

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
REVIEW NO. 85 / 2017 OF 29TH SEPTEMBER, 2017

BETWEEN

INOVATE ENTERPRISES LIMITED APPLICANT

AND

**A.C.K. LAGAT MIXED DAY/BOARDING
HIGH SCHOOL - OLMETUNYIPROCURING ENTITY**

Review against the decision of the A.C.K. Lagat Mixed Day/Boarding High School, Olmetunyi in the matter of Tender Number ALSS/TG/PROJ/28/2017 for Proposed Construction of 1 Number Classroom and Completion of Laboratory Block

BOARD MEMBERS PRESENT

1. Mr. Hussein Were - In the Chair
2. Eng. Weche Okubo - Member
3. Mrs. Rosemary Gituma - Member
4. Mr. Peter B. Ondieki, MBS - Member
5. Mr. Nelson Orgut - Member
6. Mr. Paul Ngotho - Member

IN ATTENDANCE

1. Philip Okumu - Holding Brief for Secretary
2. Maryanne Karanja - Secretariat
3. Maureen Namadi - Secretariat

PRESENT BY INVITATION

Applicant: - Inovate Enterprises Ltd

1. Danson Were - Advocate, Masika & Koross Advocates
2. Linda Kitur - Director, Inovate Enterprises Ltd
3. Geoffrey Rotich - Director, Inovate Enterprises Ltd

Procuring Entity: - A.C.K. Lagat Mixed Day/Boarding High School

1. Gilbert Ng'etich - Principal
2. William Rono - SIC Chairman, Board Member

Interested parties: - Shaulyne Logistics Ltd

1. Edwin Mlesoi - Operations Manager
2. Richard Kemboi - Agent
3. Joel Biama

BACKGROUND OF AWARD

Tender Invitation

A.C.K. Lagat Mixed Day/Boarding High School, Olmetunyi advertised for bids for construction works for the Proposed Construction of 1 Number Classroom and Completion of Laboratory Block under Tender Number ALSS/TIG/PROJ/28/2017. The tenders were received and opened on 11th September, 2017 as follows:

Bidder No.	Name of Bidder	Bid Sum
1.	Inovate Enterprises Ltd	2,921,870.00
2.	Procon Company Ltd	3,461,825.00
3.	Talent Graphics Ltd	2,731,800.00
4.	Phew Co. Ltd	2,937,410.00
5.	Sellmark "K" Ltd	2,802,000.00
6.	Bejesy Enterprises Ltd	3,050,200.00
7.	Lintai Co. Ltd	2,896,891.00
8.	Mec Development Ltd	2,970,922.00
9.	Iga Builders & Contractors Ltd	3,400,714.00
10.	Eldoret Builders (K) Ltd	3,155,460.00
11.	Bekech Enterprises Ltd	2,970,130.00
12.	Shaulyne Logistics Ltd	2,989,300.00
13.	Songol Enterprises Ltd	2,958,160.00

TENDER EVALUATION

The Procuring Entity's Evaluation Committee met on 18th September, 2017 and agreed on the following procedure/criteria for evaluation:-

Stage 1 - Advert Conditions

Stage 2 - Technical Evaluation

Stage 3 - Financial Evaluation

The Committee agreed that marks for all other sections were to remain the same except for the bid sum which was to be awarded as follows:-

Bid Sum	Marks
3,000,000 - 2,900,000	2
2,900,000 - 2,800,000	4
2,800,000 - 2,700,000	6
2,700,000 - 2,600,000	8
2,600,000 - 2,500,000	10

The Evaluation Team perused the tender documents and realized that eight out of the thirteen bidders did not meet the basic requirements (were non-responsive) and were hence disqualified. The non-responsive bidders were Bidder Numbers 02, 03, 04, 06, 09, 10, 11, and 13 and the reasons for the disqualification were given as follows:

Bidder 02 – Procon Company Ltd

- No Company Registration
- Bid sum of Kshs 3,461,825.00
- Form of Tender not filled

Bidder 03 – Talent Graphics Ltd

- No Tax Compliance attachment
- Form of Tender not filled

Bidder 04 – Phew Company Ltd

- No document receipt
- Form of Tender not filled

Bidder 08 – Mec Development Ltd

- No NCA registration and validity

Bidder 09 – Iga Builders And Contractors Ltd

- Bid sum of Kshs 3,400,714.00 above Engineer's' Estimate of Kshs 3,000,000.00

Bidder 10 – Eldo Builders (K) Ltd

- Bid sum of Kshs 3,155,460.00 above Engineer's' Estimate of Kshs 3,000,000.00

Bidder 11 – Bekech Enterprises Ltd

- No NCA registration certificate
- No similar works attached
- No bank statement

