

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 38/2008 OF 18<sup>th</sup> NOVEMBER, 2008**

**BETWEEN**

**KANGAMA BUILDERS & CONSTRUCTION LTD..... APPLICANT**

**AND**

- 1. OFFICE OF THE PRESIDENT, PROVINCIAL ADMINISTRATION  
AND INTERNAL SECURITY..... PROCURING ENTITY**
- 2. MINISTRY OF PUBLIC WORKS**

Review against the decision of the Embu District Tender Committee dated 29<sup>th</sup> October, 2008 in the matter of Tender No. W.P. ITEM DO I EN/MWI 701 JOB 8264B for the Proposed Erection and Construction of "E" Houses (2 No. Blocks, Comprising 24 No. Flats) and Civil Works at Mwingi police station - Mwingi.

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Eng. C. A. Ogut	-	Member
Ms. J. A. Guserwa	-	Member
Ms. Natasha Mutai	-	Member
Mr. Sospeter Munguti	-	Member

## **IN ATTENDANCE**

Mr. C. R. Amoth - Secretary to the Board

## **PRESENT BY INVITATION**

### **Applicant, Kangama Builders & Constructors**

Eric Mutua - E. K. Mutua & Advocates  
Judicaster Nthuku - E. K. Mutua & Advocates  
E. Ogoti - E. K. Mutua & Advocates

### **Procuring Entity, Office of the President/Internal Security**

J. A. Gikandi - Provincial Quantity Surveyor  
E. N. Muindi - Provincial Quantity Surveyor  
R. M. Owoko - Public Works Officer, Eastern  
J. M. Nyaga - PPOs Office, Eastern  
M. M. Muriithi - District Quantity Surveyor, Embu  
J. K. Munyiri - Provincial Architect

### **Interested Candidates**

E. K. Gikandi - Landmark Holdings Ltd  
B. M. Kilonzi - Wetco Building Construction 7 Engineering  
C. K. Njiru - Kamuti Building Contractors  
Jackson Njiru - Kamuti Building Contractors

## **BOARD'S DECISION**

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

## **BACKGROUND**

The Tender for erection and completion of Type "E" Houses in two blocks containing 24 flats at Mwingi Police Station was advertised on 18<sup>th</sup> August, 2008 in the Daily Nation Newspaper. The tender closed/opened at the Eastern Provincial Offices Boardroom on 10<sup>th</sup> September, 2008. The bidders who submitted bids and the tender sum at the opening are as listed below:-

<b>TENDERER</b>	<b>TENDER SUM (KSHS)</b>
1. Kahnes Builders (K) Ltd	83,597,722.00
2. Kamuti Building Contractors	76,849,550.20
3. Ndovu Builders & General Contractors	80,326,166.00
4. Landmark Holdings Ltd	74,589,997.00
5. Model Builders & Civil Engineers (K) Ltd	87,038,795.00
6. Laton Engineering Ltd	90,829,462.00
7. Spion Construction Co. Ltd	77,788,782.20
8. Alf Construction Co. Ltd	104,139,150.80
9. Kitho Civil Engineering Co. Ltd	91,907,142.20
10. Kangama Builders & Contractors	65,887,672.00
11. Policol International Co. Ltd	77,445,253.00
12. Lunao Enterprises	74,755,549.00
13. Wetco Building, Construction & Building	87,959,610.00
14. Stepal Builders	93,667,868.00
15. Gragab Agencies	79,829,414.50
<b>Official Estimate</b>	<b>76,036,803.00</b>

## **Preliminary Evaluation**

The Procuring Entity conducted a Preliminary Evaluation to determine the responsiveness of the bids to the following parameters:-

- a) Provision of a bid security from a reputable bank of Kshs. 200,000 with a validity period of up to and including 12<sup>th</sup> January, 2009.
- b) Properly filled and signed Form of Tender.
- c) Proof of registration with Ministry of Works Category "D" or above.
- d) Particulars of similar works done by the tenderer.
- e) Particulars of professional/technical staff.
- f) Particulars of available plant and equipment for the works and other requirements as indicated in the Instructions to Tenderers.

