

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 17/2012 OF 24<sup>TH</sup> APRIL, 2012**

**BETWEEN**

**OGLE CONSTRUCTION COMPANY.....APPLICANT**

**AND**

**DISTRICT COMMISSIONER HABASWEIN....PROCURING ENTITY**

Review against the decision of the District Commissioner Habaswein, in the matter of Tender No. PW/NO/59 for Proposed erection and completion of lowland type District Headquarters at Habaswein.

**BOARD MEMBERS PRESENT**

|                      |   |                       |
|----------------------|---|-----------------------|
| Mr. Joshua W. Wambua | - | Member (In the Chair) |
| Mr. Akich Okola      | - | Member                |
| Ms. Natasha Mutai    | - | Member                |
| Ms. Judith Guserwa   | - | Member                |

**IN ATTENDANCE**

|                  |   |             |
|------------------|---|-------------|
| Mr. Nathan Soita | - | Secretariat |
| Ms. Judy Maina   | - | Secretariat |

## **PRESENT BY INVITATION**

### **Applicant, Ogle Construction Company**

Mr. John Ochola - Advocate  
Mr. Mohamed Ogle - Director  
Mr. Hussein Bahir - Operations Manager  
Mr. Ahmed Mohamed - Site foreman  
Mr. Francis Gichuhi - Consultant

### **Procuring Entity, District Commissioner Habaswein**

Not represented

### **Interested Candidates, Baseline Architects Ltd**

None

## **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 OF AWARD**

### **Advertisement**

The Procuring Entity invited quotations No. HBSN/QT/7/2011-2012 for the proposed perimeter fence for the Habaswein District Headquarters at Habaswein town from five (5) firms on 26<sup>th</sup> March, 2012 and opened on 4<sup>th</sup> April, 2012.

### Closing/Opening:

The quotations closed and opened on 4<sup>th</sup> April, 2012 at 10.00 am with the following three (3) bidders responding:

1. Badai Construction Company
2. Ruunlama Construction Company
3. Ohio Construction Ltd

### EVALUATION

The bids received were evaluated on the basis of the Bidders' responsiveness to the mandatory requirements and comparison with the official Estimate for the project. The three bidders' quotations as compared to the official Estimate is as tabulated in table 1 below.

**Table 1: Comparison of bidders' quotations with Official Estimate**

| S/No.                    | Tenderer                             | Tender sum<br>(Ksh) | % Deviation from<br>Official Estimate |
|--------------------------|--------------------------------------|---------------------|---------------------------------------|
| 1                        | M/s Badai Construction Company Ltd   | 1,998,980.00        | -0.05%                                |
| 2                        | M/s Ruunlama Construction<br>Company | 2,223,800.00        | +11.19%                               |
| 3                        | M/s Ohio Construction Ltd            | 2,468,240.00        | +23.41%                               |
| <b>Official Estimate</b> |                                      | 2,000,000.00        | 0%                                    |

### **Responsiveness**

The three quotations were subjected to Preliminary evaluation where they were evaluated against the following mandatory requirements:

1. Bidders must be registered with the Ministry of Public Works in category "G" or above as approved Building Contractors and must have renewed their registration for year 2012.

2. Bidders to attach a valid Tax Compliance Certificate from KRA.
3. Adequate equipment and key personnel for the specified works.
4. Sound financial standing and access to credit line.
5. A quotation from one who has at least four (4) number ongoing projects regardless of their total contract sums will be rejected.
6. A quotation from one who has been issued with default notice will be rejected.
7. A quotation from one whose ongoing project(s) is/are behind schedule and no extension of time has been granted will be treated as non-responsive.
8. A quotation whose deviation from the official estimate exceeds plus or minus 10% from the official estimate shall be taken as non-responsive.

Table 2 below provides a summary of Preliminary evaluation results.

