

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

**REVIEW NO 9/2014 OF 26<sup>TH</sup> MARCH, 2014**

**BETWEEN**

**MWAGHO COMPANY LIMITED .....APPLICANT**

**AND**

**COAST INSTITUTE OF TECHNOLOGY .....PROCURING ENTITY**

Review against the decision of Coast Institute of Technology in the  
Matter of Tender No CIT/T/01/2/2013-2014 for Proposed Sewerage,  
Drainage and Rehabilitation Works.

**BOARD MEMBERS PRESENT**

Mr. Paul Gicheru	- Chairman
Mr. Hussein Were	- Member
Mrs. Josephine Wambua Mong'are	- Member
Eng. Weche Okubo	- Member
Mr. Peter Bitia Ondieki	- Member

## **IN ATTENDANCE**

Pauline Opiyo	- Secretary to the Board
Stanley Miheso	- Secretariat
Judy Maina	- Secretariat

## **PRESENT BY INVITATION**

### **Applicant - Mwagho Company Limited**

Isaac Owuor	- Advocate
Jared Nzano	- MD, Mwagho Co. Ltd
Mwazighe Nyabu	- Director, Mwagho Co. Ltd

### **Procuring Entity - Coast Institute of Technology**

Francis Mwakireti	- Counsel
Patrick Machoni	- Deputy Principal

### **Interested parties**

Peter Mbogho	-Director, Shake Distributors
Jane Taveta	- Manager, Dantax Enterprises Ltd
Samson Mwawasi	- Accountant, Motalent Construction Ltd

## **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**

The Tender for proposed sewerage drainage and rehabilitation works (Tender No. CIT/T/01/2/2013- 2014) was advertised in the *Daily Nation* and *The Standard* of 18<sup>th</sup> and 19<sup>th</sup> February 2014, respectively, closing on 4<sup>th</sup> March, 2014 at 10.00 am and thereafter opened at the Institute's boardroom.

A total of 21 bid documents were purchased by prospective bidders and fourteen were returned. At the opening of the bids the names of the bidder, amount quoted and Tender surety were read out loud and recorded in an opening register.

The Evaluation Committee met on 6<sup>th</sup> March, 2014 and agreed to adopt the following criteria for mandatory evaluation:-

1. Be within plus or minus 10% range of official priced tender document from C.W.O.
2. Proof as a registered contractor with the National Construction Authority (NCA 6 and above)
3. Provide a tender security bond of Ksh:300,000/- from a reputable bank or approved insurance company
4. Provide valid Tax Compliance Certificate, VAT and PIN Certificates

5. Evidence of 3 similar works successfully completed (completion certificates)
6. Provide certified audited accounts for the last 3 years
7. Litigation history of the company, if any (including court and arbitration cases)
8. Proof of legal existence (copies of certificates of incorporation /registration)
9. Evidence of adequate equipment and qualified personnel for the specified types of works
10. Form of Tender should be filled and dully signed

The Tenders received were compared to the official estimate as follows:-

NO	TENDER NAME	TENDER SUM (KSHS)	BID % OF ESTIMATE	VARIANCE
1.	Pasha Enterprises Ltd	08,703,415.00	32.3%	-68.7%
2.	Motalent Construction Co. Ltd	22,730,814.00	81.7%	-18.3%
3.	Jeddy General Contractors	23,238,493.00	83.6%	-16.4%
4.	Reenah Kenya Ltd	23,959,909.04	86.1%	-13.9%
5.	Mwagho Co. Ltd	25,030,933.56	90.0%	-10.0%
6.	Shake Distributors Ltd	25,102,597.20	90.3%	-9.7%
7.	Lizam Enterprises Ltd	25,102,938.00	90.3%	-9.7%
8.	Mombasa Road General Supplies	25,381,895.04	91.3%	-8.7%
9.	Joe Timber & Harware Investments	25,520,000.00	91.8%	-8.2%
10.	Jumbo Interlinks Ltd	25,867,954.80	90.0%	-7.0%
11.	Dantax Enterprises Ltd	28,270,301.00	101.6%	1.6%
12.	Maz Engineering And Co. Ltd	29,923,808.64	107.6%	7.6%
13.	Tayo Enterprises	33,478,573.24	120.4%	20.4%
14.	Ighonyi Enterprises Ltd	43,998,329.52	158.2%	58.2%

