

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 35/2011 OF 4<sup>th</sup> AUGUST, 2011**

**BETWEEN**

**CUSTOMER CARE CENTER LIMITED.....APPLICANT**

**AND**

**KENYA MEDICAL RESEARCH INSTITUTE.....PROCURING ENTITY**

Review against the decision of the Tender Committee of Kenya Medical Research Institute (KEMRI) dated 12<sup>th</sup> July, 2011 in the matter of Tender No. KEMRI/GS/09/2010-2011 for Provision of Cleaning Services

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Ms. J. A. Guserwa	-	Member
Amb. C. M. Amira	-	Member
Mr. Sospeter Kioko	-	Member
Mr. Joshua W. Wambua	-	Member

**IN ATTENDANCE**

Ms. Pamela K. Ouma	-	Holding brief for the Secretary
Ms. Shelmith Miano	-	Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Customer Care Center Limited**

- Mr. John Kamunya - Advocate, Kamunya & Co. Advocates  
Ms. Elizabeth Ouma - Advocate, Kamunya & Co. Advocates  
Mr. Felix Okoth - Staff  
Mr. Steve Ogola - Staff

### **Procuring Entity, Kenya Medical Research Institute (KEMRI)**

- Ms. Carolyne Kamende - Advocate, Kyalo & Associates  
Mr. Brian K. Lang'at - Legal Assistant, Kyalo & Associates  
Mr. C. Isabwa - Head of Procurement

### **Interested Candidates**

- Mr. Romely Amira - Manager, Betoyo Contractor

## **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 invited twenty (20) bidders to participate in a Restricted tender for provision of cleaning services vide the letter dated 6<sup>th</sup> June, 2011 with the closing date being 20<sup>th</sup> June, 2011.

**Closing/Opening:**

At the time of tender closing/opening, only seven (7) out of the twenty (20) invited bidders had responded. The particulars recorded at the opening were as shown in table 1 below:

***Table 1: Records of tender opening***

<b>No.</b>	<b>Bidder</b>	<b>Bid Bond</b>	<b>Bank</b>	<b>Tender Sum (Ksh.)</b>
1	Oneway Cleaning Services Ltd	100,000.00	African Banking Corporation	15,383,976.00
2	Insecta Limited	300,000.00	Fina Bank	13,372,480.00
3	Customer Care Center	564,000.00	G.A. Insurance	28,200,000.00
4	Betoyo Contractors	Nil	-	9,845,136.00
5	Neatcare Cleaning Services	334,080.00	Equity Bank	16,704,000.00
6	Kibera Garbage Collection	84,460.00	Equity Bank	4,223,000.00
7	Chymel International Ltd	Nil	-	No Quote

**EVALUATION**

The tenders received were subjected to three stages of evaluation namely; Preliminary Evaluation, Technical Evaluation and Financial Evaluation.

### **Preliminary Evaluation:**

Tenderers were evaluated against the following mandatory requirements:

1. Certificate of Registration/Incorporation
2. Submit a copy of the title deed or copy of lease agreement for the company's premises.
3. Valid tax compliance certificate issued by KRA
4. Submit proof of compliance with existing labour laws from the Ministry of Labour.
5. Letter to compliance with NSSF requirements.
6. Attach copy of PIN certificate.
7. Attach valid single business permit from the local authorities.
8. Attach copy of VAT registration certificate.
9. Attach copy of trade license certificate
10. Valid work injury benefits policy or group personal accident policy or employers liability policy.
11. Companies incorporated in Kenya under the Companies Act Cap 486 must submit evidence of the company's annual returns for 31<sup>st</sup> December 2009.
12. Submit audited financial statements/accounts for the last three (3) years.
13. Past performance will be taken into consideration
14. Submit a valid copy of the contractual Liability Insurance Policy document.

A summary of the results of Preliminary Evaluation were as tabulated in table 2 below:

**Table 2: Results of Preliminary Evaluation**

No.	Criteria	Bidders				
		1	2	3	5	6
1	Certificate of Registration/Incorporation	√	√	√	√	√
2	Submit a copy of the title deed or copy of lease agreement for the company's premises.	√	√	√	√	×
3	Valid tax compliance certificate issued by KRA	√	√	√	√	√
4	Submit proof of compliance with existing labour laws from the Ministry of Labour.	√	√	√	×	×
5	Letter to compliance with NSSF requirements	√	√	√	√	√
6	Attach copy of PIN certificate	√	√	√	√	×
7	Attach valid single business permit from the local authorities	√	√	√	√	√
8	Attach copy of VAT registration certificate.	√	√	√	√	√
9	Attach copy of trade license certificate	√	√	√	√	√
10	Valid work injury benefits policy or group personal accident policy or employers liability policy.	√	√	×	√	×
11	Companies incorporated in Kenya under the Companies Act Cap 486 must submit evidence of the company's annual returns for 31 <sup>st</sup> December 2009	√	√	×	×	×
12	1. Submit audited financial statements/accounts for the last three (3) years.	√	√	×	√	√
13	Past performance will be taken into consideration	√	√	√	√	√
14	Submit a valid copy of the contractual Liability Insurance Policy document.	√	√	×	√	×
<b>Remarks</b>		<b>R</b>	<b>R</b>	<b>NR</b>	<b>NR</b>	<b>NR</b>

**Key:** R- Responsive, NR- None Responsive, √ - Met requirement, ×- Requirement not met

Two tenderers namely; Betoyo Contractors and Chymel International Ltd were not subjected to Preliminary Evaluation since they failed to submit a bid bond as at the tender closing/opening. Three tenderers namely: Customer Care Center, Kibera Garbage Collection and Neatcare Cleaning Services were disqualified at the Preliminary Stage for not meeting all the mandatory requirements.

### Technical Evaluation

Two tenderers namely; Oneway Cleaning Services and Insecta Limited met all the mandatory requirements and proceeded to Technical Evaluation. At this stage, tenderers were evaluated against the earmarked maximum score per each parameter with the pass mark being **70%** for a tenderer to qualify to proceed to Financial Evaluation.

A summary of the Technical scores were as shown in table 3 below;

**Table 3: Results of Technical Evaluation**

No.	Criteria	Max. Score	Bidder			
			1		2	
			Internal Cleaning	Gardening, Landscaping & Garbage Collection	Internal Cleaning	Gardening, Landscaping & Garbage Collection
1	Company profile: Suitability of service provider	30	26	26	NQ	29
2	Staff competency profile: Qualification of key staff	20	18	18	NQ	20
3	Financial Resources: Financial ratios to be evaluated	15	15	15	NQ	15

4	Physical Facilities: Proof of physical address and capacity to deliver services	15	10	10	NQ	10
5	Experience: Number of continuous years of service required	10	10	10	NQ	10
6	Reputation: Proof of satisfactory service	5	4	4	NQ	4
7	Social Obligations: Proof of having satisfied Key social Obligations	5	4	4	NQ	4
<b>TOTAL SCORE</b>		<b>100</b>	<b>87</b>	<b>87</b>	<b>-</b>	<b>92</b>

Key: NQ – No quote

Tenderer No. 2, M/s Insecta Limited did not quote for Internal cleaning.

### Financial Evaluation

At this stage, bid prices of technically qualified firms were to be compared and the lowest tenderer was to be awarded the tender. Financial proposals of the two technically qualified firms were as shown in table 4 below.

**Table 4: Comparison of Financial proposals**

No.	Bidder	Cleaning (Ksh. Per Month)	Gardening (Ksh. Per Month)	Garbage collection (Ksh. Per Month)	Grand Total for one (1) Year
1	Oneway Cleaning Services Ltd	649,179.00	334,253.00	298,566.00	<b>15,383,976.00</b>
2	Insecta Ltd	-	1,071,840.00		<b>12,862,080.00</b>

Tenderer No.2, M/s Insecta Ltd only quoted for Gardening and Garbage collection.

### **RECOMMENDATION**

The Evaluation Committee recommended that the tender be awarded to **Oneway Cleaning Services Ltd** at total cost of **Ksh.1,281,998.00** per Month for Internal cleaning, Gardening & Landscaping and Garbage collection.

### **THE TENDER COMMITTEE DECISION**

The Corporation Tender Committee in its 12<sup>th</sup> meeting held on Monday, 11<sup>th</sup> July, 2011 adopted the Evaluation Committee's recommendation and approved award of tender for Provision of Cleaning Services to **Oneway Cleaning Services Ltd** at a total cost of **Ksh. 1,281,998.00** inclusive of VAT per Month for Internal cleaning, Gardening & Landscaping and Garbage collection.

### **THE REVIEW**

The Applicant Customer Care Centre Limited lodged the Request for Review on 4<sup>th</sup> August, 2011 against the decision of Kenya Medical Research Institute (KEMRI) in the matter of Tender No. KEMRI/GS/09/2010-2011 for provision of Cleaning Services. The Applicant was represented by Mr. John Kamunya, Advocate while the Procuring Entity was represented by Ms. Carolyne Kamende, Advocate.

