

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 29/2017 OF 15TH MARCH, 2017

BETWEEN

TETRALINK TAYLOR & ASSOCIATES

EAST AFRICA IMITED LTD.....APPLICANT

AND

KENYA DEPOSIT INSURANCE

CORPORATIONPROCURING ENTITY

Review against the decision of Kenya Deposit Insurance Corporation in the matter of Tender Number KDIC/RFP/003/2016-2017 for the Provision of Selection of Consultants for Human Resource Services (Staff Recruitment).

BOARD MEMBERS PRESENT

- | | |
|---------------------|-----------------------|
| 1. Hussein Were | - Member in the Chair |
| 2. Paul Ngotho | - Member |
| 3. Nelson Orgut | - Member |
| 4. Peter B. Ondieki | - Member |

IN ATTENDANCE

1. Philemon Kiprop - Secretariat
2. Maryanne Karanja - Secretariat

PRESENT BY INVITATION

Applicant: - Tetralink Taylor & Associates East Africa Ltd

1. C. N. Kihara - Advocate, C. N. Kihara
2. Joe Adongo - Consultant
3. Paul Obado -

Procuring Entity - Kenya Deposit Insurance Corporation

1. Richard Kwach (JR) - Advocate
2. Roy Sasaka - Head of Procurement

Interested Parties

1. E. N. K. Wanjama - Advocate, Manpower Services Ltd
2. Francis G. Muhindi - MD, Manpower Services
3. Sammy Kombo - Viscar Industrial Capacity Ltd

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

INVITATION OF BIDS

Tender Number KDIC/RFP/003/2016-2017 for the Provision of Selection of Consultants for Human Resource Services (Staff Recruitment) for the Kenya Deposit Insurance Corporation (KDIC) was an open tender. It was advertised on 2nd February 2017 in *The Standard and Daily Nation* newspapers. The tender closed and opened on 17th February 2017. Ten bids were received as follows:

Bidder No.	Bidder's Name
01	Human Resource Capital Business:
02	Tetra Link Taylor & Associates
03	Viscar Industrial Capacity Ltd
04	Manpower Services Ltd
05	Star Consulting Group:
06	AON Hewitt
07	Alpex Consulting Africa
08	PKF Consulting
09	KPMG
10	Working Smart Skills

TENDER EVALUATION

The KDIC's evaluation committee carried out evaluation of bids in three stages of mandatory requirements, technical evaluation and financial evaluation.

Preliminary Evaluation

Tenders were examined at this stage for responsiveness to the following mandatory requirements:

- (a) Certificate of Registration and / or Incorporation
- (b) Valid Tax Compliance Certificate
- (c) Valid Business Permit
- (d) Audited financial statements for the last two financial years (most recent 2015 and 2014)
- (e) Tender security / Bid bond of Kshs. 100,000.00
- (f) Duly Completed, Stamped and Signed Confidential Business Questionnaire in the format provided
- (g) Submit an **ORIGINAL AND ONE (1NO)** additional copy of the separate technical and financial proposal
- (h) Fill, Sign and Stamp the Technical proposal submission form in the format provided.
- (i) Comments and suggestions of the consultant on the terms of reference, personnel, facility and other requirements to be provided by the procuring entity in the format provided.

- (j) Firm's Reference for previous similar works - written and certified references from at least six existing current clients undertaken in the last three years, with telephone & email addresses. At least two of such references must be from Public Sector Organizations (They should be duly filled, signed and stamped in the format provided).
- (k) Consultancy services activities times' schedule in the provided format.

The tenders were checked for responsiveness to the mandatory requirements. A bidder who failed to meet any of the mandatory requirements was deemed to be non-responsive and was disqualified at this stage from further evaluation. The following five bidders were considered non-responsive having failed to comply with the mandatory requirements and thus disqualified from proceeding to the technical stage:

Bidder No.	Bidder's Name
02	Tetra Link Taylor & Associates
03	Viscar Industrial Capacity Ltd
05	Star Consulting Group:
06	AON Hewitt
10	Working Smart Skills

Five bidders having met all the mandatory requirements were considered responsive and thus proceeded to the technical evaluation stage.

