

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.54/2007 OF 20TH SEPTEMBER, 2007

BETWEEN

M. J. VEKARIA ELECTRIC 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 (Electric Installations and Associated Services).

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 APPLIATION NO.54/2007

Applicant, M.J. Vekaria Electric Ltd

- | | | |
|------------------------|---|--|
| Mr. Alex S. Masika | - | Advocate, Masika & Koross
Advocates |
| Mr. Vinod M. Vekaria | - | Managing Director |
| Mr. Dennis B. O. Njiji | - | Estimator |

Procuring Entity, National Social Security Fund

- | | | |
|--------------------------|---|--|
| Mr. Paul Lilan | - | Advocate, Kipkenda, Lilan
& Co. Advocates |
| Mr. Timothy Cheruiyot | - | 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 Mwandembo | - | Assistant Procurement
Manager |

Interested Candidates, Ultimate Engineering Ltd

- | | | |
|---------------------|---|---------------------------------|
| Mr. Andrew Wandabwa | - | Advocate, Wandabwa
Advocates |
| Mr. A. M. Muriithi | - | Advocate, Wandabwa
Advocates |
| Ms. Leah Ileri | - | General Manager |
| Mr. Joseph Lupediru | - | Technical Manager |

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

Electrical Installations and Associated Works

No.	Name of the Firm	Completion Period	Bid Sum (Kshs)
1.	Contemporary Electrical Enterprises	13 Weeks	147,136,540.00
2.	Central Electricals Ltd	-	-
3.	Ultimate Engineering Ltd	26 Weeks	159,591,414.26
4.	M.J.Vekaria Electrical Ltd	As per main contractor	143,428,109.00
5.	Burhani Engineers Ltd	11 Weeks	203,685,052.00

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:-

10
11
12
13
14



Electrical Installations

S/No	Bidder's name	NSSF compl.	Tax compl.	Directors	Audited A/c 3yrs	Company Reg.	M.O.P.W Cat. C	Decl.	B/B	PA JV	Remarks
1.	Contemporary Electrical Enterprises	√	√	√	√	√	√	√	X	N/A	N/R
2.	Central Electrical Ltd	√	√	√	√	√	√	√	X	N/A	N/R
3.	Ultimate Engineering Ltd	√	√	√	√	√	√	√	√	N/A	R
4.	M. J. Vikaria Ltd	√	√	√	√	√	√	√	√	N/A	R
5.	Burhani Engineers Ltd	√	√	√	√	√	√	√	√	N/A	R

KEY

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

Based on the above results, two bidders, namely Contemporary Electrical Enterprises and Central Electrical Ltd were disqualified for being non-responsive to all the tender requirements. The other three bidders, Ultimate Engineering Ltd, M. J. Vikaria Electric Ltd and Burhani Engineers Ltd qualified for the next stage of 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:

Electrical Installations

STAGE 2	Max. Points (total 100)	BIDDER NO. 3	BIDDER NO. 4	BIDDER NO. 5
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	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	2
<ul style="list-style-type: none"> ➤ Consistency in Price Distribution (3 points) ➤ Non consistent (0 Points) 	3	3	3	3

2.2 Personnel (20 Points)				
<p>➤ Contract Manager to have at least Bsc (Electrical Engineering) with 7 years experience or Certificate (Eng) with 15 years experience in works of similar nature and a class 'A' Electrician license from Ministry of Energy.</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	2	2
<p>➤ Site Managers(1 No) to have at least HND (Electrical Engineering) with 10 years experience or Certificate (Engineering) with 15 years experience in works of similar nature and a class 'A' electrician license from Ministry of Energy.</p> <ul style="list-style-type: none"> • Qualification and Experience for the period indicated (1 Point) • Less than the period indicated (0 points) 	1	1	1	1
<p>➤ Supervisors (3N0) to have at least Certificate (Electrical Engineering) with at least 10 years experience in works of similar nature and a class 'C' Electrician license from Ministry of Energy.</p>	3	3	2.5	2.5