Bidder 13 – Songol Enterprises Ltd

- No name of employer and no capacity filled

- Similar works not available, the tender only quoted renovation of Kapsagara cattle dip
- Form of Tender not filled

Bidder 06 – Bejesy Enterprises Ltd

- Bid sum of Kshs 3,050,200.00 above Engineer's' Estimate of Kshs 3,000,000.00

Bidder 07 – Lintai Company Ltd

- Responsive but ranked number 4 with 61 marks

The Evaluation Committee evaluated the rest of the firms and recommended the following:-

Bidder 05 - Sellmark (K) Ltd

- Most responsive though the expiry date of 120 days not filled with 81 marks

Bidder 01 - Inovate Enterprises

- Most responsive with 80 marks though their financial capability of contractors shows a bank overdraft of Kshs 907,559.15 as per bank statement of 1st September, 2017 (Co-op Bank) and a debit of 2 ½ months from 14th June to 31st August, 2017.

Bidder 12 - Shaulyne Logistics Ltd -

- Most responsive with most building construction works as attached in their tender document with 78 marks.

Recommendation for Award

The evaluation team recommended the above three firms for the Board of Management (BOM) chairman and the BOM secretary to come up with the best bidder among the three.

REQUEST FOR REVIEW No. 85/2017

The Request for Review was lodged by M/s. Inovate Enterprises Limited (hereinafter, "the Applicant"), whose address for purposes of this request for review is care of Masika & Koross Advocates, P. O. Box 50208, Nairobi, on 29th September, 2017 against the decision of A.C.K. Lagat Mixed Day/Boarding High School, Olmetunyi (hereinafter, "the Procuring Entity") in the Matter of Tender Number ALSS/TG/PROJ/28/2017 for Proposed Construction of 1 Number Classroom and Completion of Laboratory Block.

The Applicant sought the following orders of the Public Procurement Administrative Review Board (hereinafter, "the Board"):

- 1. Annul in whole the decision of the tender committee of the Procuring Entity;*
- 2. Award the tender to the Applicant;*
- 3. The Procuring Entity be condemned to pay costs of this Request for Review to the Applicant*

The Applicant raised six grounds of review and was represented at the hearing of this Request for Review by Mr Danson Were, Advocate from the

firm of Masika & Koross Advocates while the Procuring Entity was represented by Mr. Gilbert Ngetich, the Principal.

On its part the Procuring Entity prays as follows:

1. *That the school has not entered into any agreement with the Innovate Enterprises Ltd, and are not bound to any losses, damage, etc;*
2. *Allow the work to continue with interest of the young school at heart and poor form four candidates without a laboratory for KCSE practicals.*

THE APPLICANT'S CASE

The Applicant raised six grounds of review which it consolidated and argued as follows:

The Applicant submitted that the Procuring Entity proceeded to award the tender without expressly disclosing the successful tenderer. It submitted further that it had not received a proper and / or valid notification letter to date and that the Procuring Entity had therefore acted in breach of the provisions of Section 87(3) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act").

The Applicant averred that it came to learn that the tender was awarded to M/s Shaulyne Logistics Ltd, the successful bidder, which, according to the Applicant, ought to have been disqualified at the preliminary stage of

evaluation for lack of the current registration certificate of the National Construction Authority (NCA) which was a mandatory requirement. It averred further that the information on the registration status of a company was easily obtainable from the website of the NCA. The Applicant also averred that it not only complied with all the mandatory requirements of the tender but added that it was the bidder with the lowest evaluated price. The Applicant lamented that the Procuring Entity acted in breach of Section 79(1) of the Act for failing to find that the Applicant's tender was responsive, as a consequence whereof the Applicant was wrongfully disqualified at the financial evaluation stage. It lamented further that the Procuring Entity violated the provisions of Section 86(1)(a) of the Act for wrongfully awarding the tender to one of the Applicants' competitors.

The Applicant alleged that the Procuring Entity misinterpreted the Applicant's Bank Statements and proceeded to impute lack of financial capacity due to an active overdraft whereas the Applicant had duly attached a Letter of Credit from the same bank stating otherwise. As a consequence, alleged the Applicant, the Procuring Entity breached the requirements of Sections 3, 81 and 83 of the Act by failing to seek clarification and or exercise due diligence in finding out the financial capability of the Applicant.

