

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 17 OF 14TH MAY 2014**

**BETWEEN**

**DELOITTE AND TOUCHE.....APPLICANT**

**AND**

**SALARIES AND REMUNERATION**

**COMMISSION.....PROCURING ENTITY**

Review against the decision of the 34<sup>th</sup> Tender Committee of Salaries and Remuneration Commission dated 7<sup>th</sup> May, 2014 in the matter of Tender No.SRC/INT.RFP/PJE/01/2013-14 for Consultancy for Undertaking a Comprehensive Job Evaluation for Jobs in the Public Service.

**BOARD MEMBERS PRESENT.**

1. Paul Gicheru -Chairman.
2. Peter Ondieki -Member.
3. Gilda Odera -Member

4. Paul Ngotho -Member

5. Nelson Orgut -Member

**IN ATTENDANCE**

1. Pauline Opiyo -Board Secretary.

2. Philemon Kiprop -Secretariat

3. Judy Maina -Secretariat

**PRESENT BY INVITATION**

**Applicant - Deloitte and Touche**

1. Kithinji Marete -Advocate

2. Saada Kinyanjui -Advocate

3. Richard Airo -Advocate

**Procuring Entity - SRC**

1. Cyprian Masafu Wekesa -Advocate

2. Richard Malebe -Associate.

3. Venessa Lwila -Associate.

**Interested parties-**

1. James Ochieng -Advocate

2. Marystella Oduor -Partner.

3. Daniel Ouma -E&Y-Director.

4. Laban Gathungu -E&L-Partner

5. Gitahi Gachau -E&Y-Partner

6. Charles Kangette -E&L-Director.

7. Katambo Wa Katambo ----- E& Young -- Novatek-Eureka
8. Kuria Muchiru -PWC
9. Michael Holzmann -PWC
10. Patience Njau -PWC
11. George Hapisu -Deloitte-Director
12. Felix Osope- Tetra Link
13. Dr. Jackson M. Gutu -Tips Management -Director
14. James Wahome -PKF-Consultant

### **BOARD'S DECISION**

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

### **BACKGROUND OF AWARD**

### **INTRODUCTION**

The Salaries and Remuneration Commission advertised for an international expression of interest for Consultancy Assignment for Undertaking a Comprehensive Job Evaluation for the Public Service. The tender was advertised on 8<sup>th</sup> and 10<sup>th</sup> February, 2014 on the Daily Nation and Standard Newspaper, respectively. Following the issuance addenda to the tender, on 13<sup>th</sup> and 18<sup>th</sup> February, 2014 on the newspapers, the original closing date was extended from 21<sup>st</sup> February to 28<sup>th</sup> February,

2014. The Tender attracted fourteen bidders and evaluation of EOI commenced and was concluded on or about 7<sup>th</sup> March, 2014.

## **RECOMMENDATION**

From the 14 bidders, four were responsive to the EOI criteria according to EOI evaluation report, namely:

1. PKF Consulting Ltd in Association with PKF Jordan & Development Impact Consulting Ltd
2. Ernst & Young in Consortium with Novatek Ltd and Eureka Educational and Training Consultants Ltd
3. Deloitte
4. Price Waterhouse Coopers (PWC)

The above four firms were issued with Request for Proposal (RFP) documents which had a closing / opening date of 9<sup>th</sup> April, 2014

## **Evaluation of RFP**

The Tender Processing Committee's Chairperson tabled the minutes of the Tender Opening of the RFPs on the Consultancy for undertaking a Comprehensive Job Evaluation for Public Service which was held on 9<sup>th</sup> April 2014 at 4.00pm.

The members noted from the opening minutes that proposals for the four firms who were issued with the RFPs were received and they were all represented at the Tender Opening.

It was further noted that one firm PKF was unable to present the tender security together with the technical and financial proposal. This therefore disqualified the firm from proceeding.

In view of the above, the members resolved to evaluate the technical proposals for the three remaining firm's namely M/s Delloite and Touche, PWC and Ernst and Young Limited.

### **The Technical Evaluation**

The Evaluation was based on the requirements as stated in the RFP as shown below:

<b>2.6.1</b>	<b>Qualifications, competence and Specific experience of the Consultant related to the assignment Total (35)</b>		
	<b>Item</b>	<b>Marks</b>	<b>Remarks</b>
	i) Number of Consultants (3 Marks) <ul style="list-style-type: none"> <li>• If 30 Consultants – 2 Marks</li> <li>• If above 30 Consultants –3 Marks</li> </ul>		
	ii) Academic qualifications (7 Marks) <ul style="list-style-type: none"> <li>• If all Consultants have Masters Degree only- 5 Marks</li> <li>• Firms with at least one Consultant possessing PhD - 2 Marks</li> </ul>		
iii) Diversity of Skills (10 Marks) <ul style="list-style-type: none"> <li>• 75% - to 100% diversity (22 – 30-Consultants from distinct fields) – 10 marks</li> <li>• Below 75% diversity(15 – 21 Consultants from distinct fields) – 7 Marks</li> </ul>			

