

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

**REVIEW NO. 31/ 2011 OF 8<sup>th</sup> JULY 2011**

**BETWEEN**

**LUKE OSHOTTOE ONDULA, HCS .....APPLICANT**

**AND**

**NATIONAL ASSEMBLY OF KENYA .....PROCURING ENTITY**

Review against the decision of the Tender Committee of the National Assembly dated 16<sup>th</sup> November, 2010 in the matter of Tender No. WP ITEM D29 NB 201 JOB NO. 0284 of Supply and Installation of Artwork Alternative B

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Ms. Loise Ruhiu	-	Member
Amb. C. M. Amira	-	Member
Mr. Akich Okola	-	Member
Mr. Joshua W. Wambua	-	Member

**IN ATTENDANCE**

Mr. C. R. Amoth	-	Secretary
Ms. Shelmith Miano	-	Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Luke Oshottoe Ondula, Hcs**

Mr. Luke Oshottoe Ondula - Artist

### **Procuring Entity, National Assembly of Kenya**

Mr. Antony Njoroge - Legal Counsel

Ms. Mary Kunyiha - Chief Procurement Officer

Mr. Wilberforce Makape W. - Procurement

Mr. Henry Kwomba - Procurement

Arch. Ndiritu S. M - Architect/ M.O.P.W

Mr. M. N. Mbugua - Architect/M.O.P.W

### **Interested Candidates, Northcort Enterprises**

Job Owino M. - Partner

Japheth B. Mbalanya - Partner

## **BOARD'S DECISION**

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

## **BACKGROUND**

### **Advertisement**

The Procuring Entity had advertised for Expression of Interest to Supply and Install Bespoke Furniture and Artworks

### Closing/Opening:

The tender was opened/closed on 7<sup>th</sup> December 2010 at 10.00 and the following tenders submitted their bids

- 1 M/s Oshottoe Ondula
- 2 M/s G. O. Nyotumba
- 3 M/s Northcort Enterprises

## EVALUATION

### **Background**

The Parliamentary Service Commission advertised for Expression of Interest To Supply And Install Bespoke Furniture And Artworks on 16<sup>th</sup> November 2010. The Expression of Interest was evaluated by the Ministry of Public Works and all the three firms were pre-qualified.

### **Response to Invitation**

The firms purchased the tenders and all responded

### **The Opening Results**

The tender opening results were as follows-

No	Firm	Tender Amount	Bid security of Kshs.
1	M/s Oshottoe Ondula	Kshs8,935,000	Jamii Bora Bank
2	M/s Northcort Enterprises	kshs 7,000,000	Equity Bank
3	M/s G. O Nyotumba	Kshs. 13,080,000	Eco Bank

## Preliminary Examination

In the Preliminary Evaluation, the result was as tabulated:

	Evaluation Criteria	Oshottoe Ondula	G. O Nyetumba	Northcort Enterprises
1	Bid security of kshs. 70,000,000 valid for 150 days	√	x	√
2	Duly completed provided form of tender	√	x	√
3	Provision of precise description of material to be used in sculptural artistic works	X	√	√
4	No material deviations or reservations in the tender	X	√	√
5	Undertaking to complete the works in ten weeks	√	√	√

Key:

√ = meet the condition

X= did not meet the condition

Two bidders namely Oshottoe Ondula and G. O. Nyotumba were declared non responsive for not meeting the requirements of the tender. M/s Ondula had given conditions that it must be given advance payment for the works to start while M/s G. O. Nyotumba provided a bid bond that was valid for a period of 120 days and that it would take four months to complete the artworks.

## Financial Evaluation

The bid submitted by M/S Northcort Enterprises was evaluated at the financial stage and found to have no arithmetic errors. Its tender was found to be within the tender rates and was comparable and consistent.

The Evaluation Committee then recommended that the tender be awarded to M/s Northcort Enterprises at their tender sum of Kshs. 7, 000, 000.

## **THE TENDER COMMITTEE DECISION**

The National Assembly Tender Committee in its meeting held on 20<sup>th</sup> June, 2011 deliberated on the Evaluation Committee's recommendation and awarded the tender for Supply of Artwork Alternative B to M/s Northcort Enterprises at their tender price of Kshs. 7,000, 000.

