

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 49/2015 OF 24<sup>TH</sup> SEPTEMBER, 2015**

**BETWEEN**

**PROTECHT LIMITED.....APPLICANT**

**AND**

**KENYATTA NATIONAL HOSPITAL.....PROCURING ENTITY**

Review against the decision of the Kenyatta National Hospital Tender Committee meeting dated 5<sup>th</sup> August, 2015 in the matter of Tender No. KNH/T/111/2014-2015 Tender for Enterprise Risk Management.

**BOARD MEMBERS PRESENT**

- |                                   |   |          |
|-----------------------------------|---|----------|
| 1. Mr. Paul Gicheru               | - | Chairman |
| 2. Mrs. Josephine Wambua Mon'gare | - | Member   |
| 3. Mr. Peter B. Ondieki, MBS      | - | Member   |
| 4. Eng. Weche Okubo               | - | Member   |
| 5. Mr. Hussein Were               | - | Member   |

**IN ATTENDANCE**

- |                        |   |                             |
|------------------------|---|-----------------------------|
| 1. Mr. Philemon Kiprop | - | Holding Brief for Secretary |
| 2. Ms. Maureen Kiyundo | - | Secretariat                 |

## **PRESENT BY INVITATION**

### **APPLICANT – PROTECHT LIMITED**

- |                    |          |
|--------------------|----------|
| 1. G.M Nyaanga     | Advocate |
| 2. Gilbert Mwalili | Director |

### **PROCURING ENTITY – KENYATTA NATIONAL HOSPITAL**

- |                     |                            |
|---------------------|----------------------------|
| 1. Ray Tollo        | Advocate                   |
| 2. Fredrick Nyabuti | Lawyer                     |
| 3. Jessica Oluoch   | Lawyer                     |
| 4. Abdallah Ofula   | Procurement                |
| 5. Simon Waithaka   | Senior Procurement officer |

### **INTERESTED PARTIES**

- |                    |  |
|--------------------|--|
| 1. Timothy Kimathi | Director , MACL                                    |
| 2. Omosa Wilson    | Consultant, Audit & Corporate<br>Governance Centre |

### **BOARD'S DECISION**

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

## BACKGROUND

### Preliminary Evaluation

The Tender processing committee carried out preliminary evaluation which was a confirmation of Compliance with the mandatory requirements and the outcome of the preliminary evaluation is summarised below:-

Bidder no.	Firm	Reason for failing/Remarks
1.	M/s Management Audit Consulting Ltd	<ul style="list-style-type: none"><li>• The Tax Compliance Certificate expired on 19<sup>th</sup> May 2015 (though there was evidence of a new application the requirement was a copy of valid TCC)</li><li>• Audited accounts for 2013, 2012 and 2011 attached but not certified.</li></ul>
2	M/s KPMG	<ul style="list-style-type: none"><li>• The Tax Compliance Certificate attached was computer generated and signed which is against a KRA disclaimer/caveat</li><li>• The Certificate date indicated as 06/06/2014 and validity period as up to 06/08/2015</li><li>• The TCC number was not legible thereby not possible to confirm its validity online</li></ul>
3	M/s Audit and Corporate	<ul style="list-style-type: none"><li>• Audited accounts for June 2014, 2013 and 2012 attached but not certified</li></ul>

	Governance Centre	<ul style="list-style-type: none"> <li>• Confidential Business Questionnaire not signed or dated</li> <li>• No Copy of Professional Indemnity</li> </ul>
4	M/s Millenium Management Consultants Ltd	<ul style="list-style-type: none"> <li>• No Audited accounts provided, attached Bank statements from National Bank of Kenya.</li> <li>• Confidential Business Questionnaire not signed or dated</li> </ul>
5	M/Envag Associates (K) Ltd	<ul style="list-style-type: none"> <li>• Provided expired Tax Compliance (expired on 13<sup>th</sup> June 2015) and no evidence of having applied for a new one.</li> </ul>
6	M/s JMG Strategy Innovations Ltd	<ul style="list-style-type: none"> <li>• No copy of professional indemnity</li> <li>• Audited accounts for April 2014, 2013 and 2012 attached but not certified</li> </ul>
8	M/s Josim Instantaneous	Did not Provide technical proposal
7	M/s Protecht Limited	Passed

Only one bidder passed preliminary evaluation and was recommended for the next stage of evaluation.

### Technical evaluation.

Based on the results of preliminary evaluation, the Tender Processing Committee proceeded to technical evaluation and the results are as summarised below:-

1. Specific Experience (total 20 marks)

M/s Protecht attained 18 marks out of 20

2. Work plan and methodology (total 50 marks)

M/s Protecht attained 44 marks out of 50 marks

3. Personnel

M/s Protecht attained 25 marks out of 30 marks

The firm attained the requisite pass mark and was recommended to proceed to the financial stage of evaluation.

