

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 79/2017 OF 31STAUGUST, 2017

BETWEEN

KENCHUAN ARCHITECTS LIMITEDAPPLICANT

NATIONAL HOSPITAL INSURANCE FUNDPROCURING ENTITY

Review against the decision of National Hospital Insurance Fund (NHIF) in the Matter of Tender Number NHIF/012/2016-2017 for Provision of Architectural Consultancy Services on Spatial Re-organization and Office Optimization.

BOARD MEMBERS PRESENT

- | | | |
|----|------------------|------------|
| 1. | Mr.Paul Gicheru | - Chairman |
| 2. | Mr. Hussein Were | - Member |
| 3. | Mr. Nelson Orgut | - Member |
| 4. | Eng. Weche Okubo | - Member |

IN ATTENDANCE

- | | | |
|----|-----------------|---------------|
| 1. | Philemon Kiprop | - Secretarat |
| 2. | Maureen Namadi | - Secretariat |

PRESENT BY INVITATION

Applicant - Kenchuan Architects

1. Walter Akwabi - Advocate, Lutta & Co. Advocates
2. Reuben Gusiji - Kenchuan Architects

Procuring Entity- National Hospital Insurance Fund

1. Rose Nakhungu - Legal Officer, NHIF
2. Olive Osugo - Legal Officer
3. Kennedy Wakhu - Supply Chain Officer
4. Johnstone M. Ouma - Principal Officer-SCM

Interested Party:

1. Francis M. Gichuhi - Principal, Habitech Consultants Ltd
2. Eng. Joel Sigei - Team member, Habitech Consultants Ltd

BOARD'S DECISION

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

BACKGROUND OF DECISION

Tender Invitation

The Request for Proposal for Architectural Consultancy Services on Spatial Re-Organization and Office Optimization for the National Hospital Insurance

Fund (NHIF) were issued on 25th April 2017 and opened on 9th May 2017. Six (6) pre-qualified firms were invited to tender and they submitted their tender documents on the date of opening as follows:

Bidder No.	Bidder's Name	Address
01	Top Safety Africa Ltd	P.O. Box 22878 - 00100 Nairobi
02	Lins Consult	P.O. Box 1555 - 00100 Nairobi
03	Triad Architects	P.O. Box 30725 - 00100 Nairobi
04	Habitech Consultants Ltd	P.O. Box 66495 - 00800 Nairobi
05	Kenchuan Architects Ltd	P.O. Box 19895 - 00202 Nairobi
06	Dama Services Ltd	P.O. Box 9656 - 00100 Nairobi

Tender Evaluation

NHIF's tender evaluation committee evaluated the tenders in three stages of preliminary (mandatory), technical and financial evaluation.

Preliminary Evaluation

Bidders were assessed for compliance with the following mandatory requirements:

1. Tender Security - A bid bond from a reputable bank or an Insurance Company approved by PPOA of Two Hundred Thousand (Kshs, 200,000.00) valid for 120 days.

- a. AGPO groups not required to submit a tender security but to fill, sign and submit the Tender Securing Declaration form and AGPO certificate of registration.
2. Signed Introduction Letter – tender submission form;
3. Copy of current NHIF Compliance Certificate;
4. Copy of Certificate of Incorporation;
5. Copy of Tax Compliance Certificate;
6. Audited Accounts for the last two years;
7. Relevant Trading / Operation Licenses;
8. Document was to be Serialized;
9. Document was to be Vero Bound;
10. Signed declaration statement that Consultant will not engage in any corrupt or fraudulent practices; and
11. Signed declaration statement that Consultant is not debarred from participating in Public Procurement in Kenya.

Failure to meet mandatory requirements led to disqualification.

