

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**REVIEW NO.31/2017 OF 23<sup>RD</sup>MARCH, 2017**

**BETWEEN**

**MUTURI MAINA T/A SAMJUSH**  
**CONTRACTORS AND SUPPLIERS.....Applicant**

**AND**

**KENYA AIRPORTS AUTHORITY.....Procuring Entity**

Review against the decision of the Kenya Airports Authority in the matter of Tender Number KAA/ES/MANDA/1082/ENV for the Provision of Environment Management Services (grass cutting & vegetation control, drainage and gardening) at Manda Airstrip.

**BOARD MEMBERS PRESENT**

- |                              |                |
|------------------------------|----------------|
| 1. Mr.Hussein Were           | - In the Chair |
| 2. Mrs. Gilda Odera          | - Member       |
| 3. Mr. Peter B. Ondieki, MBS | - Member       |
| 4. Mrs.Rosemary Gituma       | - Member       |
| 5. Mr. Nelson Orgut          | - Member       |

## IN ATTENDANCE

1. Stanley Miheso - Holding Brief for Secretary
2. Maureern Namadi - Secretariat

## PRESENT BY INVITATION

**Applicant: - Samjush Contractors And Suppliers**

1. Gikandi Ngibuini - Advocate, Gikandi & Co. Advocates
2. Simon Muturi - Sole Proprietor
3. M. Muturi - Technical Advisor

**Procuring Entity: - Kenya Airports Authority**

1. Joy Igandu - Legal Officer
2. Lilian Okidi - Ag. Projects Manager

## 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:

### INVITATION OF BIDS

Tender Number KAA/ES/MANDA/1082/ENV for the Provision of Environment Management Services (grass cutting & vegetation control, drainage and gardening) at Manda Airstrip for the Kenya Airports Authority (KAA) was advertised in *The People Daily* newspaper on Friday November 18th, 2016 and *The Daily Nation* newspaper of Thursday

November 17th 2016. The tender was for the reserved groups of youth, women and persons with disabilities and it was for a period of three years renewable annually based on performance. The tender was closed on 30<sup>th</sup> November 2016 at 11.00 a.m. and opened immediately thereafter in the presence of tenderers' representatives. Seven (7) tenderers submitted their bids by the closing date and time as listed below:-

Bid No.	Name Of Company	Amount (Ksh)
1.	Wiseden Ventures Ltd	1, 690,061 Per Year
2.	Saary General Suppliers Ltd	4,933,248 Per Year
3.	Samjush Contractors And Suppliers	5,865,250 Per Year
4.	Prolific Works Ltd	6,555,392 Per Year
5	Peesam Limited	6,182,800 Per Year
6	Zamilmar Enterprises Ltd	9,702,240 Per Year
7	Dekings Traders Ltd	11,275,200 Per Year

### EVALUATION PROCESS

The KAA's evaluation committee carried out evaluation of bids in three stages of preliminary evaluation, technical evaluation and financial evaluation.

#### Preliminary Evaluation

Tenders were examined at this stage for responsiveness to mandatory requirements. A bidder who failed to comply with any of the mandatory requirements was disqualified at this stage from further evaluation.

**Bidder 01** (Wiseden Ventures Ltd) was declared non-responsive after failing to provide the Tender Securing Declaration Form.

Six (6) Bidders complied with the stated requirements and qualified for technical evaluation. Bidder No. 03 Samjush Contractors and Suppliers were noted to have a litigation matter with Kenya Airports Authority.

### Technical Evaluation

The Six (6) responsive bidders were evaluated for their full compliance to the technical evaluation requirements. Two bidders were declared non-responsive at this stage for failing to meet the mandatory technical requirements. Bidder 03 (Saary General Suppliers Ltd) and Bidder 07 (Dekings Traders Ltd) did not proceed to the next stage of evaluation. The remaining four (4) bidders were declared responsive after meeting all the technical requirements and were recommended for financial evaluation.

