

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 55/2010 OF 8<sup>TH</sup> OCTOBER, 2010**

**BETWEEN**

**MOTOMO METAL FABRICATORS LIMITED.....Applicant**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....Procuring Entity**

Review against the decision of the Tender Committee of the Kenya National Highways Authority dated 24<sup>th</sup> September, 2010 in the matter of Tender No. KeNHA/107/2010 for Design, Supply and Construction of Prefabricated Site Office at Mtwapa, Isinya, Thika Road (Juja), Gilgil, Edldoret, Busia, Mai Mahiu and Malaba Transit Weighbridges.

**BOARD MEMBERS PRESENT:**

1. Mr. J. W. Wambua - Member (In the Chair)
2. Amb. C. Amira - Member
3. Mr. S. Kioko - Member
4. Qs. N. Mutai - Member
5. Eng. C. A. Ogut - Member

**SECRETARIAT MEMBERS PRESENT:**

1. Mr. M. A. Obuya - Sitting in for Board Secretary
2. Ms. K. A. Rota - Secretariat
3. Ms. F. Okumu - Secretariat (Intern)

**PRESENT BY INVITATION:**

**PROCURING ENTITY - THE KENYA NATIONAL HIGHWAYS  
AUTHORITY**

1. Mr. Charles Dulo - Advocate
2. Mr. Felix Koske - Head of Procurement
3. Eng. K. Ndungu - M-ALC
4. Mr. Joseph Kimaru - Procurement
5. Ms. Monica K. Ohrina - Procurement Assistant
6. Mr. Vincent Chelimo - Senior Procurement Officer
7. Ms. Norah Odingo-Kajwang' - Head - L & CA

**APPLICANT: MOTOMO METAL FABRICATORS LIMITED**

1. Mr. John R. Ibae - Director
2. Mr. George Hinga - Director
3. Mr. Paul Njuguna - Director

**INTERESTED PARTIES:**

**HOWARD CONSTRUCTION**

- Mr. James Chege Muriu - Representative

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

## **BACKGROUND OF AWARD**

### **Tender Notice**

The Procuring Entity advertised the tender for Design, Supply and Construction of pre-fabricated offices for Mtwapa, Isinya, Thika, Gilgil, Eldoret, Busia, Mai-Mahiu and Malaba transit weighbridges in the Daily Nation Newspaper on 16<sup>th</sup> and 19<sup>th</sup> July 2010.

### **Closing/Opening:**

The bids closed/opened on 13<sup>th</sup> August 2010. The bidders who submitted bids and their bid prices as at opening were as follows:

#### ***Bid Prices (As Read Out)***

<b>Serial No</b>	<b>Name of Bidders</b>	<b>Bid price Currency (KShs)</b>
1.	Wood products (K) ltd	15,265,440.00
2.	Motomo Metal fabricators	23,980,768.00
3.	Benir Construction Ltd	23,398,157.00
4.	Sesei Springfield Ltd	2,319,275.00
5.	Asoro Plus Construction co. Ltd	42,707,753.00
6.	Rodmik Enterprises Ltd	1,473,090.60
7.	Howard construction Co. Ltd	13,022,162.50
8.	Oracon Construction	13,612,832.00
9.	Index Construction Ltd	11,910,810.00

## EVALUATION

Tender evaluation was carried out in three stages namely Preliminary, Technical and Financial.

### **Preliminary Evaluation:**

The bids were evaluated for responsiveness and completeness based on the parameters set out and the results of preliminary evaluation were as follows:

#### ***Preliminary Requirements (Mandatory)***

No.	Documents to be submitted	Tenderer 1	Tenderer 2	Tenderer 3	Tenderer 4	Tenderer 5	Tenderer 6	Tenderer 7	Tenderer 8	Tenderer 9
<b>A. Completeness And Responsive Criteria</b>										
	Certificate of Incorporation	Y	Y	Y	Y	Y	Y	Y	Y	Y
	Copy of PIN & VAT certificate	Y	Y	Y	Y	Y	Y	Y	Y	Y
	Dully filled confidential questionnaire	Y	Y	Y	Y	Y	Y	Y	Y	Y
	Power of Attorney	N	Y	N	N	N	Y	Y	Y	Y
	Certificate of Bidders Visit to Site	Y	Y	N	N	Y	N	Y	N	Y
	Valid Tax Compliance Certificate	N	Y	Y	Y	Y	Y	Y	Y	Y
	Bank Guarantee (Kshs 100,000.00)	N	Y	Y	N	Y	Y	Y	Y	Y
	Tender validity period of ninety (90) days from the tender opening date	N	Y	N	N	Y	Y	Y	Y	Y
	Duly filled and signed Form of Tender	Y	Y	Y	Y	Y	Y	Y	Y	Y
	Registration as Contractor	Y	Y	Y	Y	Y	Y	Y	Y	Y
	Bid Security: 120 Days(30 Days Beyond Validity Period)	N	Y	N	Y	Y	Y	Y	Y	Y
	Name of Bank Issuing the Bid Guarantee	Kenindia Assurance	Equity Bank	KCB	Insurance Agency	Equity Bank	Y	Y	Y	Y
<b>A. Financial Capability</b>										
1.	Financial Reports for the last Three (3) years	N	Y	N	N	Y	Y	Y	Y	Y
2.	Financial Resources	Y	Y	Y	N	Y	Y	Y	Y	Y
3.	Bidders Bank – Contract, Name, Address, Telephone, Fax and Email	Not Submitted	Equity Bank	KCB	Equity	Equity Bank	Y	Y	Y	Y
<b>B. Litigation</b>										
1.	History of litigation	N	Y	N	N	Y	Y	Y	Y	Y
<b>D. Bidder's Experience and Capability</b>										
1.	Schedule of Relevant	Y	Y	N	N	Y	Y	Y	Y	Y

	Projects Carried out in the Five (5) Years									
2.	Personnel for the work	Y	Y	Y	Y	Y	Y	Y	Y	Y
3.	Detailed Resourced Programme of Works	N	Y	N	Y	Y	Y	Y	Y	Y
4.	Schedule of ongoing Projects	Y	Y	N	N	Y	Y	Y	Y	Y
5.	Major Items of Equipment	Y	Y	N	Y	Y	Y	Y	Y	Y
<b>RESPONSIVENESS</b>		<b>NR</b>	<b>R</b>	<b>NR</b>	<b>NR</b>	<b>R</b>	<b>NR</b>	<b>R</b>	<b>NR</b>	<b>R</b>

**Key/Legend:**

*Y – Yes/Signed, information is complete as required*

*N/C – Not Competent*

*N – Information not provided*

*R – Responsive*

*NR – Not Responsive*

**Remarks:**

The following firms were not qualified and hence their bid documents were not subjected to further evaluation.

***Bidders Disqualified at Preliminary Stage.***

<b>Tenderer No</b>	<b>Name of Tenderer</b>	<b>Reasons for Rejection</b>
1.	Wood products (K) ltd	<ul style="list-style-type: none"> <li>➤ Valid Bid Bond not submitted.</li> <li>➤ Tax compliance Certificate not submitted.</li> </ul>
3	Benir Construction Ltd	<ul style="list-style-type: none"> <li>➤ Bidder visited 4 stations.</li> <li>➤ Bid Bond expires before the validity period</li> <li>➤ No Audited accounts attached.</li> <li>➤ History of Litigation not submitted</li> </ul>
4	Sesei Springfield Ltd	<ul style="list-style-type: none"> <li>➤ Bidder has bid for only one station – Eldoret.</li> <li>➤ No architectural drawings are attached.</li> <li>➤ History of Litigation not submitted</li> </ul>
6.	Rodmik Enterprises Ltd	<ul style="list-style-type: none"> <li>➤ Bidder has bid for only one station – Mtwapa.</li> </ul>
8	Oracon Construction	<ul style="list-style-type: none"> <li>➤ No architectural drawings attached.</li> <li>➤ No specification attached.</li> <li>➤ Bidder did not visit the sites</li> </ul>

The following firms were found to be responsive and therefore recommended to proceed for technical evaluation

❖ Motomo Metal Fabricators

- ❖ Asoro Plus Construction co. Ltd
- ❖ Howard construction Co. Ltd and
- ❖ Index Construction Limited

## Technical Evaluation

The Summary for the Technical Evaluation was as follows:

### *Technical Evaluation*

	<b>Technical Consideration</b>	<b>Tenderer 2</b>	<b>Tenderer 5</b>	<b>Tenderer 7</b>	<b>Tenderer 9</b>
1.	Detailed architectural and structural drawings	Y	Y	Y	Y
	1.1 Material used for the Office walls	Y	Y	Y	Y
	1.2 Overall Floor area	Y	Y	Y	Y
	1.2.1 Weighing Room	Y	Y	Y	Y
	1.2.2 Weighbridge In charge Office	Y	Y	Y	Y
	1.2.3 Police Officers Room	Y	Y	Y	Y
	1.2.4 Stores	Y	Y	Y	Y
	1.2.5 Kitchen	Y	Y	Y	Y
	1.3 Ventilation and Lighting	Y	Y	Y	Y
	1.4 Electrical and Plumbing Installation	Y	N	Y	N
2.	Detailed Specifications for the works and utilities	Y	Y	Y	Y
3.	Priced and complete Bill of Quantities	Y	Y	Y	Y
4.	Detailed and resourced Program of Work	Y	Y	Y	Y
<b>RESPONSIVENESS</b>		<b>R</b>	<b>NR</b>	<b>R</b>	<b>NR</b>

### *Bidders Disqualified at Technical Stage*

Tenderer No	Name of Tenderer	Reasons for Rejection
5	Asoro Plus Construction Co. Ltd	➤ The Bidders quotation for electrical works is not for the project under evaluation.
9	Index Construction Limited	➤ The Bidder has not quoted for electrical works which are critical for the operation.

The following firms were found to be technically responsive and therefore recommended to proceed for commercial/financial evaluation

1. Motomo Metal Fabricators

## 2. Howard Index Construction Company Limited

### FINANCIAL EVALUATION

#### *Financial Checks*

S. No.	Financial Checks And Correction Of Bids Sums	Tenderer 2	Tenderer 7
1.	Amount In Words And Figures	C	C
2.	Unit Rates and line Item Totals	C	C
3.	Carried Forward to summary	C	C
4.	Tender Balance (Check for Frontloading or Not)	B	B
5.	Total Tender Sum	E	C

#### **Key/Legend:**

*C – Financial Information Check is correct*

*E – Error noted in Financial Checks*

*B – The Tender is balanced.*

#### ***Tenderer 2 – A Motomo Metal Fabricators Limited Error Correction.***

A.	Financial Checks And Correction Of Bids Sums As per the Bid	Evaluated Price Financial Checks And Correction Of Bids
1.	Wrong Multiplication on main building - line items 011 (100 to 200 mm Girth – Knot, prime, stop and apply two undercoats and one gloss finishing coat paint to woodwork)) and line item 012 (100 to 200 mm girth) for windows thus incorrect summary	The correct total summary is KShs 363,613.00 instead of 363,481

***NB: For correction of errors the rates rules in accordance with clause 3.24 (b) – Instruction of Bidders.***

#### ***Financial Rankings***

Name of Bidder	Read out Bid Price (KShs)	Evaluated Bid Price (KShs)	Ranking
<b>Motomo Metal Fabricators</b>	23,980,768.00	23,982,768.00	2
<b>Howard Construction Company Limited.</b>	13,522,162.50	13,522,162.50	1

## **RECOMMENDATIONS**

The Tender Evaluation Committee recommended that **the design, supply and construction of prefabricated offices for Mtwapa, Isinya, Juja (Thika Road), Mai Mahiu, Gilgil, Eldoret, Malaba and Busia Weighbridges Tender No. KeNHA/107/2010**, be awarded to **Howard Construction Company Limited of P.O. Box 10591 - 00100 NAIROBI** at a Total Tender Sum of **KES 13,522,162.50 (Thirteen million five hundred fifty two thousand one hundred and sixty two thousand and cents fifty only) (INCLUSIVE OF VAT)** being the most competitively evaluated bidder.