The result of the preliminary evaluation was as follows:

Mandatory Requirement	Bidder					
	01	02	03	04	05	06
1	√	√	√	√	x	√
2	√	√	√	√	√	√
3	√	√	√	√	√	√
4	√	√	√	√	√	√
5	√	√	√	√	√	√
6	√	√	√	√	√	x
7	√	x	√	√	√	√
8	√	√	√	√	√	√
9	√	x	√	√	x	x
10	√	√	√	√	√*	x
11	√	√	√	√	√*	x
Result	√	x	√	√	x	x

Three firms, M/s Top Safety Africa Ltd (01), M/s Triad Architects (03) and M/s Habitech Consultants (4), met all the mandatory requirements and were subjected to the next stage of technical evaluation. Three other firms did not

meet all the mandatory requirements and were disqualified from further evaluation. The disqualified bidders were M/s Lins Consult (02), M/s Kenchuan Architects Ltd (05) and M/s Dama Services Ltd.

M/s Lins Consult did not provide the following documents / information:-

- Relevant Trading / Operation Licenses; and
- The document was not Vero Bound.

M/s Kenchuan Architects Ltd did not provide the following documents / information:-

- Tender Security - A bid bond from a reputable bank or an Insurance Company approved by PPOA of Two Hundred Thousand (Kshs, 200,000.00). The one submitted was a scanned copy in the name of **M/s Bilmax Insurance Brokers** from Co-operative Bank of Kenya;
- The document was not Vero Bound and all pages were not serialized;
- Signed declaration statement that Consultant will not engage in any corrupt or fraudulent practices (the statement was not stamped); and
- Signed declaration statement that Consultant is not debarred from participating in Public Procurement in Kenya was not stamped).

M/s Dama Services Ltd did not provide the following documents / information:-

- The document was not Vero Bound;
- Signed declaration statement that Consultant will not engage in any corrupt or fraudulent practices; and

- Signed declaration statement that Consultant is not debarred from participating in Public Procurement in Kenya.

Technical Evaluation

Proposal from consultants were evaluated based on technical soundness, that is, experience of consulting firm, adequacy of proposed methodology and work plan as well as on financial viability.

Marks were awarded as follows:-

- Technical Evaluation to carry 80%
- Financial Evaluation to carry 20%

The evaluation committee evaluated the proposals using the following criteria:

1. Adequacy/appropriateness of the proposed Work plan and Methodology in responding to the Terms of reference for the project.
2. Specific experience of the technical personnel undertaking the assignment. Company background, professional competencies was to be provided.
3. Evidence of relevant ongoing or past service provision of this type and magnitude supported by three reference letters.
4. Suitability of value added and benefits realisation.
5. Requisite qualifications and competence of key staff for the assignment and their CVs, at least five (5).

Summary of Technical Evaluation Table out of 80% is as below

Bidder's Name	Evaluation Criteria							Total Marks Scored	Total Score out of 80%
	1	2	3	4	5	6	7		
Top Safety Africa Ltd	20	10	0	8	30	0	5	73	58.4
Triad Architects	10	0	10	10	30	10	5	75	60.0
Habitech Consultants	20	0	3	3	30	10	5	71	56.8

The pass mark at the technical evaluation stage was 70%. All the above firms scored more than 70% and were subjected to financial evaluation.

Financial Evaluation

The firms were invited for opening of financial proposals on 13th June 2017.

The firm that scored the highest at the technical and provided the most cost effective financial proposal was considered for award of tender. Bidders were advised to provide the rate cards for all the items as listed below:

1. Rates and days for consultants
2. Rates and days for the subsistence
3. Costs for equipment
4. Costs for validation of the outcomes
5. Costs for production of reports
6. Costs for dissemination

The formula for determining the financial scores was as following:

$S_f = 100 \times F_m / F$, where S_f is the financial score, F_m is the lowest price and F the price of the proposal under consideration

The weights given to the technical and financial proposal are: T=0.8 and F=0.2

The Technical Proposal comprised 80% of the Total Marks while the Financial Proposal comprised 20% of the Total Marks.

Bidder No.	Bidder's Name	Amount read out (Kshs.)	FP - 20%	Ranking
04	Habitech Consultants	116,000.00	20	1
01	Top Safety Africa Ltd	11,848,000.00	0.2	3
03	Triad Architects	29,815,020.00	0.1	4

The aggregate was determined as follows: 80 (Technical Score) + 20 (Financial Score) = Total Aggregate Score.