The summary results of the Preliminary Evaluation is as tabulated below:-

Tenderer	Bid Bond	Form of Tender	Category "D" or above	Past Work Experience	Technical Staff/Plants/Equipment /Other Instructions	Remarks
Kahnes Builders (K) Ltd	X	√	√	√	X	Not Responsive
Kamuti Building Contractors	√	√	√	√	√	Responsive
Ndovu Builders & General Contractors	x	√	√	√	√	Not Responsive
Landmark Holdings Ltd	√	√	√	√	x	Not Responsive
Model Builders & Civil Engineers (K) Ltd	√	X	√	√	√	Not Responsive
Laton Engineering Ltd	√	√	√	√	√	Responsive
Spion Construction Co. Ltd	X	X	√	√	√	Not Responsive
Alf Construction Co. Ltd	√	√	√	√	√	Responsive
Kitho Civil Engineering Co. Ltd	√	√	√	√	√	Responsive
Kangama Builders & Contractors	√	X	√	X	X	Not Responsive
Policol International Co. Ltd	X	X	√	√	√	Not Responsive
Lunao Enterprises	√	X	√	√	√	Not Responsive
Wetco Building, Construction & Building	√	X	√	√	√	Not Responsive
Stepal Builders	X	X	√	√	√	Not Responsive
Gragab Agencies	X	√	√	√	√	Not Responsive

The bidders who were not responsive were eliminated at this stage. The responsive bids were then subjected to a further detailed evaluation.

The table below shows tender sum at opening, corrected tender sum, percentage arithmetic error and percentage variation from the official Engineers Estimate.

<b>Tenderer</b>	<b>Tender Sum</b>	<b>Corrected Tender Sum</b>	<b>% Arithmetic Error</b>	<b>% Various From Official Estimate</b>
M/S Kamuti Building Contractors	76,849,550.00	76,853,550.00	+Ve 0.007%	+V 1/07%
M/S Laton Engineering Ltd	99,829,462.00	90,573,762.00	-Ve 0.35%	+Ve 19.45%
M/S Alf Construction Co. Ltd	104,139,150.00	104,133,049.20	-Ve 0.007%	+V 36.95%
M/S Kitho Civil Engineering Co. Ltd	91,907,142.20	91,925,142.20	-Ve 0.24%	+Ve 20.87%

The Technical Evaluation Committee noted that M/s Kamuti Building Contractors had an arithmetic error of 0.007% to their advantage. This was 1.07% above the Official Estimate. Their rates for the various items of works were reasonably within market rates. M/s Laton Engineering Ltd had an arithmetic error of 0.35% to their disadvantage. The tender was 19.45% above the official estimate. In addition it was noted that the prices inserted for various items of work were higher than the current market rates. M/s Kitho Civil Engineering Co. Ltd's tender had an arithmetic error of 0.24% to their disadvantage. The tender was 20.87% above Official Estimate. Though items had been priced consistently, the pricing of the tender was above reasonable market rates. M/S Alf Construction Co. Ltd tender contained an arithmetic error of 0.007% to their disadvantage. The tender sum was 36.95% above the Official Estimate. Though the various work items were consistently priced, the pricing levels were well above current market rates.

The Evaluation Committee then recommended that M/S Kamuti Building Contractors be awarded the tender at an evaluated tender sum of Kenya Shillings Seventy Six Million, eight Hundred and Fifty Three, Five Hundred and Fifty (Kshs.76,853,550.00).

## **THE TENDER COMMITTEE DECISION**

The District Tender Committee in its meeting No.EBU/TDC/6/2008-2009 held on 29<sup>th</sup> October, 2008 deliberated on the Technical Evaluation Report and made an award to Kamuti Building Contractors at a cost of Ksh.76,853,550.00 for the proposed erection and completion of type "E" Houses (2No.Blocks, comprising 24 No. Flats) and Civil Works at Mwingi Police Station, Mwingi.

## **THE REVIEW**

The Applicant lodged the Request for Review on November 18, 2008 after being notified that its bid was not successful. The Applicant was represented by Eric Mutua, an Advocate while the Procuring Entity was represented by J. A. Gikandi, Provincial Quantity Surveyor.

Before the commencement of the hearing, the Board dealt with preliminary issues raised by the Parties as follows:-

## **PRELIMINARY ISSUES**

**First Issue: On the name of the Applicant and the candidate who participated in the Tender.**

The Procuring Entity submitted that the Applicant, **Kangama Builders and Construction Ltd**, was not one of the tenderers who submitted bids on the

tender and that the tenderer with the closest name to the name of the Applicant is a sole proprietor named **Kangama Builders and Contractors**.