The results of the Preliminary evaluation to determine responsiveness was as tabulated below:-

X: Means Non-responsive

Y: Means Responsive

NO.		TENDER NAME	Within 10% of estimate	Reg. Category	Bid Bond	Valid Tax compliance	Similar Works	Audited account	Current Litigation History	Legal existence	Plant & equipment	Qualified personnel	Form of Tender	Remarks
MINIMUM QUALIFYING CRITERIA														
1.		Motalent Construction Co.	X	Y	Y	Y	X	Y	Y	Y	Y	Y	Y	X
2.		Mombasa Road General Supplies	Y	Y	Y	Y	Y	X	X	Y	Y	Y	X	X
3.		Ighonyi Enterprises Ltd	X	Y	Y	Y	X	Y	X	Y	X	X	Y	X
4.		Jeddy General Contractors	X	Y	Y	Y	X	Y	Y	Y	Y	Y	Y	X
5.		Mwagho Co. Ltd	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
6.		Dantax Enterprises Ltd	Y	Y	Y	Y	Y	Y	X	Y	Y	Y	Y	X
7.		Pasha Enterprises Ltd	X	X	Y	Y	Y	X	X	Y	X	X	Y	X
8.		Reenah Kenya Ltd	X	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	X
9.		Jumbo Interlinks Ltd	Y	Y	Y	Y	Y	Y	X	Y	Y	Y	Y	X
10.		Tayo Enterprises	X	X	Y	Y	Y	Y	Y	Y	X	Y	Y	X
11.		Lizam Enterprises	Y	Y	Y	Y	Y	Y	Y	Y	X	Y	Y	X
12.		Joe Timber & Harware Invest.	Y	X	Y	Y	X	Y	X	Y	X	Y	Y	X
13.		Shake Distributors Ltd	Y	Y	Y	Y	Y	Y	X	Y	Y	Y	Y	X
14.		Maz Engineering And Co. Ltd	Y	Y	Y	Y	X	X	Y	Y	X	X	Y	X

From the table above only one tender was found to be responsive, having met all the mandatory criteria.

The Evaluation Committee observed that Regulation 48(1) of the Public Procurement and Disposal Regulations, 2006, requires a Procuring Entity (PE) to reject tenders which are not responsive in accordance with Section 64 of the Act. The Committee however, upon consideration of Regulation 48 (2) of the Regulations on, *classification of a deviation from the requirements as minor under Section 64(2) (a) of the Act shall be applied uniformly and consistently to all the tenders received by the procuring Entity*, agreed to consider the following requirements as minor:-

1. Litigation history of the company, if any (including court and arbitration cases).
2. Evidence of adequate equipment
3. Evidence of qualified personnel for the specified types of works.

The Evaluation Committee after consideration of the above as minor deviations re-tabulated the results as below:-