### Financial evaluation

The Only firm, M/s Protecht Ltd which passed the preliminary and technical evaluation was invited for financial opening and the firm quoted the sum of Kenya shillings 27,148,430 to run for two years as tabulated below:

Item No	Item description	Service period	Total Price (Ksh)	Firm/Remarks
1	Request for proposal for enterprise risk management-tender No. KNH/T/111/2014-2015	1st year	12,216,793.50	M/s Protecht Limited. Only bidder who passed all criteria.
		2nd Year	14,931,636.50	
	Total		27,148,430.00	

## **Recommendation**

The Tender Processing Committee recommended the award to M/S Protecht limited at Ksh.27, 148,430/= and further recommended a review of supplier performance to check on conformance before proceeding to year two.

## **TENDER COMMITTEE DECISION**

The Procurement Entity's Tender Committee met on 5th August, 2015 and directed for a retender for the Tender for the Provision of Enterprise Risk Management.

## **REVIEW**

The Request for Review was filed by M/s Protecht Limited on 24<sup>th</sup> September, 2015, in the matter of Tender No.KNH/T/111/2014-2015 for the Provision of Enterprise Risk Management.

During the hearing of the Request for Review the Applicant was represented by Mr. G. M. Nyaanga, Advocate from the firm of M/s Anyoka & Co. Advocates while the Procuring Entity was represented by Mr. Ray Tollo, Advocate. The Interested Parties present were Mr. Timothy Kimathi, Director-MALC, Mr.OmosaWilson, Consultant, and Audit& Corporate Governance.

1. The Applicant Requested the Board for the following orders:
  - a) *The Respondent's decision not to award TENDER NO. KNH/T/111/2014-2015 be set aside and nullified.*

- b) The Board be pleased to review all records of the procurement process relating to TENDER NO. KNH/T/111/2014-2015 and be pleased to substitute the decision of the Review Board for the decision of the Respondent and award the Tender to the Applicant.*
- c) The Respondent be ordered to negotiate and sign a contract with the Applicant in accordance with the Tender and the decision of the Board.*
- d) The Respondent be and is hereby ordered to pay the costs of and incidental to these proceedings; and such other or further relief or reliefs as this Board shall deem just and expedient.*

#### **THE BOARD'S DECISION**

This is the second time that the present Request for Review is coming up for hearing before the Board.

When the Request for Review first came up for hearing, the Board made the following orders in it's decision dated 22<sup>nd</sup> October, 2015.

- 1. The Request for Review filed on 24<sup>th</sup> September 2015 and filed on the same day by M/S Protecht Limited against Kenyatta National Hospital in respect of tender No.KNH/T/111/2014-2015 in respect of Enterprise risk Management is allowed and the tender for similar services No. KNH/T/61/2015-2016 for Request for Proposal for Enterprise Risk Management Implementation, advertised by the**

**Procuring Entity on the 9<sup>th</sup> of September, 2015 is nullified and cancelled forthwith.**

**2. That the Procuring Entity M/S Kenyatta National Hospital is directed to proceed and award the tender to the Applicant, M/S Protecht Limited forthwith and proceed to start immediate negotiation and complete the negotiations within the next fourteen days from the date of this decision and file a report with the Board to confirm compliance with the provisions of the Act and the Regulations within the Fifteen (15) days from the date of this decision.**

**3. The Board makes no order as to the costs.**

The procuring entity was however dissatisfied with the Board's decision and filed a judicial Review application in the High Court being Nai HC JR No. 393 of 2015 between the Republic -vs- The Public Procurement Administrative Review Board Exparte Kenyatta National Hospital.

The Court heard the Judicial Review application and in a decision given on 4<sup>th</sup> October, 2016, the High Court remitted back the dispute to the Review Board for re-consideration on the question of whether the procuring entity had funds to enable it comply with the earlier award made by the procuring entity and which was later affirmed by the Board.



However the High Court made the following observation at it's finding No. 39 which is relevant to the issue now under consideration:-

*"In this case, it was contended that the available funds, as per the budget for the 2015/2016 was Kshs. 9,000,000.00 (Nine Million Kenya Shillings) only for the full consultancy which was not sufficient against the Applicant's quotation of Kshs. 27,148,430.00 and that this was the reason for termination of the tender. In my view this was a material fact to be taken into consideration by the Board in order to ensure that its decision did not violate the Constitutional and legislative principles relating to Public Procurement. It seems that this fact was not given weight by the Board".*

During the re-hearing of this dispute, the advocates for the parties opted to rely on written submissions which they stated were sufficient and left the question of whether the procuring entity had sufficient funds to go on with the implementation of procurement for determination by the Board.

