

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 67/2012 OF 14TH DECEMBER, 2012

BETWEEN

NELSON & FRANCIS ASSOCIATESAPPLICANT

AND

KENYA PORTS AUTHORITY PENSION

SCHEME.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Kenya Ports Authority Pension Scheme dated 23rd November, 2012 in the matter of Tender No. KPAPS/08/AUDIT/2012 for Provision of Audit services for the KPA Pension Scheme for the year 2012.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	- Chairman
Mr. Joshua W. Wambua	- Member
Eng Christine Ogut	- Member
Amb.Charles Amira	- Member

IN ATTENDANCE

Nathan Soita	-Secretariat
Shelmith Miano	-Secretariat

PRESENT BY INVITATION

Applicant- Nelson & Francis Associates

Mr. Sylvester Metto - Advocate, Metto & Company Advocates

Mr. Nelson Korir - Public Accountant

Mr. Livingstone Wamathai - Public Accountant

Procuring Entity -Kenya Ports Authority Pension Scheme

Mr. Stephen Kyandih - Advocate, Muthoni Gatere Advocates

Mr. Simon Nyakundi - Senior Procurement Officer

Interested Party -AAC Kenya

Mr. Frankline Masaviru - Public Accountant

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

Invitation to tender

The Procuring Entity advertised Tender No. KPAPS/08/AUDIT/2012 for Provision of Audit Services for the KPA Pension Scheme for the year 2012 in the Standard and Daily Newspapers of 25th and 26th October, 2012 with the closing date given as 19th November, 2012.

Closing/Opening:

At the time of tender closing, the following five firms had submitted their bids:

1. Ernest & Young
2. AAC Kenya
3. Nelson & Francis Associates
4. PKF Kenya
5. Pricewaterhouse Coopers Ltd

EVALUATION

The evaluation was carried out by an Evaluation Committee of four members under the chairmanship of C. Macharo. The Technical evaluation was carried out on 20th and 21st November, 2012. The evaluation was undertaken in three stages namely Preliminary, Technical and Financial evaluation.

PRELIMINARY EVALUATION

Bidders were evaluated for responsiveness based on one mandatory requirement which required that the bidding firm ought to have audited pension schemes with a fund size equal to or greater than Ksh. 8 billion. Two bidders namely; AAC Kenya and Nelson & Francis Associates were disqualified at this stage for not having audited any scheme worth Ksh. 8 billion. The remaining three firms namely; Ernest & Young, PriceWaterhouse Coopers and PKF Kenya met the requirement and proceeded to Technical Evaluation.

TECHNICAL EVALUATION

At this stage, bidders were evaluated against the technical evaluation criteria which were in five (5) main sections as follows;

1. General Information and experience - 31 maximum scores
2. Personnel - 22 maximum scores
3. Asset Allocation - 21 maximum scores
4. Risk Controls - 21 maximum scores
5. Performance Statistics - 5 maximum scores

It was agreed that successful bidders who passed the technical evaluation will be requested to hold a 10 minutes presentation on the provision of fund management services for the pension scheme if successful.

The Tender Committee set the pass mark at 75%.

The firms scored as follows:-

NO.	NAME OF FIRM	SCORE	REMARKS
3.	Ernest & Young	70%	▪ Below pass mark
4.	Price Waterhouse Coopers (PWC)	80%	▪ Qualified in the technical evaluation
5.	PKF Kenya	68%	▪ Below pass mark

Only one (1) firm M/s Price Waterhouse Coopers (PWC) qualified in the technical evaluation by scoring 80% being over and above the pass mark of 75% and thus qualified for Financial evaluation. The other two firms namely; Ernest & Young and PKF Kenya were disqualified at this

stage for scoring 70% and 68% respectively which was below the required passmark of 75%.

FINANCIAL EVALUATION

The financial bid for the only technically qualified bidder M/s Pricewaterhouse Coopers was opened on 29th November 2012 at 10.00 AM. The bidder had quoted a tender sum of Ksh.2,958,000 inclusive of VAT for carrying out the audit of the scheme for the year ending 31st December, 2012.

All unsuccessful bidders were notified of their results of the tender by letters dated 23rd November, 2012 and their Financial proposals returned to them.

The financial proposal for the technically qualified bidder, M/s Pricewaterhouse Coopers was opened on 29th November, 2012.

THE REVIEW

The Request for Review was lodged by Nelson & Francis Associates on 14th December, 2012 in the matter of Tender No: KPAPS/08/AUDIT/2012 for Provision of Audit services for the KPA Pension Scheme for the year 2012.