X: Means Non-responsive		Y: Means Responsive									
NO.	TENDER NAME	Within 10% estimate	Reg. Category	Bid Bond	Valid Tax compliance	Similar Works	Audited account	Legal existence	Form of Tender	Remarks	
1.	Motalent Construction Co.	X	Y	Y	Y	X	Y	Y	Y	X	
2.	Mombasa Road General Supplies	Y	Y	Y	Y	Y	X	Y	X	X	
3.	Ighonyi Enterprises Ltd	X	Y	Y	Y	X	Y	Y	Y	X	
4.	Jeddy General Contractors	X	Y	Y	Y	X	Y	Y	Y	X	
5.	Mwagho Co. Ltd	Y	Y	Y	Y	Y	Y	Y	Y	Y	
6.	Dantax Enterprises Ltd	Y	Y	Y	Y	Y	Y	Y	Y	Y	
7.	Pasha Enterprises Ltd	X	X	Y	Y	Y	X	Y	Y	X	
8.	Reenah Kenya Ltd	X	Y	Y	Y	Y	Y	Y	Y	X	
9.	Jumbo Interlinks Ltd	Y	Y	Y	Y	Y	Y	Y	Y	Y	
10.	Tayo Enterprises	X	X	Y	Y	Y	Y	Y	Y	X	
11.	Lizam Enterprises Ltd	Y	Y	Y	Y	Y	Y	Y	Y	Y	
12.	Joe Timber & Harware Invest	Y	X	Y	Y	X	Y	Y	Y	X	
13.	Shake Distributors Ltd	Y	Y	Y	Y	Y	Y	Y	Y	Y	
14.	Maz Engineering And Co. Ltd	Y	Y	X	Y	X	X	Y	Y	X	

The responsive tenders after the application of the minor deviation clause were as shown in the table below:-

NO.	TENDER NAME	TENDER SUM KSH.	BID % OF ESTIMATE	VARIANCE IN %	ERROR FACTOR
1.	Mwagho Co. Ltd	25,030,933.56	90.0%	-10.0%	0.00%
2.	Shake Distributors Ltd	25,102,597.20	90.3%	-9.7%	4.40%
3.	Lizam Enterprises Ltd	25,102,938.00	90.3%	-9.7%	0.00%
4.	Jumbo Interlinks Ltd	25,867,954.80	90.0%	-7.0%	0.57%
5.	Dantax Enterprises Ltd	28,270,301.00	101.6%	1.6%	0.00%

The Evaluation Committee recommended that the lowest responsive tender submitted by **M/S MWAGHO CO. LTD** be considered for award at Kshs 25,030,933.56, for award.

### **TENDER COMMITTEE**

A Tender Sub-committee was appointed to report on site visits in Mwatate and Mombasa on 10<sup>th</sup> and 11<sup>th</sup> March 2014. The objective was to inspect the workmanship/quality of sampled finished constructions by the five responsive bidders. The Sub-committee reported the following:-

#### **1. Shake Distributors.**



Constructed Mwatate CDF Hall at least five years back and finished on time. The CDF officials reported that the bidder waited for his final payment without causing problems.

The sub-committee observed the building to be strong, well built with strong and durable materials, no cracks on the walls, good finishings on doors, windows, stair cases, floor, and proper colour mixing that has not waned over a long duration.

## **2. Mwagho Contractors.**

Constructed the first phase of Kenyatta High School four(4) classrooms that was completed in early February 2014. The classes are already in use; however, cracks have already appeared and have been repaired within that short period. Other observations include poor finishing - floors in some classes are not even; black board materials used were of poor quality. Doors were however of good quality and work was finished on time.

## **3. Lizam Enterprises.**

Constructed and completed a four floor storey hostel in Mama Ngina girls in Mombasa on time (one year as per the contract) in July 2013.

The sub-committee observed the building to be strong, well built with strong and durable materials, no cracks on the walls, good finishings on doors, windows, stair cases, floor, and proper colour mixing.

The contractor is said to have completed a building that was abandoned by a previous contractor and is now building classrooms after completing others in Kajiado, Ribe boys, Sacred Heart and Coast Girls.

#### **4. Dan tax Enterprises.**

Rehabilitated the Coast General Hospital drug and substance male dormitory in 2011. The floor was not well done since it has already disintegrated. The floor oxidant and washroom were poorly done.

The roof was however, well executed with strong materials, proper water tower and fence built. The contractor has abandoned the second project on site citing lack of payment by the hospital.

#### **5. Jumbo interlink Limited**

No evidence of the highlighted projects in Mombasa as stated in the Tender document and evaluation sheet.

Tender Committee awarded the tender to M/s **Shake Distributors Limited** at a corrected tender figure of Kshs **23,996,502.40** subject to the bidder accepting the corrected amount and, if he rejects the correction, the contract be awarded to M/s. **Lizam Enterprises** at Kshs **25,102,938.00**.