It was the procuring entity's case at the re-hearing that whereas the Applicant had been awarded the tender at the sum of Kshs. 27,148,430, the procuring entity had an available budget amounting to Kshs. 8,000,000 for the years 2016/2017 and Kshs. 18,000,000 for the years 2017/2018.

In it's written submissions filed with the Board, Counsel for the Applicant submitted that whereas the Applicant had quoted a tender price of approximately Kshs. 27,000,000 it was clear from the evidence tendered by

the procuring entity that its available budget was the sum of Kshs. 26,000,000. The Applicant therefore stated that this being a tender that was procured through a Request for Proposals method, the parties had the leeway to negotiate even in the event that the procuring entity's that its budget was lower than the price quoted by the Applicant.

The Applicant relied on the provisions of Sections 84 and 85 of the Public Procurement and Disposal Act (2005) now repealed which governed the subject procurement and submitted that the mere fact that a bidder has quoted a price which was higher than the price at which the tender was awarded can be dealt with through negotiations under the above provisions of the said Act.

In its submissions filed on 11<sup>th</sup> January, 2017, the procuring entity admitted at the last two paragraphs appearing at page 1 of its submissions that from the contents of the budget allocated for the subject procurement spread out over two financial years namely 2016/2017 and 2017/2018 was Kshs. 26,000,000. The procuring entity further stated as follows in the last part of the last paragraph appearing at page 1 of its submissions.

*"The Respondent appreciates the law and notes the submission of the Applicant as for negotiations with the successful bidder. We have no objection to the approach as long as the amount is within the available budget".*

The Board has considered the above submissions and finds that both the Applicant and the procuring entity are in agreement that the available budget is the sum of Kshs. 26,000,000 while the tender sum submitted by the Applicant/the successful bidder was the sum of Kshs. 27,148,430 which represents a figure of slightly over One Million over and above the approved budget.

The Board further finds that both parties were not averse to carrying out negotiations to narrow the gap in the two figures under the provisions of Sections 84 and 85 of the old Act which allows parties to a Request for Proposals to negotiate in the event that there was a difference between the sum awarded in the tender against the available budget.

The said Sections 84 and 85 of the Public Procurement and Disposal Act provide as follows:-

**84(I) The procuring entity may negotiate with the person who submitted the successful proposal and may request and permit changes, subject to Section 85 (2).**

**(2) If the negotiations with the person who submitted the successful proposal do not result In a contract the procuring entity may negotiate with the person who submitted the proposal that would have been successful had the successful proposal not been submitted and subsection (I) and this subsection apply, with necessary modifications, with respect to those negotiations.**

**85. (1) This section shall apply with respect to the contract resulting from a procurement by a request for Proposals.**

**(2) The contract may not vary from the requirements of the terms of reference, the request for proposals or the terms of the successful proposal except in accordance with the following-**

**a) the contract may provide for a different price but only if there is a proportional increase or reduction in what is to be provided under the contract; and**

**b) the variations must be such that if the proposal, with those variations, was evaluated again under section 83, the proposal would still be the successful proposal.**

**(3) The contract must be in writing.**

**(4) The contract must set out either-**

**a) The maximum amount of money that can be paid under the contract; or**

**b) The maximum amount of time that can be paid for under the contract.**

These provisions therefore permit for negotiations and the procuring entity having admitted so in it's submissions and stated that it was willing to enter into negotiations based on the available budget of Kshs. 26,000,000 the Board therefore finds that it would be in the interest of both parties to have the matter negotiated.

Having addressed the issue that the Court remitted back to it, the Board therefore holds and directs as follows on this Request for Review.

**FINAL ORDERS**

In view of the foregoing findings and in the exercise of the powers conferred upon in by the provisions of Section 173 of the Public Procurement and Asset Disposal Act, the Board makes the following orders on this Request for Review.

- a) The Applicant's Request for Review dated 24<sup>th</sup> September, 2015 in respect to Tender No. KNH/T/111/2014-2015 for Enterprise Risk Management is hereby allowed.
  
- b) Both the procuring entity and the Applicant are directed to enter into and complete negotiations within fourteen (14) days from the date of this decision with the aim of bringing the Procurement process herein to an end.
  
- c) The Board directs that each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 25<sup>th</sup> day of January, 2017.



**CHAIRMAN  
PPARB**



**SECRETARY  
PPARB**