	<p><b>iv) Relevant combined Experience of Consultants (15 Marks)</b></p> <ul style="list-style-type: none"> <li>• Combined experience of 300 - 360 years - 9 marks</li> <li>• Combined experience of 361 years - 420 years - 11 marks</li> <li>• Combined experience of over 420 years - 13 marks;</li> </ul> <p><b>AND</b></p> <ul style="list-style-type: none"> <li>• CVs recently signed by the proposed Consultants and the authorized representative submitting the proposal -2 marks</li> </ul>		
	<b>Sub Total</b>		
<b>2.6.2</b>	<b>Specific job evaluation experience of the Firm/Consortium (25 Marks)</b>		
	<b>Item</b>	<b>Marks</b>	<b>Remarks</b>
	i) If firm has handled more than 500 -600 job families with attached <b>three</b> reference letters and certificate of completion as evidence. 20 marks		
	ii) If firm has handled over 600 job families with attached <b>three</b> reference letters as Evidence and certificate of completion. 22 marks		
	<p><b>AND</b></p> iii) Proof that the proposed Consultants are permanent employees of the firm or have an extended and stable working relationship with the firm or in the Consortium - 3 Marks		
	<b>Sub Total</b>		
<b>2.6.3</b>	<b>Adequacy of the proposed work plan/methodology and suitability of the tool in responding to the terms of reference (40 Marks)</b>		
	<b>Item</b>	<b>Marks</b>	<b>Remarks</b>
	(i) Job evaluation tool and applicability to the assignment - 6 marks		
	(ii) Job evaluation approach, work plan and assignment design including staff team by specialty - 13 marks		
	(iii) Sequence of program action and key responsibilities for supervision and implementation - 10 marks		
	(iv) Training of job evaluators - 6 marks		
	(v) Presentation on consultants appreciation of the assignment - 5 Marks		
	<b>Sub Total</b>		

	<b>GROSS TOTAL</b>		
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After review of the documents the members decided that the marks on presentation should be awarded without having to ask the firms to do an oral presentation. The summaries of individual evaluators are as shown below:-

	Name of Evaluator	Organization	Firm 1	Firm 2	Firm 3	Average
1	Mr. Nicholas Siwatom	SRC	93	89	87	89.7
2	Mr. Nicodemus Odongo	SRC	97	93	90	93.3
3	Mr. Tony W. Nasirembe	IHRM	97	100	97	98.0
4	Mr. Hillary Onami	ICPAK	97	91	97	95.0
5	Ms. Wanjira Wairegi	SRC	82	85	83	83.3
6	Mr. George Okioma	SRC	83	77	90	83.3
	Total		549	535	544	542.7
	Average (%)		91.5	89.2	90.7	90.4
	Position		1	3	2	
	<b>MINIMUM TECHNICAL SCORE 75%</b>					

All the firms evaluated were therefore found to be responsive to the Request for Proposal as they met the minimum technical score of 75% and proceeded to the next stage of financial evaluation.

### **The Financial Evaluation**

On 28<sup>th</sup> April 2014 the Tender Processing Committee conducted the Financial Evaluation from 4.00pm. During the Evaluation the following observations were made:-

**1. The RFP Document stated the Financial formula .**

After application of the formulae the results were:

Bidder	Bid Price	Financial Score	Technical Score	Combined Score
<b>Ernst &amp; Young</b>	118,287,520/=	SF= (100X118,287,520) /118,287,520 =100	ST = 90.7%	S = (90.7X 0.75)+(100X0.25) = 93.03
<b>Deloitte and Touche</b>	67,182,664/=	SF= (100X118,287,520) /267,182,664 =44.27	ST = 91.5%	S = (91.5X 0.75)+(44.27X0.25) = 79.69
<b>PWC</b>	328,821,731/=	SF= (100X118,287,520) /328,821,731 =35.97	ST = 89.2%	S = (89.2X 0.75)+(35.97X0.25) = 75.89
<b>Most Responsive</b>		<b>Ernst &amp; Young - 93.3%</b>		

**a) Security Bond**

Under this requirement the evaluation showed the following:

Bidder	Evaluation
<b>Ernst &amp; Young</b>	Offer for Consultancy - Kshs.118,287,520/= 2% Security Bond Kshs.2,365,800/= - Meets Format Reputable Bank : Barclays Bank - Meets Format Bank Seal : NONE Bank Stamp : Yes
<b>Delloitte and Touche</b>	Offer for Consultancy - Kshs267,182,664/= 2% Security Bond Ksh5,343,652/= - Meets Format Reputable Bank: Barclays Bank - Meets Format Bank Seal :: NONE,Bank Stamp:: Yes



<b>PWC</b>	Offer for Consultancy - Kshs328,821,731/= 2% Security Bond Ksh5,856,743/= Reputable Bank : Standard Chartered Bank- Meets Format Bank Seal: NONE -Bank Stamp:: NONE
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Lowest evaluated responsive bidder: - **Ernst and Young Observations.**

The tender processing Committee in evaluating the financials noted the following:

- a) That Ernst & Young, PWC, Deloitte & Touche submitted their bid bonds.
- b) That Ernst & Young, PWC, Deloitte & Touche did not have a bank seal on their bid bonds. The Committee observed that the requirement to seal the security bond is not material as the authenticity of the security bond can be ascertained through due diligence. In addition, none of the bidders whose financial bids were evaluated had a seal on their security bond and none of them would therefore be prejudiced if the requirement is relaxed.
- c) That PWC produced a bid bond that is less than 2% of the tender sum while Ernst & Young and Deloitte & Touche submitted bid bonds that are 2% of their respective tender sum.
- d) Due diligence should be conducted on the successful bidder.