## **THE REVIEW**

The Request for Review was lodged by M/s Mwagho Company Limited on 26<sup>th</sup> March, 2014 in the matter of Tender No: CIT/T/01/2/2013-2014 for Proposed Sewerage Drainage and Rehabilitation Works.

The Applicant's request for Review revolved around the procedures and criteria the PE applied in the evaluation of tenders. The Applicant raised five grounds of review and sought the following orders:

- 1. The contract award of the Procuring Entity is illegal and the same be annulled in whole;*
- 2. The Board be pleased to award the contract to the Applicant in accordance with the recommendation made by the Evaluation, Negotiations, Inspection and Acceptance Committee of the Procuring Entity; and*
- 3. The Procuring Entity be condemned to pay costs of this Request for Review to the Applicant.*

The Applicant raised five grounds of review as follows:

**Ground 1, 2, 3, 4 and 5- Breach of Sections 64(1) and 66(2) of the Public Procurement and Disposal Act, 2005 (hereafter referred to as "the Act") read together with Regulations 11(2) and (3), 16(5)(a), 48(1) and 49(2) of the Public Procurement and Disposal Regulations, 2006 (hereafter referred to as "the Regulations") and Clauses 1.5(d), (e) and (i) and 5.6 of the Instructions to Tenderers in the Tender Document (hereafter referred to as "the ITT").**

The Board has consolidated all the five grounds into three issues as all relate to the evaluation and award of the Tender.

The Applicant submitted that the Procuring Entity acted in breach of the provisions of Section 64(1) of the Act, as read together with Regulation 48(1) and Clause 5.6 of the Tender Document by failing to reject all tenders that were not responsive. It argued that the Act allows the PE to declare as responsive only the tenders that conformed to all the mandatory requirements stated in the tender documents. The Applicant further argued that only the Applicant met all the mandatory requirements and ought to have been the only bidder to be declared responsive.

The Applicant further submitted that the Procuring Entity acted in breach of Section 66(2) of the Act as read together with Regulations 16(4)(a) and 49(2) and Clauses 1.5(d), 1.5(e), 1.5(i) and 5.6 of the ITT by failing to carry out evaluation and comparison using the procedures and criteria set out in the Tender Documents and failing to reject tenders which did not satisfy the technical requirements contained in the Tender Document. It argued that the PE clearly stated that there were ten mandatory requirements which all bidders were to comply with in order to proceed to the next stage of evaluation. Only one tender was determined responsive as per the requirements of the tender documents that being the Applicant.

The Applicant further argued that when the PE realised that the Applicant was the only responsive bidder it made some changes in the

evaluation criteria so as to accommodate other bidders, in contravention of the Act and the Regulations. The mandatory requirements on litigation history, adequate equipment and qualified personnel were made minor deviations. It was the Applicant's contention that these were key requirements and it was wrong for the PE to turn them into minor deviations. It was the Applicant's further contention that the fact that the same mandatory requirements were stated in the tender advertisement made it clear that they were not meant to be termed as minor deviation. Despite the new evaluation criteria having brought forward five responsive bidders, the Applicant observed that the Evaluation Committee still recommended the Applicant for the award of the tender.

The Applicant further stated that the Procuring Entity acted in breach of Regulation 11(2) and (3) by modifying the submission of the Evaluation Committee with respect to the recommendations for a contract award. The Applicant added that this was done by rejecting the submission aforementioned without any justifiable and objective reasons and failing to report the decision to reject the Evaluation Committee's recommendation to the head of the Procuring Entity.

The Applicant further submitted that the tender committee undertook an activity they were not required to do by carrying out site visits as though they were an evaluation committee. It argued that the tender committee acted in contravention of the Regulations and the Act when it awarded the tender to Shake Distributors Ltd at a price of Kshs

23,996,502.40 which was below the mandatory requirement of 10% deviation from the estimate.