Technical Evaluation

The bids that passed the preliminary stage were subjected to technical evaluation as required in clause 3.20 of the tender document. The details of the technical evaluations are not reproduced here since this Request for Review is based on the rejection of the Applicant's bid for allegedly failing to meet the mandatory requirements. Suffice to state that three bidders did not meet the minimum set score of 70 out of a maximum score of 80 and were disqualified from proceeding to the Financial Opening. The affected bidders were the following:

Bidder No.	Bidder's Name
01	Human Resource Capital Business
07	Alpex Consulting Africa
08	PKF Consulting

Manpower Services Ltd (**Bidder 04**) and KPMG (**Bidder 09**) scored a total of 74 and 70 respectively and thus qualified for the Financial Evaluation stage.

Financial Evaluation

The Bidders who passed technical evaluation were subjected to financial evaluation. Quality and Cost Based Selection Method was used. The weights given to technical and financial proposals were:

$$T = 0.90$$

$$F = 0.10$$

The total weighted score was as follows:

Description	Manpower Services Ltd (Bidder 4)	KPMG (Bidder 9)
Technical Score (80)	74	70
Weighted Technical Score (90)	83.25	78.75
Weighted Financial Score (10)	10.00	3.20
Total Weighted Score	93.25	81.95

Manpower Services Ltd was found to have scored the highest combined score of 93.25.

Recommendation

The Tender Evaluation Committee recommended the lowest evaluated bidder, Manpower Services Ltd (**Bidder 04**) to be awarded the tender at a total cost of Nine Million, Two Hundred and Eighty Thousand Shillings Only (Kshs. 9,280,000.00) inclusive of all taxes.

PROFESSIONAL OPINION

The Head of Procurement & Supplies Manager in his professional opinion, noting the user comments, evaluation report and the requirements of the Public Procurement and Asset Disposal Act, 2015 recommended to the Managing Director to award the tender to the lowest evaluated bidder Messrs Manpower Services Ltd at a total cost of Kshs. 9,280,000.00.

THE REQUEST FOR REVIEW

This Request for Review was lodged by Messrs Tetralink Taylor & Associates East Africa Ltd (hereinafter "the Applicant") of Reinsurance Plaza situated on Taifa Road, of Post Office Box 13418 - 00100, Nairobi, telephone No. +254722705794 and Email tetralinkeastafrica@gmail.com, on 15th March 2017 urging the Public Procurement Administrative Review Board ("the Board") to review the decision of the Kenya Deposit Insurance Corporation (hereinafter "referred to as the Procuring Entity") in the matter of Tender Number KDIC/RFP/003/2016-2017 for Provision of Selection of Consultants for Human Resource Services (Staff Recruitment).

The Applicant sought for the following orders from the Board:

1. *Annul the evaluation of the proposals and order a fresh re-evaluation of the technical proposals by either an impartial and independent evaluation committee or a new constituted evaluation committee or on such terms as may be found fair.*
2. *Revoke/or annul the decision to reject the Applicant's tender (as unresponsive) and instead re-evaluate the same and have it proceed to financial evaluation.*
3. *Direct the procuring entity to re-tender with such technical specifications that do not offend the procurement law and regulations.*
4. *The Procuring Entity be condemned to pay costs of this Request for Review.*

5. *Any other relief that the Public Procurement Administrative Review Board may deem appropriate to issue.*

The Applicant was represented by Mr. C. N. Kihara, Advocate from the firm of C. N. Kihara and Company Advocates while the Procuring Entity was represented by Mr. Richard Kwach (JR), the Procuring Entity's in-house Advocate. The successful bidder in the said tender Messrs Manpower Services was represented by Mr. E. N. K. Wanjama, Advocate.

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

APPLICANT'S CASE

The Applicant, on grounds 1, 2, 3 and 4 of the request for review, alleged that the Procuring Entity breached Section 3 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter "referred to as the Act") and Regulation 49(1) of the Public Procurement and Disposal Regulations as read together with Article 27 of the Constitution, 2010. The Applicant argued that the Procuring Entity erred in law and fact when it decided that the Applicant's bid, which had reached the technical evaluation stage, was not responsive and added that the said decision was contrary to the values and principles of equality and freedom from discrimination as provided for under Section 3 of the Act as read together with Article 27 of the Constitution. It claimed that the Procuring Entity's decision was based on a false statement that the Applicant did not satisfy the mandatory requirements of section XVII of the tender document adding that the said

statement was vague, devoid of truth and contrary to the tender submitted by the Applicant.