Bidder No.	Bidder's Name	TS - 80	FS - 20	TAS - 100	Ranking
04	Habitech Consultants Ltd	56.8	20.0	76.8	1
03	Triad Architects	60.0	0.1	60.1	2
01	Top Safety Africa	58.4	0.2	58.6	3

Habitech Consultants Ltd was the highest ranked bidder with a total aggregate score of 76.8% and the lowest bidder at a total cost of Kshs. 116,000.00 charged in lump sum and as per the Conditions of Engagement and Scale of Fees for Professional Services for Building and Civil Engineering Works (1987 Edition) thereon.

Recommendations

The Evaluation Committee recommended award of the tender to the lowest evaluated bidder, Habitech Consultants Ltd of P.O. Box 66495 - 00800, Nairobi, Kenya at their tender sum of Kshs. 116,000.00 charged in lump sum and fees as per the Conditions of Engagement and scale of Fees for Professional Services for Building and Civil Engineering Works (1987 Edition) thereon and as per section 80(2), 86(d), 121(2) and 124(7) of the Public Procurement & Disposal Act, (2015).

Professional Opinion

Pamela Marendi, Manager, Supply Chain Management, in a Professional Opinion dated 15th August 2017 to the Director of Corporate Services stated that she had no reservations on the recommendation of the evaluation committee to award the contract to the lowest evaluated bidder, Habitech Consultants Ltd at their tender sum of Kshs. 116,000.00 together with applicable statutory scale remunerations. She stated that the bidder recommended for Architectural Consultancy Services on Spatial Re-organization and Office Optimization was the successful tenderer as per section 86 (1) (a) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter "the Act"). She stated further that the procurement process was competitive and the evaluation was conducted using the criteria set in the bidding document and that the item was budgeted and planned for by Administration Division and as per Section 84 of the Act.

The successful and unsuccessful bidders were notified *vide* letters dated 17th August 2017 of the award of the tender.

REVIEW

The Request for Review was lodged by M/s Kenchuan Architects Limited (hereinafter "the Applicant") on 31st August, 2017 in the matter of Tender Number NHIF/012/2016 - 2017 for Architectural Consultancy Services on Spatial Re-organization and Office Optimization for National Hospital Insurance Fund (hereinafter "the Procuring Entity").

The Applicant sought for the following orders of the Board:

1. *A declaration that the Respondent acted unreasonably and unfairly against the Applicant.*
2. *A declaration that the Tender Process and award is void and contrary to the provisions of the Act.*
3. *An order quashing and annulling the Respondent's decision to award the tender on account of various irregularities and breach of law.*
4. *Costs of this Request for Review to the Applicant.*
5. *Any other relief that the Review Board deems fit to grant in the interest of justice.*

The Applicant was represented by Mr. Walter Akwabi Advocate from the firm of Lutta & Co. Advocates while the Procuring Entity was represented by Ms Rose Nakhungu, Legal Officer at NHIF. The Interested Party present, M/s Habitech Consultants Ltd, was represented by Mr. Francis M. Gichuhi its Managing Director.

THE APPLICANT'S CASE

Mr. Walter Akwabi advocate who appeared on behalf of the Applicant relied on the grounds set out in the Applicant's Request for Review and challenged the Procuring Entity's decision to declare the Applicant's tender as

unsuccessful as contained in its letter dated 17th August, 2017 which the Applicant produced and annexed at page 66 of the its Request for Review.

Counsel for the Applicant submitted that all the grounds set out in the said letter on the basis of which the Applicant was declared as non-responsive were not correct.

On the first ground set out by the Procuring Entity namely that the Applicant did not submit a valid bid bond, Counsel for the Applicant provided that the Applicant submitted a valid bid bond in support of it's tender. He stated that the bid bond in question was issued by the Co-operative Bank Ltd on 4th May, 2017 but he acknowledged that the only error in the bid bond was that it indicated that it had been issued in favour of an entity known as Bilmax Insurance Brokers and not the Applicant. Counsel for the Applicant however argued that the Procuring Entity ought to have treated the above defect as a minor one and ought not to have disqualified the Applicant's tender on this ground.