The Applicant alleged that as a result of the Procuring Entity's actions the Applicant was bound to suffer loss and damage.

PROCURING ENTITY'S RESPONSE

In response, the Procuring Entity raised a preliminary objection alongside opposition to the request for review.

The Procuring Entity refuted allegations that it breached the provisions of Section 87(3) of the Act arguing that the notification letters were given to all unsuccessful bidders through the bidders' postal addresses, disclosing the successful bidder as Shaulyne Logistics Ltd with a bid sum of Kshs 2,989,300.00. It maintained that the successful bidder, M/s Shaulyne Logistics Ltd had a valid National Construction Authority (NCA) certificate as attached in its tender document.

Averring that it could not risk with an active overdraft on the Applicant's bank statement and a debit of over 2¹/₂ months as from 14th June to 31st August, 2017, the Procuring Entity stated that the school needed the project to start immediately so that the students could sit their science practical examinations. The Procuring Entity thus strongly considered the cash flow of the bidders hence the preference of the successful bidder to the Applicant.

INTERESTED PARTY'S RESPONSE

The Interested Party submitted that when the tender was advertised the Interested Party, through the chairman of the local contractors association, complained to the County Engineer responsible for the project that the minimum requirement for NCA 7 was too high and that works costing about

Kshs 3 million could be done by an NCA-8 contractor. It submitted further that designation for registration was as follows:

- NCA-8: Kshs 0 up to 10 million
- NCA-7: Kshs 10 million up to 20 million
- NCA-6: Kshs 20 million up to 50 million
- NCA-5: Kshs 50 million up to 100 million
- etc

It was also the Interested Party's submission that it understood that the NCA-7 requirement had been struck out of the system to open the tender to any contractor to participate as long as the contractor was registered at any level with NCA. It could not therefore understand why the change to allow for broader participation was not effected in the tender document.

The Interested Party averred that at the first stage bidders submitted tenders which were opened in the presence of the County Engineer. Subsequent stages involved preliminary and technical evaluation. At the end of the evaluation process the Interested Party was given the letter of award. It averred further that it had already signed the contract and had proceeded to order equipment that is supposed to be installed in the laboratory and had also ordered window panes for the classroom. It also averred that it was working towards handing over the completed buildings before the start of KCSE, which was two weeks away.

On being asked, the Interested Party admitted that it was registered with NCA at Category 8 for works, roads and buildings. Mr. Biama also stated that he was out fending for his family in good faith when he tendered for this project and pledged to abide by the decision of the Board.

APPLICANT'S REPLY

Mr. Were, in reply on behalf of the Applicant, stated that the Procuring Entity had informed this Board that it issued a second letter disclosing to the Applicant the name of the successful bidder but had not provided any proof of service adding that the Applicant was unaware of the letter.

On the issue of registration with National Construction Authority, the Applicant stated that the Procuring Entity had confirmed that, as per the tender document, they were indeed looking for a contractor with a capacity of NCA 7 and above and hence the party awarded was non-responsive and not suited for the tender. It stated further that the Procuring Entity had confirmed that it was looking for the lowest evaluated bidder and considering the figures, the Applicant was the lowest bidder.

THE BOARD'S FINDINGS

The Board has considered the submissions made by parties and has further examined all the documents that were submitted to it and has identified the following issues for determination in this Request for Review:

1. *Whether the Board is deprived of jurisdiction in the Request for Review pursuant to the provisions of Section 167 (4 (c) of the Act following the signing of the contract for the tender subject of the review.*
2. *Whether the Procuring Entity failed to evaluate the tender in accordance with the evaluation criteria set out in the tender document contrary to the provisions of Section 80 (2) of the Act.*
3. *Whether the Procuring Entity acted in breach of the provisions of Section 87 (3) of the Act for failing to disclose the successful tenderer and give reasons as to why the Applicant's tender was unsuccessful.*

The Board now proceeds to determine the issues framed for determination as follows:-

1. **As to whether the Board is deprived of jurisdiction in the Request for Review pursuant to the provisions of Section 167 (4 (c) of the Act following the signing of the contract for the tender subject of the review.**

This is a jurisdictional issue and the same having arisen, the Board is duty bound to determine it first before making any step to inquire into the merits of the request for review. Should the Board find that a valid contract has been signed it ought to down its tools and strike out the review.

The Board has heard submissions by the Procuring Entity that it entered into a written contract with the successful bidder in respect of the tender subject of the request for review on 3rd October 2017. If that is found to be so then the Board ceases to have jurisdiction over the matter.