The Applicant submitted that the Procuring Entity's letter of notification dated 24th February, 2017 breached the Act as it did not point out the specific requirements the Applicant failed to meet arguing that its bid met the mandatory requirements of the tender document and that the Procuring Entity erroneously failed to conduct the evaluation of the Applicant's financial proposal.

On grounds 5 and 6 of the request for review, the Applicant submitted that the Procuring Entity was under an obligation to prepare specific requirements relating to the subject tender for Consultancy Services. It stated that the requirements prepared by the Procuring Entity ought to be clear, give a correct and complete description of what was to be procured and that it ought to allow for fair and open competition among those who wished to participate in the procurement process. Counsel for the Applicant further argued that the Procuring Entity failed to prepare specific requirements of the tender that are clear and which give a correct and complete description of what was to be procured and further that the tender document did not allow for fair and open competition. For these reasons, the Applicant argued that the Procuring Entity breached Section 60 (1) of the Act. It further argued under grounds 7 and 8 that there was muddling up of the material data or information and as such the reasons given by the Procuring Entity for the rejection of the Applicant's tender showed dishonesty, contrary to the principles of integrity under the

Leadership and Integrity Act, 2012 and hence the Procuring Entity was in breach of Section 3 of the Act as read together with Article 73 (1) (a) (vi) of the Constitution, 2010.

Consequent to the actions of the Procuring Entity, the Applicant claimed in ground 9 that it had suffered loss of a business opportunity to make earnings and that it incurred costs in preparing the bid and therefore prayed that the Request for Review be allowed.

PROCURING ENTITY'S RESPONSE

In response to grounds 1, 2, 3 and 4 of the Request for Review, the Procuring Entity submitted that the Applicant was non-responsive because it had not met the threshold set out under Section XVII of the mandatory requirements and specifically the firm's reference for previous similar works. It further submitted that it carried out evaluation in accordance with the Act and the Regulations and that the Applicant was hence properly disqualified for not providing the mandatory requirement at Roman number 17 on references.

On the allegation concerning the requirements of the tender, the Procuring Entity stated that it set out specific requirements as highlighted at page 26 of the tender document in line with the spirit of section 60 (1) of the Act. Counsel for the Procuring Entity stated that the allegation made by the Applicant that the Procuring Entity had falsified and muddled up with the material data or information was malicious and made in bad faith and was devoid of any evidence.

The procuring entity therefore prayed that the Applicant's Request for Review be dismissed with costs.

INTERESTED PARTY'S RESPONSE

Submitting for the Successful Bidder, Mr. Wanjama in his brief submissions associated the Interested Party with the Procuring Entity's submissions and opposed the Request for Review. He stated that he did not intend to file any submissions of his own in opposition to the Request for Review.

APPLICANT'S REPLY

In a brief response to the procuring entity and the interested party's submissions, Mr. Kihara on behalf of the Applicant submitted that the Procuring Entity chose only six references out of about 24 references provided by the Applicant. He further submitted that only two of the references were required to be duly filled, signed and stamped in the format provided at page 33 of the tender document and that the form had no provision for the format of the certification. He also submitted that the references the Applicant provided, for instance, the references from Rwanda were certified as true copies of the original and the reference by the Applicant was also certified by a lawyer.

THE BOARD'S FINDINGS

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

- (i) *Did the Procuring Entity fail to provide reasons as to why the Applicant's tender was unsuccessful thereby breaching the provisions of Section 87 (3) of the Act?*
- (i) *Did the Procuring Entity fail to evaluate the Applicant's tender in accordance with the evaluation criteria set out in the tender document when it rejected the Applicant's references thereby breaching the provisions of Section 80(2) of the Act?*

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

1. As to whether the Procuring Entity failed to provide reasons as to why the Applicant's tender was unsuccessful thereby breaching the provisions of Section 87 (3) of the Act.