It argued that Section 3 of the Public Procurement & Disposal Act defines a candidate as "a person who has submitted a tender to a Procuring Entity". In addition it stated that Section 93(1) of the Act provides that any candidate who claims to have suffered or to risk suffering, loss or damage due to a duty imposed on a procuring entity by the Act or the Regulations, may seek administrative review. The Procuring Entity submitted that it received a bid from Kangama Builders and Contractors, a sole proprietor while the Applicant before the Board is **Kangama Builders and Construction Ltd**. It argued that in the eyes of the Law, these are two different persons and therefore the Applicant is a stranger in this Request for Review and urged the Board not to entertain the Request for Review.

On its part, the Applicant made an application to the Board, to amend the name of the Applicant on the Request for Review to read "**KANGAMA BUILDERS AND CONTRACTORS LTD**". It stated that at the time of tendering, its bid was under the name "**KANGAMA BUILDERS AND CONTRACTORS**", a sole proprietor, but had since been incorporated as "**KANGAMA BUILDERS AND CONTRACTORS LTD**". It argued that this fact had been communicated to the Procuring Entity during the time of bidding that the Applicant was in the process of converting to a company limited by shares. It argued that this amendment would be in line with Regulation 86, which states that the Board is not bound to follow the Rules of Evidence. It argued that the Board is mainly concerned with substantive matters and should not be tied down by issues of technical nature to defeat justice. In this regard it sought the Board's leave to correct the error on the name of the Applicant.

The Board has considered the submissions of the parties and the documents presented before it.

The Board has noted that the tenderer who submitted its bid to the Procuring Entity was **M/S Kangama Builders and Contractors**. The Board has further noted that a certificate of Registration submitted as an attachment to the Tender Documents bears the name **Kangama Builders and Contractors a sole Proprietor**. It is further noted that a payment receipt attached shows that a payment of Kshs. 40, 000 had been made by Kangama Builders and Contractors to E. K. Mutua & Co. Advocates in respect of Registration and signed/stamped by Kangama Builders and Contractors stating that, "we are processing a document for a limited company with limited liabilities (Kangama B/C LTD)". Further, the Board takes note of an Affidavit sworn by the Applicant, indicating that **M/S Kangama Builders and Contractors**, had applied for business cessation to convert to a Company Limited by shares in the name of **Kangama Builders and Constructors Ltd** and that the Procuring Entity was alive to these developments. In this regard, the Board finds that the Applicant is not a stranger in the Request of Review. Accordingly, the application by the Applicant to amend the name succeeds.

**Second Issue: Signed Contract between the Procuring Entity and the Successful Bidder.**

The Procuring Entity submitted that letters of notification of the Award were dated 4<sup>th</sup> November, 2008. It further submitted that the contract with the successful bidder was signed on 18<sup>th</sup> November, 2008 after the expiry of the 14 days appeal window and therefore was in line with Section 68(2) of the



Act. In this regard, it stated that the Request for Review had been filed outside the stipulated period of 14 days after notification of the Award.

In its response, the Applicant submitted that if a contract had been signed as argued by the Procuring Entity, this was in breach of Section 68(2) of the Public Procurement and Disposal Act, 2005 and the Regulations thereof and was hence null and void. It argued that a contract would only be properly signed after a period of 14 days, following the notification of the award to both the successful and unsuccessful bidders. It stated that the letter communicating the outcome of the tender was dated 4<sup>th</sup> November, 2008. It argued that under the Interpretation and General Provisions Act, Cap. 2, Section 57, the first day of an event is excluded from the computation of time and hence the 14 days should be counted from 5<sup>th</sup> of November, 2008 to end on 18<sup>th</sup> November, 2008. Therefore, the earliest date to sign the contract would be November 19, 2008. The Applicant therefore requested the Board to exercise its powers and nullify the contract as it had been entered into hurriedly, was in bad faith and in breach of Section 2 of the Public Procurement and Disposal Act. In addition the Applicant argued that having filed its Request for Review on 18<sup>th</sup> November, 2008, its Application was within the requisite appeal window.

The Board has considered the representations of all the parties and examined the documents presented before it. The Board finds that letters of notification of the Award were dated 4<sup>th</sup> November, 2008. The Procuring Entity was however unable to produce any evidence on when the letters of notification were dispatched to the bidders. In this regard the Board holds that 14 days, commencing from 5<sup>th</sup> November, 2008 would end on 18<sup>th</sup> November, 2008. The Request for Review was filed on the 18<sup>th</sup> November, 2008 which is the last day of the appeal window. Under the circumstances, the Board finds that

the Request for Review was filed within time. With regard to the signing of the contract with the successful bidder, the Board's finding is that, this is not in line with the provisions of Section 68 of the Act, having been signed on 18<sup>th</sup> November, 2008 which is the 14<sup>th</sup> day after notification of the award and hence the last day of the appeals window. Taking the above into consideration, the Board has the jurisdiction to hear and determine the Request for Review.

