

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.53/2007 OF 19TH SEPTEMBER, 2007

BETWEEN

PIONEER PLUMBERS LTD.....APPLICANT

AND

**NATIONAL SOCIAL
SECURITY FUND.....PROCURING ENTITY**

Appeal against the decision of the Tender Committee of National Social Security Fund, Procuring Entity dated 6th September, 2007 in the matter of Tender No.33/2006-2007 for Completion of Phase II Nyayo Housing Estate Embakasi (Plumbing and Drainage Installations).

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Amb. C. M. Amira	-	Member
Mrs. L. G. Ruhiu	-	Member
Eng. C. A. Ogut	-	Member
Ms. J. A. Guserwa	-	Member
Mr. S. K. Munguti	-	Member

IN ATTENDANCE

Mr. P. M. Wangai	-	Holding Brief for Secretary
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PRESENT BY INVITATION FOR APPLICATION NO.53/2007

Applicant, Pioneer Plumbers Ltd

Mr. Alex S. Masika - Advocate, Masika and Koross
Mr. Bharat Patel - Managing Director
Mr. James Onguru - Quantity Surveyor

Procuring Entity, National Social Security Fund

Mr. Paul Lilan - Advocate, Kipkenda, Lilan & Co.
Advocates
Mr. James Akaja - General Manager
Mr. Anderssons N. Ndwiga - Estates Manager
Ms Anastasia W. Mbogo - Deputy Manager Procurement
Services
Mr. Wycliffe W. Mutonyi - IT Manager
Ms Hope Mwashumbe - Deputy Manager, Legal Services
Mr. George Mwandando - Assistant Procurement Manager

Interested Candidates, Volcanic Plumbing Works

Mr. Kingori Karuki - Advocate, King'ori Kariuki & Co.
Advocates
Mr. William M. Kihonge - Project Manager
Mr. Cyrus Githinji -

BOARD'S DECISION

Upon hearing the representations of the parties and upon considering the information in all the documents before it, the Board decided as follows: -

BACKGROUND

This tender was advertised by the Procuring Entity in the Daily Nation and the East African Standard Newspapers on 25th June, 2007. The tender entailed Completion of Phase II Nyayo Housing Estate Embakasi and had three distinct categories of works namely Main Works (Building Works), Plumbing and Drainage Installations and

Electrical Installations. Three bidders responded to the tender notice before 18th July, 2007 at 11.00 a.m., the closing/opening date with respect to Plumbing and Drainage Installations works which is the subject of the appeal. Tenders were opened immediately after closing in the presence of bidders' representatives as follows:

Plumbing and Drainage Installations

No.	Name of the Firm	Completion Period(Weeks)	Bid Sum (Kshs)
1.	Pioneer Plumbers Ltd	54	180,172,474.70
2.	EPCO Builders Ltd	80	167,491,625.00
3.	Volcanic Plumbing Works	Not Indicated	149,603,912.00

EVALUATION

The evaluation was carried out in the following three stages:

Stage One - Preliminary and Mandatory Requirements

This was done to establish the responsiveness of the tenders to the mandatory requirements of the tender. The results of the preliminary evaluation were as follows:

Plumbing Works

S/No	Bidder's Name	NSSF Compl.	Tax Compl.	Directors	Audited A./C 3 yrs	Company Reg.	M.OP.W. Cat. A	Decl.	B/B	PA	Remarks
1.	Pioneer Plumbers	√	√	√	√	√	√	√	√	JV	R
2.	EPCO Builders Ltd	√	√	√	√	√	X	√	√	N/A	N/R
3.	Volcanic Plumbing	√	√	√	√	√	√	√	√	N/A	R

KEY

1. N/R - Non-Responsive
2. R - Responsive

Arising from the above results, EPCO Builders was found non-responsive since it was not registered under A category with the Ministry of roads and Public Works. It was therefore disqualified from further evaluation.