<ul style="list-style-type: none"> • Qualification and Experience for the period indicated (3 Points) • Less than the period indicated (Pro-rata) 				
<ul style="list-style-type: none"> ➤ Electricians (12 N0) to have at least Certificate (Electrical Engineering) with at least 5 years experience in works of similar nature. • Qualification and Experience for the period indicated (12 Points). • Less than the period indicated (Pro-rata) 	12	6	8	4
<ul style="list-style-type: none"> ➤ Detailed curriculum vitae of the above personnel certified by employee and bidding company to be attached. • Submission for all the above staff (2 Points) • Submission of less (pro-rata) 	2	1	1	0
2.3 Relevant Experience (15 Points)				
<ul style="list-style-type: none"> ➤ List of projects carried out in the last 10 years in construction industry as Electrical contractor. 	2	2	2	2
<ul style="list-style-type: none"> ➤ Total monetary value of electrical works carried out in the last 5 years of not less than Ksh. 200 million 	4	4	4	4
<ul style="list-style-type: none"> ➤ 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	1.5	1.5	1.5

➤ Details of electrical Installations underway or committed including expected completion dates	4	4	4	4
2.4 Machinery & Equipment (10 Points) 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 that the equipments/machinery are available for inspection by NSSF at any time.				
• Tools & Plant	4	4	4	4
• Measuring Instruments	3	3	3	3
• Communication Equipments	1	1	0.5	1
• Vehicles	2	2	2	2
Less than listed above(Pro-rata)				
2.5 Business Support (15 Points)				
➤ Insurance cover for equipment and proof of indemnity against risks and workman's compensation cover	2	2	2	2
➤ Liquid assets, access to lines of credit or other	4	2	4	4

financial resources				
➤ Proof of Financial stability	4	2	4	4
➤ Appointed bankers and letter of authority to seek references	2	2	1	1
➤ Statement of estimated monthly cash flow for this project	2	0	0	0
➤ Legal advisors and a statement and nature of any litigation in the last 5 years. If none, state so.	1	1	0	0
2.6 At least 3 referees (attach letters from the firms you have worked with).	5	5	5	0
2.7 <u>Completion programme for the works (15 points)</u>				
<ul style="list-style-type: none"> • Shortest realistic contract period for sub - zones 2.6 - 2.10 • Any other period (pro-rata) 	15	15	0	6
TOTALS	100	81.5	69.5	66
N.B. Cut off – 75% to qualify for financial evaluation.		Q	NQ	NQ

KEY: Q – Qualified; NQ- Not Qualified.

Based on the above results M. J. Vikaria Electrical Ltd and Burhani Engineers Ltd were disqualified from further evaluation for failing to attain 75 % which was the cut-off mark. Ultimate Engineering Ltd qualified for financial evaluation after attaining a score of 81.5%.

Financial Evaluation

The evaluation committee noted that Ultimate Engineering Ltd was the only bidder who qualified for financial evaluation with respect to Electrical Installations and Associated Services. Consequently, the evaluation committee recommended the award of the tender for electrical installations to Ultimate Engineering Ltd at its tender of Kshs. 159, 591, 414.00 and a contract period of 26 weeks.

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 Electrical Installations and Associated Services to Ultimate Engineering Ltd.

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

THE APPEAL

This Appeal was lodged on 20th September, 2007 by M. J. Vekaria Electric 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 (Electric Installations and Associated Services). The Applicant was represented by Mr. Alex Masika while the Procuring Entity was represented by Mr. Paul Lilan, both Advocates. M. J. Vekaria Ltd, an Interested Candidate, was represented by Mr. Andrew Wandabwa of Wandabwa Advocates.

Prior to commencement of the hearing, the Applicant made an application that the Board accepts the Applicant's addendum dated 20th September, 2007 and filed on 24th September, 2007 to be part of the appeal document. The Applicant stated that addendum was filed prior to the filing of the response on 26th September, 2007 by the Procuring Entity.

On its part, the Procuring Entity urged the Board not to allow the addendum. The Procuring Entity stated that it responded to issues to the issues raised in the addendum as a precautionary measure in the event the addendum was allowed by the Board. This should not be used as an excuse to accept the addendum.

Mr. Andrew Wandabwa objected the addendum arguing that it was filed outside the 14 days appeal window period. He further argued that the addendum was filed in bad faith in attempt to cure the weaknesses in the Request for Review. Counsel further argued that the Regulations did not have a provision for filing of addendums and the Board had no power to allow introduction of the addendum Memorandum of Appeal as it was filed out of time.

