

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 5/2009 OF 4TH FEBRUARY, 2009

BETWEEN

ONGATA WORKS LIMITED ...(APPLICANT)

AND

KENYATTA UNIVERSITY.....(PROCURING ENTITY)

Appeal against the decision of the Tender Committee of Kenyatta University dated 4th February, 2009 in the matter of Tender No.

KU/TNDR/BLDG/WK/LIB/1/2008-2009 Proposed Post-Modern Library-
Main Works.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. Joshua W. Wambua	-	Member
Mr. Akich Okola	-	Member
Ms. Judith Guserwa	-	Member
Ms. Loise Ruhiu	-	Member

IN ATTENDANCE

Mr. C.R. Amoth	-	Secretary to the Board
Mr. Gilbert K. Kimaiyo	-	Secretariat

PRESENT BY INVITATION

Applicant, Ongata Works Limited

Mr. Joram Mwenda Guantai - Advocate
Mr. G.G. Wambugu - Managing Director
Mr. Josphat M. Munyoki - Contracts Manager

Procuring Entity, Kenyatta University

Mr. Mohammed Nyaoga - Advocate
Mr. Emmanuel Wetangula - Advocate
Mr. Guto Mogere - Advocate
Mr. N.M. Karagu - Advocate
Mr. Tirus K. Mburu - Procurement Officer
Prof. David Mugendi - Deputy Vice Chancellor (FOD)
Prof. Geoffrey Muluvi - Deputy Vice Chancellor (ADM)
Mr. Aron Tanui - Legal Officer
Mr. P.Kabithi Muiruri - D/R

Interested Candidate, China Jiangxi International Ltd

Mr. Wambugu Gitonga - Advocate
Mr. Kiprotich Kirui - Legal Assistant
Ms Vivianne Mutua - Legal Assistant
Mr. Zhong Ling - Representative
Mr. Mau Monghui - Deputy Representative
Mr. Obino Nduko - Administration

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 was advertised by the Kenyatta University on 28th August, 2008. The tender was for construction of the proposed post modern library. The tender was opened on 19th September, 2008 in the presence of the bidders' representatives. The bidders who responded to the tender notice were as follows:

1. Dinesh Construction Ltd
2. Njuca Consolidated Co. Ltd
3. EPCO Builders Ltd
4. Landmark Holdings Ltd
5. China Jiangxi International (K) Ltd
6. Seyani Brothers & Co. (K) Ltd
7. Ongata Works Ltd
8. N. K. Brothers Ltd
9. Magic General Constructors Ltd.
10. Don-Woods Company Ltd

PRELIMINARY EVALUATION

This was conducted to determine the responsiveness of the tenders to the mandatory requirements of the tender. Magic General Contractors Ltd was disqualified at this stage for failing to comply with all the mandatory requirements.

TECHNICAL EVALUATION

A summary of the technical evaluation was as tabulated below:-

CODE	NAME OF TENDERER	TOTAL SCORE of the Evaluators	AVERAGE SCORE OVER 70	AVERAGE SCORE OVER 100%	REMARKS
5	CHINA JIANGXI CORPORATION	550	68.8	98.3	QUALIFIED
3	EPCO BUILDERS LTD	537.5	67.2	96.0	QUALIFIED
6	SEYANI BROTHERS & CO. (K) LTD	497	62.1	88.7	QUALIFIED
1	DINESH CONSTRUCTION LTD	482	60.3	86.1	QUALIFIED
8	N.K. BROTHERS LTD	470	58.8	84.0	QUALIFIED
4	LANDMARK HOLDINGS	465	58.1	83.0	QUALIFIED
7	ONGATA WORKS LTD	451	56.4	80.6	QUALIFIED
10	DON-WOODS COMPANY LTDQ	449	56.1	80.1	QUALIFIED
2	NJUCA CONSOLIDATED CO. LTD	366	45.8	65.4	DISQUALIFIED
9	MAGIC GENERAL CONSTRUCTORS LTD	0	0.0	0.0	DISQUALIFIED

Arising from the above information, Njuca Consolidated Co. Ltd was disqualified for failing to attain the cut-off mark. Eight (8) bidders attained the cut-off mark and qualified for financial evaluation.