To determine this issue the Board takes cognisance of Section 167 (4) of the Act which states:

Section 167 (4) *“The following matters shall not be subject to the review of procurement proceedings under subsection (1) –*

- (a) The choice of a procurement method;*
- (b); and*
- (c) Where a contract is signed in accordance with section 135 of this Act.”*

In reference to Section 135 of the Act the Board notes its provisions:

Section 135 (2) *“An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.”*

Further, section 168 states as follows:

Section 168 *“Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review of the procurement proceedings in such manner as may be prescribed.”*

The Board also considers Regulation 74 which provides as follows:

Regulation 74 (1) *“The Secretary shall immediately after filing of the request under Regulation 73, serve a copy thereof on the procuring entity of Director General as the case may be.*

(2) The copy to the procuring entity under paragraph (1) shall also contain a notification of the pending review and the suspension of the procurement proceedings of such procuring entity.”

It is evident from the provisions of Section 168 of the Act and Regulation 74 of the Public Procurement and Disposal Regulations, 2006 that notification by the Secretary of the filing of the request for review to the Procuring Entity operates as a stay of procurement proceedings.

The Board observes that the Applicant filed this request for review on 29th September, 2017. On 2nd October 2017 the Board Secretary informed the Principal of the Procuring Entity, who is the Accounting Officer, by way of email that this request for review had been filed with the Board. The notification instructed the Procuring Entity to suspend all activities on the procurement proceedings until the review is heard and determined. The

Board further observes that when an acknowledgment of the notification of 2nd October 2017 and the supply of requested documents were not forthcoming from the Procuring Entity, a reminder of the notification was sent by the Secretary on 11th October 2017 to the same email address. The Board also observes that on 3rd October 2017 the Procuring Entity entered into a written contract on the tender subject of the review with the M/s Shaulyne Logistics Ltd (the Successful bidder).

The Board has heard the submissions of the Procuring Entity that it did not receive the notification sent to it via email on 2nd October 2017 but admits having received the reminder of 11th October, 2017. The Board finds it difficult to believe the contestation of the Procuring Entity that it did not receive the notification of 2nd October 2017 although it received the one of 11th October 2017 and yet both notifications were sent to the same email address. The Board wishes to observe that the conduct of the Procuring Entity has been disdainful towards it. The Procuring Entity, within five days as requested by the Secretary in the notification, did not provide the documents pertaining to the subject tender. Even assuming that the notification was on 11th October as alleged by the Procuring Entity, it ought to have supplied its response and the documents before 16th October 2017. It instead chose to come with the response and the documents on the hearing date on 17th October 2017, arriving one hour late after the scheduled time of the hearing. The Procuring Entity also kept the Board and other parties waiting when it turned up half an hour late on the second day of the hearing, on 18th October 2017. This attitude of the Procuring Entity can be

described not only as casual but contemptuous of the Board and cannot, by any stretch, be encouraged coming from an institution of learning.

Be that as it may, it is the view of the Board that the action of the Procuring Entity to sign the contract for the subject tender on 3rd October 2017 was calculated to defeat the stay order issued by the Board on 2nd October 2017. The date of 3rd October 2017 was the first day after the 14 day period following notification of award during which time a contract is not supposed to be signed pursuant to section 135 (3) of the Act. It is the Board's view however that a stay was in force effective 2nd October 2017 when the Procuring Entity was notified *vide* email that the request for review for the subject tender had been filed on 29th September 2017. The Board therefore finds that the contract signed on 3rd October 2017 was not in accordance with section 167 (4) (c) of the Act. This ground of preliminary objection therefore fails and is disallowed. Accordingly the Board determines that it is well seized of the matter and will proceed to hear it.

The Board having found that no valid contract exists determines that it has jurisdiction to hear and decide the request for review on its merits.