RULING ON THE PRELIMINARY APPLICATION FOR LEAVE TO ADMIT THE ADDENDUM

Filing of appeals in this Review Board is well set out at Regulation 73 of the Public Procurement and Disposal Regulations, 2006. The statutory period of filing the request for review is 14 days from the date of the occurrence of the breach or notification of award.

The Board has noted that the addendum the applicant seeks leave to be admitted was indeed filed on 24th September, 2007 which was outside the 14 days period appeal window. There is no provision in the Act nor Regulations thereto that provide for filing of the addendum to the request for review.

Consequently, the Board declines to grant leave to the applicant to admit the filed addendum. The response to the addendum by the Procuring Entity is therefore of no consequence. However, the Board rules that it cannot prevent the applicant from referring to any relevant legal provision of the Act in support of the alleged breaches as set out in its Memorandum of Appeal filed on 20th September, 2007.

Accordingly the application for leave to introduce an addendum Memorandum of Appeal is dismissed the request for review will proceed to hearing.

SUBSTANTATIVE HEARING

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

Ground 1

This was a complaint that the Procuring Entity breached Section 62(1) of the Public Procurement and Disposal Act, 2005 by failing to seek clarification on the Applicant's tender with regard to its completion period. As a result, the Procuring Entity awarded the tender to Ultimate Engineering Ltd at a higher price than that of the Applicant. It further contended that its tender had complied with most of the tender requirements and any non-conformance with the tender requirements should have been treated as minor deviation which could not materially affect the tender.

Finally, the Applicant submitted that its tender was unfairly evaluated especially with respect to personnel and completion period. As a result, the Applicant lost valuable points that would have enabled it to qualify for financial evaluation.

In response, the Procuring Entity denied that it breached Section 62(1) of the Act. The Procuring Entity stated that the failure by the Applicant to state the completion period of the tender was a substantive matter that could not be cured by Section 62(1) of the Act which deals with clarifications on the tenders. The Procuring Entity further stated that it was apparent from the Form of Tender contained in the tender document that bidders were required to indicate their respective completion period in weeks. It further submitted that the evaluation committee did not find it prudent to seek clarifications from the Applicant. It argued that clarifications

would amount to submission of further information by the Applicant to improve its tender. This would have been unfair to other bidders.

The Board has read Section 62(1) which provides as follows;

“The Procuring Entity may request a clarification of a tender to assist in the evaluation and comparison of tenders”.

It is clear that Section 62 (1) gives the Procuring Entity the discretion to seek clarification that may assist in the evaluation and comparison of tenders. That section has to be read together with Section 62(2) which states that “A clarification may not change the substance of the tender”.

The Board has noted that the Tender Form required the bidders to state the completion period in weeks. The Applicant did not state the completion period in weeks but rather, it stated in the space provided for completion period as follows:-

“as per main contractors”

The completion period was a main parameter of the tender. This was not an issue that the Procuring Entity would have sought clarification on as such a clarification would have gone to the substance of the tender.

There was no evidence adduced by the Applicant that the Procuring Entity breached Section 62(1) by failing to exercise the discretion.

Accordingly, this ground has no merit and must fail.

Grounds 2 and 3

These grounds of appeal have been consolidated since they raised similar complaints regarding the evaluation of tenders. These are

complaints that the Procuring Entity breached Sections 64(1) and 66(4) of the Public Procurement and Disposal Act, 2005.

The Applicant stated that it had submitted the most responsive tender as compared to that of Ultimate Engineering Ltd and Burhani Engineers Ltd. However, the Procuring Entity failed to declare its tender as the tender with the lowest evaluated tender price.

The Applicant submitted that it did not indicate the completion period in weeks. Instead, it had indicated that its completion period would be "as per main contract". Citing Clause 29.4 of the Instructions to Tenderers, the Applicant stated that the sub-contract could only be performed in tandem with the main contract. Consequently, it argued, the most realistic and practical period could only fall within that of the main contract.

Finally, the Applicant submitted that the completion periods stated by Ultimate Engineering Ltd and Burhani Engineers Ltd were impractical and intended to influence the evaluation of the tenders. The Applicant contended that the decision to award the tender to its competitor was wrong and contrary to the law.