As a result of the foregoing actions of the Procuring Entity, the Applicant stated that it stood to suffer loss and prayed that the Board grants it the orders sought.

The interested parties present, Messrs Shake Distributors Ltd, Dantax Enterprises Limited and Motalent Construction Limited, did not make any submissions even after being given a chance by the Board to do so.

The Procuring Entity in its Response to the Request for Review stated its submissions by arguing that the Board did not have jurisdiction to hear the dispute before it since the Procuring Entity has already entered into a contract with Shake Distributors Ltd by the time the Applicant filed its Request for Review. The Procuring Entity however conceded that the contract had been entered into before the expiry of 14<sup>th</sup> day from the date of notification of the award to the Interested Party.

In response to the main grounds of Review, the Procuring Entity (PE) opposed the review terming it frivolous, vexatious and that it was made solely for the purpose of delaying the procurement. It stated that the Tender Committee fully complied with Section 64 (1) of the Act as read together with regulation 48(1) as the Tenders which failed to conform to the mandatory requirements in the Tender documents were rejected. It

further stated that the minor deviations of the Tenderers that were considered responsive did not materially depart from the requirements set out in the Tender documents and the errors and oversights of the Tenders that were considered responsive could be corrected without affecting the substance of the Tender. The PE however admitted that the criterion on minor deviation was introduced during the evaluation and not before.

The Procuring Entity submitted that the Tender Committee correctly awarded the Tender to M/s Shake Distributors Ltd who was the Tenderer with the lowest evaluated price after correction of arithmetic errors in accordance with Section 63 of the Act. The PE also submitted that the Tender Committee complied with Section 66 of the Act in awarding the Tender to M/s Shake Distributors Ltd having taken into consideration the price, quality and service. It clarified that due diligence to establish that bidders had done similar works was undertaken by a sub-committee of the tender committee and not by the evaluation committee.

The Procuring Entity stated that the Tender Committee properly considered the evaluation report in accordance with Regulation 51 and proceeded to confirm the qualifications of the Applicant. After confirming it was not qualified in accordance with the Act, the PE proceeded to award the Tender to M/s Shake Distributors Ltd which had the lowest evaluated responsive Tender after correction of arithmetic errors. The PE denied breaching Regulation 11 and averred that the Tender Committee acted justifiably and objectively having taken into account the price, quality and service. It clarified that due diligence by a sub-committee of

the tender committee was done after the recommendation of the evaluation committee to award the tender to the Applicant. It conceded that the results of the site visits were not passed on to the evaluation committee for consideration as part of the evaluation of the mandatory requirement on evidence of successfully completed works and that the omission was an oversight. It also conceded that the mandatory requirement that a tender must be within plus or minus 10% range of official priced tender document was not in the tender documents but was introduced during the evaluation process.

The PE stated that the Applicant did not suffer any loss and that the PE saved in excess of Kshs. 1 million in awarding the Tender to M/s. Shake Distributors. It argued that the request for review was not merited and requested the Board to dismiss it with costs to the Applicant.

In reply the Applicant stated under Regulation 52 on qualification the issue is founded on Section 31(1) of the Act which outlines the qualifications required for one to be awarded the tender. The Applicant had the qualifications, capability, experience, resources and equipment to provide what is to be procured.

The Board having carefully considered the submissions of the parties and examined all the documents that were submitted notes as follows:

The Board has identified issues for determination to be as follows:



- (i) Whether or not the Board has jurisdiction to hear and determine the Request for Review.
- (ii) Whether the Procuring Entity carried out the preliminary evaluation of the tender in compliance with Section 64(1) of the Act, Regulation 48(1) and Clause 5.6 of the ITT.
- (iii) Whether the technical evaluation was conducted in compliance with Section 66(2) of the Act, Regulations 16(5)(a) and 49(2) and Clauses 1.5(d), (e) and (i) and 5.6 of the ITT.
- (iv) Whether the award of the Tender was in compliance with Regulation 11.
- (v) Whether as a result the Applicant suffered loss.