2. **As to whether the Procuring Entity failed to evaluate the tender in accordance with the evaluation criteria set out in the tender document contrary to the provisions of Section 80 (2) of the Act.**

The Board notes evident facts from the documents placed before it and uncontested submissions made by the parties that the subject tender was

opened on 11th September 2017 attracting 13 bidders including the Applicant. It is further noted that the Evaluation Committee of the Procuring Entity evaluated the submitted bids through three stages of preliminary, technical and financial evaluation. Three bidders passed the preliminary and technical stages of the evaluation and were evaluated at the financial stage. These were:

- Bidder 01 - Inovate Enterprises
- Bidder 05 - Sellmark (K) Ltd
- Bidder 12 - Shaulyne Logistics Ltd -

Bidder 12 was recommended for award at its bid price of Kshs 2,989,300.00 and issued with a letter of award dated 18th September 2017. Bidder 01 (the Applicant herein) was simultaneously notified that its bid was unsuccessful. The reason stated for the Applicant's bid being declared unsuccessful was provided in the Procuring Entity's response that the Applicant had an active overdraft on its bank statement and a debit of over 2 1/2 months and was therefore considered a risk. The Board also heard the Procuring Entity's submission that the school needed the project to start immediately so that the students could use the facility for their national science practical examinations and therefore it strongly considered the cash flow of the bidders when disqualifying the Applicant. The Board has also heard arguments that the successful bidder was not qualified for award in that it did not possess a mandatory requirement of registration with National Construction Authority at NCA 7 and above.

The issue which has arisen for the Board to determine is whether the Procuring Entity failed to evaluate the tender in accordance with the evaluation criteria set out in the tender document in breach of the provisions of Section 80 (2) of the Act.

To determine this issue, the Board has perused the tender document and particularly the evaluation criteria found at the Invitation to Tender and noted the following provisions:

“The B.O.M A.C.K Lagat Secondary School invites sealed bids from eligible bidders for construction works as follows

.....

Interested bidders should note that only those who meet the criteria indicated below as minimum requirement supported by the relevant documents as at the time of submission will be considered for evaluation.

- *Company Registration with the relevant Authorities*
- *Proof of current registration with NCA (NCA 7 and above) as stated above*
- *Copy of P.I.N Certificate*
- *Proof of similar works and their value undertaken in the last three years (Attach Completion Certificates)*
- *Evidence of access to credit lines from financial institutions and availability of other financial resources”*

It is clear from the reading of the tender document that the tender was open to building contractors registered with the National Construction Authority at Category 7 and above. The tender document also required evidence of access to credit lines from financial institutions and availability of other financial resources.

The Board observes that the Applicant's tender was evaluated, along other tenders through the stages of preliminary, technical and financial evaluation. It is further observed that the Applicant's tender passed all the stages of the evaluation process except the financial stage when it was disqualified for the reasons stated in the letter of notification. It is also observed that the Applicant's tender was evaluated to be the lowest evaluated bidder.

In the evaluation process, it is the firm view of the Board that the evaluation committee is guided in its work by none other than the provisions of Section 80 (2) which states as follows:

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents..."

The Board is cognisant of the following provisions of the Act:-

Section 79 (1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

The Board has looked at the tender document and notes that presence of an active overdraft was not part of the criteria for evaluation in the tender document. It is the respectful view of the Board that an existing overdraft facility is not synonymous with lack of financial capacity and the Procuring Entity misdirected itself on this issue. It is further noted that, by its own admission, the Successful bidder did not possess NCA 7 with the National Construction Authority. It instead possessed NCA 8 which is a lower category than NCA 7. The successful bidder may as well be right in stating that a category NCA 8 contractor was perfectly capable of carrying out the works but the requirement in the tender document was for NCA 7 and above. If this requirement had been found to be too high the prospective bidders ought to have sought it to be changed before the deadline for submission of tenders.

The Board has already observed that the Applicant's tender was evaluated to be the lowest evaluated bidder and in terms of section 86 (1) of the Act, it ought to have been awarded the tender. The said section states as follows:

- Section 86(1)** *"The successful tender shall be the one who meets any one of the following as specified in the tender document -*
- (a) The tender with the lowest evaluated price;*
 - (b)"*

The Board finds that the Procuring Entity's decision to declare the Applicant's tender as non-responsive on account of purported unreliable cash flow and the existence of an active overdraft was against the provisions of Section 79 (1) of the Act.

In view of the foregoing, the Board finds and holds that the Procuring Entity's evaluation committee failed to evaluate the tender subject of the review in accordance with the evaluation criteria contained in the tender document. This ground of review therefore succeeds and is allowed.

3. As to whether the Procuring Entity acted in breach of the provisions of Section 87 (3) of the Act for failing to disclose the successful tenderer and give reasons as to why the Applicant's tender was unsuccessful.