Technical Evaluation

This involved checking on the responsiveness of the tenders to the technical specifications set out in the tender document. The results of the technical evaluation were as tabulated below:

Plumbing and Drainage

STAGE 2	Max. Points (total 100)	BIDDER NO. 1	BIDDER NO. 3	BIDDER NO.
TECHNICAL EVALUATION (MAX.100 POINTS) Documentary evidence Must be provided				
2.1 Completion and compliance of the Particular Specifications (20 Points)				
<ul style="list-style-type: none"> ➤ Full compliance with the standards and quality of materials / goods to be supplied and installed as per specifications given in Tender Document and compliance with pricing instructions. (Submit copies of relevant Certificates). <ul style="list-style-type: none"> • Compliance (13 Points) • None compliance - Rejection. 	13	13	13	
<ul style="list-style-type: none"> ➤ No errors (4 points) ➤ Up to 15% error (2 points) ➤ Above 15% error - Non responsive 	4	2	2	
<ul style="list-style-type: none"> ➤ Consistency in Price Distribution (3 points) ➤ Non consistent (0 Points) 	3	3	0	

2.2 Personnel (20 Points)				
<p>➤ Contract Manager to have at least Bsc Mechanical Engineering) with 5 years experience or HND (Mechanical Engineering) with 7 years experience or Certificate (Mechanical Eng) with 15 years experience in works of similar nature.</p> <ul style="list-style-type: none"> • Qualification and Experience for the period indicated (2 Points) • Less than as period indicated (0 points) 	2	2	0	
<p>➤ Site Managers(1 No) to have at least HND (Mechanical Engineering) with 10 years experience or Certificate (Engineering) with 15 years experience in works of similar nature.</p> <ul style="list-style-type: none"> • Qualification and Experience for the period indicated (1 Point) • Less than the period indicated (0 points) 	1	0.5	1	

<p>➤ Supervisors (3N0) to have at least Certificate (Mechanical Engineering) with at least 10 years experience in works of similar nature and a class 'C' Electrician license from Ministry of Energy.</p> <ul style="list-style-type: none"> • Qualification and Experience for the period indicated (3 Points) • Less than the period indicated (Pro-rata) 	3	0	2	
<p>➤ Plumbers (12 N0) to have at least Certificate (Mechanical Engineering) with at least 5 years experience in works of similar nature.</p> <ul style="list-style-type: none"> • Qualification and Experience for the period indicated (12 Points). • Less than the period indicated (Pro-rata) 	12	4	8	
<p>➤ Detailed curriculum vitae of the above personnel certified by employee and bidding company to be attached.</p> <ul style="list-style-type: none"> • Submission for all the above staff (2 Points) • Submission of less (pro-rata) 	2	1	1	
2.3 Relevant Experience (15 Points)				
➤ List of projects carried	2	2	2	

out in the last 10 years in construction industry as Plumbing and Drainage contractor.				
➤ Total monetary value of Plumbing & Drainage works carried out in the last 5 years of not less than Ksh 200 million	4	4	4	
➤ 5 years experience in similar works (at least four clients) each with value not less than Kshs.50,000,000.00. (Attach award letters and certificates of completion).	5	1	3	
➤ Details of Plumbing & Drainage Installations underway or committed including expected completion dates	4	4	4	
<p>2.4 Machinery & Equipment</p> <p><u>(10 Points)</u></p> <p>Ownership or lease of major equipment including but not limited to the listed items as shown in Appendix 3. Proof of ownership e.g. copies of log books, receipts, letters of insurance e.t.c. and / or lease agreements to be provided or a firm commitment letter to this effect with confirmation</p>				

that the equipments/machinery are available for inspection by NSSF at any time.				
• Tools & Plant	4	4	4	
• Measuring Instruments	3	3	3	
• Communication Equipments	1	0	1	
• Vehicles	2	2	2	
Less than listed above(Pro-rata)				
2.5 <u>Business Support (15 Points)</u>				
➤ Insurance cover for equipment and proof of indemnity against risks and workman's compensation cover	2	2	2	
➤ Liquid assets, access to lines of credit or other financial resources	4	0	4	
➤ Proof of Financial stability	4	0	4	
➤ Appointed bankers and letter of authority to seek references	2	1	2	
➤ Statement of compliance with clause 1.2 of Instructions to Tenderers	1	1	1	
➤ Legal advisors and a statement and nature of any litigation in the last 5 years. If none, state so.	2	0	2	
2.6 At least 3 referees (attach letters from the firms you have worked				