The Applicant requests the Board for the following orders:-



- a) *"The Procurement Entity's procurement process be and is hereby rendered flawed and thus annulled.*
- b) *The Procuring Entity's Decision to award the tender to a bidder who was not the lowest evaluated price be and is hereby annulled.*
- c) *The Procuring Entity be and is hereby ordered to pay the costs of and incidental to these proceedings.*
- d) *Such other or further relief or reliefs as this Board shall deem just and expedient."*

**Grounds 1, and 6: Breach of Sections 39 and 89 (3)(c)**

The two grounds have been consolidated since they raise similar issues on whether there was unequal treatment of bidders and if the time given to bidders for preparation of the bid documents was adequate.

The Applicant submitted that the Procuring Entity breached Section 89 (3) (c) of the Public Procurement and Disposal Act, 2005 (herein after "the Act") by failing to give the bidders adequate time for preparation of the tender. It further stated that the Procuring Entity failed to treat all bidders equally in that it did not give the tender documents to all the bidders at the same time. It further stated that although letter of invitation was dated 6<sup>th</sup> June 2011, the Procuring Entity only called the Applicant on the 15<sup>th</sup> June, 2011 to collect the letter. The Applicant finally submitted that as the tender closing/opening date was 20<sup>th</sup> June, 2011 it was therefore left with only five days to prepare its quotation.

In response, the Procuring Entity submitted that Section 89 (3) (c) of the Act relate to Request for Quotation method and not restricted tendering as was the case with the tender under review. It submitted that Section 89 of the Act was not relevant to the case under review and urged the Board to dismiss the same for lack of relevance. The Procuring Entity further submitted that the Invitation to Tender letters dated 6<sup>th</sup> June 2011 were sent out to all the invited bidders on the same day and the bid documents were to be returned by 20<sup>th</sup> June 2011. It added that Regulation 53(5) of the Public Procurement and Disposal Regulations, 2006 (herein after "the regulations") provides that the minimum time for preparation of tenders for the purposes of Section 73 of the Act shall be a period of 14 days. It argued that it complied with that provision and therefore all tenderers were treated equally.

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

The Board notes that the tender under review was conducted using the Restricted method of procurement as provided under Section 73 of the Act and not the Request for Quotation under Section 88 of the Act as argued by the Applicant.

The Board further notes that all the letters of invitation to all the bidders, including that of the Applicant were dated 6<sup>th</sup> June, 2011 with the closing date as 20<sup>th</sup> June, 2011. The Board also notes that, during the hearing, the Procuring Entity produced a copy of the dispatch register which indicated that the Applicant picked and signed for its invitation letter on 10<sup>th</sup> June, 2011. This letter was signed for by one Mr. Felix Okoth on behalf of the Applicant.

The Board finds that although the Applicant received its letter of invitation four days after the date of the letter, it did not raise any concern or objection on the matter with the Procuring Entity prior to submission of its bid. The Board further notes that the Applicant did not request for extension of time if it felt that the time given was not adequate therefore this issue appears to be an afterthought.

Consequently, these grounds fail.

## **GROUND 2: Breach of Regulation 16(4)**

The Applicant submitted that the Procuring Entity breached Regulation 16(4) of the Regulations by having one member of its Evaluation Committee sit in the Tender Committee. It further stated that the same person was also the chairman of the Tender Opening Committee.

In response, the Procuring Entity submitted that its Head of Procurement sat in the Tender Committee in the capacity of Secretary and not a member. It submitted that Regulation 16(4) only prohibits members of the Tender Committee from being appointed as members of the Evaluation Committee. It further submitted that the Head of Procurement is, by law, the Secretary to the Tender Committee as provided in the Second Schedule of the Regulations. It stated that the Head of Procurement sat in the Tender Committee as the secretary and was therefore not involved in any decision making.

The Procuring Entity added that Section 60 (1) (b) of the Act required that at least one of the members sitting in the Tender Opening Committee should not

be directly involved in the evaluation. In the circumstances, it submitted that the fact that the Head of Procurement sat in the Evaluation Committee having been a chairman of the tender opening committee was proper within the provisions of Section 60 (2) of the Act.