**TENDER COMMITTEE DECISION**

The Tender Committee at its meeting No.34 held on 7<sup>th</sup> May, 2014 adopted the recommendations of the Evaluation Committee and approved the bidder with the highest technical score M/s Ernst & Young Ltd at a total cost of Kshs.118,287,520/= to be awarded the tender.

## THE REVIEW

The Applicant M/s Deloitte and Touche Deloitte and Touche lodged this Request for Review on 14<sup>th</sup> May, 2014 against the decision of the Salaries and Remuneration Commission in the matter of Tender No. SRC/INT.RFP/PJE/01/2013-14 for Provision of Consultancy for Undertaking a Comprehensive Job Evaluation for Jobs in the Public Service.

When the Application came up for hearing before the Board Mr. Kithinji Marete, Saada Kinyanjui Advocate and Ricard Airo Advocates appeared on behalf of the Applicant submission were led by Mr. Marete. The Procuring Entity was on the other had represented by Mr. Cyprian Masau Wekesa, Richard malebe and Venessa Iwila all of whom were advocates of the High court of Kenya. Submissions on behalf of the Procuring Entity where however led by Mr. wekesa. Submissions on behalf of the Successful Bidder M/s Ernst and Young Limited were made by Mr. James Ochieng Oduol who appeared together with Marstellar Oduor advocate in the matter before the Board.

Counsel for the applicant started off his submissions by reminding the Board that the Procuring Entity was a constitutional body and that pursuant to the powers conferred upon it by law the Applicant invited international tenders for the Provision of Consultancy for Undertaking a Comprehensive Job Evaluation in the Public Service. According to counsel for the Applicant and this was a matter which was not in dispute before the Board, the tender was conducted by means of Requests for Proposals and was therefore governed by the provisions of

Section 76 to 87 of the Public Procurement and Disposal Act, 2005 (herein after referred to as the Act)

The Applicant submitted that pursuant to the invitation, the Applicant submitted its proposals which were evaluated alongside other proposals submitted by other bidders and that upon the evaluation of the proposal the Procuring Entity at its tender meeting No.34 held on may, 2014 awarded the subject tender to M/s Ernst and Young Ltd at a total cost of Kshs. 118,287,520 the said firm having attained the highest combined aggregate technical and financial score.

The Applicant was dissatisfied with the Procuring Entity decision timeously filed an application for Review before the Board in which it set out two general grounds of Review namely that:-

- 1) There was unfair competition occasioned by undercutting of the Financial bid by Ernest & Young that was formulated to deny Delloitte & Touche who was the highest technically responsive bidder from being awarded the tender to undertake a comprehensive job evaluation for jobs in the public service for the Republic of Kenya.
- 2) That the technical proposition of M/s Ernest & Young Ltd was questionable and required to be interrogated in order to determine the accuracy of the results of the technical evaluation against the Request for Proposal (RFP) document for the tender No.SRC/INT-RFP/PJE/01/2013-14.

It's clear on the face of the Request for Review that the Applicant did not expressingly state both in the Request for Review and in the statement in

support thereof the Provisions of the Act and the Regulations which the Procuring entity had breached and that this only appeared in the submissions which were filed with the Board on 29<sup>th</sup> May, 2014 and in the applicant counsels submissions at the hearing.

The Applicant's case before the Board centered around what it described as unfair competition occasioned by undercutting of the financial bid by the Successful Bidder which was formulated to deny the Applicant, which by its own admission the claimed to have had the highest technically responsive bid.

The Applicant conceded before the Board that the Procuring Entity carried out both a Technical and financial evaluation whose results it summarized in items 3.6 and 3.8 of its submissions filed on 29<sup>th</sup> May, 2014 as follows:-

#### **Technical Evaluation**

- |  |         |
|--|---------|
| a) M/s Price Waterhouse Coopers(PWC)                 | -89%    |
| b) M/s Delloite and touché                           | -91.5%  |
| c) M/s Ernst and young in Consortium with Novtek ltd | - 90.7% |

#### **Financial Evaluation**

- |  |        |                      |
|--|--------|----------------------|
| a) M/s Price Waterhouse Coopers(PWC)                 | 75.89% | Ksh. 328,821,731.00  |
| b) M/s Delloite and touche                           | 79.69% | Ksh. 267,182,664.00  |
| c) M/s Ernst and young in Consortium with Novtek ltd | 93.3%  | Ksh. 118,287,520.00. |

The Applicant urged the Board to note that at the technical evaluation stage, the Procuring Entity awarded literally the same scores on technical evaluation to the three bidders and that the variance between the lowest and the highest in that category was only 0.8% which in the Applicant's view was a negligible variance. The Applicant submitted that in its estimation the technical evaluation was competitive in the sense that the parties seem to have been ranked almost at par and that the Applicant would therefore have expected the same during the financial evaluation stage but instead of that happening a practice kicked in at this stage which raised serious concerns about the competitiveness of the process and its fairness in the context of Section 2 of the act.

The Applicant lamented that the Successful Bidder which had been rated almost at par with the other two bidders on methodology and the same skills was suddenly proposing to levy a fee which was 210 million shilling less than the highest bidder and 148 million shilling less than the Applicant representing a percentage variance of 35.975 and 44% which in the Counsels view amounted to a majestic act of under cutting.