FINANCIAL EVALAUTION

The financial proposals were opened on 30th October, 2008. The bidders' prices less material on site and after the correction of errors was as follows:

S/No.	Bidder's Name	Tender Price (Kshs)
1.	Dinesh Construction Ltd	794, 548,250.00
2.	Epcu Builders Ltd	803,262,250.00
3.	Landmark Holdings Ltd	679,109,220.00
4.	China Jiangxi Corporation	639, 316, 012.00
5.	Seyani Brothers & Co. Ltd	751, 765, 780.00
6.	Ongata Works Ltd	658, 998,580.00
7.	N. K. Brothers Ltd	799,909,101.00
8.	Don-Woods Co. Ltd	759, 835, 100.00

Arising from the above information, the Evaluation Committee recommended the award of the tender to China Jiangxi International (K) Ltd at its tender price of Kshs. 639, 319, 248.00 and a contract period of 82 weeks. This price was less the materials on site.

In its meeting held on 13th November, 2008 the Tender Committee concurred with the recommendations of the Evaluation Committee and awarded the tender to China Jiangxi International (K) Ltd.

Letters of notification of award were sent to both the successful and unsuccessful bidders on 15th November, 2008.

The Applicant M/s Ongata Works Limited on 28th November, 2008 appealed against the decision of the Tender Committee of Kenyatta University of 14th November, 2008 in **Application No.42 of 2008**.

The Board having considered all the grounds raised by the applicant issued orders to the Procuring Entity Pursuant to Section 98 of the Act, to **re evaluate the tenders** in accordance with its Tender Documents, the Act and Regulations.

RE-EVALUATION OF THE TENDER

The Procuring Entity conducted a re evaluation of the following ten (10) tenderers.

CODE	NAME OF BIDDER	LOCATION	SHARE HOLDING
1	DINESH CONSTRUCTION LTD	Tausi Rd, Westlands	> 100% Kenyan > 2share holders
2	NJUCA CONSOLIDATED CO.LTD	Garrisa Rd	> 100% Kenyan > 6share holders
3	EPCO BUILDERS LTD	Falcon Rd, off Enterprise Rd	> 99% Kenyan (1) > 1%British (1)
4	LANDMARK HOLDINGS LIMITED	Falcon Rd, off Enterprise Rd	> 100% Kenyan > 2share holders
5	CHINA JIANGXI INTERNATIONAL (K) LTD	SUGUTA Rd BOMET (R.Valley)	> 100% Chinese > 3share holders
6	SEYANI BROTHERS & CO (K) LTD	Forest Road	>100% British > 4share holders
7	ONGATA WORKS LIMITED	Kasarani- Mwiki Rd	>100% Kenyan >2share holders
8	N.K.BROTHERS LIMITED	Lunga lunga Rd, Industrial Area	> 87.5% Kenyan (3) > 12.5% British (1)
9	MAGIC GENERAL CONTRACTORS LTD	Lunga lunga Rd, Industrial Area	>100% Kenyan > 3share holders
10	DON-WOODS COMPANY LTD	Chiromo Road	>100% Kenyan >2share holders

**EVALUATION CRITERIA AS SET OUT IN THE TENDER
DOCUMENT**

RE-EVALUATION CRITERIA FOR MAIN CONTRACT WORKS

ITEM	DESCRIPTION	SCORE
A	MANDATORY REQUIREMENTS	
1	Provide certified copies of original documents defining <ul style="list-style-type: none"> <input type="checkbox"/> The constitution or legal status, <input type="checkbox"/> Place of registration, <input type="checkbox"/> Principal place of business, <input type="checkbox"/> Written power of Attorney of signatory of the tender to commit the tenderer 	√
2	Provide copy of Company registration certificate . (Be a registered company incorporated in Kenya under the companies Act CAP 486)	√
3	Provide Certified copy of the Registration certificate from Ministry of Roads and Public Works (or its predecessors) as category A in Building Works (General Building Contractor).	√
4	Provide Current Trade License.	√
5	Provide Company PIN and VAT Certificate.	√
6	Must provide a bid security in form of A bank guarantee or Bankers cheque Of Kshs 4 million (from a reputable commercial bank only). NB: Insurance bid security will not be accepted	√
7	Provide a Certified copy of tax compliance certificate	√
B	GENERAL REQUIREMENTS	
(i)	Financial status of the company	
(a)	Provide reports on financial standing of the tenderer, such as profit loss statements, auditor's reports for the last five years. (Enclose certified copies of audited accounts)	5