### Financial Evaluation

Bidders who reached this stage of evaluation were verified for the financials and checked for arithmetical errors, omissions and price comparison. The results of the financial evaluation are as shown below:

### **Price Schedule for the Annual Environmental Management Service**

Bid No.	3	4	5	6
Name of Company	Samjush Contractors	Prolific Works Ltd	Peesam Ltd	Zamilmar Enterprises
EMS - Grass cutting and vegetation control	4,676,250	5,040,000	4,320,000	7,800,000
Maintenance of new and old garden hedges	96,000	43,200	120,000	24,000
Maintenance of new and old flower gardens	180,000	432,000	600,000	240,000
Drainage management	84,000	16,000	240,000	180,000
<b>Sub total</b>	<b>5,036,250</b>	<b>5,531,200</b>	<b>5,280,000</b>	<b>8,244,000</b>
<i>Add 16% VAT</i>	<i>805,800</i>	<i>884,992</i>	<i>844,800</i>	<i>1,319,040</i>
<b>Grand Total Per Year</b>	<b>5,842,050</b>	<b>6,416,192</b>	<b>6,124,800</b>	<b>9,563,040</b>
<b>Ranking</b>	<b>1</b>	<b>3</b>	<b>2</b>	<b>4</b>

### Price Schedule for the One- Off Environmental Management Service

Bid No.	3	4	5	6
Name Of Company	Samjush Contractors	Prolific Works Ltd	Peesam Ltd	Zamilmar Enterprises
One-Off (New Flower Garden)	15,000	96,000	30,000	100,000
One-Off (New Garden Hedge)	5,000	24,000	20,000	20,000
Sub-total	20,000	120,000	50,000	120,000
Vat at 16%	3,200	19,200	8,000	19,200
<b>Total One-Off</b>	<b>23,200</b>	<b>139,200</b>	<b>58,000</b>	<b>139,200</b>

#### Observation:

The evaluation committee noted that Bidder 03 (Samjush Contractors and Suppliers) was the lowest bidder. However, at the time of evaluation, the bidder had filed a law suit against KAA and the matter was yet to be determined. The legal and Procurement departments advised the evaluation committee to recommend award to the second lowest evaluated. The approved estimate for Environmental Management Service, Manda Airstrip was Kshs. 6,000,000 per year.

#### Recommendation

The Tender Evaluation Committee recommended that the tender for Provision of Environmental Management Services (Grass cutting, vegetation control, gardening, and drainage management) for Manda Airstrip - Tender Number KAA/ES/MANDA/1082/ENV - be awarded to the second lowest evaluated bidder, Messrs **Peesam Limited** at their quoted price of Kenya shillings six million one hundred and eighty-two thousand, eight hundred only (Kshsb. 6,182,800) inclusive of all taxes.

## PROFESSIONAL OPINION

The Acting General Manager (Procurement & Logistics) advised that the Procurement process was conducted as per the Public Procurement and Asset Disposal (PPAD) Act, 2015 and that the award of the tender be as recommended in the evaluation report.

## REQUEST FOR REVIEW

The Request for Review was lodged by M/s Muturi Maina T/A Samjush Contractors and Suppliers (hereinafter "the Applicant") on 23<sup>rd</sup> March, 2017 urging the Public Procurement Administrative Review Board ("the Board") to review the decision of the Kenya Airport Authority (hereinafter "the Procuring Entity") in the matter of the Tender Number KAA/ES/MANDA/1082/ENV for the Provision of Environment Management Services (grass cutting & vegetation control, drainage and gardening) at Manda Airstrip.

The Applicant sought the following orders of the Board:

- 1. The entire decision of the Respondent made on 9th March, 2017 in respect of Tender No. KAA/ES/MANDA/1082/ENV awarding the tender to M/s Peesam Limited at Kshs. 6,182,800/= be annulled in its entirety.*
- 2. Tender No. KAA/ES/MANDA/1082/ENV be awarded to the Applicant herein, Samjush Contractors and Suppliers at Kshs 5,865,250/= being the lowest evaluated tender.*
- 3. Award of costs to the Applicant.*

On its part, the Procuring Entity prayed that:

1. *The Applicant's Request for Review be dismissed and the Procurement Entity be allowed to proceed with the procurement process.*
2. *The Applicant pays costs of this Review.*

The Applicant was represented by Mr. Gikandi Ngibuini, Advocate from the firm of Gikandi and Company Advocates while the Procuring Entity was represented by Ms Joy Igandu, the Procuring Entity's Legal Officer.

The Applicant raised ten grounds of review which it argued as follows:-

#### APPLICANT'S CASE

The Applicant submitted that when the tenders were opened on 30<sup>th</sup> November, 2016 its bid price was the lowest and that it had complied with all the terms as stipulated in the tender document. It told the Board that on 9<sup>th</sup> March, 2017 it was notified by the Procuring Entity that the tender had been awarded to the second lowest bidder despite the fact that the Applicant had emerged the lowest evaluated bidder based on both the technical and financial evaluation requirements as per clause 2.11.1 of the appendix to instructions to tenderers in the tender document.