## **THE REVIEW**

The review was lodged by M/s Luke Oshottoe Ondula, HSC on 8<sup>th</sup> July 2011 against the decision of the tender committee of the National Assembly of Kenya in the matter of Tender No. WP ITEM D29 NB 201 JOB NO. 0284 of Supply and Installation of Artwork Alternative B. The Applicant represented himself while the Procuring Entity was represented by Mr. Antony Njoroge, Legal Counsel.

### **Grounds 1, 2 and 3:- Breach of Section 80, 78-86, 92 (2) (b) of the Act.**

The Applicant submitted that, the services that the Procuring Entity advertised for calling for bids was for Works of Art which are fine art objects of artistic creations. He argued that since works of Art are 'creation of the mind' they are of intellectual property nature and are therefore treated as assets and protected by the Law.

The Applicant submitted that in the acquisition of intellectual property (in this case, works of art), the National Assembly invited Artists to express interest to supply and install Works of Art to the Debating Chamber. He argued that Works of Art, given its complexity in creation, could not be supplied through the tender method used by the Procuring Entity. He stated that as a Professional Artist, he expected that upon being shortlisted, was to be invited

to submit proposals in creative form for the National Assembly to evaluate, which the Procuring Entity did not do, and hence breached section 80 of the Act.

The Applicant submitted that the tender document which the bidders purchased from the Procuring Entity was for a building contract, which had nothing to do with acquisition of Intellectual Property.

The Applicant stated that upon buying the said tender document, he realized that the document did not require bidders to submit proposals in form of models, sketches and preparatory drawings and consequently informed the Chief Procurement Officer that, the procurement method used by the Procuring Entity was not the correct one for services of Intellectual Property nature. He argued that the Procuring Entity ought to have invoked Section 92 (3) (b) of the Public Procurement Disposal Act on the procurement procedure used to invite Architects to compete on design competition. He further argued that by denying the Artists the opportunity to create and present their proposals, the Procuring Entity infringed on their Intellectual Property Rights, namely the right to create and compete.

The Applicant further stated that in the absence of sketches, models and all preparatory drawings, it was incomprehensible how the Procuring Entity carried out the technical evaluations. He questioned the capability of the persons who evaluated the tender, arguing that the Ministry of Public works in the past had admitted that it lacked the capacity to evaluate such works because of lack of experts in this field.

The Applicant further submitted that since the service sought by the Procuring Entity is of predominantly Intellectual nature, the Procuring Entity ought to have used the Procurement procedure set out in Section 78 to 86 of the Act.

The Applicant further stated that, in the technical specifications, bidders were required to choose the material to use in executing their works. He submitted that the Successful bidder, M/S Northcort Enterprises, did not submit any attachments to show proof of having done similar work on the metal it proposed to use. He argued that, the successful bidder presented their bid document, which was not adequate for evaluation on procuring of Intellectual Property services.

The Applicant further stated that the Procuring Entity gave choices of metals and materials to be used by the bidders. He argued that various metals and materials that the Procuring Entity gave bidders to choose from have varying costs due to the varying processes involved, with bronze being the most preferred material and in this regard, price determination would vary depending on the material used. He argued that, cost determination and comparison therefore could not be assessed reasonably. He challenged the Procuring Entity to disclose to the Board the kind of materials proposed to be used by the successful bidder in the execution of the works. He argued that, awarding this tender on the basis of the lowest price bid was in bad faith considering the choice of material given by the Procuring Entity.

In conclusion, the Applicant urged the Board to nullify the award of the tender due to the irregularities as argued above and the tender be repeated to allow artists to submit their proposals and the technical team assessing the proposals to consist of professionals in the field of art.