(b)	Adequacy of working capita for this contract (access to lines of credit and available of other financial resources). Enclose copies of current Bank statements and other proof of financial status for the last two years.	10
(c)	Provide letter of authority to seek references from tenderer's bank (letters addressed to specific banks giving authority to the client to verify the bank statement)	5
B	GENERAL REQUIREMENTS	SCORE
(ii)	Experience of Work	
(a)	Must have had a minimum annual turnover of Kshs 500 million for each year over the last five years (2003 – 2007) Provide total Monetary Value of construction work performed for each project for the last five years. (Draw a table/chart indicating annual turnover in the last five years).	8
(b)	Must have completed a minimum of two projects of similar nature and complexity in the last five years, each of which must be of a value of at least Kshs 500 million (Certificate of completion/award letters) to be enclosed. Experience in works of A Similar nature and size for The last five years and names and addresses of Employers who may be contacted for further information on these contracts. Enclose: >Completion certificates or letters of award	10
(c)	Provide information on current/ongoing work in the prescribed format. All current/ongoing work should be indicated irrespective of whether it is of similar nature or not. Indicate time frame and contract amount for each project. (Enclose letters of Award or other proof documents).	5
(d)	Experience of work done within the African region in the last five years.	5
(iii)	Equipment for carrying out work	
(a)	List major items of equipment proposed to carry out the contract and an undertaking that the same will be available for the contract. (Earth mower, Graders, Lorries, Pickups, Hoist machine, Concrete mixers, Compressor machines and any other). (Include copies of logbooks or other ownership documents).	10

(iv)	Qualification and Experience of key Management and Technical personnel	
(i)	Enclose letters, copies of certificates and curriculum vitae of Directors, Technical and key staff duly signed by the staff Directors - 2 points Technical staff – 6 points Support staff - 2 points	10
	Litigation History Attach list of disputes, name of contract, date of dispute, amount in dispute, method of dispute resolution used, settlement achieved or status of the dispute.	2
	TOTAL MARKS	70
(vii)	FINANCIAL PROPOSAL /TENDER SUM (To be opened after Evaluation of Technical proposal). 1. All those who qualify in the technical proposal/tender. 2. All tenderers who qualify in the technical proposal will be placed on the same standing in the financial proposal and will be considered on equal footing.	

PRELIMINARY/TECHNICAL EVALUATION

The Evaluation Committee conducted the preliminary/technical evaluation and summarized their evaluation results as per the table below:-

MANDATORY REQUIREMENTS

CODE	NAME OF BIDDER	REGISTRATION	CLASS "A"	TURNOVER	COMPLETED PROJECTS	CAPABILITY	SECURITY BOND	TAX COMPLIANCE	TRADE LICENSE	PIN/VAT CERT	REMARKS
1	DINESH CONSTRUCTION LTD	√	√	√	X	√	√	√	√	√	DISQUALIFIED
2	NJUCA CONSOLIDATED CO.LTD	√	√	√	X	√	√	√	√	√	DISQUALIFIED
3	EPCO BUILDERS LTD	√	√	√	√	√	√	√	√	√	QUALIFIED
4	LANDMARK HOLDINGS LIMITED	√	√	X	X	√	√	√	√	√	DISQUALIFIED
5	CHINA JIANGXI INTERNATIONAL (K) LTD	√	√	√	√	√	√	√	√	√	QUALIFIED
6	SEYANI BROTHERS & CO (K) LTD	√	√	√	√	√	√	√	√	√	QUALIFIED
7	ONGATA WORKS LIMITED	√	√	X	X	√	√	√	√	√	DISQUALIFIED
8	N.K.BROTHERS LIMITED	√	√	X	√	√	√	√	√	√	DISQUALIFIED
9	MAGIC GENERAL CONTRACTORS LTD	√	√	X	X	√	X	X	√	√	DISQUALIFIED
10	DON-WOODS COMPANY LTD	√	√	X	X	√	√	√	√	√	DISQUALIFIED

Preliminary Evaluation was conducted to determine the responsiveness of the tenders to the mandatory requirements of the tender. Dinesh Construction Ltd, Njuca Consolidated Co. Ltd, Landmark Holdings Ltd, Ongata Works Ltd, N.K. Brothers Ltd, Magic General Contractors Ltd and Don-Woods Company Ltd were disqualified at this stage for failing to comply with some of the mandatory requirements.