with)(5 points)				
• 3 references (5 points)	5	5	5	
• Less or none (0 point)				
2.7 Completion programme for the works (15 points)				
• Shortest realistic contract period for sub - zones 2.6 - 2.10 (15 points)	15	15	15	
• Any other period (pro-rata)				
TOTALS	100	69.5	85	
N.B. Cut off - 75% to qualify for financial evaluation.		NQ	Q	

KEY: NQ - Not Qualified
Q - Qualified.

Based on the above results, Pioneer Plumbers Ltd was disqualified from further evaluation for failing to attain a score of 75 % which was the cut-off mark. Volcanic Plumbing Works qualified for financial evaluation after attaining a score of 81.5% and 85 % marks respectively.

Financial Evaluation

The evaluation committee noted that Volcanic Plumbing Works was the only bidder who qualified for financial evaluation with respect to Plumbing and Drainage Installations. Consequently, the committee recommended the award of the tender for Plumbing and Drainage Installations to Volcanic Plumbing Works at Kshs. 149, 603, 912.00

Tender Award

In its meeting held on 6th September, 2007, the Tender Committee concurred with the recommendations of Evaluation Committee and

awarded the tender for Plumbing and Drainage Installations was awarded to Volcanic Plumbing Works for being the lowest evaluated bidder at Kshs. 149,603,912.00.

Letters of notification of award to the successful and the unsuccessful bidders were dated 6th September, 2007

THE APPEAL

This appeal was lodged on 19th September, 2007 by Pioneer Plumbing Works Ltd against the decision of the tender committee of the National Social Security Fund in the matter of tender No. 33/2006-2007 for Completion of Phase II Nyayo Housing Estate Embakasi (Plumbing and Drainage). The Applicant was represented by Mr. Alex Masika while the Procuring Entity was represented by Mr. Paul Lilan, both Advocates. Volcanic Plumbing Works, an Interested Candidate, was represented by Mr. King'ori Kariuki, Advocate.

Prior to commencement of the hearing, the Applicant made an application as follows:

1. That the name of the successful bidder at paragraphs 2, 3 and 4 of the Request for Review be amended to read Volcanic Plumbing Works and not Volcanic Plumbers Works.
2. That the words Public Procurement and Disposal Regulations, 2005 at paragraphs 3, 4 and 5 of the Request for Review be amended to read Public Procurement and Disposal Regulations, 2006.
3. That the words 'commercial evaluation' at paragraph 7 of the Request for Review be amended to read 'financial evaluation.'

In response, both the Procuring Entity and the interested candidate stated that they had no objections on the applications for amendment of the Request for Review by the Applicant. Consequently, the Board

granted the application for amendment and amended Memorandum of Appeal accordingly and ordered the hearing to proceed.

The Applicant raised eight grounds of appeal, which we deal with as follows:

Grounds One, Two, Six and Seven

These are not grounds of appeal but mere statements that are not supported by any breach of the Act or Regulations and as such the Board need not make a finding on them.

Grounds 3 and 4

These grounds of appeal have been consolidated since they raised a similar complaint regarding the evaluation of the tender.

In these grounds, the Applicant complained that the Procuring Entity breached Regulations 47 and 48 of the Public Procurement and Disposal Regulations, 2006 as read together with Sections 60 and 64(1) of the Public Procurement and Disposal Act, 2005.

