

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 03/2017 of 18<sup>TH</sup> JANUARY, 2017**

**BETWEEN**

**MESHACKMATENGO & DR. PETER GITHAE,  
T/A MATENGO GITHAE & ASSOCIATES ..... APPLICANT**

**AND**

**MINISTRY OF DEVOLUTION & PLANNING,  
STATE DEPARTMENT OF  
DEVOLUTION ..... PROCURING ENTITY**

Review against the decision of the Ministry of Devolution & Planning,  
State Department of Devolution in the matter of Tender No.  
MODP/KDSP/01/2015-2016, for Consultancy Service for the Annual  
Capacity and Performance Assessment.

**BOARD MEMBERS PRESENT**

1. Mr. Paul Gicheru - Chairman
2. Mr. Paul Ngotho - Member
3. Mr. Hussein Were - Member

**IN ATTENDANCE**

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

## **PRESENT BY INVITATION**

**Applicant - Meshack Matengo & Dr. Peter Githae, T/A  
MatengoGithae& Associates**

1. Anthony E. Kiprono -Advocate, A.E.Kiprono Advocates
2. Meshack Matemo - Partner

**Procuring Entity - Ministry of Devolution & Planning, State  
Department of Devolution**

1. Mwangi - State Counsel
2. Edward M. Irungu - D. A.
3. Judith Nyadimo - SSCMO
4. Ngari Githu - AD.SCMS

## **BOARD'S DECISION**

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

## **BACKGROUND OF AWARD**

The Annual Capacity and Performance Assessment Expression of Interest (EOI) was advertised on Friday, 6<sup>th</sup> May, 2016 on *The Standard* newspaper and closed on 3<sup>rd</sup> June, 2016.

The following firms responded to Expression of the Interest:-

S/No.	Name of Firm
1.	M/s Legislative Leadership Institute
2.	M/s International Renaissance Centre
3.	M/s CDC Consulting Group limited
4.	M/s KPMG Advisory Services Limited
5.	M/s Talem Group Limited
6.	M/s Solamart Consultants Limited/Mabeya and Associates
7.	3D Africa Communications Limited and Geekan Consultants Limited
8.	M/s Deloitte Limited
9.	M/s Price Waterhouse Coopers Limited
10.	M/s MatengoGithae& Associates in association with Zurich University of Applied Science, and KCA university,
11.	M/s Ernst &Young LLP
12.	M/s Charmy Investments Limited
13.	M/s Move on Afrika Limited
14.	M/s Prestige Management Solutions Limited
15.	M/s Africa Development Professional Group
16.	M/s Bailey Consulting Group &UNES University of Nairobi Enterprises & Services (UNES)
17.	M/s Jeypent Company Limited

Following the tender opening, the above seventeen (17) firms were evaluated and the following eight (8) firms were shortlisted for Request for Proposal (RFP)

- (i) M/s KPMG Advisory Services Ltd
- (ii) M/s Price Waterhouse Coopers Ltd
- (iii) M/s Africa Development Professional Group in Association with Hewitt Consulting Ltd and Tertiary International Ltd
- (iv) M/s Bailey Consulting Group and University of Nairobi Enterprise Services (UNES)
- (v) M/s Ernst & Young LLP
- (vi) M/s MatengoGithae and Associates, Zurich University of Applied Science and KCA University
- (vii) M/s 3D Africa Communications Ltd and Geekan Consultants Ltd
- (viii) M/s Prestige Management Solutions Ltd

The shortlisted bidders were issued with Request for Proposal documents and invited to bid on 8<sup>th</sup> September 2016. The bids were opened on 22<sup>nd</sup> September 2016 at 10.00 a.m. by an Evaluation Committee comprising of officers appointed by the Accounting Officer, State Department of Devolution.

### **Evaluation Criteria**

The evaluation committee assessed the responsiveness of the bidders to the RFP based on the evaluation criteria developed taking into consideration the Terms of Reference (TOR) and the Information to Consultants (ICS) as contained in the RFP document.

Upon evaluation the following three firms were found to be technically responsive and therefore proceeded to financial evaluation.

- (i) M/s Matengo Githae and Associates, Zurich University of Applied Science and KCA University
- (ii) M/s Ernst & Young LLP
- (iii) M/s Africa Development Professional Group in Association with Hewitt Consulting Ltd and Tertiary International Ltd

The following were the technical scores and financial bids

Bidder No.	Bidder Name	Technical Score	Financial Bid (KShs.)
8	M/s MatengoGithae and Associates, Zurich University of Applied Science and KCA University	81.8	47,109,224.00
5	M/s Ernst & Young LLP	80.7	73,430,320.00
7	M/s Africa Development Professional Group in Association with Hewitt Consulting Ltd and Tertiary International Ltd	70.2	88,572,960.00

### Financial proposal evaluation

The financial bids were opened on 11<sup>th</sup> October, 2016, at 9.00 a.m. the following are the bids as read out.