Ongata Works Ltd was disqualified by for failure to attain a minimum annual turnover of Kshs. 200 Million for each year over the last five years (2003-2007) -certified copies of audited accounts were to be enclosed.

The Evaluation Committee further gave the following other reasons for disqualifying the bidder.

- Poor workmanship on Muthurwa project
- Failure to work without diligent supervision (Kiambu mortgage project)
- Providing inaccurate information on Mitihani house Project contrary to the instructions to tenderers (clause 6.8) which provides for automatic disqualification.
- Failure to provide evidence showing that it had completed a minimum of two projects of similar nature and complexity in the last five years, each of which must be of a value of at least Kshs. 300 million.(Certificate of completion was to be enclosed)

TECHNICAL EVALUATION RESULTS

The Evaluation team conducted the Technical Evaluation and presented the summary of the Technical Evaluation results as follows:-

CODE	NAME OF TENDERER	Average score over 70	Average score over 100%	REMARKS
5	CHINA JIANGXI CORPORATION	69.0	99	Qualified
3	EPCO BUILDERS LTD	67.2	96	Qualified
6	SEYANI BROTHERS & CO (K) LTD	62.6	89	Qualified

- The Evaluation Committee short listed China Jiangxi International (K) Ltd, EpcO Builders Ltd and Seyani Brothers & Co (K) LTD for having met the required pass mark, and recommended their financial bids to be opened and evaluated further.
- The Evaluation Committee decided that the financial bids for the Seven disqualified bidders need not be returned before proceeding to re-evaluate the financial bids

FINANCIAL EVALUATION

The financial proposals were opened. The bidders' prices less material on site and after the correction of errors was presented as follows:

S/N	Name Of Bidder	Quotation Kshs	Correction (+) Or (-)	Adjusted Amount Khs	Value Of Materials On Site	Net Tender Amount Kshs	Completion Period (Weeks)	Preference Bias 10% On Quotation
1	China Jiangxi Corporation	752,397,540.00	3,118.00	752,400,658.00	113,081,410.00	639,319,248.00	82	752,400,658.00
2	EpcO Builders Ltd	856,218,440.00	-	856,218,440.00	104,452,660.00	751,765,780.00	78	856,218,440.00
3	Seyani Brothers & Co (K) Ltd	905,047,876.00	-	905,047,876.00	98,745,400.00	806,302,476.00	80	814,543,088.40

The Evaluation Committee noted that among the responsive bidders, it was only M/s EpcO Builders Ltd who had 99% Kenyan shareholding and 1% British shareholding. The bidder qualified for 10% preferential bias according to clause 5.12 of the tender document. The bidder's price was calculated to Kshs 814,543,088.40 against the recommended bidder's adjusted price of Kshs 752,400,658.00.

In view of the above it was noted that 10% preferential bias would not favour M/s Epco Builders Ltd.

The Evaluation Committee made the following recommendations:-

- (i) That the Tender Committee considered awarding the Tender for the main contracts works to China Jiangxi International (K) Ltd at their quoted evaluated price of Kshs. 752,397,540.00

- (ii) That the bidder would be allowed to get the materials on site at their quoted (highest) price of Kshs 113,081,410.00

- (iii) That the net tender sum would be Kshs 639,316,316.00

TENDER COMMITTEE'S DECISION

The Tender Committee in its meeting of 20th January, 2009 **awarded** the tender for Construction of Proposed Post Modern Library main contract works to **M/s China Jiangxi International (K) Ltd** at their quoted evaluated price of Kshs. 752,397,540.00. The bidder would be allowed to get the materials on site at their quoted (highest) price of Kshs 113,081,410.00. That the net tender sum would be Kshs 639,316,248

On 20th January 2009, the Procuring Entity notified both the Successful bidder and unsuccessful bidders about the award of the tender.

THE REVIEW

This Appeal was lodged on the 4th day of February, 2009 by Ongata Works Ltd, against the decision of the Tender Committee of Kenyatta University dated 20th January, 2009 in the matter of Tender No. KU/TNDR/BLDG/WK/LIB/1/2008-2009 for Proposed Post-Modern Library-Main Works.

