

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD

APPLICATION NO. 40/2015 OF 10TH AUGUST, 2015

BETWEEN

PROTECHT LIMITED(Applicant)

AND

**NATIONAL CONSTRUCTION
AUTHORITY (Procuring Entity)**

Review against the decision of the National Construction Authority in the matter of Tender No. NCA/RT/21/2014-2015 for Provision of Consultancy Services for the Establishment of an Automated Institutional Risks Management and Policy Framework.

BOARD MEMBERS PRESENT

- | | |
|--------------------------|------------|
| 1. Paul Gicheru | - Chairman |
| 2. Nelson Orgut | - Member |
| 3. Peter B. Ondieki, MBS | - Member |

IN ATTENDANCE

1. Mr. Stanley Miheso - Secretariat
 2. Ms. Maureen Namadi - Secretariat
-

PRESENT BY INVITATION

Applicant - Protecht Limited

1. G. M. Nyaanga - Advocate
2. Gilbert Mwalili - Managing Director
3. Henry Mien - Director

Procuring Entity - NATIONAL CONSTRUCTION AUTHORITY

1. Samson Lukoba - NCA Head of logistics
2. Vincensia Apopa - Manager, Supply Chain
3. Kipkoech Kirui - Snr. Supply Chain Officer
4. John Kipkorir - Supply Chain Officer

BACKGROUND OF AWARD

The purpose of the consultancy is to enable the National Construction Authority to focus in a comprehensive and holistic basis on all the risks which could impact on achievement of strategic objectives as well as service delivery targets. The performance contracting and results based management already in place demands a framework that provides a basis for management to effectively deal with uncertainties and associated risks.

The overall objective of the consultancy is to Develop Risk management policy framework and NCA Risk Appetite, Conduct GAP analysis on Risk management practices, train the Board, Senior Management, risk champions and other line staff on risk management.

Advertisement

The National Construction Authority invited Expressions of Interest for provision of Consultancy Services for the Establishment of an Automated Institutional Risks Management and Policy Framework through open tender advertised in the *Daily Nation* and *Standard* newspapers of 22nd April, 2015.

Evaluation was carried out and three firms were prequalified to tender for the Consultancy Services.

What followed was a restricted tender for provision of Consultancy Services for the Establishment of an Automated Institutional Risks Management and Policy Framework.

The Authority invited three firms that had been approved by the Tender Committee during its 24th meeting held on 14th May, 2015.

Tenders were sent out on 26thMay, 2015 to the following three approved consultants:

1. M/s Aziz Limited.
 2. M/s Protecht Limited (Africa)
 3. M/s KPMG Kenya
-

Closing/Opening:

The tenders were received and opened on 5thJune, 2015 at 11.00 a.m. in the Authority's Board Room in the presence of tenderers who chose to attend.

EVALUATION

The evaluation exercise was conducted in two stages, namely:

1. Preliminary stage (Mandatory)
2. Technical stage - To check compliance with technical specifications.

Bidders had to meet all the minimum requirements before proceeding to the next stage of Technical Evaluation.

Bidders who failed any of the mandatory requirements were disqualified from further evaluation.

PRELIMINARY REQUIREMENTS (MANDATORY)

| No. | Documents to be submitted | Bidder No.1 M/s Azizi Ltd | Bidder No.2 M/s KPMG Kenya | Bidder No.3 M/s Protecht Limited |
|-----|--|---------------------------------|----------------------------------|--|
| 1. | Copy of Certificate of Incorporation | YES | YES | YES |
| 2. | Copy of the Valid Current Tax Compliance | YES | YES | YES |
| 3. | Duly filled Confidential Business Questionnaire | NO | NO | YES |
| 4. | Dully filled Technical Proposal Submission form. | NO | YES | YES |
| | RESPONSIVENESS | NO | NO | YES |

MANDATORY SOFTWARE REQUIREMENTS

| No. | Requirements | M/s Azizi Ltd | M/s KPMG Kenya | M/s Protecht Ltd |
|-----|---|------------------|----------------------|------------------------|
| 1. | Vendor owned or at least provide details of agreement with vendor to ensure continuous support | NO | NO | YES |
| 2. | Minimum modules being Risk assessment, Key Risk indicators, Incident management, Compliance and Audit | NO | NO | YES |
| 3. | Locally installed and site visits available | YES | NO | YES |
| 4. | Must have automated workflow rules | YES | YES | YES |
| 5. | Must have advanced analytics and dashboards | YES | YES | YES |
| 6. | Be capable of integration with NCA systems | YES | NO | YES |
| 7. | Be able to support various applications such as | YES | NO | YES |

| No. | Requirements | M/s Azizi Ltd | M/s KPMG Kenya | M/s Protecht Ltd |
|-----|---|------------------|----------------------|------------------------|
| | Business Continuity Management, Performance Management among others | | | |
| | RESPONSIVENESS | NO | NO | YES |

From the above analysis the following was observed:

- a) Bidder No. 1, M/s Azizi Limited did not sign and stamp the confidential business questionnaire and did not submit a duly filled Technical Proposal Submission form. In software requirement the bidder did not provide proof of whether the software is Vendor-owned or at least provide details of agreement with vendor as assurance for continuous support and also did not give specifications on minimum modules being Risk assessment, Key Risk indicators, Incident management, Compliance.

For failing these mandatory requirements the bidder was disqualified from further Evaluation

- b) Bidder No.2, M/s KPMG did not sign and stamp the confidential business questionnaire as required, on mandatory software requirements the bidder did not provide evidence of ownership or an agreement with vendor to ensure continuous support. Additionally, the bidder did not provide local sites where a similar ERM software has been installed and did not indicate its ability to integrate with NCA's systems and support

various applications such as Business Continuity Management, Performance Management among others.