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

The Board notes the following provisions of the Act and the Regulations;

***Section 60 (1) (b)-opening of tenders:***

***60(1).....***

***(a).....***

***(b) at least one of the members shall not be directly involved in the processing or evaluation of the tenders.***

***Regulation 8 (3) (h) and (q)-The Functions of the Procurement unit shall be:***

***(a).....***

***(h) co-ordinate the evaluation of tenders, quotations and proposals;***

***(q) act as a secretariat to the tender, procurement and disposal committees;***

***Regulation 16 (4)***

***No person shall be appointed under paragraph (3) if such person is a member of the tender committee of the procuring entity.***

It is undisputed fact that the Head of Procurement Unit participated in the Tender Opening Committee and the Evaluation Committee as chairman and member respectively. However, the Board notes that the Head of Procurement only acted as secretary in the Tender Committee meeting held on Monday 11<sup>th</sup> July, 2011. The Board further notes that under the Second Schedule, Composition of the Tender Committee, under the State Corporations Tender Committee, the secretary is the officer heading the procurement unit of the corporation.

In the circumstances the Board finds and holds that the Procuring Entity acted properly within the provision of the Act and the Regulation.

Consequently this ground of appeal fails.

### **GROUND 3: Breach of Section 89(1)(b) and 34**

The Applicant submitted that the Procuring Entity breached Section 34 and 89(1)(b) of the Act by failing to give clear, correct and complete description of the items and/or services to be procured. It argued that this limited fair and open competition between the participating bidders. It stated that this was solely intended to lock it out from the competition and tilt the award of the tender to a particular bidder.

The Applicant further submitted that the Procuring Entity had issued a tender document that included provision of cleaning services, sanitary bins and

fumigation. It stated that, as a result it had tendered for all this services unaware of the addendum which excluded the provision of the sanitary bins and fumigation. It further stated that, as a result, and owing to the inclusion of the above services in its bid, its bid price was higher than the rest of the bidders and believed this could have led to its disqualification.

In response, the Procuring Entity submitted that it provided all tenderers with its requirements as provided under Section 34 of the Act. It further submitted that if the Applicant did not understand any of the requirements set out in the tender document and or its addendum, the Applicant was at liberty to seek clarifications from it before participating in the tender. The Procuring Entity stated that the Applicant was not disqualified on account of its bid price but was dismissed at the Preliminary Evaluation stage for failure to provide the following mandatory requirements as set out in the tender documents:-

- ***“Companies incorporated in Kenya under the Companies Act Cap 486 must submit evidence of the company's annual returns for 31<sup>st</sup> December 2009***
- ***Submit audited financial statements/accounts for the last three (3) years.***
- ***Submit a valid copy of the contractual Liability Insurance Policy document”***

The Board has perused the blank tender document and notes that the services to be procured were provided for under Section IV – Description of Services of the tender document. The Board also notes that the tender document, under the description of services provided for the fumigation and sanitary services.

Further, the Board notes that the Procuring Entity had on 11<sup>th</sup> June, 2011 issued an addendum no. 1 to the bidders advising them to exclude the provision of sanitary bins and fumigation in their bids.

The Board finds that the tender document clearly provided for the services to be procured and the evaluation criteria were set out at pages 31- 33 of the tender document.

The Board has also noted that the Procuring Entity carried out Preliminary Evaluation whose results were as shown in Table 2.

From the above, the Board notes that the Bidder No.3, Applicant, was knocked out at the Preliminary Evaluation stage for failing to comply with mandatory requirements Nos. 10, 11 and 12 as provided in the Preliminary Evaluation Table 2.

The Board therefore finds that the Applicant, having failed to submit mandatory documents, was non-responsive and was properly disqualified from the tender process in accordance with Regulation 48 (1) of the Regulations.

Consequently, the above ground also fails.

#### **GROUND 4 and 7: Breach of Sections 67(1) and (2), Section 68**

The Applicant submitted that the Procuring Entity failed to notify it at the same time as the Successful Bidder in contravention of Section 67 (2) of the Act. It submitted that although the letter of notification was dated 12<sup>th</sup> July,

2011, the letter was dispatched on 22<sup>nd</sup> July, 2011 as reflected on the postal stamp on the envelope. It submitted that it was therefore not given enough time to raise its complaints. Further, it stated that the Procuring Entity entered into contract with the Successful Bidder on 1<sup>st</sup> August, 2011 before the lapse of 14 days appeal window as required by the Act and the Regulations.

In response, the Procuring Entity stated that it had notified all the bidders simultaneously as required under Section 67 (2) of the Act. It added that the letters of notification were sent out by registered mail to the tenderers on 18<sup>th</sup> July, 2011. At the hearing, the Procuring Entity provided a certificate of registration duly stamped by city square post office and dated 18<sup>th</sup> July, 2011.