The Applicant was represented by Mr. Joram Mwenda Guantai, Advocate, while the Procuring Entity was represented by Mr. Mohammed Nyaoga, Advocate. The successful candidate was represented by Mr. Wambugu Gitonga, Advocate.

The Applicant in its Request for Review has raised six grounds of appeal.

The Board deals with them as follows:-

GROUND 1, 2, 3, 4, 5 AND 6

The Board has noted that this tender was the subject of **Application No. 42 of 2008. Ongata Works Ltd and Kenyatta University.**

Upon hearing that Application, the Board ruled that a re-evaluation of the tender be done.

From the documents submitted by the parties, the Board has noted that a re-evaluation was done and the Applicant having been dissatisfied with the decision of the Procuring Entity filed the present Application for Review.

Upon perusal of the grounds of Appeal and the response by the Procuring Entity, it is clear that all the issues arise from the re-evaluation that was done by the Procuring Entity.

Accordingly, the Board has consolidated all the grounds and will deal with them together as they are intertwined.

The Applicant submitted that the Procuring Entity conducted a re-evaluation and arrived at a decision on 20th January, 2009. It argued that the decision made after the re-evaluation was a fresh decision and therefore the Board had the jurisdiction to hear this Request for Review and the Board had the power under Section 103 of the Public Procurement and Disposal Act 2005 (hereinafter referred to as the Act) to declare the decision of the Procuring Entity null and void.

The Applicant further submitted that Clause 36 of the Instructions to bidders provided that the tender validity period was 120 days. It argued that the tender validity date expired on 17th January, 2009 and that no award could be made by the Procuring Entity unless an extension had been sought from all bidders and granted.

The Applicant argued that the Procuring Entity deliberately failed or neglected to comply with the directions of the Board in decision No. 42 of 2008. It stated that if the Procuring Entity had followed the decision of the Board, it would have disqualified the successful candidate for failing to submit its bid in two separate envelopes. It also argued that the successful bidder had its bid submitted in electronic format and that it contained numerous cancellations.

The Applicant submitted that the successful bidder's documents did not meet the criteria set out in the tender document on the grounds that:

- (i) The form of tender was not available in December, 2008 at the hearing of Application No. 42 of 2008, yet it was now included in its tender document.
- (ii) The tender by the successful candidate had been submitted in an electronic format and there was no provision for a Tenderer to purchase a soft copy.
- (iii) The tender documents had numerous cancellations.
- (iv) It was registered in Kenya on 4th April, 2007 and therefore could not meet the tender requirement on registration.
- (v) It failed to meet the criteria of a minimum turn over of Kshs. 500 Million in the last five years.
- (vi) It had not completed two projects of similar magnitude.

The Applicant further stated that it had met the mandatory criteria in the tender documents. It argued that during the first evaluation, it had passed the technical stage and therefore it was not tenable for the Procuring Entity to declare it technically non-responsive in the re-evaluation, following the order by the Board.

The Applicant stated that it was wrong for the Procuring Entity to disqualify it on the ground that it had not given information on two projects of a similar magnitude as required in the Instructions to Tenderers. It informed the Board that it had submitted in its bid, the various letters to demonstrate the projects it had done in the last five years and the certificates of completion where necessary. It argued that if there was an error apparent on its bid documents, the Procuring Entity should have followed the procedure for correcting or verifying the misinformation in accordance with instructions to bidders.

The Applicant alleged that it had received a call from the Procuring Entity requesting for information on the two projects it had included in its tender. As a result, it wrote a letter on 5th January, 2009 to the Vice Chancellor of the University. It referred the Board to a further affidavit which it had filed on 24th February, 2009. In the affidavit, the Applicant's Managing Director deponed that he received a telephone call from an unidentified caller from the Procuring Entity, who threatened the Applicant and informed him that he was wasting time and that the Applicant would never do any work at the University. The Managing Director stated as result he wrote the letter dated 5th January, 2009.

In conclusion, the Applicant submitted that it was the lowest responsive bidder and that the Procuring Entity must have considered extraneous matters not contained in the tender documents to determine that it was not the successful bidder.

In response, the procuring Entity submitted that it was common ground that the tender was subject of Review in **Application No. 42 of 2008, Ongata**

Works Ltd and Kenyatta University and that the Board in its decision ordered a re-evaluation of the tender, in accordance with the Act, Regulations and Tender Documents. It stated that the Procuring Entity as ordered by the Board conducted a re-evaluation of the tenders.