The Applicant in addition stated that a financial proposal must be tied to a technical proposal in the sense that one relates to the other and the inescapable inference was that the technical evaluations scores were erroneous.

The Applicant urged the Review Board not to countenance the practice by bidders of submitting low bids in order to manipulate the process so

as to be deemed responsive by undercutting since this would only undermine the satisfactory implementation of any assignment that is procured by the public. He urged the Board not to allow such a practice was in breach of Section 2(a), (b), Section 66(2) and 3(b) of the Act and Article 227 of the constitution of Kenya 2010 that enjoins Procuring Entities to be fair, equitable, and transparent and promote competition and cost effectiveness.

Counsel for the Applicant firmly stated that the financial proposal submitted by the Applicant was not in line with international standards and cited the case of Ghana demonstrate that such jobs would cost a professional service provider approximately Ksh250,000,000 and based on that comparison and international standards generally, the fees quoted by the Successful Bidder was way below the market rates and hence amounts to unfair competition by undercutting.

Mr. wekesa on behalf of the Procuring Entity started off his submissions by addressing the Board on the issue of jurisdiction. Mr. Wekesa started by reminding the Board that Section 98 of the Act was the repository of the jurisdiction of the Board and that in order for this jurisdiction to crystallize, the Applicant had to bring itself within the provisions of Section 93 of the Act by demonstrating two critical issues namely that:-

- i. The Applicant must show that it suffered or risked suffering loss or damage by reason of the action of the Procuring Entity.
- ii. In the same application, the Applicant must show a breach of duty imposed on the Procuring entity by the Act and the Regulations.

Counsel for the Applicant submitted that he had looked at the entire application for review together with the statement in support of the Applications and did not find any statement alluding to breach of any duty by the Procuring Entity of any Provision of the Act or the Regulations.

Counsel further urged that the provisions of Section 2,66 and 86 of the Act and article 227 of the constitution had been introduced by the Applicant in it's written and oral submissions. The Procuring Entity however submitted that reference to the alleged breaches of the provisions of the Act or Regulations could not be done through written or oral submissions and that such matters must be specifically pleaded and further that what the Applicant was attempting to do amounted to placing the cart before the horse. The Procuring Entity referred the Board to several authorities on the issue of jurisdiction in his written submissions filed on 28<sup>th</sup> May, 2014.

On the issue of the alleged breaches, the Procuring Entity submitted that unfair competition and undercutting were tortious acts which are governed by the common law of torts and cannot be matters within the jurisdiction of the Board. The Procuring Entity further submitted that the criteria for evaluation was clearly set out in the Request for Proposal document and that an issue of any breach of the criteria was an issue of fact which could only be determined on the basis of evidence but not by general allegations of breach through inferences. The procuring Entity submitted that none of the allegations of undercutting was supported by any factual basis in the request for Proposal and that reference to a

practice in Ghana amounted to a mere assertion in statement which was not supported by an evidence of the existence of such a practice.

Mr. Wekesa submitted that under the provisions of the law as it exists today, it is only the Procuring Entity which can incorporate an evaluation criteria into a document and that it was therefore not open for a tenderer such as the Applicant to set out or decide its own parameters and then seek to compel the Procuring Entity to evaluate it according to that new criteria.

Mr. Wekesa submitted on the basis of the decisions he had supplied to the Board that in the cases that where the allegation raised relates to undercutting, the Board had consistently held that it was the relevant professional bodies and associations that could entertain such disputes but not the Board.

The procuring Entity finally submitted that the Applicant had not demonstrated any breach of the provisions of Article 227 of the Constitution or of any other provision of the Act or the Regulations.

Mr. James Ochieng Oduol on behalf of Successful Bidder M/s Ernst and Young associated himself with the Procuring entity Submissions both on jurisdiction and the grounds for review. Counsel for the Successful Bidder pointed out that the Applicant had not made any allegation of loss or damage and or cited any Provision of the Act or the Regulations which has been breached that the attempt by the Applicant to introduce alleged breach of the provisions of the constitution, the Act and the



regulations in its submissions—was unprocedural and amounted to introducing new grounds of Review outside the statutory limitation period of seven days (7) provided for the filing of an application for Review. Mr. Uduol further argued that both the written and oral Submissions were not pleadings and that the practice of introducing substantive grounds of Review on submissions amounted to an ambush since it denied the parties a level playing ground and he right to know the case they were expected to face in good time and therefore prepare for it.

Counsel for the Successful Bidder stated that the issue of unfair competition was an issue of fact which ought to have been measured against a proved standard .Mr. Oduol stated that he had carefully followed the arguments by the Applicant while making it's oral Submissions through Mr. Marete but at no point had the Applicant provided evidence of any international standard as the basis for comparative analysis.

In the Successful Bidder's view, a technical and financial proposal were two different requirements of the tender document and that technical evaluation relates to technical competence while financial evaluation was a question of pricing .Counsel submitted that if the Applicant had overpriced their financial bid they would only have themselves to blame and that it was wrong for the Applicant to lament about the Successful Bidders alleged inability to render the service at the quoted price.

The Successful bidder finally submitted that the Application for review had been filed for a collateral purpose to cow competitiveness and was a malicious application. The Successful Bidder therefore urged that the Board to dismiss the Request for Review with costs.