The Applicant submitted that the Procuring Entity failed to carry out a preliminary evaluation as per the tender requirements to determine whether all the required information and documents were submitted by the bidders. It argued that although Volcanic Plumbing Works were registered with the Ministry of Roads and Public Works as plumbing contractors, they had not attained category A as at the time of tender closing on 18th July, 2007. It argued that the letter dated 17th July, 2007 contained in the bid submitted by Volcanic Plumbing Works, though authentic, was not a registration certificate as per the tender requirements. In addition, the Applicant submitted that Volcanic Plumbing Works did not submit a copy of its tender document as required in the tender thus breaching Regulation 47(1) (d).

The Applicant further submitted that these were mandatory requirements and therefore the bid by Volcanic Plumbing Works should have been disqualified for being non-responsive, if the evaluation was carried out as specified in the tender document.

In addition, the Applicant further submitted that the bid submitted by Epcu Builders Ltd was also non-responsive and should have been rejected. It argued that Epcu Builders Ltd was not registered with the Ministry of Roads and Public Works under Category A as plumbing and drainage contractors. The failure by the Procuring Entity to disqualify such bids was a breach of Section 64(1) of the Public Procurement and Disposal Act, 2005 read together with Regulation 48 of the Public Procurement and Disposal Regulations, 2006.

Finally, the Applicant submitted that the tender by the successful candidate, Volcanic Plumbing Works, should have been declared non-responsive as it did not indicate the completion period as per the tender requirement. It stated that this was a major irregularity and this was evidence that the evaluation was not carried fairly and objectively.

In response, the Procuring Entity denied that it breached Sections 60 and 64(1) of the Act as read together with Regulations 47 and 48 of the Public Procurement and Disposal Regulations, 2006. The Procuring Entity stated that the said Sections of the Act and the Regulations should be read together with Sections 64(2), 66(2), 66(3) and Regulation 48(2). It argued that the preliminary evaluation was carried out in accordance with the Act and only responsive bidders were allowed to proceed to the next stage of the evaluation.

The Procuring Entity stated that Volcanic Plumbing Works were registered under category A with Ministry of Roads and Public Works. This was evidenced by the letter dated 17th July, 2007 contained in its tender document. The letter stated that Volcanic Plumbing Works was registered under Category A with effect from 17th July, 2007 and the letter was to serve as a certificate until a formal certificate was issued.

On the issue of the failure by Volcanic Plumbing Works to submit a copy of its tender document, the Procuring Entity submitted that that requirement was considered by the evaluation committee as a minor deviation that could not affect the substance of the tender. The requirement was therefore waived by the evaluation committee pursuant to Section 64(2) of the Act. The evaluation committee noted that the copy of the original tender document could not have contained any information other than the one contained in the original tender document. The Procuring Entity submitted that the purpose of the copy was to provide it with an alternative in the event the original tender document was misplaced. The Procuring Entity submitted that waiver was also extended to the Applicant who had failed to submit a signed copy of its audited accounts for the past three years as per the tender requirements. Therefore, all bidders were treated equally.

In response to the issue of failure by the successful candidate to state the completion period, the Procuring Entity stated as follows:-

Firstly, it stated that after the first preliminary technical evaluation all the three bids were declared non-responsive. However, the Committee decided to reconsider the evaluation as failure to award this tender would have an impact on the entire project. Accordingly, the evaluation committee carried the technical evaluation afresh.

In the second evaluation, the committee waived some of the tender requirements including the requirement of stating the completion period. Consequently, the committee awarded 15 points to the bidders on this requirement. Hence none of them was prejudiced by the waiver on the completion period.

Mr. Kingo'ri Kariuki, Advocate for the successful bidder, submitted that Volcanic Plumbing Works were registered with the Ministry of Roads and Public Works as plumbing contractors under Category A. Counsel stated that a copy of the registration certificate was annexed in the original tender document which was submitted to the

Procuring Entity. He further stated that it was evident at page one of the Request for Review that Volcanic Plumbing Works had the lowest priced tender. Hence the Board should dismiss the appeal and confirm the award of the tender to the successful candidate.