The Procuring Entity denied the allegation by the Applicant that the tender was re-evaluated outside time. It argued that time started to run from the date the order to re-evaluate the tenders was made by the Board.

The Procuring Entity further submitted that the arguments by the Applicant were contradictory by arguing on one hand that the evaluation was done outside the tender validity period and on the other that it was seeking a prayer for re-evaluation.

The Procuring Entity submitted that the substratum of the ruling in Application No. 42 of 2008, was to re-evaluate the tenders in accordance with the tender documents, the Act and the Regulations. It argued that an order for re-evaluation as made by the Board, was like a court ordering a retrial. Therefore, the Procuring Entity had to do the Technical and Financial Evaluation afresh. The Procuring Entity argued that if the Board had intended to order for re-evaluation of the financial bids only as argued by the Applicant, this would have been expressly set out in the decision of the Board. It referred to Section 98(b) of the Act which gives the Board power to give directions to the Procuring Entity with respect to anything to be done or redone in the Procurement proceedings. It denied that there was any breach of the Board's order as argued by the Applicant.

On the argument that the Applicant was the lowest responsive bidder, the Procuring Entity stated that the Applicant was disqualified at the technical evaluation stage for giving false and inaccurate information in its bid document.

It highlighted the false information given by the Applicant as follows:-

- (i) That the Applicant stated that it was the contractor for Mitihani House, Phase III, and this statement was false.
- (ii) That the Applicant stated that it had completed the Kiambu Mortgage Housing in September, 2008. This statement was false as work was still ongoing on the project as at 7th November, 2008.

The Procuring Entity submitted that clause 68 of the tender document provided that giving of false information would lead to automatic disqualification. Accordingly, the Applicant was disqualified for giving false information in its tender documents. The Procuring Entity stated that since it had been ordered to do a re-evaluation, it evaluated the tenders afresh and the fact that the Applicant had not been disqualified in the first technical evaluation was not material, as the Procuring Entity was not bound by the first technical evaluation report.

The Procuring Entity further submitted that the issue of preferential treatment had been raised in Application No. 42 of 2008 and should not be argued again. Further, it argued that preferential treatment could not apply to the Applicant as it is considered during Financial Evaluation stage, whereas the Applicant failed at the technical evaluation stage.

Finally, the Procuring Entity submitted that the Applicant attempted to influence the evaluation process by writing a letter dated 5th January, 2009 when the re-evaluation process was in progress. It denied the allegation that it called the Applicant on telephone. It argued that if that were so, then the Applicant would have expressly referred to the telephone conversation in the said letter.

The Procuring Entity submitted that the letter dated 5th January, 2009 was a breach of the express provisions of the Act which bar the tenderers from attempting to influence the evaluation process. The letter by the Applicant amounted to canvassing and it was therefore wrong for the Applicant to approach the Board for a remedy while at the same time, the same Applicant is in breach of the Act and Regulations.

On its part, the successful bidder argued that the Board had no jurisdiction on the ground that these proceedings arose from Appeal No. 42 of 2008 and a contract had already been signed between the parties.

The successful bidder argued that it had submitted its tender documents properly and in two envelopes as required under the tender. It stated that the argument that the tender documents were electronically filled had no merit as the form of tender is a one page document which is easy to retype, fill in and print. Further, it argued that the Instruction to Bidders did not require bidders to fill in the documents manually.

The successful bidder informed the Board that it is an international company which has been in existence for more than twenty years. The information of

its incorporation and the projects it had undertaken was included in the tender documents.

In conclusion, the interested candidate submitted that it complied with all requirements of the tender documents and it was the lowest responsive bidder contrary to the allegations made by the Applicant.

The Board has carefully considered the submissions of the parties and examined all the documents that were submitted.

The first issue to dispose is on jurisdiction of the Board on this matter.

It is common ground that this tender was the subject of **Application No. 42 of 2008, Ongata Works Ltd and Kenyatta University**. Upon hearing the Application the Board ordered that a re-evaluation be done. The successful bidder in that application, who is also the Interested Party in the present Application, filed a Judicial Review in the High Court. The parties informed the Board that the Judicial Review Application is still pending. It was also common ground between the parties that a re-evaluation was done pursuant to the order of the Board. The present Request of Review arises from the decision that was made by the Procuring Entity's Tender Committee after the re-evaluation. That being the case, the decision that was arrived after the re-evaluation arise from a different adjudication process of the tender and any party aggrieved by that decision is at liberty to lodge a complaint with the Board. Accordingly, the Board holds that it has jurisdiction to hear and determine this Request for Review.