Mr. Kuriu Muchirua a Director of and who appeared before the Board on behalf of Price waterhousecoopers Ltd(PWC) an interested party for the purposes of Section 96 of the Act confirmed that the interested party had not filed its own independent request for review and that it had only wrote a letter dated 28<sup>th</sup> May, 2014 to the secretary of the Review Board highlighting it's concerns and complaints. In nutshell, the interested party summarized the background of the tender, the result of the technical and financial evaluation and Request for Review that the Review Board orders for a re-tender of the assignment. Mr. Muchiru in conclusion stated that the interested party associated itself with the Applicant's arguments but request by the Applicant that the Board awards the subject tender to the Applicant.

In reply to the submissions made by the procuring Entity, the Successful Bidder and the Interested Party Mr. Marete submitted that his client had the right to present and the Board had the jurisdiction to hear and determined the dispute before it for the reason that it was a bidder and that under the Provisions of Section 93 of the Act, the Applicant was therefore within its right to approach the Board for the purposes of having the dispute between it, the Procuring Entity and the Successful bidder ventilated.

## **The Decision of the Board**

The Board has considered the Request for Review, the statement in support of the request, the written submissions by the Applicant, the replies, the written submissions and the authorities filed by the Procuring Entity and the successful Bidder together with the response filed by the Interested Party (Price Water House Coopers Ltd). The Board has considered the submissions by advocates for the parties who appeared by counsel together with the submissions made by Mr. Kuria Muchiru a director of the interested party all of which the Board has set out in summary above.

Upon a consideration of all the foregoing documents and submissions the Board has framed the following issues for determination in this request for review

- 1) Whether or not the Applicants Request of Review is properly before the Board and if the answer to the first limb of this issue is in the affirmative, whether or not the Applicant has met the jurisdictional threshold as set out under the provisions of Section 93 of the Act.*
- 2) Whether or not the Application has proved any of the two grounds of Review set out in it's Request for Review.*
- 3) What order should the Board make on the issue of the costs of the application for review?*

### **ISSUE 1**

**Whether or not the Applicants Request of Review is properly before the Board and if the answer to the first limb of this issue is in the**

**affirmative, whether or not the Applicant has met the jurisdictional threshold as set out under the provisions of Section 93 of the Act.**

As rightly argued by Mr. Wekesa and Mr. Ochieng Oduol on behalf of the Procuring Entity and the successful bidder, the issue of jurisdiction is a threshold issue which must position overtime and which has been restated over time.

In the case of SAMUEL KAMAU MACHARIA & ANOTHER =VS= KENYA COMMERCIAL BANK LTD & 2 OTHERS [2012]eKLR which counsel for the Procuring Entity relied upon, the Supreme Court of Kenya at page 20 of it's decision observed as follows:-

*"we agree with counsel for the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality, it goes to the very heart of the matter for without jurisdiction, the Court cannot entertain any proceedings."*

IN THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION [2011]eKLR the supreme court of Kenya at page 8 declared;

*"Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution by statute law and by principles laid out in judicial precedent."*

Mr. Wekesa's objection on the issue of jurisdiction was simple and it was that whereas the Board has jurisdiction under Section 93(1) to entertain a Request for Review arising from a procurement undertaken pursue and

to the Provisions of the said Act, the Board's jurisdiction could only be triggered and only crystallizes when the Applicant moving it demonstrates that:-

(a) He/her/it has suffered or risks suffering loss or damage.

(b) And that such loss or damage was due to a breach of a duty imposed on a Procuring Entity by the Act or the Regulations.

Mr. Wekesa stated that he had looked at the Applicant's entire Request for Review and that nowhere in the application for Review did the Applicant claim that it had suffered or that it risked suffering loss or damage. He further stated that nowhere in the application for Review did the Applicant cite any provisions of the Public Procurement and Disposal Act or the Regulations that had been breached.

Mr. Wekesa in addition submitted that the allegations of breach of Sections 2, 66, 86 of the Act and Article 227 of the Constitution were being raised by the Applicant for the first time in its written submissions and that such a practice was wrong because in Mr. Wekesa's view the provisions of the Act and the Regulations which were breached ought to have been pleaded in the Request for Review and only then can they form part of any written or oral submissions.

Mr. Ochieng Oduol learned counsel for the successful bidder supported the Procuring Entity's submissions on the issue of jurisdiction and reiterated Mr. Wekesa's submissions on the point counsel for the successful bidder added that by seeking to include and address issues

that were not pleaded in its written or oral submissions, the Applicant was introducing new grounds for Review long after the limitation period of seven (7) days provided by law for the filing of Request for Review had lapsed.

Mr. Marete in answer to the Preliminary objection reiterated his earlier position was that the Applicant was within its right to institute the Request for Review since it was a bidder in a public procurement process and had a right to come before the Board to adjudicate over the administrative issue of the subject procurement. He argued further that his client having participated in the procurement process had a legitimate expectation that such a process would be fair and meet the objectives of the Act and that his client the Applicant was therefore not only entitled to move the Board but also had the right to have the dispute filed by it, heard and determined on merit.

He concluded his submissions by asking the Board not to shut out the Applicant on what he termed as a matter of "semantics" and that doing so would fly on the face of Article 159 of the Constitution.