**Table 2: Results of Preliminary Evaluation**

| S/No.          | Criteria  | Bidder No. |      |      |
|----------------|---|------------|------|------|
|                |   | 1          | 2    | 3    |
| 1              | Registration with Ministry of Public Works and Renewal for 2012 | x          | ✓    | x    |
| 2              | Valid Tax Compliance Certificate from KRA                       | x          | ✓    | x    |
| 3              | Financial Status  | x          | ✓    | x    |
| 4              | Not more than 4 No. ongoing projects                            | ✓          | ✓    | ✓    |
| 5              | No. of ongoing projects behind schedule                         | ✓          | ✓    | ✓    |
| 6              | Not issued with default notice                                  | ✓          | ✓    | ✓    |
| 7              | Deviation from Engineer's Estimate within plus or minus 10%     | x          | ✓    | x    |
| <b>Remarks</b> |   | Fail       | Pass | Fail |

From the above results, only one bidder, M/s Badai Construction Company Ltd qualified through the Preliminary Evaluation. The

remaining two bidders were disqualified for failure to meet all the mandatory requirements.

### **RECOMMENDATIONS**

The Evaluation Committee recommended that the contract be awarded to M/s Badai Construction Company Ltd at a tender sum of Ksh.1,998,980.00 for being the lowest evaluated bidder.

### **TENDER COMMITTEE DECISION**

The Tender Committee at its meeting held on 10<sup>th</sup> April, 2012 adopted the recommendations of the Evaluation Committee and approved award of the contract for the proposed perimeter fence to the New Habaswein District Headquarters to M/s Badai Construction Company Ltd at a tender sum of Ksh.1,998,980 for being the lowest evaluated.

### **THE REVIEW**

The Request for Review was lodged by Ogle Construction Company on the 24<sup>th</sup> April, 2012 against the decision of the District Commissioner Habaswein in the matter of tender No. PW/NO/59 for proposed erection and completion of lowland type District Headquarters at Habaswein.

The Applicant was represented by Mr. John Ochola, Advocate while the Procuring Entity was not represented.

The Applicant raised nine grounds of Review and requested the Board for the following orders:-

- (a) *The award by the Respondent for the construction of a perimeter fence for the District Commissioners Headquarters at Habaswein to Baday Construction Company Limited and any purported proceedings thereto be nullified.*
- (b) *The Respondent be directed to pay the Applicant herein the outstanding balance of the construction amount of Kshs. 5, 373,120/=*
- (c) *That the costs of this review be met by the Respondent in any event.*
- (d) *That any offer and relief that this court may deem fit to grant.*

At the beginning of the hearing, Miss Isabella N. Barasa, State Counsel, Office of the Attorney-General, appearing for the Procuring Entity, applied for adjournment of the hearing of the Request for Review on the ground that the Procuring Entity had other commitments which made it impossible for it to attend the hearing. Miss Barasa further stated that, insofar as the Application might subsequently be the subject of Judicial Review, wherein the Attorney-General would represent the Board, she could not represent the Procuring Entity in the proceedings as there would be a conflict of interest. She further stated that in light of this she could only be present in the hearing as *amicus curia*.

Upon hearing the submissions by the Counsel, the Board makes the following decision:

1. The Board noted that the Request for Review was filed by the Applicant on 24th April 2012. Following the lodging of the Request for Review, the Procuring Entity was served with the same by the Secretariat.

2. Following the above mentioned service by the Secretariat, the Procuring Entity duly filed its response on 30th April, 2012, in which it sets out its grounds of opposition to the Applicant's claim.
3. The Board further notes that the Procuring Entity was served with the notice of hearing of the Request for Review by the Secretariat, which date it was aware of as evidenced by the fact that it instructed the Attorney-General Chambers to attend the hearing today to make the application for adjournment.

In light of the above facts the Board is not persuaded that the Procuring Entity has demonstrated sufficient grounds to entitle it to adjournment. Furthermore, and explained to the parties by the Board, the Board is undertaking an official mission to Europe from 13th to 24th May 2012. Taking into account the fact that the Application was filed on 24th April, 2012 and must therefore be heard and determined within the statutory period of thirty days, it is clear that the time for hearing and determining the Application would lapse during absence of the Board.

In the circumstances therefore, the application for adjournment was dismissed.