## **THE TENDER COMMITTEE DECISION**

The Tender Committee, in its meeting held on 23<sup>rd</sup> September, 2010, awarded the tender to M/s **Howard Construction Company Limited of P.O. Box 10591 - 00100 NAIROBI** at a Total Tender Sum of **KES 13,522,162.50 (Thirteen million five hundred fifty two thousand one hundred and sixty two thousand and cents fifty only)**

## **THE REVIEW**

This Request for Review was lodged on the 8<sup>th</sup> day of October, 2010 by Motomo Metal Fabricators Limited against the decision of the Tender Committee of the Kenya National Highways Authority dated 24<sup>th</sup> September, 2010 in the matter of Tender No. KeNHA/107/2010 for Design, Supply and Construction of Prefabricated Site Office at Mtwapa, Isinya,



Thika Road (Juja), Gilgil, Eldoret, Busia, Mai Mahiu and Malaba Transit Weighbridges.

**The prayers of the Applicant are:-**

1. That the Board annuls the award to the successful tenderer.
2. That the Board either awards the contract to M/S Motomo Metal Fabricators which is the only firm of the two firms in the financial evaluation stage that had quoted using the correct materials as specified in SECTION II after receiving tender notice 1 of 28<sup>th</sup> July 2010."

The Applicant was represented by Mr. John R. Ibae, Director while the Procuring Entity was represented by Mr. Charles Dulo, Advocate. The interested candidates present included Howard Construction represented by Mr. James Chege Muriu.

**The Applicant in its Request for Review raised 4 (four) grounds of review and the Board deals with them as follows:-**

**Ground 1: Breach of Section 67(2) of the Act**

The Applicant alleged that the Procuring Entity breached Section 67(2) of the Public Procurement and Disposal Act, 2005 (herein after referred to as the Act) by failing to communicate to it, at the same time as all other

bidders, whether its bid was successful or not. It averred that this was serious considering that it was the only other bidder besides the Successful Bidder to have been found technically responsive and to have its financial bid opened. It further averred that this was in spite of having clearly stated its contact details in the confidential business questionnaire. It submitted that it had yet to receive via the contact details provided any notification on the outcome of its bid. It further submitted that it was not until it physically visited the office of the Procuring Entity on 7<sup>th</sup> October, 2010 to enquire, that it became aware of the notification letter. It concluded by stating that had it not taken the initiative to visit the Procuring Entity's offices, it would have not been able to file this Request for Review.

In its response, the Procuring Entity denied that it breached Section 67(2) of the Act. It submitted that all the nine bidders were duly notified of the outcome of the award vide registered mail. It further submitted that even though the Applicant's letter inadvertently bore an address that was not the Applicant's, which error it highly regretted, that this error did not in any way prejudice the Applicant in that it managed to file its Request for Review in time.

The Board has carefully examined the documents submitted before it and the parties' submissions.

The Board notes that letters of notification to both the successful and unsuccessful bidders were all dated 24<sup>th</sup> September, 2010, and dispatched via registered mail. The Board further notes that the letter to the Applicant is addressed to PO Box 8180-00100 Nairobi and that it was also to this same address that the registered letter was sent to as evidenced by a copy of the registration certificate from the Postal Corporation of Kenya. On examination of the Applicant's completed confidential questionnaire, the Board notes that the address provided was PO Box 53451-00200 Nairobi.

The Board therefore finds that the Procuring Entity did not send the Applicant's letter to the Applicant's given address and as such the notification letter could not have reached the Applicant.

That notwithstanding, the Board also finds that, in this instance, the Applicant was not prejudiced by the incorrect address because having picked its letter on 7<sup>th</sup> October, 2010, it managed to lodge this Request for Review on 8<sup>th</sup> October, 2010, which was the last day of the appeal window. This finding is consistent with the Board's decision in **Application 19/2008, Pyramid Construction Limited Vs Municipal Council of Eldoret** dated 18<sup>th</sup> July, 2008 in which the Board held as follows.

*"Regarding the merit of the grounds, the Board holds that the Applicant was not prejudiced by the incorrect address on the letter of notification as it picked the letter on 13<sup>th</sup> June, 2008. It had sufficient time to lodge the review and indeed it did so on 20<sup>th</sup> June,*

***2008 within the Appeals window time. Accordingly, the Applicant has not suffered any prejudice”***

Accordingly, the Applicant has not suffered any prejudice.

**Ground 2: Breach of Section 57(4) of the Act**

The Applicant alleged that by returning its bid security, the Procuring Entity implied that it had already entered into a contract with the Successful Bidder before the expiry of the mandatory 14 days period for appeal.