The above arguments raised two jurisdictional issues, namely;

- (i) Whether the Applicant had the right to approach the Board having participated in the tender as a bidder and;
- (ii) Whether having approached the Board, the Applicant had fulfilled the threshold set out in Section 93 of the Act in order to entitle the

Applicant to any of the reliefs that the Board can grant under the Provisions of S.98 of the Act.

On the first jurisdictional issue the Board finds that the Applicant was a bidder in the Request for proposal the subject matter of the procurement and was there a candidate within the meaning of Section 3 of the Act which defines a "candidate" as a person who has submitted a tender to a Procuring Entity. The Applicant being a candidate for the purposes of the Act was therefore entitled to bring an application for Review before the Board.

However on the second jurisdictional issue this Board finds that an applicant who is entitled to apply for Review is under a duty to comply with the provisions of the Act and establish the threshold set out under Section 93 of the Act in order to be entitled to any relief under Section 98 of the Act. S.93 of the Act specifically required that an Applicant demonstrates that it has suffered or risks suffering loss or damage due to the breach of a duty imposed on a Procuring Entity by the Act or the Regulations.

The Board further finds that under the Provisions of Regulation 73(1) of the Regulations an applicant in a Request for Review must file a request for Review setting out his/her complaint, including any alleged breach of the Act or the Regulations. Such request must be accompanied by such statements as the Applicant considers necessary in support of it's request. Regulation 73 2(b) as amended by legal notice 106 requires that such a request and statement must be filed within seven days of the

occurrence of where the request is made before the making of an award; or Seven (7) days of a notification being served under the Provisions of Sections 67 or 83 of the Act.

It is the Board's finding that the Request for Review and the accompanying statement constitute the pleadings for the purposes of an application for Review. It is the Board's further findings that Regulation 73 of the Regulations which is Couched in mandatory terms requires that an Applicant sets out with particularity the Provisions of the Act or the Regulations which have been breached.

The Board has perused the Request for Review and the accompanying statement thereof and finds that the statement makes general allegations of breach without stating which provisions of the Act or the Regulations were breached by the Procuring Entity. The Applicant which was unrepresented by counsel at the time it filed the Request for Review then attempted to set out the provisions of the Act and the Regulations in its skeleton submissions filed by the firm of M/s Robson Harris & Company Advocates and in Mr. Marete's submissions from the bar.

The Board finds that this practice is improper for the simple reason that it is the pleadings and not the submissions which form the foundation of any dispute and that submissions can only be based on pleaded issues and not the vice versa. It is also trite that a party to any proceedings of a judicial or a quasi judicial nature can only base its case on pleaded issues. Pleadings are meant to enable parties define the issues in dispute



and enable the other party/parties know and prepared to respond to the cause pleaded against it.

The Board therefore finds and holds that the Applicant did not bring itself within the threshold provided for under the provisions of Section 93 of the Act as read together with Regulation 73 of the Regulations and this ground of the Procuring Entity's preliminary objection and which was supported by the Successful bidder therefore succeeds. But even in the event that the Board is wrong on any of its above findings the Board shall now proceed and consider the next issue.

#### **ISSUE NO. 2**

**Whether or not the Application has proved any of the two grounds of Review set out in its Request for Review.**

In view of the Board's finding on issue No.1 above, the Board will consider and determine the second issue on the basis of the general grounds set out in the Applicant's request for Review. The Board has consolidated grounds 1 and 2 of the Request for Review since they are generalized statements by the Applicant in which no breach of any of the provisions of the Act or the Regulations has been alleged.

The Applicant alleged that there was financial under cutting on the bid by the Successful bidder and the financial bid was formulated to deny the Applicant the award of the tender since it had the highest technical scores resulting into an unfair competitive practice.

The Applicant further alleged that the technical proposal of the Successful Bidder is questionable and requires to be interrogated in order to determine the accuracy of the results of the technical evaluation against the Request for Proposals (REP) document.

In response, the Procuring Entity argued that it conducted the procurement in conformity to the dictates of the Constitution, the Public Procurement Act as well as the Regulations and that it afforded all the bidders an equal opportunity and none of the bidders was favoured or discriminated against. It added that it is not aware of any unfair competition occasioned by "undercutting" of the financial bid by Successful Bidder. An interested party supports the request for review and submits that the financial bid submitted by Successful Bidder may not be adequate for assignment given their past experience with the Procuring Entity.

The Procuring Entity argued that the Applicant cannot determine the criteria to be used to evaluate the technical aspects of the Tender more so when it questions the technical Proposal of the other Bidders. On the issue of Successful Bidder's experience the Procuring Entity further submits that bidders have different experiences in the performance of their assignments and the Applicant should not impose its purported experience in job evaluation on the Procuring Entity as the award of the tender is premised on criteria which the Successful Bidder met.

The Procuring Entity submitted that the Applicant was engaged in a fishing expedition which is frivolous and that its Request for Review

was an abuse of process. The successful bidder in opposing the request for review stated that there was no under cutting in its financial bid and that its financial bid was based on its interpretation and understanding of the services required of it in the Request For Proposal and that it was properly awarded of the tender.

The Board has examined the documents submitted to the Board and notes that the International Request for Expression of Interest for this tender was advertised in the Daily Nation of 8<sup>th</sup> February, 2014 and closed/opened on 28<sup>th</sup> February 2014. Fourteen expression of interest were received which were subjected to Preliminary Evaluation .Ten firms were disqualified for not meeting the mandatory requirements of evaluation while the following four firms qualified and were issued with Request for Proposal(RFP) Document, the four firms are:-Delloite and Touche, PWC , Ernst and Young and PKF Consulting Ltd.