The Applicant argued that it was irrational, unfair and an abuse of power for the Procuring Entity to knock out the Applicant when it had qualified to be awarded the tender and proceed to award the same to the successful bidder simply because the Applicant had pending litigation. Counsel for the Applicant disclosed that the dispute in question was referred by the

Honorable Chief Justice through the powers granted to the Chief Justice to the Arbitrator Mr. Eric Nyongesa for hearing and determination since the Laws provide for some of those disputes be referred to an Arbitrator appointed by the Chief Justice. It further argued that the tender document did not contain a term stipulating that a party would be disqualified from participating in the tender if it had a pending litigation. It went on to argue that, under Article 50 of the Constitution of Kenya, 2010, the Applicant had a right to ventilate any genuine dispute through an impartial tribunal or body or through a court process and that the existence of the said fact could not be used to punish it for simply doing that which the law allows it to do.

The Applicant averred that the Procuring Entity had an obligation to disclose in the tender document the requirement that if a party had a pending litigation with the Procuring Entity, then such a party would be disqualified from being awarded the tender adding that the said disclosure was necessary so that bidders who fell outside the requirement would not have bothered to bid for the tender. It averred further that failure to disclose the information in the tender document estopped the Procuring Entity from applying the said benchmark as a basis of knocking off the Applicant.

The Applicant stated that Section B of the tender document at Clause 2.24.1 sub headed as "*award of contract*" Clauses 2.24.1 and 2.24.4, categorically stated "*...the Kenya Ports Authority will award the contract to the successful tenderer whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily*".



The Applicant's submission was that under clause 4 of the mandatory requirements found at page 16 of the tender document, the Procuring Entity clearly requested the bidders to, among other things, fill forms giving the litigation history of each bidder wherein the Applicant indicated that it had a pending arbitration matter with the Procuring Entity. Its further submission was that it was clear from the letter served on it on 9<sup>th</sup> March, 2017 that the reason why its tender was unsuccessful was because of the said pending litigation with the Procuring Entity. Upon prompting by the Board on the status of activities that were to be implemented in the contract under litigation, the Applicant disclosed that they are on site and implementing the contracts besides other contracts the Applicant had with the Procuring Entity.

The Applicant averred that, for the Procuring Entity to have used that very reason to knock off the Applicant from succeeding in his otherwise best evaluated bid, amounted to changing the conditions of the tender, post the floating of the same. It relied on the case of *Blue Sea Services Ltd -vs- Kenya Ports Authority, High Court Judicial Review No. 72 of 2016* which was an appeal against the decision of this board in *Review No. 61 of 2016* in which the Court held that any attempt to change the conditions of the tender mid-stream was untenable.

The Applicant urged the Board to allow the application and order the Procuring Entity to pay costs.

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

In response the Procuring Entity submitted that the criterion on pending litigation was provided in the tender document. It submitted further that

paragraph 2.24 of the tender document [page 12], sub-paragraph 2.24.2 provided as follows:

*"The determination will take into account the tenderer's financial and technical capabilities. It will be based upon an examination of the documentary evidence of the tenderer's qualifications submitted by the tenderer pursuant to paragraph 2.12, as well such other information as the Kenya Airports Authority deems necessary and appropriate."*

Sub-paragraph 2.24.3 provided:

*"An affirmative determination will be a pre-requisite for award of the contract to the tenderer. A negative determination will result in rejection of the tenderer's tender in which event, the Kenya Airports Authority will proceed to the next lowest evaluated tender to make a similar determination of that tenderer's capabilities... .."*

The Procuring Entity stated that whilst the Applicant emerged the lowest evaluated bidder, the determination was negative, owing to its pending litigation against the Procuring Entity and that this was in accordance with the provisions of paragraph 2.24 [sub-paragraph 2.24.2] of the tender document. It went on to state that the negative determination caused it to move to the next lowest evaluated tender in compliance with sub-paragraph 2.24.3 of the tender document. The Procuring Entity therefore maintained that the Applicant's contention that the criterion on pending litigation was introduced extraneous to the tender document was erroneous and unfounded.