The Board finds that Tender Number KDIC/RFP/003/2016-2017 for the Provision of Selection of Consultants for Human Resource Services (Staff Recruitment) for the Kenya Deposit Insurance Corporation (KDIC) advertised by the Procuring Entity on 2nd February 2017 attracted ten bids which were opened on 17th February 2017. The Board further finds that the Procuring Entity's tender evaluation committee evaluated the tenders through three stages namely the preliminary (mandatory requirements) evaluation, technical evaluation and financial evaluation. The Board also finds that five bidders, including the Applicant, failed at the preliminary evaluation stage and the remaining five were evaluated at the subsequent stages of technical and financial evaluation whereupon Messrs Manpower

Services Limited emerged successful and was awarded the tender at a sum of Kshs 9,280,000.00.

Through its letter dated 24th February 2017 the Board observes that the Procuring Entity notified the Applicant that its tender was not successful for the reason that:

“The bidder did not satisfactorily meet/non-responsive to the requirements of Section XVII of the Mandatory Requirements of the tender document”.

In determining this issue the Board makes reference to Section 87 (3) of the Act which states as follows:-

“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 Procuring Entity's letter is indeed not specific since it does not state exactly why the Applicant's bid failed. Several possibilities arise- for example, were the bids were fewer than the required number? Was failure to give the references in the provided format the issue? The Board therefore finds that the Procuring Entity's notification to the Applicant was not in keeping with the statutory requirement set out in Section 87 (3) of the Act.

The Board however notes that the award of tender had not taken place by the date of the letter of notification of 24th February 2017 and therefore the successful bidder was unknown as at that date. For this reason the Procuring Entity cannot be faulted for not disclosing the name of the successful bidder in the Applicant's letter of notification.

The Board notes that the Procuring Entity's notification letter to the Applicant dated 24th February 2017 was sent to the Applicant by email at 17.52 pm on 2nd March 2017. The Procuring Entity did not explain why it delayed in dispatching the letter for six days. The Procuring Entity proceeded with this procurement with notable speed the following day, on 3rd March 2017 when the financial proposals were opened, the professional opinion to the Accounting Officer issued and the notification letter to the Interested Party also issued, all on the same day. While notification to the Applicant took unduly long, notification to the successful bidder was carried out most expeditiously. For all the above reasons this ground of the Request for Review therefore succeeds and is allowed.

2. **As to whether the Procuring Entity failed to evaluate the Applicant's tender in accordance with the evaluation criteria set out in the tender document when it rejected the Applicant's references thereby breaching the provisions of Section 80(2) of the Act.**

It has been observed in the preceding parts of this decision that the Procuring Entity evaluated the tenders through three stages of preliminary (mandatory requirements) evaluation, technical evaluation and financial evaluation. It has been further observed that five out of the ten bidders

who submitted tenders passed the preliminary evaluation stage and were evaluated for technical responsiveness and two went on to financial evaluation with one emerging the Successful bidder. The Applicant was disqualified at the preliminary evaluation stage on account of failure to *satisfactorily meet/non-responsive to the requirements of Section XVII of the Mandatory Requirements of the tender document*. The Applicant disputed the contention by the Procuring Entity that its bid not meet the Mandatory Requirements as per the tender document.

To determine the dispute arising from the disqualification of the Applicant's tender at the preliminary evaluation stage and more particularly the allegation that the evaluation was not done in accordance with the criteria found in the tender document, the Board refers to the evaluation criteria set out in the tender document and the provisions of Section 80 (2) of the Act. The preliminary evaluation criteria found at clause 3.18 of the tender document required bidders to supply the following:-

- (a) A Certificate of Registration and / or Incorporation
- (b) A valid Tax Compliance Certificate
- (c) A valid Business Permit
- (d) Audited financial statements for the last two financial years (most recent 2015 and 2014)
- (e) A Tender security / Bid bond of Kshs. 100,000.00

- (f) A duly completed, stamped and signed Confidential Business Questionnaire in the format provided
- (g) Submit an **ORIGINAL AND ONE (1NO)** additional copy of the separate technical and financial proposal
- (h) Fill, Sign and Stamp the Technical proposal submission form in the format provided.
- (i) Comments and suggestions of the consultant on the terms of reference, personnel, facility and other requirements to be provided by the procuring entity in the format provided.
- (j) Firm's Reference for previous similar works - written and certified references from at least six existing current clients undertaken in the last three years, with telephone & email addresses. At least two of such references must be from Public Sector Organizations (They should be duly filled, signed and stamped in the format provided).
- (k) Consultancy services activities times' schedule in the provided format.