From the Tender Opening Minutes of 9<sup>th</sup> April, 2014, the Secretariat notes that PKF consulting was not considered for evaluation by the Procuring Entity's Tender Processing Committee for not providing a tender security as requirement under Clause 2.7 of the RFP document.

The three remaining firms were subjected to a Technical Evaluation as per criteria provided in the Request for Proposal document under Clauses 2.7.1, 2.7.2 and 2.7.3 and assigned scores as provided in the three clauses. Clause 2.7.1 provided the criteria and scores for qualification, competence and specific experience of the consultants with a maximum score of 35 marks Clause 2.7.2 provided the criteria and scores for

specific job evaluation experience of the firm/consortium with a maximum score of 25 marks .Clause 2.7.3 provided the criteria that assessed adequacy of the proposed work plan/methodology and suitability of the tool in responding to the terms of reference with a maximum score of 40 marks. The minimum technical score required to pass the technical evaluation stage was 75% as provided under foot note of Clause 2.7.3 of the RFP document. The three firms namely; Delloite and Touche, PWC and Ernst and Young qualified at the technical evaluation stage by scoring 91.5%, 89.2% and 90.7%% marks respectively which are all above the required pass mark .The Applicant was ranked 1<sup>st</sup> in the technical evaluation with a total score of 91.5% as compared to the Successful Bidder M/s Ernst and Young which scored 90.7%. The Secretariat notes that the Successful Bidder submitted its proposal as a consortium of *M/s Ernst &Young in Consortium with Novatek Ltd and Eureka Educational and Training Consultants Ltd* and was therefore evaluated using evidence relating to its experience as well as that of its partners. Clause 2.3.3 of Tender Documents provided for submissions of bids by consortium.

The Secretariat further notes that the Tender Document under Clause 2.3.5 provided that the technical proposal shall not include any financial information and therefore the financial proposal for the three bidders were opened on 17<sup>th</sup> April,2014 .The bid prices are as tabulated below:-

- Ernst & Young Kshs.118,287,520/=
- Delloitte and Touche Kshs267,182,664/=
- PWC Kshs.328,821,731/=

The Board further finds that the financial proposal of individual bidders were subjected to a formula provided in the Tender Document the result of subjecting the bid prices to the formula and combining the financial score it with technical score was as follows:-

Bidder	Financial Score	Technical Score	Combined Score
<b>Ernst &amp; Young</b>	SF= (100X118,287,520)/118,287,520 =100	ST = 90.7%	<b>S = (90.7X 0.75)+(100X0.25) = 93.03</b>
<b>Deloitte and Touche</b>	SF= (100X118,287,520)/267,182,664 =44.27	ST = 91.5%	<b>S = (91.5X 0.75)+(44.27X0.25) = 79.69</b>
<b>PWC</b>	SF= (100X118,287,520)/328,821,731 =35.97	ST = 89.2%	<b>S = (89.2X 0.75)+(35.97X0.25) = 75.89</b>
<b>Most Responsive</b>	<b>Ernst &amp; Young -- 93.3%</b>		

The method of selection in this tender was quality and cost based selection; where the highest ranked firm achieving the highest combined Technical and financial score is to be invited to negotiations. The resultant combination and ranking placed the Applicant as the Second lowest evaluated bidder.

The Tender Processing Committee recommended the award to the successful bidder which had the highest combined Technical and financial score and further recommendation that due diligence be carried out on the Successful Bidder.

The Board's attention is drawn to the provisions of Clause 2.8.3 of the RFP and Section 82 of the Act.

Clause 2.8.3 of the Request for Proposal states; *“The evaluation committee will determine whether the financial proposals are complete (i.e. whether the consultant has costed all the items of the corresponding Technical Proposal and correct any computational errors. The cost of any unpriced items shall be assumed to be included in other costs in the proposal. In all cases, the total price of the Financial Proposal as submitted shall prevail”*

Section 82 of the Act provides as follows: -

*82(1)“The procuring entity shall examine the proposals received in accordance with the request for proposals.*

*(2)For each proposal, the procuring entity shall evaluate the technical proposal to determine if it is responsive and, if it is, the procuring entity shall assign a score to the technical proposal, in accordance with the procedures and criteria set out in the request for proposals.”.*

*(5) The successful proposal shall be the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals under subsections (2) and (3) and the results of any additional methods of evaluation under subsection (4).*

The Procuring Entity was therefore bound by the Provisions of Section 82(5) of the Act to award the tender to the bidder who attained the highest aggregate score in the technical and financial evaluation.