The committee used the formulae provided in the proposal document to determine the financial score for the bidders. These scores were combined with the technical scores attained by the bidders at the

technical evaluation stage. The weight assigned to the technical score and financial score were 0.8 and 0.2 respectively.

The table below shows the combined weighted scores

Bidder No.	Name of Bidder	Technical Score in %	Weighted Technical Score	Weighted Financial Score	Combined Weighted Score (%)
5	M/s Ernst & Young	80.7	64.6	12.8	77.4
7	M/s Africa Development Professional Group	70.2	56.2	10.6	66.8
8	M/s KCA/Zurich MatengoGithae & Associates	81.8	65.4	20	85.4

From the foregoing, these firms are local firms therefore no preferential bias (10%) was applied in the proposal prices as stipulated in section 2.8.4 of the proposal document

#### Evaluation Committee's Recommendation

Based on the Technical and Financial evaluations, M/s KCA/Zurich MatengoGithae & Associates having scored the highest combined score of 85.4% is recommended to be considered for contract award, to carry out the county ACPA at a total sum of financial bid of Kshs. 47, 109,224.00, inclusive of all statutory taxes. The lead consultant for this consortium is Matengo Githae & Associates.

After the tender evaluation, the consortium of M/s Matengo Githae and Associates, Zurich University of Applied Science and KCA University emerged as the lowest technically responsive bidder.

### **PROFESSIONAL OPINION**

Following completion of the evaluation process and pursuant to the report by the Evaluation Committee, the Head of Procurement of the Procuring Entity gave a professional opinion on the procurement process and stated that the procurement was done in accordance with the Public Procurement and Disposal Act 2015.

Following the results of the bidding process the winning consortium was invited for negotiation and thereafter a notification of award was issued on 27<sup>th</sup> October, 2016 and accepted on 28<sup>th</sup> October, 2016

Following the notification and acceptance of the tender award and considering that the winning bid consisted of a consortium of three entities the State Department of Devolution requested that an agreement between the consortium members be signed as a commitment of the consortium membership to the due performance of the contract. This was to be done prior to executing the principal contract between the State Department of Devolution and the consortium.

## REVIEW

The Request for Review was lodged by M/s Meshack Matengo & Dr. Peter Githae, T/A Matengo Githae & Associates, the above named Applicant of P.O. Box 725-00517 Nairobi on 18<sup>th</sup> January, 2017 in the matter of Tender No. MODP/KDSP/01/2015-2016, for Consultancy Service for the Annual Capacity and Performance Assessment.

The Applicant in this request for review was represented by Mr. Anthony Kiprono, Advocate while Procuring Entity was represented by Mr. Mwangi, State Counsel.

The Applicant set out a total of four grounds at the conclusion of which he sought for the following prayers:-

- a) **An order directing/compelling the Respondent to sign with the Applicant the contract in line with the award dated 27/10/2016.**
- b) **Costs of the Request for Review.**
- c) **Any other relief that the Review Board deems fit to grant under the circumstances.**

During the course of the Request for Review however the procuring entity purported to terminate the procurement proceedings via letters dated 19<sup>th</sup> March, 2017 which were written on 19<sup>th</sup> January, 2017 just a day after the Request for Review had been filed.

The Board has looked at the Request for Review, the responses thereto together with all the original tender document and has come to the



conclusion that this Request for Review only raised two issues namely:-

- a) **Whether the Respondent could terminate the proceedings under the provisions of Section 63 of the Public Procurement and Asset Disposal Act in view of the pending proceedings.**
  
- b) **Whether the Respondent could lawfully refuse to execute the contract between the parties under section 135(2) of the Act.**

### **ISSUE NO. I**

**Whether the Respondent could terminate the proceedings under the provisions of Section 63 of the Public Procurement and Asset Disposal Act in view of the pending proceedings.**

On the first issue framed for determination 63 of the Act is explicit that a procuring entity can only terminate procuring proceedings prior to the notification of award. This is unlike the repealed Act where a procuring entity could terminate proceedings at any time under the provisions of Section 36 of the Act so long as no letter of notification had been issued to the successful bidder.

A look at the statement signed by Mr. Meshack Matengo on 18<sup>th</sup> January, 2017 and which accompanied the Request for Review shows that the procuring entity issued a letter of award of the tender to the Applicant on 27<sup>th</sup> October, 2016 which accepted the award on 31<sup>st</sup> October, 2016.

Having therefore awarded the tender to the Applicant it was not therefore open for the procuring entity to terminate the award of the tender.