The other issue that arose from the response filed by the Procuring Entity and the further affidavit by the Applicant is on the effect of the letter dated 5th January, 2008 written by the Applicant to the Procuring Entity. The said letter stated as follows:-

“5th January 2008

***To the Vice Chancellor,
Kenyatta University,
P.O. Box 43844 – 00100,
NAIROBI***

Dear Madam,

***RE: PROPOSED POST-MODERN LIBRARY FOR
KENYATTA UNIVERSITY TENDER NO.
KU/TNDR/BLDWIC/LIB/2008-2009 – MAIN CONTRACT
WORKS***

We convey our New Year’s greetings and goodwill wishes to you and through you to the entire University body at this beginning of the Year.

Secondly, we congratulate you in particular in the various exemplary works done in development projects, expansion programmes put in action at your various campuses, excellent academic performance and overall environmental cleanliness you have undertaken in Kenyatta University, with exceptionally large student and staff population. Congratulations.

We would like to share in the success of Kenyatta University. In sharing on your success at Kenyatta University, we would like to

correct any misunderstanding, that arose in a matter of the ruling, by the Public Procurement Administrative Review Board, on the tender for the Library that affects both of us i.e. The University and our Company.

Our company is considering seriously withdrawing from participating in the above tender evaluation, and would like to discuss with the university the best way forward.

We did realize time is of essence to the University and works were to start on 1st December 2008. Any further delay in implementing this project will be very expensive to the university and specifically the stakeholders-the students, hence a loss to our country that we love so dearly.

We also observe that your tender documents, the act and regulations if respected, had good intentions to develop and support local indigenous Kenyan companies, hence our economy at large. The Board was very categorical in their ruling.

These observations/losses outweigh our company's (would be) financial gains from this project hence our consideration to withdraw.

Our decision to withdraw is based on the following major observations:

a) Misunderstanding on the reason we went to Appeal Board for review

Your defence at the appeal showed misunderstanding of our good intentions in corrections of the mistake at evaluation which we thought could be easily corrected while we honestly believed

and still believe we can work and deliver the project on time, it appears we being local (indigenous company), the University does not have confidence in our capabilities to deliver the project on time.

b) Opening the technical bids again

The University (Procuring Entity) might be tempted to open the technical bid which is outright suicidal to the project.

Knowledge of the tenderers figures in the financial bids disqualifies re-visiting of the technical documents.

*Having opened the financial bids, revisiting the technical bid would again take you to another appeal. Ongata Works Limited, even though capable, does not intend (want) to be one of the Applicants of the Review Board, but other agreed tenderers are likely to exercise their right of appeal. The likely verdict would be **RETENDER** the project. This would mean*

- 1. The entire University would lose over six months in the performance of contract*
- 2. Irreparable loss to the stakeholders (students) due to loss of use of the facility*

c) Financial Evaluation

Application for review was strictly on the financial bids as there was no appeal on the technical bids. The ruling of the Board is obvious on what must be corrected in the evaluation. Your defence and arguments at the Board, was very worrying to us and hence our thought to withdraw from participating

The Directors have heavily considered this option in order to support the development projects of the University and enhance harmonious working relation with the University and the entire construction industry at large while clearing any possible misunderstanding between the University and our company. We therefore respectfully appeal that you facilitate discussion for an amicable way forward as proposed hereof. We have found it necessary to copy this letter to your representatives who attended the public Procurement Administrative Review Board to show our openness and sincerity in this matter.

Yours Faithfully,

***G.G. WAMBUGU,
MANAGING DIRECTOR,
ONGATA WORKS LIMITED.***

cc:

Prof. D.N Mugendi – Deputy Vice Chancellor, (Finance, Planning & Development), K.U.

Prof. G.M.Muluvi – Deputy Vice Chancellor, (Administration), K.U.

Mr. P. Kibuthi Muiruri – Deputy Registrar, K.U.

Mr. J.K.Wambua – Finance Officer, K.U.

Mr. Aaron Tanui – Legal Officer, K.U.