The Board observes as follows in relation to the financial proposal. The RFP was competitively done and that the opening of financial proposals was conducted openly after the reading of the Technical scores to the Bidders. The Board may note that the financial proposal and the Technical proposal were submitted at the same time though separately and therefore the assertion that the Successful Bidder is offering services at a lower price than the Applicant was not foreseeable as the Successful Bidder was not privy to the Applicant financial proposal or that of the other bidders for under cutting scheme to take place. The Board may further note that the Successful Bidder's financial Proposal was prepared as per Section IV Clause 4.3 and all the standard forms filled and complied with as required by the said clause. In any event Clause 2.8.3 is clear on the resultant consequence in situation where a bidder fail to cost some critical technical requirement and therefore allaying the Applicant's concern that the Applicant quoted below the market rates. The observation is reinforced by the Board's decision in Application No 23 of 2009 Between *H.Young (EA) Ltd vs East African Portland Cement Ltd in which* (Application No.23 of 2009):-

*"The lowest evaluated is the Bid that is most advantageous to the Procuring Entity when all factors including the price are considered. As such, price alone is not the only factor to be considered when awarding a tender"*

The Board has considered the arguments made by the parties and its observation on the issue of undercutting and finds that the arguments were based on an alleged international standards particularly an alleged standard existing in Ghana which demonstrated that an assignment

such as the Procuring Entity sought to procure would cost a professional service provider approximately Kshs.250, 000, 000.00(US \$ 3, 000, 000). The Applicant did not however provide any documentary evidence in support of the existence of such a standard or anyother. The Board therefore agrees with the successful Bidder's submission that this assertion was based on no factual foundation and was not supported by any documentary or affidavit evidence.

The Board cannot also ignore the fact that the price difference between the Applicant and the successful bidder was a staggering sum of Kshs.148 Million.

From all the foregoing, the Board finds and hold that the evaluation was carried out in accordance to Section 82 of the Act and that the Successful Bidder and its consortium recommended for award as provided by Section 82(5) of the Act. The Board also finds that the Successful Bidder complied with provisions of Section 31. (1) of the Act on qualification to be awarded contract contrary to the allegation by the Applicant which is not backed by any evidence.

### **ISSUE NO.3 ON COSTS**

**What order should the Board make on the issue of the costs of the application for review?**

Upon the conclusion of the parties submissions on the above substantive issues and owing to the fact that each of the parties sought for an award of costs, the Board invited the advocates present to address the Board on



the issue of costs. The parties agreed by consent to allow counsel for the successful Bidder, the Procuring Entity and the Applicant to address this issue in that order.

Mr. Ochieng Oduol asked the Board to take judicial notice that the engagement of counsel to undertake an application for review is a tedious act which imposed on the parties a financial burden in defending the request for review. Counsel for the successful Bidder therefore urged the Board to find that where an Applicant lodges a request for review raising complaints which are unjustified, the Board should condemn such a party to pay costs. On the particular request for review the successful bidder urged the Board to find that the review lacked the basic ingredients and that it was a collateral challenge of the legitimate process not aimed at the objects of the Act but was solely instituted to bismatch a fellow bidder and impose a position of dominance.

On the Applicable schedule, Mr. Ochieng Oduol urged the Board to find that Schedule V of the Advocates Remuneration Order was applicable to proceedings instituted before the Board.

Mr. Wekesa on behalf of the Procuring Entity associated himself with the submissions by Mr. Ochieng Oduol particularly on the issue of the financial burden imposed upon parties upon the filing of a Request for Review and stated that the Board would be perfectly entitled to award costs to the opposing parties if the request for review fails.

Mr. Marete while not disputing the fact that the board has the power to award costs nonetheless urged the Board to be objective while determining the issue of costs. Speaking for himself and his client, Mr. Marete stated that he would refrain himself from making a proposition that the Procuring Entity should be punished with an order of costs in the event that the application succeeds.

He emphasized that procurement matters are so important to the country to the extent that Kenyans had deemed it fit to include procurement in the new constitution.

He argued that in order not to discourage parties with genuine complaints from approaching the Board, the Board should order costs since there is no party which comes before the Board with frivolous appeals.

Counsel concluded his submissions by urging the Board to look at the issue of costs objectively and that each case should be considered on the basis of its circumstances.

The Board has anxiously considered the issue of costs and the submissions made by the advocates for the respective parties. The Board agrees that any party who files a Request for Review before the Board must do so on the basis of sound grounds. The Board is however sensitive to the fact that procurement is a matter of great public importance and that the Board in making any determination on costs should not be seen to discourage parties who have genuine complaints

from approaching the Board due to prohibitive orders on costs. The Board therefore agrees with Mr. Marete's submissions that the Board should look at the issue of costs objectively.

The Board has already held in favour of the Procuring Entity and the successful bidder on the two issues framed by the Board for determination. The Board has also held that the Applicant's Request to review was not well founded. The Procuring Entity and the successful bidder were forced to hire advocates to defend the Review.

Taking into account all the factors and applying the test of objectivity the Board awards the Procuring Entity and the successful party the sum of Kshs.100, 000.00 each as costs. The Costs shall be payable by the Applicant.

### **THE ORDERS.**

In conclusion and pursuant to the powers conferred upon it by the Provisions of Section 98 of the Act, the Board makes the following orders:-

- (a) The application for Review filed by the Applicant herein on 14<sup>th</sup> May, 2014 be and is hereby dismissed.
- (b) The Procuring Entity is at liberty to proceed with the procurement process and may enter into a contract with the successful bidder within fourteen (14) days from the date of this decision.



- .. (c) The Applicant shall pay the costs of this Request for Review assessed at the sum of Kshs.100, 000 each to the Procuring Entity and the successful bidder M/s Ernest and Young Ltd.

Dated at Nairobi this 3<sup>rd</sup> June, 2014.

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Chairman  
PPARB

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Secretary  
PPARB

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