The Board has pronounced itself on the effect of a notification of award made under the provisions of Section 63 of the Public Procurement and Asset Disposal Act as demonstrated in the cases of **Republic -vs The Public Procurement and Administrative Review Board & Others Exparte Selex Sistemi Intergrati (Nai HC Misc. Appl. No. 66 of 2007)** where the effect is the same and the court held that the Board and the High Court have jurisdiction to inquire into the question of whether a procurement process was properly terminated or not. In the above case, the court held that a procuring entity cannot terminate a procurement process after the making of an award.

Once a letter of award has been issued by a procuring entity, the Board has also severally held that the award cannot be terminated. This was the Board's holding in the case of **AON Insurance Brokers Limited -vs- Teachers Service Commission (PPARB Decision No. 14 of 2016)** where the court relied on the High Court's decision in the **Selex Systemi** case in arriving at its finding.

The Board further finds that the letter of termination dated 19<sup>th</sup> January, 2017 was written in bad faith in that the letter was written one day after the Request for Review was filled. This action on the part of the procuring entity was only meant to defeat the Applicant's legitimate right to benefit from a tender it had participated in leading

upto the award of the tender to it and the Board cannot allow such an action to stand.

On the grounds for termination, Section 63 of the Act sets out the grounds under which a procuring entity can terminate a procurement process.

Mr. Mwangi learned Counsel for the procuring entity conceded before the Board that the termination by procuring entity was not based on any of the grounds set out in Section 63 of the Act. Having conceded as he did, the Board is unable to uphold the termination and the same is therefore set aside and declared null and void.

#### **ISSUE NO. II**

**Whether the Respondent could lawfully refuse to execute the contract between the parties under section 135(2) of the Act.**

The second ground upon which the Applicant sought to terminate the procurement process herein was because the members of the consortium which bided in this tender namely M/s Matengo, Githate Associates, KCA University and Zurich University had not signed a contract guaranteeing to the procuring entity the due performance of the consultancy services and that the procuring entity had requested the group to avail to it a group agreement enjoining all the three members of the consortium to complete the contract.

It was the procuring entity's further case that by a letter dated 7<sup>th</sup> November, 2016, Zurich University of Applied Sciences

communicated its inability to enter into a contract with its consortium partners citing legal inhibitions under Swiss law.

The procuring entity further contended that thereafter, a group agreement was executed between Matengo, Githae Associates and KCA University which was forwarded to the procuring entity. The procuring entity stated that the substitution of personnel was done contrary to clause 4.2 of the draft agreement contained in the tender document.

Based on this state of affairs, the procuring entity sought for an advisory opinion from the Public Procurement and Regulatory Authority vide its letter dated 8<sup>th</sup> December, 2016 and in a lengthy opinion running from pages 109 to 110 of its response, the Authority gave the procuring entity the following opinion:-

- a) The precondition of signing a contract agreement where the consortium was requested to avail a group agreement enjoining all three member consultancies to the completion of the contract was initially not included in the tender document. This condition is also not backed by any letter from the Ministry of Devolution and Planning.
- b) We note that Zurich University participated in the consortium as an entity and not as individual consultants. Clause 4.2 is categorical that only personnel can be changed and not the firm and therefore this clause cannot be invoked as mentioned in your letter. In their letter dated 7<sup>th</sup> November, 2016, Zurich

University has indicated their commitment to the project up to it's completion.

- c) Section 135(2) of the Act provides that 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.

The Board has read the said opinion together with the tender document and it has been unable to find any provision in the tender document that required the consortium partner to sign a contract agreement with the procuring entity to guarantee the due performance of the consultancy services.

What the procuring entity appears to have been referring to is clause 4.2 headed "**Form of Contract**" which was to have been signed at the contract execution stage but not at the notification of the award stage. If any party to the consortium agreement declined to execute the contract or changed personnel midstream then that could only be enforced as a breach of contract and could not affect the award already made and notified.

The procuring entity did not in any event demonstrate that it forwarded the form of contract to the consortium partners and that they refused to execute it.

The Board therefore finds that the refusal by the procuring entity to cause the agreement to be signed under Section 135(2) of the Act had no basis and this ground is therefore allowed.

In the above circumstances, the Applicant's Request for Review is allowed on the following basis.

**FINAL ORDERS**

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

- a) The Applicant's Request for Review dated 18<sup>th</sup> January, 2017 in respect of Tender No. MODP/KDSP/01/2015 - 2016 for consultancy services for annual capacity and performance assessment is allowed.
  
- b) The Procuring Entity is directed to enter into a contract with the Applicant pursuant to the letter of award issued to it within fourteen (14) days from the date hereof.
  
- c) Each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 8<sup>th</sup> day of February, 2017.

  
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**CHAIRMAN**  
**PPARB**

  
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**SECRETARY**  
**PPARB**