On the second and the third grounds for disqualification namely that the Applicant did not submit a signed declaration that the Applicant would not engage in corrupt or fraudulent practices and a signed declaration that the Applicant firm was not debarred from participating in public procurement in Kenya, Counsel for the Applicant argued that the Procuring Entity acted unfairly and unreasonably in disqualifying the Applicant's bid based on the two grounds.

Counsel for the Applicant submitted that the Applicant provided duly signed copies of the said declarations and stated that the only missing aspects on the two declarations was the Applicant's stamp. Counsel for the Applicant however stated that the only requirement in the tender document as relates to the said forms was that the forms be signed but there was not requirement that the same be stamped.

On the third ground of disqualification namely that the tender document was not vero bound, Counsel for the Applicant submitted that the failure by the Applicant to submit a tender document which was vero bound was a minor deviation that did not affect the responsiveness of the tender. He stated that the purpose of vero binding was to ensure that all the pages in the tender document remained intact a purpose he asserted was served by serialization and the paginating of the tender documents.

He therefore urged the Board to treat the said defect as a minor one and find that the Procuring Entity's decision to declare the Applicant's bid as unsuccessful based on the above ground was improper.

In addition to the above grounds, Counsel for the Applicant urged the Board to find that the letter of notification issued by the Procuring Entity to the Applicant contravened the provisions of Section 87(1) of the Public Procurement and Disposal Act for want of proper service.

Counsel for the Applicant stated that the Procuring Entity had not produced any evidence to show how the letter of notification was dispatched to the Applicant. He contended that the letter of notification dated 17th August,

2017 was only prepared by the Procuring Entity for the purposes of resisting the Request for Review before the Board and that the said letter was an afterthought.

Based on all the above grounds, the Applicant therefore urged the Board to allow the Request for Review.

THE PROCURING ENTITY'S RESPONSE

The Procuring Entity, in response to the Request for Review relied on the statement of Geoffrey Mwangi, its Chief Executive Officer and denied that it acted unfairly and unreasonably in declaring the Applicant's bid as unsuccessful on the ground that the Applicant had provided a bid Bond which did not meet the requirements set out in the tender document. The Procuring Entity submitted that the Applicant did not provide a bid bond as required but instead provided a scanned copy of a bid bond issued in favour of M/s Bilmax Insurance Brokers by the Co-operative Bank of Kenya.

On the issue of the two declaration forms, Counsel for the Procuring Entity disputed the Applicant's assertion that it acted unfairly and unreasonably in disqualifying the Applicant by failing to consider that the Applicant had submitted a duly executed declaration statement that it will not engage in any corrupt or fraudulent practices and a duly executed declaration statement that it was not debarred from participating in Public Procurement in Kenya. Counsel for the Procuring Entity stated that the Applicant's declaration forms were incomplete in that the same did not disclose the name of the Procuring Entity and were not stamped as required by the tender document.

On the issue of *vero binding*, Counsel for the Procuring Entity submitted that the Applicant had admitted that it did not comply with this requirement. She stated that this requirement together with the requirements on the submission of the bid bond and the declaration forms were all mandatory requirements of this tender and that the failure by the Applicant to comply with the said requirements rendered the Applicant's tender as non-responsive.

Counsel for the Procuring Entity additionally submitted that the above defects rendered the Applicant's tender as non-responsive pursuant to the provisions of Section 79 of the Act as read together with the provisions of Sections 74(1)(i) and Section 86 of the same Act.

On the issue of notification, Counsel for the Procuring Entity submitted that the Applicant was duly notified of the outcome of its tender pursuant to the provisions of Section 87(1) of the Public Procurement and Asset Disposal Act and further stated that the letter of notification dated 17th August, 2017 was issued within the tender validity period as extended by the Procuring Entity's letter of notification dated 25th July, 2017 and further that the letter of notification contained all the particulars contemplated by Section 87(1) of the Act.

She therefore urged the Board to find that the Applicant's Request for Review lacked merit and dismiss the same with costs.