The Board has perused the documents submitted by the Procuring Entity and in particular minutes of the tender opening and the evaluation report. The Board noted from the tender opening minutes that the tender closed on 18th July, 2007 at 11.00 a.m. as stipulated in the tender notice. Tenders were opened by a committee of three members immediately after closing and the name of the tenderers and their respective tender sum, completion period, bid bond and the issuing bank were read out. This information was recorded in the tender opening register. During the tender opening, the tender opening committee prepared the tender opening minutes in which it observed that Volcanic Plumbing Works had not submitted a copy of their bid document as required in the tender among other observations.

The Board has also perused the copy of the blank tender document issued to the bidders by the Procuring Entity. The Board noted that Clause 23 of the Instructions to Tenderers provided for a preliminary evaluation to determine the responsiveness of the tenders. This was followed by a detailed evaluation and comparison of tenders as set out under Clause 26 of the Instruction to Tenderers. The tender document also contained the criteria used in both preliminary and detailed evaluation of tenders. The items that were considered at the preliminary evaluation stage included certificate of registration, tax compliance certificate, details of directorship, audited accounts, registration certificate with the relevant ministry in appropriate and bid bond. Bidders who were found non-responsive at this stage were disqualified pursuant to Regulation 48 and were not evaluated further.

On the allegation that the Procuring Entity breached Section 64(1) by failing to disqualify Volcanic Plumbing Works had not complied with the registration requirement, the Board found that Volcanic

Plumbing Works had attached a copy of letter Ref: BK 3/2/2362/0447 dated 17th July, 2007 to its tender document.

The letter read as follows:

"...We are pleased to inform you that the Contractors' Registration Committee at its meeting held on 12th July, 2007 discussed and agreed to approve your application for re-registration/upgrading as follows:

TYPES OF WORKS	CATEGORY
PLUMBING, DRAINAGE, FIRE FIGHTING AND SECTIONAL WATER TINKS/PUMPS	- 'A'
GAS INSTALLATION	- 'B'
CIVIL ENGINEERING (ROAD WORKS)	- 'C'
SEWERS	- 'C'
GENERAL BUILDING WORKS	- 'C'

This letter shall serve as a certificate until such time that you are issued with a formal certificate."

The Board is satisfied that that letter was authentic and a clear demonstrate that Volcanic Plumbing Works was responsive with respect to registration requirement. The Board further notes that the bid submitted by EPCO Builders Ltd did not contain an appropriate registration certificate and hence it was properly disqualified by the evaluation committee.

Accordingly, this limb of the ground fails.

On the issue of the submission of the original tender document and a copy, it is common ground that the successful candidate did not submit a copy of its tender. The tender advertisement notice and tender document at Clause 16.1 of the Instructions to Tenderers required submission of the original tender document and a copy.

Regulation 47(1) provided as follows:-

“Upon opening of the tenders under section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether:-

- a)*
- b)*
- c)*
- d) The required number of copies of the tender have been submitted;*
- e)*”

Regulation 47(2) states as follows:-

“The evaluation committee shall reject tenders, which do not satisfy the requirements set out in paragraph (1)”.

It is therefore clear that if the tender document has a requirement for submission of copies, such copies must be provided. Regulation 47(2) is framed in mandatory terms. There was no explanation by the successful candidate why it failed to submit a copy of its tender.

Submission of the copy of the original tender was mandatory and therefore the Procuring Entity breached Regulation 47(1) (d) and 47(2).

Therefore, this limb of the ground succeeds.

The third limb of this ground concerned the completion period. It was common ground that the successful candidate did not indicate the completion period in its tender form.

The Tender Form required the bidders to state the completion period in weeks. Since the successful candidate failed to state the completion period as per the tender requirement, the question to be answered is whether the Evaluation Committee had the power to

waive this requirement. It is therefore necessary to examine the Regulations that deal with evaluation. Regulation 47(2) states in mandatory terms that the evaluation Committee shall reject all tenders, which did not satisfy the requirements stipulated in Regulation 47(1). Upon preliminary evaluation under Regulation 47, the Evaluation Committee is to conduct a technical evaluation. During technical evaluation, the committee compares each tender to the technical requirements set out in the tender document in accordance with Regulation 49(1).