Counsel for the Procuring Entity confirmed that the Applicant continues to work with the Procuring Entity on the contract under litigation besides

others which the Applicant had won previously. In the Counsel's view, that showed that there was no bad faith on the part of the Procuring Entity in rejecting the Applicant's tender. Counsel clarified that the pending litigation, arose as an issue when the Procuring Entity had not even executed the contract, the Applicant went to the field and started working. The Applicant had executed its part of the contract, returned the documents to the Procuring Entity and the Procuring Entity had not signed and the Applicant began invoicing the Procuring Entity hence the dispute arose. Counsel further submitted that the Applicant had been uncooperative in the on-going litigation, hence causing the Procuring Entity to incur unnecessary loss of public resources.

The Procuring Entity stated that it sought to rely on section 83 of the Act which allows for the process of post qualification to be used with regard to the evaluation process and the Procuring Entity decided to invoke provisions of section 83 to deny the Applicant award of the tender.

In conclusion, it was the Procuring Entity's opinion that this application was brought in bad faith in order to delay the procurement process and urged the Board to dismiss the application and award cost to the Procuring Entity.

#### **APPLICANT'S REPLY**

In response to the Procuring Entity's submission, the Applicant disputed the assertion that it had frustrated the conclusion of the litigation in question.

#### **THE BOARD'S FINDINGS**

The Board has considered the Request for Review, the responses filed in answer thereto together with all the documents that were placed before it by the parties. The Board has also considered the written and oral submissions

made to the Board by the parties and finds that this Request for Review raises only one issue for determination, namely;

*“Whether the Procuring Entity acted properly and lawfully by not awarding the tender the subject of this application to the Applicant because of the Applicant’s litigation history”.*

In determining this issue, the Board is guided by the Act and the evaluation criteria in the tender document. Section 80(2) which is the relevant section of the Act, states:

**Section 80(2)** *“The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents... ..”*

Further, the evaluation criteria found at section H of page 63 of the tender document provides as follows:

**“SECTIONH:-EVALUATION CRITERIAFOR PROVISION OF ENVIRONMENTAL MANAGEMENT SERVICES**

**i) Preliminary/mandatory evaluation**

*The evaluation committee shall first conduct a preliminary/mandatory evaluation to determine whether the following requirements have been met:*

**PRELIMINARY MANDATORY REQUIREMENT**

*Mandatory requirements Bidders shall submit the following mandatory requirements.*

- 1. Copy of Certificate of Company Incorporation/Registration.*
- 2. Copy of Current and valid KRA Tax Compliance Certificate for the company in case of limited company or for individual(s) in case of sole proprietor or partnership.*

3. *Duly filled and signed Tender Security Declaration Form.*
  4. *Duly filled Form of Tender and Price Schedule.*
  5. *Duly filled Confidential Business Questionnaire Form.*
  6. *Duly filled Self Declaration Form.*
  7. *Duly filled Litigation History Form.*
  8. *A Site Visit/Pre-bid meeting will be carried out on 24<sup>th</sup> November 2016 at exactly 10 am, and continue from this date until the closure of the tender. All bidders will assemble at the Manda Airstrip. A certificate of site visit (attached at the end of this document) will be signed after the visit. Although attendance of the pre-bid meeting is not mandatory, the tender's site visit at his/her own time is mandatory and shall ensure that the site visit certificate is signed after such visit. The costs for this visit are tender's cost. Duly filled site certificate.*
  9. *Copy of YAGPO/AGPO certificate issued from National Treasury- (must be valid) Youth, Women or Persons with Disability.*
- ii) Technical Evaluation Requirement(mandatory)*

#### **A) Personnel**

*Tenderer must demonstrate that they have at their disposal one Trained Personnel on Environment Management to undertake Environmental management supervision; evidence or proof on environmental related training is required as below;*

- a. *Minimum Diploma in environmental sciences/ studies/ management/ planning qualification only (attach related copies of academic/ professional certificates)*
- b. *Attach his/her fully signed curriculum vitae (cv) i.e. by both the employer and employee*

## ***B) Machinery, Tools and Equipment***

*Tenderer must demonstrate availability or access to machinery, tools and equipment mentioned on Section F: Schedule of Requirements as a minimum requirement in this tender (Attach proof of ownership and lease agreement for other machinery and equipment)*

<b><i>Machinery and Equipment</i></b>	<b><i>Quantity</i></b>
<i>Tractor (must be owned by the tenderer, or leased from owned supplier or agent or registered owner – submit a lease agreement and/logbook)</i>	<i>1</i>
<i>Grass trimmers (must be owned by the tenderer, or leased or hired from supplier or agent or registered owner – submit a lease agreement)</i>	<i>2</i>