THE INTERESTED PARTY'S RESPONSE

Mr. Francis Gichuki the Managing Director of Habitech Consultants Ltd, the Interested Party, averred that his firm submitted a bid as required and in accordance with the Request for Proposal document. He stated that the Interested Party complied with all the mandatory requirements and that it provided a bid bond from Kenya Orient Insurance Company. He further stated that his firm gave a competitive bid and price. He submitted that his firm received the letter extending the tender validity period and accepted to extend the validity of the tender via a letter dated 26th July 2017. The Interested Party in conclusion supported the position taken by the Procuring Entity and urged the Board to give the Interested Party a chance to do the job.

THE APPLICANT'S REPLY

Mr. Akwabi, in answer to the submissions made by Counsel for the Procuring Entity submitted that the method of service of the letters of notification upon the successful and unsuccessful bidders was discriminatory since some letters were delivered by hand and others by post. He further submitted that the successful bidder's tender sum of Kshs 116,000.00 was not fixed and that it would have been varied upwards. He also submitted that there was no proof of postage of the letter dated 25th of July 2017 offered by the Procuring Entity.

The Applicant argued that the Applicant's financials bid was not returned unopened as was expected. It argued further that the stamping of forms R61 and R62 was not a mandatory requirement stating that the form only needed to be signed which the Applicant had done. It urged the Board to find that

the Procuring Entity was in breach of its own tender document and the Act, and grant the prayers sought in the Request for Review.

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 Procuring Entity violated the provisions of Section 87 (1) of the Act by awarding the tender outside the tender validity period.*
- 2. Whether the Applicant's tender was improperly disqualified on account of non-compliance with the mandatory requirements set out in the tender document..*

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

ISSUE NO. I

As to whether the Procuring Entity violated the provisions of Section 87 (1) of the Act by awarding the tender outside the tender validity period

The Board notes that the tender the subject matter of this Request for Review was opened on 9th May 2017 whereupon six pre-qualified firms submitted their tender documents. The Procuring Entity's tender evaluation committee evaluated the said tenders in three stages namely the preliminary, technical and financial evaluation. Three bidders, including the Applicant, were disqualified at the preliminary evaluation stage for non-compliance with various mandatory requirements of the tender document. The balance of three bidders who were determined to have qualified at the preliminary evaluation stage proceeded to technical evaluation. They all attained the

minimum pass mark of 70% and were evaluated at the next stage which was the financial evaluation stage. Messrs Habitech Consultants Limited scored the highest combined technical and financial score and was therefore recommended by the tender evaluation committee for award in the tender evaluation report dated 29th June 2017.

The Board further notes that the Manager, Supply Chain Management of the Procuring Entity endorsed the recommendation of the evaluation committee in a professional opinion dated 15th August 2017 to the Director of Corporate Services thus paving the way for the award of the tender to the successful bidder and the notification to unsuccessful bidders, *vide* the letters dated 17th August 2017.

The Board has considered the arguments by the Applicant that the tender having been awarded on 17th August 2017, the same was awarded outside the tender validity period. The Board observes that the tender the subject matter of this Request for Review was opened on 9th May 2017 and had a validity period of 90 days. Counting from the date of tender opening, the validity period lapsed, at the very latest, on 9th August 2017. Award of the tender at any time after 9th August 2017 would, no doubt, be irregular and unlawful as exemplified by the provisions of Section 87 (1) the Act which states as follows:

Section 87(1): *“Before the expiry of the period during which tenders must remain valid, the accounting officer of the Procuring Entity shall notify in writing the person submitting the successful tender that his tender has been accepted”.*

The Board however wishes to observe that the Procuring Entity, vide the letter dated 25th July 2017, sought to extend the tender validity period of the tenders by a further 30 days. The said letter stated as follows:

“Reference is made to the tender in which you participated. The Fund is in the process of finalizing the tender process, however, due to some unavoidable circumstances we would like to request for extension of bid validity pursuant to clause 1.3.8 of the Request for Proposal documents and Section 88 (1-3) of the Public Procurement and Asset Disposal Act, 2015.

The bid validity was 90 days from the date of tender opening which will expire on 9th August, 2017. This is therefore to request that you extend the bid validity period for a period of thirty (30) days from the original expiry date (from 9th August to 9th September 2017)”.