Having dealt with the preliminary issues as above, the Board now proceeds to deal with the grounds of appeal.

The Applicant in its request for review has raised five grounds of review and the Board deals with them as follows:-

#### **GROUND 1- Breach of Sections 66 & 82 of the Act**

The Applicant submitted that its bid was the most competitive and responsive as it met all the Technical and Financial criteria requirements. It argued that its bid was lower than that of the successful bidder, Kamuti Contractors Ltd. It stated that the Procuring Entity failed to conduct a proper evaluation of the Technical and Financial proposals, contrary to Section 66 and 82 of the Public Procurement and Disposal Act, 2005. It submitted that if proper evaluation had been conducted the Applicant would have emerged as the lowest evaluated bidder, having quoted a lower price than the successful bidder, and having met all the Technical requirements. In this regard, it requested the Board to make the finding that the Tender process was flawed.

In response, the Procuring Entity submitted that it had conducted the tender process following all the requirements of the Public Procurement and

Disposal Act, the Regulations and the Tender document. It submitted that the Applicant's bid did not meet the Technical and Financial requirements and was hence disqualified after the tenders were analysed on their responsiveness. It stated that the Applicant did not meet the requirements of clause 1.6 (a) of the Tender document, which required tenderers to have an annual volume of construction work of at least 1.5 times the estimated annual cash flow of the contract. It further stated that the turnover of the projects done by the Applicant, as submitted with its bid, amounted to Kenya shillings 15 million for the period 1996 to September, 2008 while its tender sum at the opening of the bids was Kshs. 65,887,672.00. It submitted that the estimated time of the project on this tender was about 60 weeks and therefore the expected annual cash flow was about Kshs.66 million. In this regard, the Applicant's submitted cash flow of Kshs.15 million was far below the expected annual volume. The Procuring Entity stated that while considering the Applicant's projects, it did not consider the project for Tseikuru hospital as part of the completed projects, because the award letter of that project was signed by the Project Architect and not by the client, which is the normal practice in the construction industry, hence raising suspicion of its authenticity. Further, the Procuring Entity stated that there was no completion certificate or any interim certificate presented for this project. In addition, it stated that the Applicant did not meet the requirements of Clause 1.6 (d) on the key personnel. Bidders were required to provide proof of qualifications of the Contract Manager with 5 years of experience. The Applicant only provided names of two people with no proof of qualifications and experience as required under the Instructions to Bidders. Further, the Procuring Entity stated that the Applicant did not satisfy the conditions of Instructions to Bidders on Financial liquidity. The Applicant had attached a bank credit letter dated 28<sup>th</sup> January, 2008 for a total of Kshs.5 million, for a petrol station, with a credit facility for 30 days. The Procuring Entity

submitted that the Applicant's financial capability could not therefore be determined from the above stated documents. The Procuring Entity concluded that although the Applicant's bid price was lower than that of the successful bidder, it was not the lowest evaluated tenderer, as its bid was not responsive.

Finally, the Procuring Entity submitted that the other criteria of evaluation was the Registration category of the bidders. The Procuring Entity stated that the Applicants Registered category was entered as 'G' in the latest building register issued in June 2007. However, the Applicant had attached a letter for upgrading to category 'C' dated 25<sup>th</sup> August, 2008 which was after the advertisement of the tender on 18<sup>th</sup> August, 2008. Further, it stated that after considering the projects which the Applicant had attached as having completed, it was found that the Applicant was unlikely to effectively handle jobs for a class 'C' contractor with a minimum value of Kshs. 150 million.

The Board has observed that a technical evaluation of the bids was carried out, based on the criteria of evaluation derived from the Instructions to Bidders (ITB) Clause 1.4. The Evaluation Committee considered whether a tenderer had met the criteria set therein and either marked (✓) for compliance or (X) for non-compliance. The successful bidder and three other firms namely, Laton Engineering, Alf Construction Co. Ltd and Kitto Civil Engineering Co. Ltd were found to be responsive. The Applicant was disqualified at this stage due to non responsiveness. The four (4) firms that passed this stage were subjected to a further evaluation by measuring their tender sums and their variations from the Official Estimate.

The Board has observed that according to Clause 1.6 (a) on the Instructions to Bidders, for one to qualify for award of the contract, tenderers were

mandatorily required to provide documentary evidence on annual volume of construction work of at least 1.5 times the estimated cash flow for the contract.