In its response, the Procuring Entity denied having entered into contract with any tenderer with respect to this particular procurement. It alleged that it released the Applicant's bid after the Applicant's agent had demanded it on collection of a copy of the notification letter, and that further, the Applicant's agent signed for it.

The Board has carefully examined the documents submitted before it and the parties' submissions.

The Board notes that Section 57(4) states that the Procuring Entity shall immediately release any tender security under the following circumstances:-

- a) The procurement proceedings are terminated;

- b) The procuring entity determines that none of the submitted tenders is responsive; or
- c) A contract for the procurement is entered into.

The Board therefore finds that the release of the Applicant's bid security was premature. However, the Board also notes from the documents submitted by the Procuring Entity that it had and has not to date entered into a contract with the Successful Bidder.

**Ground 3: Breach of Section 53(4) of the Act**

The Applicant alleged that the Procuring Entity breached Section 53(4) of the Act by failing to take into consideration the Addendum it issued under Tender Notice 1, and awarding the tender to the Successful Bidder who did not conform to the conditions set out in the said Addendum. It further alleged that the Successful Bidder proposed to use wood/treated timber for the construction of the prefabricated site offices whereas the Addendum specified that bidders were to use steel sheets gauge 18 for the walls of the prefabricated offices.

In its response, the Procuring Entity stated that the Successful Bidder had proposed to use steel sheets gauge 18 for the walls of the prefabricated offices as per the Addendum issued.

The Board has carefully examined the documents submitted before it and the parties' submissions.

The Board notes that Section II of the Tender Document states that 'the proposed offices shall have walls made of prefabricated steel sheets gauge 18'.

The Board has examined both the Applicant's and Successful Bidder's Bills of Quantities submitted as part of the Tender Documents.

The Board notes that the Successful Bidder had quoted for:-

*"External and Internal Walling - The following in mild steel to BS 4360 with bolted and welded connections including hoisting and fixing into position all to include 3mm thick plywood riveted into position and fitted appropriately to approval. Gauge 18 pressed steel in plain sheet on to and including 25 x 25 x 3mm angle line at 1500mm centres fixed to ground floor in reinforced concrete pads;"*

The Board further notes that the Applicant had quoted for:-

*"Walling - Prefabricated steel panels with framing including 50 x 50 x 4mm SHS vertical members at 2000mm cc and 50 x 50 x 4mm SHS horizontal members welded to the vertical members at 1000mm cc, 18 Gauge steel plate externally and 3mm thick internal ply wood".*

The Board therefore finds that the Addendum issued required bidders to use prefabricated steel sheets gauge 18 for the walls of the prefabricated offices, and that both the Successful Bidder and the Applicant had proposed to use steel sheets gauge 18 as required.

Accordingly, this ground of Request for Review fails.

**Ground 4: Breach of Section 66(6) of the Act and Regulation 46**

The Applicant alleged that the Procuring Entity failed to evaluate the tenders within a period of 30 days after opening of the tenders as required under the Act and its Regulations. It submitted that tenders were opened on 13<sup>th</sup> August 2010, and that even though the Procuring Entity's decision was dated 24<sup>th</sup> September 2010, it was only notified on 7<sup>th</sup> October 2010 after physically visiting the Procuring Entity's offices to enquire.

In its response, the Procuring Entity submitted that it had evaluated the tender within 24 days from the date of tender closing/opening.

On its part, the Successful Bidder fully supported and aligned itself with the Procuring Entity's submissions.

The Board has carefully examined the documents submitted before it and the parties' submissions.

The Board notes that bids were opened on 13<sup>th</sup> August, 2010 and that the Evaluation Report was signed on 7<sup>th</sup> September, 2010.

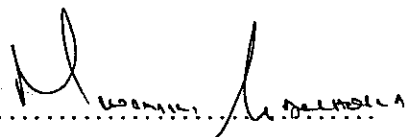
The Board therefore finds that the evaluation was concluded 25 days from opening of the bids which is within the 30 day period stipulated in the Act and its Regulations.

Accordingly, this ground of Request for Review also fails.

Taking into account all the foregoing matters, the Request for Review fails and is hereby dismissed.

The Board orders, pursuant to Section 98 of the Act, that the procurement process may continue.

**Dated at Nairobi on this 3<sup>rd</sup> day of November, 2010**



**Signed Chairman**



**Signed Secretary**