Mr. Tirus K. Mburu – Procurement Officer, K.U. “

The Applicant's Managing Director who attended the hearing explained to the Board that the said letter was written after he received a telephone call from an anonymous person from the Procuring Entity. That allegation is

also made in the further affidavit sworn on 24th February, 2009 and filed with the Board on the same day. The Procuring Entity denied that any telephone call was made to the Applicant.

The Board has carefully read the said letter and noted that it does not make any reference to any telephone call or any telephone conversation between the Applicant and the Procuring Entity.

The Board has also noted that the said letter does not make any reference to the projects that the Applicant had included in its tender contrary to the submissions made at the hearing.

The Board has noted with concern that the said letter in its ordinary meaning was meant to influence or intimidate the Procuring Entity when the re-evaluation process was in progress. What other meaning can be attributed to some of the following phrases in the letter:-

- (i) **“.....We would like to correct any misunderstanding that arose in a matter of the ruling by the Public Procurement Administrative Review Board.....**
- (ii) **.....Our Company is considering seriously withdrawing from participating in the above tender evaluation and would like to discuss with the University the best way forward.**
- (iii) **.....The University (Procuring Entity) might be tempted to open the technical bid which is outright suicidal to the project.**

- (iv)Knowledge of the tenderers figures in the financial bids disqualifies re-visiting of the technical documents.
- (v)Having opened the financial bids, revisiting the technical bid would again take you to another appeal. Ongata Works Ltd, even though capable, does not intend (want) to be one of the Applicants of the Review Board, but other aggrieved tenderers are likely to exercise their right of appeal. The likely verdict would be **RETENDER** the project.....”.

It is clear that the above letter is a flagrant breach of Section 38 of the Act which provides as follows:-

38 (1) “After the deadline for the submission of tenders, proposals or quotations:-

- (a) No person who submitted a tender, proposal or quotation shall make any unsolicited communications to the procuring entity or any person involved in the procurement proceedings that might reasonably be construed as an attempt to influence the evaluation and comparison of tenders, proposals or quotations; and**
- (b) No person who is not officially involved in the evaluation and comparison of tenders, proposals or quotations shall attempt, in any way, to influence that evaluation and comparison.**

(2) A person who contravenes subsection (1) is guilty of an offence and is liable on conviction:-

(a) If the person is an individual, to a fine not exceeding four million shillings or to imprisonment for a term not exceeding three years or to both: or

(b) If the person is a corporation, to a fine not exceeding ten million shillings”.

The Board has also noted that Clause 5.3 of the tender documents provides as follows:

“Information relating to examination, clarification, evaluation, and comparison of tenders and recommendations for the award of Contract shall not be disclosed to tenderers or any other persons not officially concerned with such process until the award to the successful tenderer has been announced. Any effort by a tenderer to influence the Employer’s officials, processing of tenders or award decisions may result in the rejection of his tender”.

The main purpose of the Public Procurement and Disposal Act, 2005 as stated in Section 2 is among others to ensure fairness, integrity, transparency and accountability in Public Procurement. To achieve this, both the Procuring Entity and candidates in a tender must observe all the provisions of the Act.

The Board finds the letter by the Applicant dated 5th January, 2009 to be a serious breach of Section 38 of the Act and the provisions of Clause 5.3 of the Tender Documents.

As the Board has observed severally, the Procurement process is a competitive race that is governed by the Act, the Regulations and the Tender Documents. Any party, be it the Procuring Entity or a Tenderer, who commits a breach, must bear the consequences. A candidate in a tender who commits a serious breach, must be disqualified from the race at the earliest opportunity.

The Board holds that the letter by the Applicant dated 5th January, 2009 alone was enough to disqualify the Applicant from the tender process.

Although the Board has already found that the Applicant committed a serious breach, it shall nevertheless consider all the issues raised in the Request for Review.

On the issue of the validity of the tender, the Board is alive to its order that a re-evaluation was to be done, following the Board's decision on Application No. 42 of 2008. The Board further notes that Regulation 46 requires an evaluation to be done within thirty days from the date of tender opening.

In addition, the Board notes that Section 66(6) of the Act requires evaluation of tenders to be done within the period stipulated in the tender documents. However, the Act is silent on what happens when a re-evaluation is ordered. The Board has noted that the evaluation of the tender was done within the tender validity period. This process was interrupted by the filing of Application No. 42 of 2008.