In response, the Procuring Entity stated that Section 64(1) should be read together with Sections 64(2), 66(2) and 66(3) of the Act. The Procuring Entity further stated that the Applicant's tender was found responsive with respect to Section 64(1) at the preliminary evaluation stage. However, the Applicant's tender failed in the technical evaluation, as it did not attain the minimum score of 75% to qualify to the financial evaluation stage.

In addition the Procuring Entity submitted that the evaluation was done in accordance with Section 66(2) and the tender was awarded to the bidder with the lowest evaluated tender price. No extraneous information was used in the evaluation of the tender.

On the allegation that the Applicant was unfairly evaluated with respect to the completion period, the Procuring Entity stated that it

could not award any mark to the Applicant on that parameter as it did not indicate its completion period as per the tender document. The Procuring Entity argued that the Applicant was not entitled to any mark as it only stated that the completion period was "as per main contractor". This statement was not as per the requirement of the tender that required the completion period to be stated in weeks. It further stated that the works were at different levels of completion and hence it was possible for sub-contractors to proceed with their works without relying on the main contractor.

Finally, the Procuring Entity stated that the completion period was critical to apportion claims in the event the implementation of the project was delayed by the sub-contractor. Therefore, the Procuring Entity acted correctly by not awarding the Applicant the marks.

The Board has considered the submissions of the parties and examined all the documents submitted. It is clear that the Applicant had not indicated a specific completion period in its tender document. Instead, it stated that its completion period would be "as per main contractor". This was contrary to paragraph 1 of the Form of Tender which required the bidders to indicate their respective completion period in weeks. It was therefore wrong for the Applicant to claim that it had complied with all the tender requirements.

The successful candidate associated itself with the submissions of the Procuring Entity. It stated that the Form of tender was clear that the completion period was to be stated in weeks. The Applicant failed to state the period in weeks and therefore the Procuring Entity was correct for not awarding the Applicant any score on this item.

The Board has also noted that the tender for the Main Works was separate from that of Electrical Works and each had separate tender documents. In both cases bidders were required to state their completion period which accounted for 15 points for the shortest realistic contract period. The Applicant did not indicate its specific completion period. Instead, it indicated "as per main contractor".

The Board has also reviewed the evaluation report submitted by the Procuring Entity and noted that the Applicant was found responsive at the preliminary evaluation stage. However, the Applicant was disqualified at the technical evaluation stage after it failed to attain the minimum score of 75%. This was the cut-off score which would have enabled the Applicant to qualify for financial evaluation. Therefore, its tender did not qualify to proceed to the financial evaluation stage. Accordingly, the Applicant could not have been the lowest evaluated bidder and therefore the Procuring Entity did not breach Section 64(1) of the Act.

These grounds of Appeal fail.

Ground 4

This was a complaint that the Procuring Entity breached Sections 44 and 45 of the Public Procurement and Disposal Act, 2005 by failing to avail a copy of the evaluation report to the Applicant despite a written request dated 13th September, 2007.

In response, the Procuring Entity stated that it verbally availed a summary of the Applicant's score to its representative on 10th September, 2007 at their offices. It denied that it breached Section 44 and 45 of the Act as the Applicant was informed of the reasons for rejection of its tender.

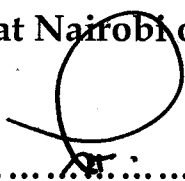
The Board has examined the Applicant's letter Ref: 292/071/100T dated 13th September, 2007. The said letter raised several issues but did not specifically request for a summary of the evaluation report. Further, the Board has noted that the Act and the Regulations do not specify the period within which a summary should be provided.

Accordingly, the allegation that the Procuring Entity breached Section 44 and 45 of the Act has no merit.

This ground of Appeal also fails.

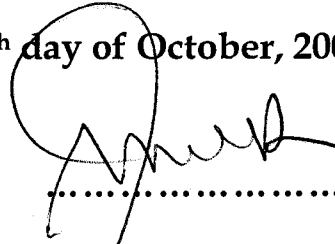
Taking into account all the above matters, the Appeal fails and is hereby dismissed. The procurement process may proceed.

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



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CHAIRMAN



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SECRETARY