In Response, the Procuring Entity denied the allegations by the Applicant that it breached the Act or the Regulations. It submitted that it carried out the procurement process pursuant to Section 3 1(1) of the Public Procurement and Disposal Act which provides that: ***“a person is qualified to be awarded a contract for a procurement only if the person has the necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured.”***

It argued that Section 32 of the Act stipulates that to identify qualified persons, a Procuring Entity may use a pre-qualification procedure or may use the results of a pre-qualification done by another Public Entity. The Procuring Entity stated that, in this tender it used a pre-qualification procedure by inviting interested parties to express interest in supplying and installing the specialized works that were being procured.

The Procuring Entity stated that pursuant to Regulation 23, it invited interested persons via an advertisement in the local dailies on 16<sup>th</sup> November 2010. It further stated that pursuant to Regulation 25 it invited the bidders who had been pre-qualified including the Applicant.

It argued that the Applicant took part in the tender process to the end and therefore it was not appropriate for him to turn around and started claiming that he had been aggrieved by the tender process. The Procuring Entity therefore urged the Board to make the finding that the application for review is frivolous.

With regard to the alleged breach of section 80 of the Act, the Procuring Entity submitted that this section, does not apply to this procurement. It argued that sections 78 to 86 are predicated on section 76 of the Act which provides that



the request for proposals may be used if the procurement is of services or a combination of goods and services and the services to be procured are advisory or otherwise of a predominantly Intellectual nature. It stated that the procurement in question was for supply and installation of works and therefore does not fall within the ambit of sections 76 to 86 of the Act.

The Procuring Entity further stated that the Applicant was contesting the choice of procurement method by complaining that "Works of Art" can only be evaluated upon presentation of Models, Graphic drawings and preparatory sketches. The Procuring Entity denied the claim by the Applicant that it had breached Section 92 of the Act. It argued that the choice of a Procurement Procedure cannot be a subject of a request for review as set out in Section 93 of the Act.

On the argument by the Applicant that Intellectual Property works of Art are executed by individual human persons and not legal persons such as companies, the Procuring Entity stated that the assertion was erroneous in law as all legal persons have a right to intellectual property. It stated that Article 260 of the Constitution of Kenya, 2010 defines a "person" as follows:

***" "Person" includes a company, association or other body of persons whether incorporated or unincorporated."***

In this respect the Procuring Entity urged the Board to find that the argument of the Applicant had no merit.

The Procuring Entity stated that the Applicant was disqualified for making an offer with conditionalities on payments that are not acceptable under the public procurement.

It stated that the Applicant, in his bid, required that upon being awarded the tender be paid his fees as follows:-

- i) 30% advance payment on award of tender.
- ii) 30% on approval of model.
- iii) 40% on completion.

It argued that these proposed terms of payment are in direct contradiction to the terms of payment set out in clause 23 of Bill No. I Preliminaries and conditions of contract, which form part of the tender documents.

It stated that Clause 23 of the Tender document required that the contractor shall submit to the project manager monthly applications for payment, giving sufficient details of the work done and the amount which the contractor considered itself entitled to. It stated that the project manager would then check the monthly application and certify the amount to be paid to the contractor within 14 days. It argued that the value of work executed and payable would then be determined by the project manager and the retention amounts also provided for.

The Procuring Entity further stated that even if the Applicant had not been disqualified due to the unacceptable terms of payment he demanded, he was still not the lowest priced bidder. It submitted the results of the tender for the Artworks for which the Applicant tendered had the following prices:-

**Artwork Alternative B:-**

Ms. Oshottoe Ondula	Kshs.8,935,000/-
Ms. Northcort Enterprises	Kshs.7,000,000/-
Ms. G. O. Nyotumba	Kshs. 13,080,000/-

**Artwork Alternative C:**

Ms. Oshottoe Ondula	Kshs.16,000,000/-
Ms. Northcort Enterprises	Kshs.8,300,000/-
Ms. G. O. Nyotumba	Kshs. 10,390,000/-

The Procuring Entity therefore urged the Board to dismiss the request of review for lack of merit.

On its part, the Successful Bidder, Northcort Enterprises, associated itself fully with the submissions of the Procuring Entity. It submitted that the services that were sought by the Procuring Entity were based on art specifications that had already been developed by the Consulting Artist. In this regard, it argued that it was not necessary to make proposals as the final products were already pre-determined. It further stated that bidders were evaluated based on similar works done for other clients.

