

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 77/2018 OF 12TH JUNE, 2018

BETWEEN

SUPERSERVE LIMITED.....APPLICANT

AND

COUNTY GOVERNMENT OF LAMU

MINISTRY OF TRANSPORT, INFRASTRUCTURE

HOUSING & URBAN DEVELOPMENT..... PROCURING ENTITY

Review against the decision of the County Government of Lamu in the matter of Tender No. CGL/TR/PSM&ADM/008/2017-2018 for the Proposed Sub-County Offices at Faza, Lamu West-Lamu County

BOARD MEMBERS

- | | |
|---------------------------|----------|
| 1. Mr. Paul Gicheru | - Chair |
| 2. Mr. Peter Ondieki, MBS | - Member |
| 3. Mr. Nelson Orgut | - Member |
| 4. Eng. Weche Okubo, OGW | - Member |

IN ATTENDANCE

- | | |
|---------------------|---------------|
| 1. Philip Okumu | - Secretariat |
| 2. Maryanne Karanja | - Secretariat |

PRESENT BY INVITATION

Applicant - SUPERSERVE LIMITED

- | | |
|------------------|---------------------------------------|
| 1. Cynthia Njagi | - Advocate, Garane & Somane Advocates |
| 2. Yussuf Yunis | - Director |
| 3. Abdi Yussuf | - Staff |

Procuring Entity - COUNTY GOVERNMENT OF LAMU

- | | |
|--------------------|--------------------------|
| 1. Jonah Zealot | - Assistant Director SCM |
| 2. Kulthum Harith | - Advocate |
| 3. Jamila Mitsanze | - HSCM |

INTRODUCTION

The Tender for the Proposed Sub-County Offices (Main Works) at Faza, Lamu East - Lamu County was advertised in the *Standard* Newspaper of 20th February, 2018

SCOPE OF WORKS

The works to be carried out under this contract comprises of Erection and Completion of a single storey Office block, Civil and External Works, and Associated electrical and mechanical services.

TENDER OPENING RESULTS

Opening of the Tenders took place on 16th March, 2018 at 10.00 a.m. in Lamu County Headquarters Boardroom in the presence of bidder's representatives who chose to attend.

The opening results are as shown in the table below:-

S/NO	NAME OF COMPANY	ADDRESS	BID SUM (KSHS)	BID BOND (KSHS)	BIDDER NO. MARKED
1.	Naliye Agency Ltd	7456-00610 Nairobi	183,812,285.00	1,000,000.00	1
2.	Skyline Construction Company	2677-80100 Mombasa	187,584,362.00	1,000,000.00	2
3.	Buildmart solutions ltd	7226-001000 Thika	196,518,610.00	1,000,000.00	3
4.	Superserve Ltd	88356-80100 Mombasa	195,219,070.00	1,000,000.00	4
5.	Alliff Construction Company	1463-70100 Garrissa	183,506,814.00	1,000,000.00	5
6.	Kingsley Construction	435-00600 Nairobi	207,491,775.00	1,000,000.00	6
7.	Lion Building Construction	375 Malindi	233,210,001.00	1,000,000.00	7
8.	White Span Enterprises Ltd	22359-00100 Nairobi	225,186,827.00	1,000,000.00	8
9	Pioneer Engineering	101556-00101 Nbi	200,025,830.00	1,000,000.00	9
10	Muslih Telecommunication	43328-80100 Mombasa	169,748,325.00	1,000,000.00	10
11	Eco Partners Ltd	38-80502 Mokowe	200,251,050.00	1,000,000.00	11
12	Somoe Constructions Ltd	80898-80100 Mombasa	197,088,650.00	1,000,000.00	12

DETERMINATION OF RESPONSIVENESS AS MINIMUM

QUALIFYING CRITERIA

In accordance with the requirements of the conditions of tender clauses 5.5, 5.6, 5.7, and 5.8, only substantially responsive tenders were to be subjected to detailed evaluation.

The bidders were also required to provide: -

1. Certificate of Registration or Incorporation;
2. Valid Tax Compliance Certificate;

3. Certificate of confirmation of directors and shareholders (CR12) for limited companies;
4. Certificate of registration with National Construction Authority (Category 5& above);
5. Proof of payment for tender document;
6. Provision of bid security of Kshs. 1,000,000.00 with validity period of up to 13th July 2018 or 120 days from tender opening date;
7. Duly filled, signed and stamped /sealed Form of Tender; and
8. Duly filled, signed and stamped /sealed Confidential Business Questionnaire (S33).