It is noted that the Applicant submitted information on works done for the past 5 years and a list of contracts executed whose totals amounted to Kshs.15 million, compared to the expected cash flow of Ksh.66 million. With regard to the contract for Tseikuru Hospital, the Board notes that the copy of award letter dated 19<sup>th</sup> August, 2008 drawn by 'Hectonics' International Architects, Interior Designers & Project Managers and signed by C. Ndambo and submitted by the Applicant, confirms the award to the Applicant for its tender sum of Kshs.112,100,000. It is further noted that the Applicant did not attach a certificate of completion or any interim certificate to prove performance of this contract. In this regard, exclusion of this project by the Procuring Entity during consideration of projects for the Applicant is a correct treatment.

Further, the Board notes that Clause 1.6(b) of the tender document stated as follows:-

***“Two works of a nature and complexity equivalent to the works over the last 10 years (to comply with this requirement works cited should be at least 70% complete)”.***

It is observed that the projects submitted by the Applicant do not satisfy this requirement as no details were given on the level of completion. The information given is only the name of the project and value of the project, void of level of completion as required.

The Board takes note of the requirements of Clause 1.6(d) of the Tender Documents on key personnel, which states as follows; "A Contract Manager with at least five (5) years experience in works of an equivalent nature and volume, including no less than three (3) years as a Manager."

After analysing the Applicant's bid, it is observed that the Applicant did not submit the qualifications of the key personnel and therefore, did not meet the criteria set out under Clause 1.6(d).

With regard to the issue of the credit line, the Board notes that the letter of credit submitted by the Applicant was in respect of a petrol station. Further, the credit line was only for 30 days, whereas the estimated period of the project is 60 weeks. In view of this, the Board makes the finding that the Applicant did not provide adequate information to answer to this criteria on credit line.

On the issue of the tenderers class, the Board notes that the Applicant submitted a copy of certificate of registration for Category 'G', dated 27<sup>th</sup> June, 2007 together with its bid and a letter dated 25<sup>th</sup> August, 2008 from the Ministry of Works to M/S Kangama Builders and Contractors, upgrading it to Category 'C'. It is further noted that the Advertisement on 18<sup>th</sup> August, 2008 stated that contractors must be registered in Category 'D' and above only. At the time of submitting its tender, the Board notes that, the Applicant had been upgraded to category 'C' and thus complied with the requirements of the advertisement. In the circumstances, the Board finds no issue on the matter of Registration, and in any event it was not applied by the Procuring Entity to disqualify the Applicant.

The Board therefore finds that the Evaluation was carried out in accordance with the requirements of the Tender Document and that the Applicant could not have been the lowest evaluated bidder.

Accordingly, this ground fails.

**GROUND 2 & 4 On Failure to disclose the technical scores and notify the Applicant on the Award.**

The Applicant submitted that the Procuring Entity failed to disclose the results of the Technical Evaluation. It stated that the procuring Entity failed to notify it on whether it was successful until and after the Applicant demanded to be informed of the outcome.

In response, the Procuring Entity admitted that it indeed did not disclose to the Applicant the technical results as this was not a legal requirement. With regard to the notification, the Procuring Entity stated that all the bidders were notified on 4<sup>th</sup> November, 2008.

The Board takes note of the provisions of Section 44 (3) and 45 (2) (e) of the Public Procurement and Disposal Act, which provides that the results of evaluation ought to be given to the applicant on request, if it is for purposes of lodging a Request for Review and that such a disclosure should be in a summary report. The Board notes that the Applicant did not make such a request.

In this regard, the two grounds fail.

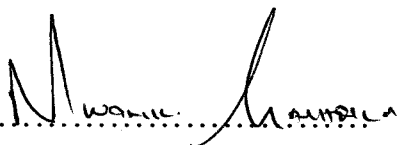
## GROUND 3 & 5

The Applicant alleged that the Procuring Entity deliberately failed to conduct fair and transparent procurement process and that it had acted in breach of the provisions of the Public Procurement & Disposal Act, 2005.

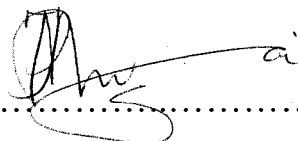
These are general statements which are not supported by any evidence and have no merit.

Taking into account all the foregoing, this Request for Review fails and is hereby dismissed. The procurement process may proceed.

**Dated at Nairobi on this 18<sup>th</sup> day of December, 2008**

  
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**Signed Chairman**

  
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*for* **Signed Secretary**