#### PRELIMINARY OBJECTION

In determining this request for review the Board first considered the issue of jurisdiction raised by the Procuring Entity. The PE in ground two of its memorandum of response and oral presentations submitted that the request for review was served on the Respondent on 27<sup>th</sup> March, 2014 after the Respondent had signed the contract with the successful tenderer. It argued that the contract having been signed the Board did not have jurisdiction to entertain the request for review, under section 93(2)(c) of the Act.

The Applicant submitted that section 93 (2) (c) of the Act states that a contract signed in accordance to section 68 of the Act shall not be subject to review. Further section 68(2) of the Act provides that a written contract shall be entered into within the period in the notification under

Sec 67(1) but not until 14 days have elapsed given that notification. The Applicant argued that it was notified on the 19<sup>th</sup> of March, 2014 and the earliest the contract could be signed was on 3<sup>rd</sup> April 2014. It argued further that the action of the PE to sign a contract on 27<sup>th</sup> March 2014 before expiration of the 14 days was illegal and the contract signed by Shake Distributors should be declared as null.

The Board having considered the submissions of the parties and examined the documents that were submitted finds that the contract was signed between the successful bidder and the PE before the end of 14 days after notification as provided for by section 67(1) of the Act. The Board holds that the contract was not signed in accordance with Section 68 of the Act and consequently Section 93(2)(c) cannot come into play.

The Board therefore holds that the Preliminary Objection fails and that it has jurisdiction and will proceed to determine the Request for Review on merit.

The Board notes the following substantive issues: -

- a). The Procuring Entity advertised Tender for proposed sewerage drainage and rehabilitation works (Tender No. CIT/T/01/2/2013-2014) in the *Daily Nation* and *The Standard* of 18<sup>th</sup> and 19<sup>th</sup> February 2014, respectively, closing on 4<sup>th</sup> March, 2014 at 10.00 am and thereafter opened at the PE's boardroom.
- b). A total of 21 bid documents were purchased by prospective bidders and fourteen were returned. At the opening of the bids the names of

the bidder, amount quoted and Tender surety were read out loud and recorded in an opening register.

- c). The Tender was evaluated on 6<sup>th</sup> March, 2014 in two stages, namely mandatory and technical/financial evaluations.
- d). Fourteen Tenders were subjected to Preliminary mandatory evaluation and one bidder was found to be responsive.
- e). The Procuring Entity decided to conduct a second Preliminary mandatory evaluation in which the following requirements were considered as minor deviations: -
  - (i) Litigation history of the company if any (including court and arbitration cases).
  - (ii) Evidence of adequate equipment
  - (iii) Evidence of qualified personnel for the specified types of works.
- f). Consequently five bidders were found to be responsive after the second mandatory evaluation.
- g). The preliminary evaluation criteria used was not clearly set out in the ITT but was found in the Tender Notice.
- h). The five responsive Tenders were then compared against the bid estimate (all had variance of 10% and below )
- i). The rates of the 10 major items were compared to the official estimates.
- j). The bidders were then ranked according to their responsiveness to the Tender.
- k). Messrs Mwangho Contractors emerged as the lowest evaluated bidder.

- l). The Evaluation Committee recommended award of the tender to the lowest evaluated bidder Messrs Mwachho Contractors at a sum of Kshs 25,030,933.56.
- m). The Tender Committee formed a Tender sub-committee to conduct site visits to inspect previous works of the five responsive bidders.
- n). The Tender Committee changed the recommendation of award of the Evaluation Committee and awarded, on the strength of the recommendations of the Tender sub-committee, to Messrs Shake Distributors Limited at a sum of Kshs 23,996,502.40.