OBSERVATIONS

Seven (7 No.) bidders were deemed to be Non-Responsive to the minimum mandatory requirements stipulated in both the Tender Document and the invitation notice and were hence disqualified from further evaluation. The seven (7 No.) bidders are: -

Bidder No. 2

- Tax Compliance Certificate not attached.

Remarks: The bidder failed to meet all the minimum mandatory requirements hence was disqualified from further evaluation.

Bidder No. 3

- Proof of payment for tender document not attached.

Remarks: The bidder failed to meet all the minimum mandatory requirements hence was disqualified from further evaluation.

Bidder No. 6

- Certificate of Company Registration/Incorporation not attached.
- Tax Compliance Certificate not attached.
- CR12 Not attached.
- National Construction Authority Registration Certificate Not attached.
- Form of Tender Not stamped.

Remarks: The bidder failed to meet all the minimum mandatory requirements hence was disqualified from further evaluation.

Bidder No. 8

- NCA Registration Certificate attached was for Category 7 which was below the required minimum of Category 5
- Proof of payment for tender documents was not attached.

Remarks: The bidder failed to meet all the minimum mandatory requirements hence was disqualified from further evaluation.

Bidder No. 9

- CR12 Not attached.
- Proof of payment for tender document not attached.

Remarks: The bidder failed to meet all the minimum mandatory requirements hence was disqualified from further evaluation.

Bidder No. 10

- Tender validity period stated in the Form of Tender was less than 120 days set out in the tender document.

Remarks: The bidder failed to meet all the minimum mandatory requirements hence was disqualified from further evaluation.

Bidder No. 12

- NCA Registration Certificate attached is Category 7 which is below the required minimum of Category 5
- CR12 Not attached.

Remarks: The bidder failed to meet all the minimum mandatory requirements hence was disqualified from further evaluation.

RESPONSIVE BIDS

Five (5 No.) bidders i.e. Bidder No. 1, 4, 5, 7 & 11 were found to be responsive to the minimum mandatory requirements of the tender and hence qualified for further evaluation.

STAGE TWO: TECHNICAL EVALUATION.

The tender documents were examined based on clause 2.2 of the Instruction to Tenderers.

Any bidder who scored 50 points and above out of 70 was considered for further evaluation.

It was observed that two (2 No.) i.e. **Bidder No. 4** and **Bidder No. 11** were responsive having attained marks above the **mandatory minimum of 50 points** and hence **qualified** for further evaluation. However, three (3 No.) bidders i.e. Bidder No. 1, 5 and 7 failed to attain the minimum 50 points hence did not qualify for further evaluation.

STAGE 3. FINANCIAL EVALUATION

The evaluation shall be conducted in two sections: -

1. Preliminary examinations and
2. Tender sum Comparisons

A. PRELIMINARY EVALUATION

The preliminary examination was carried out by checking arithmetic errors and comparison of rates.

a) Arithmetic errors

The two bids i.e. Bidder No. 4 and 11 were checked for arithmetic errors based on the rates and total sums indicated in the bills of quantities.

B. TENDER SUM COMPARISONS

Tender sums for qualifying bids i.e. Bidder No. 4 & 11, were compared and were weighted as follows:-

N O	BIDDER NO.	TENDER SUM (TS)	PRIME COST & PROV. SUMS (PC&PS)	ADJUSTED TENDER SUM (TS -PC&PS)	DEVIATIO N FROM THE MEAN	% DE V	FIN SCORE
1.	4	195,219,070.00	81,350,000.00	113,869,070.00	9,444,718.79	7.65	19.5
2.	11	200,251,050.00	75,860,000.00	124,391,050.00	1,077,261.21	0.87	30.0
3.	ENG. ESTIMA TE	211,801,246.36	80,120,000.00	131,681,246.36	8,367,457.57	6.78	21
	MEAN			123,313,788.79			

STAGE 4. COMBINATION OF TECHNICAL AND FINANCIAL SCORE

The technical and financial scores for Bidder No. 4 and Bidder No. 11 were combined to obtain the total score as follows;

Table 7: Combination of Technical and Financial Score.