It argued that, since the bidders had been identified and their capacity of delivering the works determined by the Procuring Entity, before submission of the bids, the question of Intellectual capacity would not arise during the evaluation of the bids.

It submitted that the choice of procurement procedure by the Procuring Entity was correct for these services as creativity was not an issue in this

procurement. It stated that it had complied with all the tender requirements and having been awarded the tender was ready to commence its work. Accordingly, it urged the Board to dismiss the request of review and allow the project to proceed.

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

The issues for the Board to determine are as follows:

1. Whether or not the choice of the procurement procedure used by the Procuring Entity was the appropriate one, and
2. Whether the Applicants bid was disqualified properly.

In order to determine the first issue, the Board observes the following with regard to this tender:

- i. That this tender is for interior decoration of the National Assembly Chambers, which in total includes design, art works and murals. These are sculptural abstractions, sculptures, shields, relief's/ motifs and mosaic/tile murals.
- ii. That in order to secure art work installation appropriately, the Procuring Entity engaged an Artist from the University of Nairobi who acted as a consultant in redesigning the Chamber.
- iii. The Consulting Artist generated themes that were adopted by the Procuring Entity.

- iv. The Procuring Entity through an expression of interest embarked on the process of identifying capable individuals who had handled metal and epoxy materials to propose what kind of materials they would use in the executing of the work and the price thereof.

Based on the above observations, the Board finds that the service that were being sought by the Procuring Entity were not of intellectual nature, noting that the Art designing of the project had already been determined by the said Artist from the University of Nairobi.

Indeed, it is noteworthy that all the designs and descriptions of the works to be done had been defined and documented by the said Consulting Artist, so that the executor of the project was only required to produce the artworks with the material specified, under the guidance and supervision of the Consulting Artist. To the above end, the Board finds that the choice of procurement procedure used by the Procuring Entity was appropriate.

With regard to the second issue as to the disqualification of the Applicants bid, the Board notes that:

- i) The Procuring Entity advertised on 16<sup>th</sup> November 2010, inviting candidates to express their interest in supplying and installing the Artworks at the National Assembly Chambers. The candidates were required to demonstrate that they had the capacity to produce the artworks; that they had previously done similar works and each was supposed to show evidence of recent works in the materials specified for sculptural works.

ii) Three firms expressed interests, including the applicant and following an evaluation by experts from the Ministry of Works, the three firms namely Oshotoe Ondula, HSC G.O./Nyotumba and Northcort Enterprises were prequalified and notified accordingly.

iii) Thereafter, the three prequalified bidders were invited to submit bids, which they all obliged.

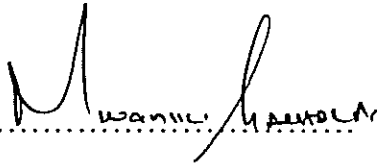
iv) Upon evaluation by the Evaluation Committee it was found that the Applicant had set terms of payment to be followed by the Procuring Entity as follows:

- i. 30% advance payment on awarding of tender.
- ii. 30% approval of model
- iii. 40% on completion of project

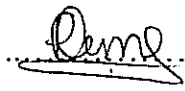
The Board notes that it is on the basis of these terms stipulated by the Applicant, that the Evaluation Committee recommended to the Tender Committee that the Applicant be disqualified. The Board further notes that the Tender Committee agreed with the recommendation and proceeded to disqualify the Applicant. Based on the above, the Board finds that the Applicant was properly disqualified for making a counter offer on payment terms which was contrary to the payment terms set out in clause 23 of the Tender Document. With regard to the issue of whether or not intellectual property services could be provided by individuals only; the Board finds that Intellectual Property Services can be offered by both natural and artificial persons. Accordingly, these grounds of request for review fail.

Taking into consideration all the above, the Request for Review is hereby dismissed and pursuant to Section 98 of the Act, the Board orders that the procurement process may continue.

**Dated at Nairobi on this 5<sup>th</sup> day of August, 2011**

  
.....

**CHAIRMAN**  
**PPARB**

  
.....

For: **SECRETARY**  
**PPARB**