Regulation 49(2) provides as follows:-

“The Evaluation Committee shall reject tenders which do not satisfy the technical requirements under paragraph (1)”.

As already noted the successful tenderer failed to stipulate the completion period. This been a tender for plumbing and drainage installation, the completion period was a key parameter to be considered. Without the completion period being stipulated in the tender document, the Procuring Entity could not be in a position to ascertain how long the successful bidder would take to complete the contract.

Therefore, the waiver of this requirement by the evaluation committee and the decision to award 15 points to all the bidders on this parameter was wrong. This was not a fair and objective evaluation. Accordingly, the Board finds that the Procuring Entity breach Sections 64(1), 66(1) and (2) and Regulations 47, 48 and 49.

This limb of the grounds also succeeds.

Ground 5

This was a complaint that the Procuring Entity breached Sections 44 and 45 of the Act by failing to provide a copy of the evaluation report to the Applicant despite written requests of 17th and 18th September, 2007. The Applicant argued that it was apparent from the letter Ref:

SF/10/16/VOL.X/140 of 17th September, 2007 that the Procuring Entity was not willing to avail the evaluation report to the Applicant.

In response, the Procuring Entity submitted that the information requested by the Applicant was verbally availed to it through its representatives, who visited the Procuring Entity on 11th and 12th September, 2007. The Procuring Entity further stated that it could not provide the whole evaluation report to the Applicant due to limitations imposed on it by Section 44 of the Act.

The Board has read the two letters dated 17th and 18th September, 2007 by the Applicant. It is apparent that the Applicant had requested to be provided with a copy of the evaluation report among other things. However, the Applicant did not request for a summary of the evaluation as provided for in Section 44(3) and Section 45 2(e).

The Board has also read Sections 44 and 45 of the Public Procurement and Disposal Act, 2005 which were alleged to have been breached by the Procuring Entity. Section 44(1) prohibited the Procuring Entity from disclosing the information relating to evaluation, comparison or clarification of tenders. However, Section 44 (3) allowed it to provide a summary of the evaluation report to the Applicant. This was the only information that could have been availed to the Applicant and not the entire evaluation report as requested by the Applicant.

Accordingly, this ground of appeal fails.

Ground Eight

This was a statement of loss/damage that the Applicant was bound to suffer due the actions of the Procuring Entity. Such costs included Kshs. 82,000.00 used by the Applicant to file the appeal.

The Applicant urged the Board to annul the award of the tender and grant the Applicant's prayers which included the costs of the appeal.

In response, the Procuring Entity submitted that the Applicant had failed to demonstrate that there were material breaches of the Act or Regulations in the tendering process to warrant the annulment of the tender. It stressed that the process was carried out diligently in accordance with the Act and the Regulations. Hence the Board should find that the appeal was frivolous and dismiss it with costs.


The Board has considered that the submissions of the parties and noted that this was an open tender duly advertised by the Procuring Entity in the daily newspapers. Accordingly, there was no guarantee that any of the bidders would have been awarded the tender. The costs of the tendering process were therefore normal business risks that were incurred by the bidders.

Accordingly, this limb of ground fails.

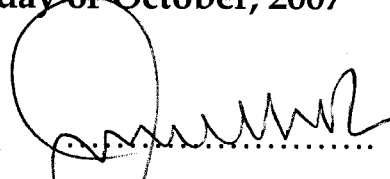
Taking into account the above matters, it was clear that the Applicant has succeeded in a number of key grounds. Accordingly, the Appeal succeeds and this tender is hereby annulled.

However, the Board is alive to the fact that this is a sub-contract and it may affect the main works. To speed up the re-tendering process, the Procuring Entity may use restricted tendering method of Procurement if it so wishes.

Dated at Nairobi on this 15th day of October, 2007


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CHAIRMAN


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SECRETARY