BIDDER NO.	TECHNICAL SCORE	FINANCIAL SCORE	COMBINED SCORE
4	51	19.5	70.5
11	52	30	82.0

TENDER EVALUATION COMMITTEE RECOMMENDATION

From the foregoing analysis, Bidder No. 4, M/s Superserve Limited of P.O. Box 88356-80100, Mombasa having been determined to be substantially responsive to the terms and conditions of the bid and having the lowest responsive bid was recommended to be considered for award of contract for The Proposed Sub-County Offices (Main Works) at Faza, Lamu East- Lamu County at their tendered amount of Kshs. 195,219,070.00 (Kenya Shillings One Hundred Ninety-Five Million, Two Hundred Nineteen Thousand, Seventy Shillings Only).

Professional Opinion

The Head of Procurement of the Procuring Entity issued his professional opinion dated 16th April, 2018 in which he confirmed that the Evaluation Committee's recommendation to award the work to the most responsive bidder as reflected in the Evaluation Report M/S Superserve Limited of P.O. Box 88356 - 80100, Mombasa, who quoted a total bid price of Kshs. 195,219,070.00 (One Hundred and Ninety-Five Million, Two Hundred and Nineteen Thousand, Seventy Shillings, Zero Cents) was in line with the Public Procurement and Asset Disposal Act 2015 hence forwarded it to the Accounting Officer for approval.

Instead of making an award to the recommended bidder the Procuring Entity however proceeded to terminate the process.

THE REQUEST FOR REVIEW

The Request for Review was lodged by M/S Superserve Limited, whose address for purposes of the review was care/of Garane & Somane Advocates of P. O. Box 20617 – 00100, Nairobi.

The Applicant sought for the following orders:

- (a) *THAT pending hearing and determination of this Request for Review the Board be pleased to STAY any likely re-advertisement of and or re-evaluation of Tender No. CGL/TR/PSM&ADM/008/2017-2018;*
- (b) *THAT the Board SUSPENDS, QUASH AND DECLARE NULL AND VOID the decision of the Procuring Entity contained in the letter dated 16th April, 2018, terminating/cancelling the entire Tender No. CGL/TR/PSM&ADM/008/2017-2018;*
- (c) *THAT the Procuring entity be COMPELLED to produce the written report to the Public Procurement Regulatory Authority on the cancellation/ termination of Tender No. CGL/TR/PSM&ADM/008/2017-2018;*
- (d) *THAT the Procuring Entity be COMPELLED to produce the summary of the Evaluation Reports and the results of the said evaluation for Tender No. CGL/TR/PSM&ADM/008/2017-2018;*
- (e) *THAT the Procuring Entity be COMPELLED to finalise the evaluation process guided by the report of the evaluation committee and award the tenders to the successful bidders for Tender No. CGL/TR/PSM&ADM/008/2017-2018;*

(f) *THAT the costs of this Request for Review be awarded to the Applicant.*

THE APPLICANT'S CASE

It was the Applicant's case during the hearing of this Request for Review that the Procuring Entity breached the provisions of Section 63 of the Public Procurement and Asset Disposal Act, 2015 by purporting to terminate the tender in issue.

It was, further, the Applicant's case that although the letter of termination of the procurement was dated 16th April 2018, the same was served upon the Applicant on the 30th of May 2018 which was outside the stipulated statutory period of fourteen days. Counsel for the Applicant added that the letter of termination should have been served upon the Director General of the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") which was not done. Counsel made reference to the Procuring Entity's alleged termination report and stated that no evidence of receipt of the said letter by the Director General of the Authority had been provided and the letter was not in fact addressed to the Director General but to the Secretary of the Authority.

The Applicant relied on the case of **Muema Associates vs Turkana County Council (PPARB Appeal Number 35 of 2008)** in support of the proposition that a Procuring Entity must among other things give sufficient notice and reasons to all the bidders of the decision to terminate procurement

proceedings and also give a report to the Authority regarding the decision to terminate.