On the question of the dilemma in which the Counsel for the Procuring Entity finds herself, the Board is of the view that it would not be prudent for the Counsel to continue with its client's case in light of the fact that there could well arise a claim of conflict of interest, should the matter be taken for Judicial Review. In the view of the Board, her very presence in these proceedings, even though only as that of *amicus curia*, might be

prejudicial to the role which the office she represents might be called upon to play if this matter were to be taken for Judicial Review. Accordingly, the Board hereby orders the Counsel to vacate the chambers.

This being the case, these proceedings will therefore be essentially ex parte in nature.

Turning to the merits of the Request for Review, the Applicant raises nine grounds of review which the Board deals with as follows:

**GROUND 1,2,3,4,5,6,7,8 and 9:**

All the grounds have been consolidated since they raise similar issues related to the contract signed between the Applicant and the District Works Officer, Wajir for construction of lowland type District Headquarters at Habaswein; and a tender for the construction of a perimeter fence on the same site covered under the contract which the Procuring Entity has recently floated.

The Applicant averred that on or about the 10<sup>th</sup> of December 2010, it successfully tendered for the erection and building of a District Commissioners Headquarters at Habaswein in tender Number PW/NO/59. Subsequently a contract was signed for the construction to be undertaken by the Applicant for the sum of Kshs 41,141,716/=. The Applicant moved to the site and begun construction, as a result it was paid Kshs. 29,995,583.22 for work which was completed and Kshs. 5,373,120/= remains unpaid for further work that was undertaken by the Applicant.



The Applicant further stated that in undertaking the construction mentioned herein, it moved building materials to the site but the construction stalled as a result of lack of funds. Thus the Applicant's building materials are still on site and the Applicant is still owed Kshs. 5,373,120/= for the completed works.

The Applicant averred that on or about the 18<sup>th</sup> day of April 2012, the Procuring Entity purportedly awarded a company by the name Baday Construction Company, the construction of a perimeter fence within the proposed District Commissioners site at Habaswein in total disregard of the existing contract between the Applicant and the Procuring Entity. It stated that this act by the Procuring Entity was in blatant breach of the provisions of the Public Procurement and Disposal Act. It averred that the construction of a perimeter fence was part of the contract between the Applicant and the Procuring Entity pursuant to tender Number PW/NO/59. In support of this contention, it pointed out that the Bills of Quantity for this tender and those of the tender for the construction of the perimeter fence were identical. It stated that the contract between it and the Respondent has not been terminated by either party and is therefore still subsisting. It argued that by inviting the tenders for the perimeter fence, the Procuring Entity acted in total disregard of Part 5 (v) of the Public Procurement and Disposal Act and the same do not fall within the exemptions or the alternative procurement procedures under part (vi) of the Public Procurement and Disposal Act.

The Applicant submitted that awarding a contract in respect to the works which it was already contracted to perform would contravene

Section 2 of the Act which requires among other things, that procurement should be carried out in a manner which ensures economy in the use of public funds.

In response, the Procuring Entity stated in its written response which were filed on 30th April, that the proposed erection and completion of Lowland Type District Headquarters at Habaswein was part of the Economic Stimulus Projects that were being handled by the Ministry of Public Works and as such any demands of pending payments that are due to the contractor should be forwarded to the Ministry of Public Works. A copy of a correspondence from the Office of the President Nairobi to that effect was attached. The Procuring Entity further stated that it has not interfered with this contract in any way and that any other work that is currently being undertaken is not part of that contract. It argued that erection of the Perimeter fence which is on-going is another project/ contract with funds from a different source. It stated that the fence is for securing Government land which measures about 70 acres.

The Procuring Entity further argued that the award of tender and subsequent contract for the erection of a perimeter fence to the District Headquarters Habaswein was done within the provisions of the Public Procurement and Disposal Act of 2005 and the Regulations 2006, as stipulated in Regulation 59(1) and meets the threshold on the first schedule. It stated that the aggrieved contractor though aware of the procuring process then, did not participate.

The Board notes that the Applicant participated in the tender No. PW/No/59 for construction of Lowland Type District Headquarters for

Habaswein District sometime in the year 2010. Having emerged the Successful Bidder, the Applicant signed the contract between itself and the Permanent Secretary, Ministry of Public Works on 8<sup>th</sup> April, 2010 for a contract price of Ksh.29,995,583.22. The Board notes that the contract was signed on behalf of the Permanent Secretary, Ministry of Public Works by a Mr. J.K. Mutwa the District Works Officer, Wajir and witnessed by Mr. Sammy J. Nzyuko the Provincial Works Officer, North Eastern Province.