As to whether the Procuring Entity carried out the mandatory preliminary evaluation of the tender in compliance with Section 64(1) of the Act, Regulation 48(1) and Clause 5.6 of the ITT:

The Board observes that some of the mandatory evaluation criteria used were indicated in the Tender Notice and are listed as follows: -

1. Proof as a registered contractor with the National Construction Authority;
2. Tender security bond of Ksh.300,000/- from a reputable bank or approved insurance company;
3. Valid Tax Compliance Certificate, VAT and PIN Certificates;
4. Evidence of 3 similar works successfully completed;
5. Certified audited accounts for the last 3 years;
6. Litigation history of the company if any;
7. Proof of legal existence; and
8. Evidence of adequate equipment and qualified personnel.

The requirement that the form of Tender should be filled and dully signed was included in Clause 1.3 of the ITT.

The Board notes that the requirement that bidders be within plus or minus 10% range of official priced tender document is not mentioned anywhere in the Tender document. This can therefore be viewed as an introduction of new.

The Board, in **Hatari Security Guards Ltd. Vs Kenya National Examination Council (KNEC) (PPARB Application of Review No. 53 of 2012.)** the Board noted that *“since the Tender Documents contained a table of mandatory requirements that the bidders were to provide, the evaluation ought to have been restricted to those criteria only. This means that upon conclusion of the technical evaluation the bidders who had complied ought to have proceeded to financial evaluation wherein the financial proposal with the lowest price ought to have been considered as the lowest evaluated bid .The Board notes that only two bidders had provided the mandatory requirements.”*

The Board makes a similar finding in this matter. The mandatory requirement that bidders be within plus or minus 10% range of official priced tender document, amounts to introduction of new evaluation criteria not found in the tender documents and this runs counter to the provisions of Section 66(2) of the Act which provides;

***“66(2) The evaluation and comparison shall be done using the procedures and criteria set out in the Tender documents and no other criteria shall be used.”***

The Evaluation Committee ought to have rejected all the tenders that were not responsive. Accordingly this ground of the Request for Review succeeds.

The Board also notes that two preliminary evaluations were conducted. The Procuring Entity justified the second evaluation under Section 64(2)(a) of the Act and Regulation 48(2) which provide as follows:

***“64(2) The following do not affect whether a Tender is responsive-***

***(a) minor deviations that do not materially depart from the requirements set out in the Tender documents; or***

***(b) .....*”**

Regulation 48:- *Non-responsive Tenders to be rejected.*

***“48(1) A procuring Entity shall reject all Tenders, which are not responsive in accordance with Section 64 of the Act.***

***48(2) the classification of a deviation from the requirements as minor under Section 64(2) (a) of the Act shall be applied uniformly and consistently to all the Tenders received by the procuring Entity.”***

Section 64 of the Act also states as follows:

***“64(1)A Tender is responsive if it conforms to all the mandatory requirements in the Tender documents.”***

Litigation history of the company; evidence of adequate equipment; and evidence of qualified personnel for the specified types of works, having been listed from the outset as mandatory requirements, are central to the performance of the contract. They cannot therefore be considered as minor deviations.

The Board finds that the evaluation committee erred in deviating from its own set criteria for evaluation in the ITT by down-grading mandatory requirements key to the performance of the contract to minor deviations. The second preliminary evaluation was unnecessary and the evaluation committee ought to have used the results of the first evaluation for further evaluation. Accordingly this ground of the Request for Review also succeeds.

The Board also notes that the Procuring Entity's Tender Committee changed the recommendation of the Evaluation Committee on award of tender. Regulation 11(1) that states:

Regulation 11:- *Approval by Tender Committees.*

***"11(1) In considering submissions made by the procurement unit or Evaluation Committees, the Tender Committee may-***  
***(a) approve a submission ;or***  
***(b) reject a submission with reasons; or***  
***(c) approve a submission, subject to minor clarifications by***  
***the procurement unit or Evaluation Committee."***

Regulation 11(2) states:

***"11(2) The Tender Committee shall not-***

- (a) modify any submission with respect to the recommendations for contract award or in any other respect;*
- (b) reject any submission without justifiable and objective reasons;*
- (c) where the Tender Committee rejects the recommendation of the Evaluation Committee, the decision shall be reported to the head of the procuring Entity or to the accounting officer"*

The Tender Committee upon rejecting the recommendation of the Evaluation Committee did not report to the head of the procuring Entity or to the accounting officer as required under Regulation 11(2) (c).