The all important clause is 3.18 (xvii) which states as follows:-

"Firm's reference for previous similar works - Written and certified References from at least Six (6) existing current clients undertaken in the last three (3) years, with telephone & email addresses. At least two such references must be from Public Sector Organizations (They should be duly filled, signed and stamped in the format provided)".

Clause 3.19 stated as follows:-

“Only firms that are responsive to the mandatory requirements shall proceed for the technical evaluation.”

The Board observes that the Procuring Entity disqualified the Applicant for failing to meet the requirement in Clause 3.18 (xvii) above. According to the Procuring Entity, the reference from the Tanzania Revenue Authority was for work carried out in 2014 and was the only reference that qualified. It claimed that the one from the Rwandan Development Board had no date while four others were marked as having been for 2010 - 2013, and were therefore ineligible for consideration. The Procuring Entity did not comment on the Applicant's other 18 references.

During the hearing of the Request for Review the Applicant demonstrated to the Board that it had submitted the six references all of which were under three years and from the public sector and had attached copies of the signed contracts. The six were:

1. The Tanzania Revenue Authority - 2015
2. The Rwandan Development Authority - 2015
3. The Teachers Service Commission - 2015
4. The Salaries & Remuneration Commission - 2014
5. The Kenya National Examinations Council 2014
6. The Rwandan Convention Bureau - 2016

As for the Procuring Entity's assertion that the Applicant's references were not certified or signed, stamped and in the provided format, the Board has perused the original bids and established that the Procuring Entity applied the criteria selectively to the Applicant's detriment and to the Successful Bidder's benefit. For instance, the Board found that the Interested Party presented six references with the ones from Savannah Cement and Competition Authority of Kenya not stating when the assignments were carried out.

The Board finds that under the provisions of Section 80 (2) of the Act the procuring entity must use the evaluation criteria set out in the tender document. The said Section 80(2) of the Act provides as follows:-

“The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered”.

The Board's finding on this issue is that the Procuring Entity was not justified in rejecting the Applicant's references and was indeed in breach of the provisions of Section 80 (2) of the Act. This ground of the Applicant's Request for Review therefore succeeds and is allowed.

COSTS

Before issuing its final orders in this Request for Review the Board wishes to comment on the issue of costs. The Applicant claimed in ground 9 of the request for review that owing to the actions of the Procuring Entity, it had suffered loss of a business opportunity to make earnings and that it incurred costs in preparing the bid and therefore prayed that the request for review be allowed and that 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 the 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 a procurement process merely because it is not declared the winner. The Board however wishes to make clear the distinction between the cost of tendering and the costs 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 that *costs follow the event*. In the instant case, although the Applicant has succeeded in this Request for Review, the Board is reluctant to award it costs since, pursuant to the final orders of the Board, the procurement process is not complete and the Applicant will be involved in

the remaining phases of the tendering process which might impact on the Applicant.

The Board, in its final orders, has also taken into account the fact that the Applicant's financial proposal has not been returned to the Applicant.

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 filed by the Applicant on 15th March 2017 in respect of Tender Number KDIC/RFP/003/2016-2017 for the Provision of Selection of Consultants for Human Resource Services (Staff Recruitment) for the Kenya Deposit Insurance Corporation be and is hereby allowed.**
- 2. The award of the Tender the subject matter of this request for Review to the successful bidder be and is hereby annulled and set aside.**
- 3. The Procuring Entity is hereby directed to re-admit the Applicant's tender back into the evaluation process and re-evaluate all tenders belonging to bidders who made it past the preliminary evaluation stage and carry out a technical and financial evaluation in accordance with the law and complete the procurement process,**

including the making of an award, within fourteen (14) days from the date of this decision.

4. In view of the outcome of this Request for Review, the Board orders that each party shall bear its own costs of this Request for Review.

Dated at Nairobi this 5th day of April, 2017.



CHAIRMAN
PPARB



SECRETARY
PPARB