The Board earlier observed in this decision that it was common ground that the Procuring Entity's letter addressed to the Applicant and dated 18th September, 2017 triggered this Request for Review. The said letter stated as follows:

"This is to inform you that ACK Lagat BOM wish to regret your bid to construct 1 No Classroom and completion of single laboratory after bid evaluation on Monday 18th September 2017. This was due to financial capability of the contractor which shoes a bank overdraft of nine hundred and seven thousand five hundred and fifty nine and fifteen

cents (Kshs 907,559.15) as shown in bank statement of Co-operative Bank as per book balance as at 1st September 2017.

You are therefore required to appeal within fourteen days (14) from the day of bid evaluation stated above."

The Board has heard submissions of the Procuring Entity that it wrote another letter of notification dated the same day as the first letter in which it disclosed the successful bidder. The Board has also heard the converse submissions of the Applicant that it received only one letter of notification which did not disclose the successful bidder. The Applicant contents that the Procuring Entity failed to disclose the successful bidder and hence flouted section 87 (3) of the Act.

To determine whether or not there was breach of the law on account of non-disclosure of the reasons in the letter of notification, the Board is guided by the provisions of Section 87 (3) of the Act, which states:

Section 87 (3) *"When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof".*

The said section of the Act enjoins the Procuring Entity to notify unsuccessful bidders in writing at the same time the successful bidder is notified. The section also requires the Procuring Entity to disclose the winning bidder and furnish the unsuccessful bidders with reasons as to why their tenders were unsuccessful. It is evident on its face that the Procuring Entity's letter of notification dated 18th September 2017 gave reasons as to why the Applicant's tender was unsuccessful but did not disclose the successful bidder.

The plea by the Procuring Entity to the effect that it revised the letter of notification and sent it by post to the Applicant is unproven and cannot be relied upon. The Procuring Entity did not offer the Board anything to show that it dispatched the second letter to the Applicant. In the absence of proof to the contrary the Board is left with no alternative but to conclude that there was in effect, no second letter of notification. Accordingly, the Board finds that the action of the Procuring Entity not to disclose the successful bidder offended the provisions of Section 87 (3) of the Act. This ground of review therefore succeeds and is allowed.

The Board however notes that the Applicant was still able to file a request for review and has been heard. The Applicant did not suffer any prejudice as a result and the Board shall not make any orders based on its findings on this issue.

COSTS

Before issuing its final orders in this request for review the Board wishes to comment on the issue of costs. The Applicant claimed at ground 6 of the request for review that consequent to the actions of the Procuring Entity, it had suffered loss of a business opportunity to make earnings and that it incurred costs preparing the bid and therefore prayed that the request for review be allowed and it be granted costs. The Board has severally held that tendering is a commercial undertaking and any bidder who participates in a commercial venture does so with full knowledge of the attendant risks. The cost of tendering falls squarely within the commercial risks a bidder undertakes when it chooses to participate in a procurement process and which costs a bidder does not expect to recoup from the Procuring Entity when it loses the tender. The Board is therefore not inclined to award such costs to any bidder who participates in procurement process.

The Board however make a clear distinction between the cost of tendering and the cost of the request for review. In the latter, the Board will award costs based on the circumstances of the case. Generally, costs are awarded to the party that succeeds in the request for review pursuant to the dictum *costs follow the event*. In the instant case the Board has held that the Request for Review as premised has merit and will allow it. However, due to the nature of the final orders in this decision and the fact that the parties to this review will be working together in future, the Board will direct that each party bears its costs of the Request for Review.

FINAL ORDERS OF THE BOARD

In view of all the foregoing findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Disposal Act, 2015 the Board makes the following orders on this Request for Review:

1. The Request for Review dated 29th September, 2017 and filed with the Board on the same date by the Applicant, M/s Inovate Enterprises Limited, in respect of Tender Number ALSS/TG/PROJ/28/2017 for Proposed Construction of 1 No Classroom and Completion of Laboratory Block to A.C.K Lagat Mixed Day / Boarding High School, Olmetunyi be and is hereby allowed.
2. The award of subject tender to the successful tenderer, Messrs Shaulyne Logistics Ltd be and is hereby set aside and annulled.
3. Considering that the evaluation of the said tender is complete and in further consideration of the Board's findings, the decision of the Procuring Entity is hereby substituted with the decision of the Board to award the said tender to the Applicant, Messrs Inovate Enterprises Limited, at the tender price of Kshs 2,921,870.00.
4. The Procuring Entity is hereby directed to sign a contract with the Applicant within seven days of this decision.
5. Each party shall bear its own costs of this Request for Review.

Dated at Eldoret on this 19th day of October, 2017


.....
CHAIRMAN
PPARB


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SECRETARY
PPARB