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

The Board notes that the Procuring Entity had dispatched the letters of notification to all the seven tenderers on the 18<sup>th</sup> July, 2011 under the certificate of registration duly stamped by the city square post office dated the same day. Under the certificate the Board notes that the Applicant is listed as number 3 while the Successful Bidder is number 1.

The Board also notes that, at the hearing, the Applicant produced its notification letter stamped by Postal Corporation of Kenya, Yaya Towers on 22<sup>nd</sup> July, 2011. The question which arises is the difference of five (5) days between when Post Office City Square received the letters on 18<sup>th</sup> July, 2011 and 22<sup>nd</sup> July, 2011 when same was stamped at Yaya Towers.



The Board notes that the Procuring Entity satisfied the requirements of Section 67 (2) by delivering the notification letters to the post office on the 18<sup>th</sup> July, 2011 and it is not clear why the post office stamped the Applicant's letter on the 22<sup>nd</sup> July, 2011. However the Board notes that the Applicant has not been prejudiced as they were able to file the request for review within time.

Taking the 18<sup>th</sup> July, 2011 as the date of dispatch, the fourteen days appeal period expired on 1<sup>st</sup> August, 2011. The Board notes that, under the circumstances, the earliest the contract would have been signed should have been 2<sup>nd</sup> August, 2011. That notwithstanding, the Board notes that the Applicant was properly disqualified at the Preliminary Evaluation Stage for failing to provide mandatory documents and therefore has not been prejudiced.

Accordingly, these grounds fail.

#### **GROUND 5: Breach of Regulation 66(2)**

The Applicant submitted that the Procuring Entity failed to provide it with written reasons as to why its tender proposal was unsuccessful despite making several requests for the same. It alleged that it had written several letters to the Procuring Entity on the issue without a reply.

In response, the Procuring Entity denied breaching Regulation 66 (2). It submitted that under Regulation 66(2), unsuccessful bidders are required to write to the Procuring Entity requesting for reasons as to why their bids were unsuccessful. It further submitted that it did not, at any time, receive any

written communication from the Applicant requesting for the reasons as to why its bid was unsuccessful.

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

The Board notes the provision of Regulation 66 (2) as follows;

*“Where so requested by an unsuccessful tenderer, a procuring entity shall, within fourteen days after a request, provide written reasons as to why the tender, proposal or application to be prequalified was unsuccessful.”*

There has been no evidence adduced before the Board to show that the Applicant requested for the reasons as to why its bid was not successful. In the circumstances the Board finds that, the Procuring Entity was under no obligation to give reasons to the Applicant.

Consequently this ground of appeal fails.

#### **Ground 8- Statement of loss**

This is not a ground of review but the Applicant’s statement of loss.

The Board has held severally that tendering costs are commercial business risks borne by business people and therefore each party bears its cost.

## **GROUND 9: Breach of Section 30(1)**

The Applicant submitted that the Procuring Entity restructured the tender for the purpose of avoiding the use of open procurement procedure. It averred that it realized that the contract was adulterated and split into different parts and awarded to different firms.

In response, the Procuring Entity denied breaching Section 30(1) of the Act. It submitted that the tender for provision of cleaning services was not structured as two or more procurements in order to avoid any procurement procedure. On the contrary, it submitted that it had consolidated all the cleaning requirements into one tender document.

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

The Board notes that Section 30(1) of the Act states as follows:

***"No procuring entity may structure procurement as two or more procurements for the purpose of avoiding the use of a procurement procedure".***

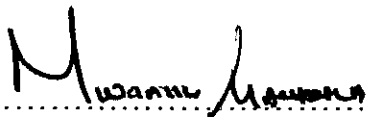
The Board has also noted that the Tender Document issued to bidders in the tender under review was for provision of cleaning, gardening and landscaping, garbage collection, fumigation and sanitary services. However, the Board also notes that the Procuring Entity issued Addendum 1 dated 11<sup>th</sup> June 2011 which excluded provision of sanitary bins and fumigation from the services required under tender No. KEMRI/GS/09/2010-2011.

The Board finds that although the Procuring Entity issued an addendum to exclude provision of sanitary bins and fumigation services from the tender in question, this does not amount to a split of tender as envisaged by Section 30 (1).

Consequently, this ground of review fails

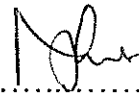
Taking into account all the above matters, the Request for Review fails and is hereby dismissed. The Board orders, pursuant to Section 98(b), that the Procurement Process may proceed.

**Dated at Nairobi on this 29<sup>th</sup> day of August, 2011**



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**CHAIRMAN  
PPARB**



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**SECRETARY  
PPARB**