The Applicant was represented by Mr. Sylvester Metto, Advocate, while the Procuring Entity was represented by Mr. Stephen Kyandih,

Advocate. The interested candidate present was M/s AAC Kenya represented by Mr. Frankline Masaviru, Public Accountant.

The Applicant requested the Board for the following orders:

1. *That procuring entity altered qualifying threshold from Ksh. 5 Billion to Ksh. 8 Billion thus locking out prospective bidders through press release.*
2. *That the scheme qualifying threshold, though draconian was set at Ksh. 5 Billion as contained in the tender document bought by the bidders. Scheme tender committee seems to have forgotten clause 7.4.2. This request for administrative review serves to remind them of their near short of memory in institution affairs.*
3. *That procuring entity threshold to qualify as auditor is draconian designed to make tender exclusive for the top Big Five Audit firms due to their dominance in auditing large organization and taking advantage of historical perspective in this country in accounting and auditing arena.*
4. *That procuring entity tender committee and procurement managers faced serious challenges ranging from tyranny from bosses and invisible hands in the tender award.*
5. *That the procuring entity did not respond within time allotted issues concerning scores on other technical issues other than the qualifying threshold that has become major focus in this request for administrative review.*
6. *That the procuring entity did not define what the threshold Ksh. 5 Billion or Ksh. 8 Billion constitute.*

7. The two documents produced by procuring entity, press release and tender documents are misleading and amount to falsification of records to conceal true position.

At the commencement of the hearing, the Procuring Entity stated that it was to raise two Preliminary Issues as it responds to the grounds raised by the parties to the hearing. The parties agreed that the Preliminary Issues be raised within the response.

The Applicant raised two grounds of review which the Board deals with as follows:

GROUND 1 & 2: Breach of Clause 7.4.2 of the Tender Document

The two grounds have been consolidated as they both relate to the discrepancy between the provision in the tender advertisement and in the Tender Document.

The Applicant alleged that there was discrepancy between the tender advertisement and the information contained in the Tender Document bought by the bidders on the qualifying threshold requirement. It stated that the two documents produced by the Procuring Entity, namely, the advertisement and the Tender Document, were misleading and amounted to falsification of records to conceal the true position. It averred that the Procuring Entity altered qualifying threshold from Ksh. 8 Billion as advertised to Ksh. 5 Billion as contained in their Tender Document, thus locking out prospective bidders through the advertisement. It stated that the scheme qualifying threshold, though

draconian, was set at Ksh. 5 Billion as contained in the tender document at clause 7.4.2. The Applicant further stated that the Procuring Entity designed the threshold to make the tender exclusive for the top Big Five Audit firms due to their dominance in auditing large organizations and taking advantage of historical perspective in this country in the accounting and the auditing arena.

The Applicant also submitted that the Procuring Entity did not respond within time on issues raised by it, concerning scores on other technical matters.

The Procuring Entity commenced its response by raising two preliminary issues. It stated that the Applicant breached the law by not lodging the Request for Review within the time stipulated.

It submitted that the Applicant was notified of its bid being unsuccessful vide a letter dated 23rd November, 2012 which was dispatched by way of hand delivery on the same day.

It argued that Regulation 73(2) (c) (ii) of the Public Procurement and Disposal Regulations, 2006 requires that Request for Review be filed within 14 days from the date of notification or date of becoming aware of the breach, whichever is the earlier.

In the given circumstances, the Procuring Entity stated that the Applicant, having been notified of the outcome of their bid by a letter dated 23rd November, 2012 filed the Request for Review on 14th

December, 2012 which was out of time. It argued that the 14 days appeals window started running from 24th November, 2012 and lapsed on 7th December, 2012 and thus by filing the Request for Review on 14th December, 2012, the Applicant was late by 7 days after the closing of the Appeal Window, pursuant to Regulations 73 (2) (c) (ii). The Procuring Entity urged the Board to make the finding that the Request for Review was out of time and therefore the Board has no jurisdiction.

The Procuring Entity raised the second preliminary issue and stated that it is not a "Procuring Entity" within the meaning of the Public Procurement and Disposal Act. It stated that the registration of the Pension Scheme is by virtue of Part III of the Retirement Benefit Act, the Regulations promulgated thereunder and the Scheme Trust Deed Rules. In this regard, it urged the Board to make a finding that it has no jurisdiction to hear the matter.