On extension of tender validity, Section 88 (1) of the Act provides as follows:

Section 88(1): *“Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.*

The legal requirement that a Procuring Entity cannot award a tender outside the tender validity period is exemplified by several decisions as illustrated by the decisions in **Bricks Security Services Limited -vs- Egerton University** PPARB Appl. No. 23 of 2008; **Vulcan Limited -vs- Ministry of Health** (PPARB Appl. No. 45 of 2004; and **Transcend Media Group Ltd -vs- Kenya Power & Lighting Company Ltd** (PPARB Appl. No. 70 of 2017).

The decision of the Procuring Entity, communicated vide its letter dated 25th July 2017 however extended the life of the tender that was otherwise set to

lapse on 9th August 2017. It is the Board's view that the tender was therefore alive on 17th August 2017 when the award was made since the validity had been extended to 9th September, 2017.

The Board, in arriving at this view, has considered the Applicant's argument that it did not receive the letter of 25th July 2017 that sought to extend the tender validity period. The Board however notes that the Applicant's submissions on this matter were not part of its pleadings, the same having been made by the Applicant's advocate from the bar. The Applicant had an opportunity to amend its Request for Review to dispute the allegation that it received the letter dated 25th July, 2017 but it did not take the opportunity to do so. Further, the letter of notification disclosed the successful bidder and provided reasons as to why the Applicant's bid was unsuccessful as required under the provisions of Section 87 (3) of the Act.

It is therefore the Board's finding that the tender was awarded in compliance with the provisions of Section 87 (1) of the Act. This ground of review therefore fails and is dismissed.

ISSUE NO. II

As to whether the Applicant's tender was improperly disqualified on account of non-compliance with the mandatory requirements set out in the tender document.

The Board notes that the Procuring Entity awarded the subject tender to the successful bidder vide a letter dated 17th August 2017 and issued a letter of notification to unsuccessful bidders on even date. The Applicant's letter of notification stated as follows:

"NHIF Management regrets to inform you that after a thorough evaluation of the tender documents, your firm was not successful because it did not provide/attach the following:

- 1. Tender Security - a bid bond from a reputable bank or an insurance company approved by PPRA of Two Hundred Thousand (Kshs. 200,000.00);*
- 2. The document was not vero bound;*
- 3. Signed Declaration Statement that consultant will not engage in any corrupt or fraudulent practices; and*
- 4. Signed declaration statement that consultant firm is not debarred from participating in Public Procurement in Kenya.*

"As per section 86 and 87 (3) of the PPRA 2015, the contract was awarded to the responsive /successful bidders M/s Habitech Consultants Ltd as their tender sum of Kshs 116,000.00 charged in lumpsum and as per the condition of Engagement and Scale of Fees for Professional Services for Building and Civil Engineering Works (1987 Edition) thereon and as per section 80 (2) 86 (d), 121 (2) and 124 (7) of the Public Procurement and Asset Disposal Act, 2015".

Evidently, the Applicant was offended by the decision of the Procuring Entity as conveyed in the letter of notification dated 17th August 2017 and challenged it through this Request for Review.

To determine this issue the Board has looked at the tender document and in particular the mandatory requirements of evaluation found at page 20 to page 22 of the tender document. The said requirements provide as follows:

“Bidders were assessed for compliance with the following mandatory requirements:

- 1. Tender Security - A bid bond from a reputable bank or an Insurance Company approved by PPOA of Two Hundred Thousand (Kshs, 200,000.00) valid for 120 days.
 - a. AGPO groups not required to submit a tender security but to fill, sign and submit the Tender Securing Declaration form and AGPO certificate of registration.**
- 2. Signed Introduction Letter – tender submission form;*
- 3. Copy of current NHIF Compliance Certificate;*
- 4. Copy of Certificate of Incorporation;*
- 5. Copy of Tax Compliance Certificate;*
- 6. Audited Accounts for the last two years;*
- 7. Relevant Trading / Operation Licenses;*
- 8. Serialization of the Document;*
- 9. Document was to be Vero Bound;*
- 10. Signed declaration statement that Consultant will not engage in any corrupt or fraudulent practices; and*
- 11. Signed declaration statement that Consultant is not debarred from participating in Public Procurement in Kenya.*

Failure to meet mandatory requirements led to disqualification.”