### ***Financial Evaluation:***

*Tender will be awarded to the lowest evaluated tenderer”.*

The Board has perused the evaluation report provided by the Procuring Entity and notes the following:

- i) The Tenders were advertised on 17<sup>th</sup> November, 2016 and closed and opened on 30<sup>th</sup> November, 2016 at 11.00 a.m. and seven bidders submitted bids which were opened.
- ii) All the seven bidders underwent the Preliminary/Mandatory evaluation. Six bidders passed and only Wiseden Ventures Ltd failed.
- iii) The six were subjected to technical evaluation and four of them, including the Applicant, were declared responsive after meeting all the technical requirements and were recommended for financial evaluation.

- iv) The final four bidders underwent the financial evaluation and the Applicant emerged the lowest evaluated bidder at a price of Kshs 5,842,050.00.
- v) The Applicant was not awarded the tender because it had filed a suit against the Procuring Entity on a matter yet to be determined.
- vi) The tender was awarded to the second lowest evaluated bidder, Messrs Peesam Limited at a price of Kshs 6,182,800.00.
- vii) The Applicant was notified vide letter dated 9<sup>th</sup> March 2017 that its tender was unsuccessful on account of a *litigation matter with the Authority which has not been finalized*.
- viii) The Applicant filed this Request for Review against the decision of the Procuring Entity on 23<sup>rd</sup> March, 2017.

The Board has considered the arguments of both parties and notes that although litigation history was one of the preliminary/mandatory criteria, the Procuring Entity did not consider the on-going litigation serious enough to knock out the Applicant at the preliminary evaluation stage and instead allowed its bid to proceed to technical and financial evaluation. The Board has heard the arguments of the Applicant that the Procuring Entity did not make it a mandatory requirement that any bidder involved in a suit that has not been determined would be disqualified. The Board has also considered the Procuring Entity's assertion that Clause 2.24 and in particular parts 2.24.1 and 2.24.3 gave authority to the Procuring Entity to review the bids at the tail end of the evaluation process.

It is the Board's view that Clauses 2.24.1 and 2.24.3 are vague and holds that no due diligence could be done on a matter like litigation which was so

obvious that it could have been dealt with at the preliminary stage of the evaluation. The Board is therefore persuaded that in the circumstances of this case the litigation history of a bidder was for information purposes only and was not meant to affect a bidder negatively. In any event the right to move to a tribunal or a court of law is recognised by the Constitution and the exercise of that right does not automatically infer an adverse finding on the party who chooses to exercise it. The Board finds that the Procuring Entity's decision not to consider the Applicant's tender because of the yet to be determined arbitration amounts to debarment on a matter that does not meet the threshold of Section 41 of the Act. But even assuming for a moment that the bidder was caught in an action that would result in it being debarred, the power to debar is not vested on the Procuring Entity and the Procuring Entity cannot therefore exercise a power it does not have under the Act.

The Board, in addition, notes that the successful bidder was awarded the tender at a price of Kshs 6,182,800.00 which is Kshs 282,750.00 above the Applicant's price. The Board finds that the Procuring Entity's decision not to award the tender to the lowest evaluated bidder offends the spirit of Section 3 of the Act and Article 227 of the Constitution in that it does not maximise value for money.

This ground of review therefore succeeds and is allowed.

### **FINAL ORDERS**

In view of all the above findings 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.

1. The Request for Review dated 23rd March, 2017 in respect of Tender Number KAA/ES/MANDA/1082/ENV for the Provision Of Environmental Management Services (grass cutting & vegetation control, drainage and gardening ) at Manda Airstrip be and is hereby allowed.
2. The award of the Tender subject of this request for Review to the Successful Bidder be and is hereby annulled and set aside.
3. The decision of the Procuring Entity to disqualify the Applicant's tender be and is hereby annulled and set aside.
4. The Procuring Entity is directed to re-instate the Applicant's tender into the evaluation process and award the tender to the lowest evaluated bidder upon complying with all the evaluation steps and procedures and in compliance with the provisions of Section 86 of the Act within fourteen (14) days from the date of this decision.
5. The Board orders that each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 13<sup>th</sup> day of April, 2017

  
.....  
**CHAIRMAN**  
**PPARB**

  
.....  
**SECRETARY**  
**PPARB**

