shall be placed in the tender box...”*

Clause, Clause 2.5.3 of the Instructions to Consultants in the tender document however provided as follows:

*“the original and all copies of the Technical Proposal shall be placed in a sealed envelope clearly marked ‘TECHNICAL PROPOSAL,’ and the original and all copies of the Financial Proposal in a sealed envelope clearly marked ‘FINANCIAL PROPOSAL’ and warning: ‘DO NOT OPEN WITH TECHNICAL PROPOSAL’. Both envelopes shall be placed into an outer*



*envelope and sealed. This outer envelope shall bear the submission address and other information indicated in the Appendix 'ITC' and be clearly marked, 'DO NOT OPEN, EXCEPT IN PRESENCE OF THE OPENING COMMITTEE.'"*

The Board has looked at the advertisement appearing in the Daily Nation and Clause 2.5.3 of the tender document and finds that whereas the advertisement in the Newspaper prohibited a bidder from indicating its name on the envelopes, the Procuring Entity did not include this prohibition in clause 2.5.3 and therefore left it open to a bidder to decide how to label the envelopes.

The Board finds that in view of this apparent conflict between the advertisement and the provisions of Clause 2.5.3 at the tender document, the Provision in the tender document must prevail. Counsel for the Procuring Entity referred the Board to Clause 2.1.2 of the tender document but the Board is of the respectful view that this Clause is not relevant as the format for the submission of tenders is expressly covered by Clause 2.5.3.

It is not in dispute that the Applicant's financial proposal bore the Applicant's name and address on the envelope. In determining this issue the Board takes cognizance of the Provisions of Regulation 47 (1) of the Regulations made under the Act which states as follows:-

---

*Regulation 47 (1) "Upon opening of the 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 Board therefore finds that under Regulation 47 (1) (a) of the Act, any determination by the evaluation committee of whether the tender was submitted in the required format should be dealt with at the preliminary evaluation stage. In the instant tender and as the Board has already observed, the Procuring Entity's tender evaluation committee evaluated the tenders through the three stages of preliminary evaluation, technical evaluation and financial evaluation. The Board finds that the Applicant's tender was evaluated and passed at the preliminary and technical evaluation stages and that its financial proposal was opened on 31<sup>st</sup> March 2015 alongside the financial proposals of three other bidders.

It has already been pointed out above that the place for determining whether the tender was submitted in the required format was at the preliminary evaluation stage. The Procuring Entity's Tender Evaluation Committee having evaluated and passed the Applicant's tender at the preliminary and technical evaluation stages, it should have proceeded to evaluate the financial proposal by the Applicant having already opened the financial proposal itself. There is no provision in the Act or the Regulations that allows for an item of preliminary evaluation to be evaluated at the technical evaluation stage or at the financial evaluation stage. There is also no such provision in the evaluation criteria in the tender document the subject matter of this request for review. The Board therefore finds that the Applicant's tender was disqualified at the financial proposal opening stage for allegedly not having complied with the required format for the submission of tenders which was a matter that should have been dealt with at the preliminary evaluation stage.

The Board takes cognizance of the provisions of the Act on evaluation of tenders found at Section 66 (2) of the Act, which states as follows: -

*Section 66 (2) "The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used."*

The Board further finds that the tender document provided, at Clauses 2.6, 2.7 and 2.8, the process and the evaluation criteria that the Procuring Entity's Tender Evaluation Committee was required to adopt. By disqualifying the Applicant's bid at the financial proposal opening stage on the basis of the tender not having been submitted in the required format, the Procuring Entity was in effect doing this too late in the day. The Board finds this act on the part of the Procuring Entity's Tender Evaluation as amounting to the re-writing of the evaluation criteria in the midst of an evaluation process and runs contrary to the Provisions of Section 66 (2) of the Act. The Board is therefore satisfied that this ground of the Applicant's request for review has merit and is allowed.

#### **OBSERVATIONS OF THE BOARD**

The Applicant further submitted that it had suffered or was likely to suffer loss if the decision of the Procuring Entity was upheld. The Board however wishes to observe that tendering is a risk which everyone who enters into the process expects to win or lose. Like two sides of a coin, a

bidder who turns out successful reaps the expected rewards that come with the success and, a bidder who turns out unsuccessful loses the same expected rewards. The Board cannot therefore grant an Applicant's prayer solely on the basis that the Applicant stands to lose resources it invested in preparing a tender. Such resources are the cost of the risk a bidder undertakes when the bidder decides to participate in a procurement process.

### **DECISION OF THE BOARD**

In conclusion therefore and in exercise of the powers conferred upon the Board by the Provisions of Section 98 of the Public Procurement and Disposal Act (2005), the Board makes the follows orders: -

1. The Request for Review filed by the Applicant on 30<sup>th</sup> April 2015 in respect of Tender No. CGK/SCM/MLHUD/06/2014-15/VOL.1 is allowed.
2. The award of the subject tender to the successful bidder Messrs Witts Engineering Consultancy Ltd is hereby annulled.
3. The Procuring Entity is hereby directed to admit the Applicant's financial proposal and evaluate it alongside other qualified tenders taking into account the findings of the Board.

4. The Procuring Entity is directed to complete the entire process, including the making of an award, within seven days from the date of this decision.

5. The Board makes no orders as to costs.

---

Dated at Nairobi on this 26<sup>th</sup> day of May, 2015

  
.....

**CHAIRMAN**

**PPARB**

  
.....

**SECRETARY**

**PPARB**