The Board notes the following relevant provisions of the tender document:

1. *Tender Security – A bid bond from a reputable bank or an Insurance Company approved by PPOA of Two Hundred Thousand (Kshs, 200,000.00) valid for 120 days.*
2. *Serialization of the Document*
3. *Document was to be Vero Bound;*
4. *Signed declaration statement that Consultant will not engage in any corrupt or fraudulent practices; and*
5. *Signed declaration statement that Consultant is not debarred from participating in Public Procurement in Kenya.*

Having looked at the sections of the tender document outlined above, the Board observes that the tender security for the subject tender was valid for 120 days from the date of tender opening. The tenders closed and were opened on 9th May, 2017. The 90 days tender validity period started running from the date of opening and lapsed on 9th August, 2017. The bid security lapsed 30 days later, on 9th September 2017. It was not denied by the Applicant that its bid bond was issued in favour of Messrs Bilmax Insurance Brokers. It was also not denied that the bid bond provided in the Applicant's tender was valid until 4th June 2017. In the Board's view, Bilmax Insurance Brokers was not a bidder in the procurement process and therefore the bid bond drawn in its favour could not be enforced by the Procuring Entity. Further, the bid bond was for a period of 25 days, and not the 120 days required by the tender document.

Owing to the above defects and shortcomings, the Board finds that the Applicant did not submit a bid bond that met the requirements of the tender document. The above finding by the Board is buttressed by the provisions of Regulation 41(4) of the Public Procurement and Asset Disposal Regulations, 2006 which states as follows:-

Regulation 41 (4) "No tender security shall be accepted under the Act unless such security is valid for a period of at least thirty days after the expiry of the tender validity period".

Consequent to the foregoing, the Board holds that the Procuring Entity did not act improperly in disqualifying the Applicant's tender on account of non-compliance with the requirement of the tender document for the provision of the bid bond. This ground of review therefore fails and is disallowed.

The Board wishes to observe that the Applicant was disqualified for failing to provide the requisite bid bond and, further, for failing to duly fill and stamp the mandatory declaration form requiring it not to engage in corrupt practices and a declaration that it was not debarred from participating in public procurement in Kenya. The Board has scrutinized the said forms and finds that the forms were filled and signed but were not stamped. In the Board's view, this is a minor omission that does not alter the substance of the tender. The Board is inclined to agree with the Applicant that its tender could not have been disqualified solely on account of its failure to stamp the forms.

On another complaint regarding the vero binding of the tender document, the Board observes that the purpose of vero binding the tender document is to protect the tender documents from any attempts to pluck papers from it or the documents being excluded from the tender document as a result of other factors. This purpose is however well served by serialization of the tender

document and failure to bind it is, in the Board's opinion, not an omission serious enough to warrant the invalidation of the tender. The finding of the Board on the later complaints does not however override the Board's finding on the defects in the Applicant's bid bond. The net effect of the above findings is therefore that this ground of review fails and is disallowed.

COSTS

It is common practice in dispute resolution mechanisms that costs are awarded to the successful party. In other words, "costs follow the event". In the current case however, the Applicant was partially successful in resisting some of the Procuring Entity's arguments particularly the one on the completeness of the forms and the mode of binding of the tender document. For this reason the Board shall not order any party to pay the costs of review.

FINAL ORDERS

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 31st August, 2017 and filed with the Board on the same date by the Applicant, M/s Kenchuan Architects Limited in respect of Tender Number NHIF/012/2016-2017 for Provision of Architectural Consultancy Services on Spatial Reorganization and Office Optimization for National Hospital Insurance Fund be and is hereby disallowed.**

2. The Procuring Entity is at liberty to proceed with the procurement process the subject matter of this tender to its logical conclusion.

3. Each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 21st September, 2017



CHAIRMAN
PPARB



SECRETARY
PPARB