The Board further notes that under the above contract, a total sum of Ksh.5,373,120 was still due to the Applicant as the contractor. This is evidenced by the letter from the District Works Officer, Wajir South/Habaswein District dated 13<sup>th</sup> September, 2011 by which he was requesting the District Commissioner to liaise with his Headquarters to avail the extra Ksh.5,373,120 due to the contractor. However, on forwarding that request to the Permanent Secretary, Provincial Administration and Internal Security, the District Commissioner was requested by letter Ref. OP/PA.2/4 dated 15<sup>th</sup> November 2011 to advise the District Works Officer to channel his request for additional funding to the Ministry of Public Works Headquarters that was involved in the financing and implementation of the Economic Stimulus Programme.

The Board further notes that the District Commissioner, Habaswein District invited quotation No. HBSN/QT/7/2011-12 from five (5) firms for fencing of the New Habaswein District Headquarters using M.S angle lines, barbed wire and vehicular and pedestrian gates and a gate-house on the 26<sup>th</sup> March, 2012 and opened on 4<sup>th</sup> April, 2012. Out of the

five firms invited, only three responded and their quotations were evaluated for responsiveness against eight set parameters. The Board notes that only one bidder namely; M/s Badai Construction Company met all the requirements and was awarded the contract at a tender sum of Ksh.1,998,980 at a District Tender Committee meeting held on 10<sup>th</sup> April, 2012.

Arising from the above, the issues for determination by the Board are:

1. Whether the Board has jurisdiction to deal with a dispute which arises from a contract which has been concluded by parties arising out of a procurement process.
2. Whether the Applicant has locus standi to lodge a request for review in respect to the tender floated by the Procuring Entity for the construction of a perimeter fence around the District Headquarters.

Regarding the first question, as noted above, the Applicant and the Procuring Entity entered into a contract dated 8<sup>th</sup> April 2010, following a tender process in which the Applicant emerged the winner. It is not in dispute that the contract in question still subsists. Both parties have so admitted and have acknowledged that apart from outstanding payment amounting to Ksh. 5,373,120.00, the contract has been largely performed. The question which arises is whether disputes arising from a procurement contract, such as this one, should be the subject of litigation before the Board. In answer to this question, Section 93 of the Act, which

confers jurisdiction on the Board to deal with procurement disputes is worth quoting. The Section states that:

- “(1) Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring Entity by this Act or the Regulations, may seek administrative review as in such manner may be prescribed.*
- (2) The following matters shall not be subject to the review under subsection (1)-*
- (a).....*
  - ...*
  - (b).....*
  - ...*
  - (c) Where a contract is signed in accordance to section 68; and*
  - (d).....”*

It is thus clear from subsection (2) (c) cited above that the Board has no jurisdiction to entertain and determine any dispute arising out of a procurement process where a contract has been signed in accordance to Section 68. There is no dispute as to whether the procedures set out in Section 68 were complied with, and indeed, even if there were, the Board would have no jurisdiction to deal with such disputes as the statutory period for raising complaints as to such disputes, as set forth in Regulation 73 (2) (c), has long lapsed. In short, this provision limits the jurisdiction of the Board to hear and determine only those procurement disputes which are pre-contractual. It therefore follows that once a contract has been signed the parties can only look to the provisions of

the contract, or other sources of law dealing with contractual disputes, for resolution of their disputes.

In this particular case, Clause 2 of the Contract in question states that:

***“the following documents shall be deemed to form and shall be deemed to form and shall be read and construed as part of this Agreement, i.e:***

***a. Letter of Acceptance***

***b. Form of Tender***

***c. Conditions of Contract, Part I***

***d. Conditions of Contract, Part II and Appendix to Conditions of Contract***

***e. Specifications***

***f. Drawings***

***g. Priced Bills of Quantities.”***

Although the Board has not had site of these documents, it can infer from the contents of previous similar documents which have come before the Board in the past that, as far as the Conditions of Contract referred to above are concerned, there must have been a clause therein which deals with dispute settlement mechanism. It is therefore to those provisions to which the Applicant should look in order to find any remedy against the Procuring Entity.