Counsel for the Applicant also argued that the reasons that were given in this case were not sufficient to terminate this tender. She cited the provisions of Section 53(8) of the Act as read together with Section 53(9) of the Act which require that before commencing the procurement process, the Accounting Officer of a Procuring Entity must satisfy himself that there are sufficient funds to meet the procurement. Counsel therefore urged the Board to allow the Request for Review and award the Applicant costs.

THE PROCURING ENTITY'S SUBMISSIONS

In response to the submissions made by the Applicant, Mr. Jonah Zealot for the Procuring Entity opposed the Application and stated that notification to tenderers and to the Director General of the Authority was dispatched on time. He averred that there was no delay by the Procuring Entity in communicating with the Applicant because the Applicant called it on 27th April, 2018 when it advised the Applicant that it had already taken the decision to terminate the procurement and that pursuant to the said communication, the Applicant collected the termination letter on 30th April 2018. Mr. Zealot stated that the reason why the process was terminated was because of lack of sufficient funds. He further argued that there was no inordinate delay on the part of the Procuring Entity in communicating the decision to terminate the procurement process as alleged by the Applicant.

While responding to an inquiry from the Board on the evidence of dispatch of the report to the Authority and the dispatch of letters of notification of the termination to all the other tenderers, Mr. Zealot confirmed that he had not

submitted any evidence of service of the letters of notification to the tenderers and the Authority. He also confirmed that it was the Accounting Officer of the Procuring Entity who should have signed the letters of termination and not him. Mr. Zealot also confirmed that the Procuring Entity had not availed evidence of the budgetary allocation for the current financial year that informed it to terminate the tender.

He nonetheless urged the Board to dismiss the Request for Review with costs.

THE BOARD'S FINDINGS

The Board has considered the Request for Review, the Response by the Procuring Entity and all the other documents which were lodged before it by the parties. The Board has also considered the submissions made before it and finds that this Request for Review raises only one issue for determination namely:-

- a) Whether the termination of the procurement process herein was lawful.**

For the purposes of determination of the above issue it is evident from the letter of notification of termination that the Procuring Entity terminated the procurement process in question under the provisions of Section 63(1)(b) of the Public Procurement and Asset Disposal Act 2015 on the ground of inadequate budgetary provision.

The Board has examined the provisions of the Act and has also looked at the Evaluation Report, the Professional Opinion and all the other documents

which were supplied to it by the Procuring Entity in support of the above reason for termination.

The Board finds on the basis of the law and the above documents, that the termination of the procurement process herein was unlawful for the following reasons.

Firstly it is evident from the letter of termination of the procurement process that the same was signed by Mr. Jonah M. Zealot who from his own admission is the Assistant Director Supply Chain Management of the Procuring Entity but not by the Accounting Officer of the Procuring Entity. Under the provisions of Section 63(1) of the Act, it is only an Accounting Officer of a Procuring Entity who can sign a letter of termination of a procurement process and cannot delegate that mandate.

Secondly, under the provisions of Section 53(8) of the Public Procurement and Asset Disposal Act, the law expressly requires that before an Accounting Officer of a Procuring Entity commences any procurement proceedings he/she must first be satisfied that there are sufficient funds to meet the obligations arising from any contract that may be entered into pursuant to the procurement process.

Section 53(9) of the same Act makes it an offence for an Accounting Officer of a Procuring Entity to commence a procurement process without first ascertaining that the goods, works or the services to which the procurement process relates have been budgeted for.

Sections 53(8) and 53(9) of the Act provide as follows: -

“Section 53(8): Accounting Officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.”

“Section 53(9): An Accounting Officer who knowingly commences any procurement process without ascertaining whether the good, work or service is budgeted for, commits an offence under this Act.”

It is not therefore open for a procuring entity to advertise for goods, works or services and then turn around at the end of the process and terminate a procurement process after tenders have been submitted, evaluated and a recommendation of award made. This view is further fortified by the fact that the budget available for any procurement is always known to the Procuring Entity way before an invitation for tenders is made public through advertisement.

Further and notwithstanding the provisions of Section 53 of the Act, where the decision of a procuring entity to terminate a procurement process is challenged, the procuring entity must provide sufficient evidence/material to justify the termination of the procurement process.

The Board has looked at all the documents placed before it by the Procuring Entity to support the allegation of lack of sufficient funds to continue with the procurement process herein and finds on the basis of the material placed before it that the Procuring Entity did not place any satisfactory evidence before the Board to justify the termination.