With regard to the alleged breach on discrepancy on information to potential bidders, the Procuring Entity submitted that it did not alter the qualifying threshold from what was contained in the advertisement. It stated that the thresholds of prospecting firms having experience of auditing institutions whose size are in excess of KES. 8 billion as contained in the advertisement was the correct threshold. It stated that the figure of KES. 5 billion contained in the Tender Document at clause 7.4.2 was a typographical error and no bidder sought for a clarification during the tender process. The Procuring Entity stated that the Applicant herein should be estopped from raising the discrepancy issue now after participating in the tender process from the start to the end. It

argued that the Applicant's actions were actuated by the fact that they were not successful in the tender.

An interested party, AAC Kenya supported the Request for Review. It submitted that the cut off points to qualify for financial evaluation were never stated in the Tender Document and this created a room for arbitrary allocation of points at will, and further the scores were never communicated to the tenderers as it is required by law.

The Interested Party argued that Clause 5.4 of the Tender Document indicated that the technical scores were 75% while Clause 5.9 indicated the technical scores as 70% and this brought contradiction.

Further, the Interested Party submitted that Clause 6.4 of the Tender Document clearly stated that the tender would be awarded through negotiations and this meant that the contract would not be awarded to the lowest evaluated bidder automatically. It therefore urged the Board to make the findings that the tender was flawed.

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

The Board notes that, the issues for determination are as follows:

- (i) Whether there was a discrepancy between the information contained in the tender advertisement and the information contained in the Tender Document issued to the bidders as to

whether the qualifying threshold was Kshs. 8 billion or Kshs. 5 billion.

- (ii) Whether the Pension Scheme is a Procuring Entity as envisaged by the Public Procurement and Disposal Act, 2005.
- (iii) Whether the request for Review was filed within time and whether the Board has jurisdiction to entertain the matter.

The first issue for the Board to consider is the subject of **jurisdiction**.

The issue for the Board to determine is whether the Board has jurisdiction and in this regard, the Board examines the dates of filing the Request for Review vis avis the date of notification. In order to answer that question the Board makes the following observations:

- (a) That the Applicant was notified that its bid was not successful on the 23rd November 2012. Indeed, during the hearing, the Applicant confirmed that it collected its letter of notification on the 23rd November 2012.
- (b) That the Applicant filed this Request for Review on 14th December 2012.

The Board notes that, Regulation 73 states as follows *"A request for review under the Act shall be made in Form RB1 set out in the Fourth Schedule to these Regulations. The request referred to in paragraph 1 shall -*

- a)*

b)

c) *Be made within fourteen days of -*

(i) *Occurrence of the breach complained of where the request is made before the making of an award: or*

(ii) *The notification under sections 67 or 83 of the Act”.*

Section 67 (1) states as follows:

“ Before the expiry of the period during which tenders must remain valid, the Procuring Entity shall notify persons submitting the successful tender that his tender has been accepted”

This being a Request for Proposal, it falls under Section 83 which requires a Procuring Entity to notify both the Successful and unsuccessful bidders of the outcome of their proposals at the same time.

In this case, the Kenya Ports Authority Pension Scheme notified all the bidders of the outcome of their proposals on 23rd November 2012.

Pursuant to Regulation 73 (2) (c) (ii), a Request for Review can only be filed within 14 days of the notification. In the instant matter, following notification on 23rd November 2012, the 14 days appeal window opened on 24th of November and closed on 7th December 2012. The Board finds that the Applicant filed its Request for Review on 14th December 2012 which apparently is 7 days after the appeal window closed.

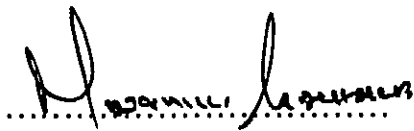
Consequently, the Board finds that the Request for Review was filed outside the stipulated period.

In the circumstances, the Board holds that it has no jurisdiction to hear and determine the matter. Consequently, in view of this finding, the

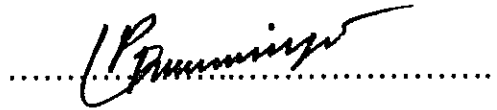
Board hereby downs its tools and therefore it is not necessary to make any findings on the other issues raised by the parties.

Taking into account the foregoing, the Request for Review is hereby dismissed and the procurement process may proceed.

Dated at Nairobi on this 10th day of January, 2013

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**CHAIRMAN
PPARB**

A handwritten signature in black ink, appearing to read 'A. G.', written over a horizontal dotted line.

**AG SECRETARY
PPARB**