Regarding the second question for determination by the Board, namely, whether the Applicant has locus standi to lodge a Request for Review in respect to the tender floated by the Procuring Entity for the construction of a perimeter fence around the District Headquarters, the Board notes once again the provisions of section 93(1) cited above, read together with

section 3(1) of the Act. Section 93 limits access to the Board to only "candidates." The term candidate is defined in section 3(1) as *"a person who has submitted a tender to a procuring entity."* In this particular Request for Review, the Applicant has not contended that it submitted a tender to the Procuring Entity so as to make it qualify as a candidate within the meaning of the section cited above. Indeed according to the procurement method used by the Procuring Entity, which was request for quotations, pursuant to Section 88 of the Act, the Applicant was not one of the five firms which the Procuring Entity invited to participate in the tender under consideration, and could not therefore have submitted a tender.

#### **OBSERVATIONS BY THE BOARD**

As already noted above, the Request for Review involves two tenders relating to the same project, namely the erection and completion of Lowland Type District Headquarters at Habaswein (Tender No PW/NO/59, which was awarded to the Applicant in 2010); and a tender issued by the Procuring Entity, for the erection of a perimeter wall (for which an award was made to Baday Construction Company in April this year). The main contention by the Applicant is that the contract awarded to it included the erection of the perimeter fence, the subject matter of the tender awarded to Baday Construction company. This is the basis for its claim that this act by the Procuring Entity contravenes Section 2 of the Act, in that such a decision does not result in economy to the Procuring Entity, and by extension, to Kenya taxpayers.

In support of this contention the Applicant brought as his witness, Mr. Francis Gachui, a Quantity Surveyor, who was until recently, a consultant to the Procuring Entity in respect to the erection of the District Headquarters at Habaswein. Mr. Gachui confirmed in his testimony before the Board that indeed, the Bills of Quantity for the erection of the District Headquarters included the erection of the perimeter fence.

The Board further observes that in its submissions, the Applicant claimed that notwithstanding the letter issued by the Secretary to the Board directing the Procuring Entity to stop further procurement proceedings following the filing of this Application, the Procuring Entity proceeded to award the tender for erection of the perimeter fence, and that in fact, the Successful Bidder in respect to this tender was already on site.

Since the Request for Review was held Ex Parte for reasons already stated in this decision, there was no opposing evidence to assist the Board in assessing the veracity of these claims. This notwithstanding, the Board is of the view that these are serious allegations which should not be ignored because if they are true, they will not only lead to loss of public funds occasioned by this double allocation of the same works to two different contractors, but it would, as well, lead to erosion of contractor/supplier confidence in the procurement system.

Without prejudice, the Board further observes that the Procuring Entity appears to have adopted a very casual attitude towards this Request for Review. It was notified of the date for the hearing of the Application, but



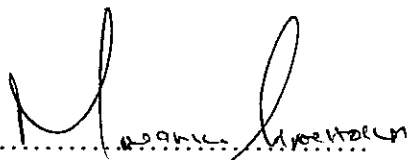
this notwithstanding, it failed to appear and instead sent a representative of the Attorney-General to plead for adjournment on its behalf.

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Based on the foregoing, the Request for Review fails as the Applicant was not by law entitled to lodge this Application.

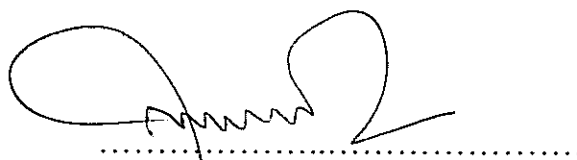
Taking all these matters into account, the Board hereby recommends that the Director General, Public Procurement Oversight Authority conducts investigations on these two tenders and ascertain the true position and take appropriate action.

**Dated at Nairobi on this 11<sup>th</sup> day of May, 2012**



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**CHAIRMAN  
PPARB**



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**SECRETARY  
PPARB**