The Board finds that the PE's Tender Committee erred in rejecting the recommendation of the Tender Evaluation Committee and failing to report the decision to the head of the PE or to the accounting officer. Further, the Tender Committee erred in modifying the recommendation of the Evaluation Committee. The award of the tender to Shake Distributors Ltd was not in accordance with Regulation 11.

Accordingly this ground of the Request for Review also succeeds.

The Board observes that in justifying its action to carry out due diligence and modify the recommendation of the Evaluation Committee the Tender Committee relied on Regulation 52, which states:

Regulation 52:- *Confirmation of Qualifications.*



*"52(1) Where so indicated in the Tender documents, a procuring Entity may, prior to the award of the Tender, confirm the qualifications of the Tenderer who submitted the lowest evaluated responsive Tender, in order to determine whether the Tenderer is qualified to be awarded the contract in accordance with Section 31(1) of the Act.*

*52(2) Where so indicated in the Tender documents, if the lowest evaluated Tenderer is determined under paragraph (1) not to be qualified in accordance with the Act, the Tender shall be rejected and a similar confirmation of qualifications conducted on the Tenderer who submitted the next lowest evaluated responsive bid."*

The Board notes that the PE did not include the requirement of confirmation of qualifications in the Tender documents as required under Regulation 52(1). It cannot therefore resort to Regulation 52(1) for to do so would run counter to Section 66(2) of the Act that requires comparisons to be done using the procedures and criteria set out in the Tender documents only.

In any event, were Regulation 52 to apply, confirmation of qualifications would have to be conducted on the Tenderer who submitted the lowest evaluated tender and if found not to qualify, the tender would be rejected and confirmation of qualifications conducted on the next lowest evaluated responsive bidder. The PE subjected all the responsive bidders to confirmation of qualifications against the requirements of Regulation 52.

The Board finds that the confirmation of qualifications exercise (site visits) was against the provisions of the Act and the Regulations.

As to whether the Applicant is bound to suffer severe loss and damage as a result of the Procuring Entity's actions:

The Applicant did not demonstrate the loss and damage it was bound to suffer from the actions of the Procuring Entity. The Board finds that the Applicant took a commercial risk to participate in the tender and there was no guarantee that its tender would be successful. All who participate in tenders do so at their own risk and cost. The PE cannot be held accountable if the tenders become unsuccessful. Ground four of the request for review therefore fails.

As to whether the public in general and the Procuring Entity in particular stand to suffer severe loss and damage as a result of the Procuring Entity's actions:

The Applicant did not demonstrate the loss and damage the public and the PE was bound to suffer from the actions of the Procuring Entity. It failed to demonstrate that it possesses specialist skill that cannot be obtained elsewhere from another contractor. Construction of sewerages and drainage is commonplace and mundane and there cannot be shortage of contractors with experience and resources to undertake the task. Ground five of the request for review therefore fails.

The Board under powers conferred on it by section 98 of the Act directs as follows:

1. The award of the tender to the successful bidder, Messrs Shakes Distributors Limited is also hereby annulled.
2. The contract signed between the Procuring Entity and the successful bidder is hereby annulled.
3. In exercise of the powers conferred upon the Board by the provisions of Section 98 (c) of the Act the Board substitutes the decision of the Procuring Entity and direct that the tender under contention be and is hereby awarded to the Applicant as recommended by the tender Evaluation Committee.
4. The Procuring Entity shall make necessary arrangements to extend the validity of the tender and the Applicants bid bond to allow the Procuring Entity and the Applicant to enter into a contract.
5. The Board makes no order as to costs against any of the parties.

Dated this 22<sup>nd</sup> day of April, 2014.

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**Chairman  
PPARB**

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**Secretary,  
PPARB**