It is clear from the documents placed before the Board that the ground of termination was based on a generalized statement of lack of sufficient funds. The Procuring Entity had evaluated the lowest responsive tenderer to be the Applicant at a price of Kshs. 195,219,070.00 which was within the estimated budget of Kshs. 250 million. The Procuring Entity did not also place before the Board the duly signed or certified copy of the approved budget for the procurement which is the subject matter of this Request for Review.

Additionally on the same issue, the Board notes that the Tender Evaluation Committee fully evaluated the tender in issue and made a recommendation of award of the tender to the Applicant. The Head of Procurement of the Procuring Entity wrote a professional opinion confirming that the tender had been evaluated in accordance with the law and that the recommendation to award the tender to the Applicant was proper and was in accordance with the law.

In view of the position taken by the Tender Evaluation Committee and the Head of Procurement of the Procuring Entity, the same Officer could not turn back and sign a letter of termination of a process he had sanctioned.

The Board further holds that where a termination is challenged, a procuring entity must, in addition to giving evidence to support the termination, also ensure that it observes all the statutory requirements set out under the provisions of Section 63 of the Act. Some of the requirements which are relevant to the case now before the Board is that the Director General of the Authority must be notified of the termination and letters of termination must

be served on all the bidders and the evidence of service must be availed. The Board has perused the file containing the documents supplied to it by the Procuring Entity and notes no such evidence was supplied and further that no report was specifically addressed to the Director General of the Authority.

The Board wishes to further clarify that the report required to be given under the provisions of Section 63 of the Act must be addressed and be delivered to the Director General of the Authority and there must be proof of receipt by at least way of stamping by the Authority.

The Board therefore holds that the Procuring Entity did not also comply with the provisions of Section 63(3) and (4) of the Public Procurement and Asset Disposal Act, 2015.

These essential requirements were set out by the Board in the case of **Muema Associates -vs- Turkana County Council (PPARB Appl. No. 35 of 2008)** where the Board held that in order for there to be a lawful termination, a Procuring Entity must among other things do the following.

- i. **Give sufficient notice to all bidders of the decision to terminate the procurement proceedings.**
- ii. **Give sufficient reasons for the decision to terminate.**
- iii. **Give a report to the Authority regarding the decision to terminate procurement proceedings.**

Based on the above findings the Board therefore finds and holds that the Procuring Entity's decision to terminate the tender in issue as contained in the letter of termination dated 16th April, 2018 was unlawful.

On the nature of the reliefs to be granted it was conceded by Mr. Zealot for the Procuring Entity that the tender in question was fully evaluated and a recommendation made to award the tender to the Applicant. This recommendation was supported by the Head of Procurement of the Procuring Entity. All that now remains to be done in this case is to issue a letter of award to the successful bidder, the Applicant herein.

Consequently, the Applicant's Request for Review dated 7th June, 2018 and which was filed with the Board on 12th June, 2018 is allowed on the following terms: -

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.

- a) The Applicant's Request for Review dated 7th June, 2018 and which was filed with the Board on 12th June, 2018 be and is hereby allowed.
- b) The Procuring Entity's decision to terminate Tender No. CGL/TR/PSM&ADM/008/2017-2018 for the Proposed Sub-County Offices (Main Works) at Faza, Lamu East- Lamu County communicated vide the letter of notification dated 16th April, 2018 be and is hereby annulled and the same is set aside.

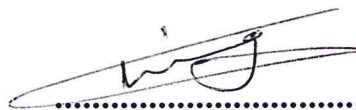
- c) The Procuring Entity be and is hereby directed to complete the procurement process of Tender No. CGL/TR/PSM&ADM/008/2017-2018 for the Proposed Sub-County Offices (Main Works) at Faza, Lamu East- Lamu County and issue a letter of award to the Applicant as per the recommendations made by the tender evaluation committee and which was approved by the Head of Procurement of the Procuring Entity.
- d) The Procuring Entity is further directed to complete the award process as directed above within fourteen days from today's date.
- e) Each party shall bear its own costs of the Request for Review.

Dated at Nairobi on this 3rd July, 2018.



CHAIRMAN

PPARB



SECRETARY

PPARB