For failing these mandatory requirements the bidder was disqualified from further Evaluation.

c) Bidder No. 3, M/s Protecht Limited met all the mandatory and software requirements and thus qualified for Technical Evaluation.

TECHNICAL EVALUATION

| No. | Requirements (Submit evidence) | Maximum Score (%) | M/s Protecht Limited |
|-----|---|-----------------------|-----------------------|
| 1. | Specific experience of the Consulting firm relevant to the assignment a) Similar experience from five (5) Public sector Institutions (Attach LSO/Contract/Completion certificate and reference letters from each institution) | 10 | 8 |
| 2. | Adequacy of the proposed methodology and work plan in responding to the terms of reference a) Technical approach and methodology b) Work plan | 20 5 | 15 5 |
| 3. | Key professional staff qualification and competence for the assignment i) Consultant a) Have at least 10 years' experience in Institutional Risk Management (IRM), (Attach CV in format provided) b) Have three (3) IRM experience in Public Sector, (Attach recommendation letter for the specific assignments undertaken as a lead consultant) c) Demonstrate working knowledge of ISO 31000 Risk Management systems in a public institution (Attach LSO/Contract/Completion certificate) e) Provide for the Training (Attach training programme) | 6 6 3 3 5 | 6 6 3 2 3 |
| 4. | Education Qualification (Attach certificates) Lead Consultant -PhD in Finance / Accounting related field -Masters in Finance/ Accounting or related field | 10 8 | 6 |

| No. | Requirements (Submit evidence) | Maximum Score (%) | M/s Protecht Limited |
|-----|---|-------------------|----------------------|
| | -Bachelor's Degree in Finance/ Accounting or related field | 6 | |
| 5. | Two Other Staff -Bachelor's Degree in Finance / Accounting or related field (3 marks each) | 6 | 6 |
| | -Diploma in related field (2 marks each) | 4 | |
| | -Certificate in the a related field(1 mark each) | 2 | |
| 6. | Experience of Two (2) other staff (Attach CVs in format provided)Demonstrate relevant experience in IRM - Experience of 3 years (3mks each) -Experience of 2 years (2 mks each) -Experience of 1 year9 (1 mk each) | 6 4 2 | 6 |
| | TOTAL MARKS | 100 | 82.5% |

To qualify for financial evaluation bidders had to score a minimum of 70 points (70%)

Observation

From the above technical analysis Bidder 3, M/s Protecht Limited scored 82.5 points and therefore qualified for financial evaluation:

COMMITTEE RECOMMENDATIONS

Based on the above analysis the Tender Processing Committee therefore recommended the opening of the financial bid for **M/s Protecht Limited** for scoring 82.5% in Technical Evaluation.

FINANCIAL OPENING

Financial bids were opened on 2nd July, 2015 at NCA board room and was witnessed by a representative of M/s Protecht Limited (Africa).

The results were as follows:

| No | Bidder's No. | Bidder's Name | Technical Score | Tender sum (Kshs) |
|----|--------------|-------------------------------|-----------------|-------------------|
| a) | No. 3 | M/s Protecht Limited (Africa) | 82.5% | 20,558,100.00 |

Financial Analysis

Bidder No. 3 - M/s Protecht Limited (Africa)

The bidder indicated a sum of Kshs. 20,558,100 in the form of tender as the sum for the consultancy.

The bidder then gave a breakdown of costs for each activity as follows;

| No | Activity | Amount |
|----|--|---------------------|
| | Phase I | |
| 1 | Initial meeting with NCA Management | 190,000.00 |
| 2 | Understanding the Organization - Mandate and commitment | 780,000.00 |
| 3 | Define, design and build customized training solutions | 870,000.00 |
| 4 | Risk Management Training | 2,310,000.00 |
| | Sub - total | 4,150,000.00 |
| | 16% VAT | 664,000.00 |
| | Total | 4,814,000.00 |
| | Phase II | |
| 1 | Develop Risk Management Strategy | 240,000.00 |
| 2 | Review current ERM policy & framework and review/develop appropriate risk management sub- policies | 285,000.00 |
| 3 | Workshop for strategic Risk Assessment and NCA- wide risk appetite statement | 755,000.00 |
| 4 | Facilitate Risk and Control Self-Assessment (RCSA)and key risk indicators workshops | 2,200,000.00 |

| No | Activity | Amount |
|----|--|----------------------|
| 5 | Develop an enterprise-wide compliance framework | 475,000.00 |
| 6 | Develop an Enterprise-wide Incident management framework | 450,000.00 |
| 7 | Develop centralized Action Tracking system | 160,000.00 |
| 8 | Develop centralized ERM reporting framework | 465,000.00 |
| 9 | Upload of data on ERM software | 1,580,000.00 |
| 10 | Training on ERM software | 1,350,000.00 |
| | Sub total | 7,960,000.00 |
| | 16% VAT | 1,273,600.00 |
| | Total | 9,233,600.00 |
| | Phase III | |
| 1 | ERM Automation support and advisory- implementation and training on Protecht - ERM | 1,450,000.00 |
| | 16% VAT | 232,000.00 |
| | Total | 1,682,000.00 |
| | Grand Sub-Total | 15,729,600.00 |
| 1 | Annual License Fees | 4,828,500.00 |
| | Grand Total in the Form of Tender | 20,558,100.00 |

Calculations for Annual License fees

| No | License for 35 users and 50 lite users | | |
|----|--|-------------------------------|---------------------|
| 1 | Upper User limit 25 | | 2,700,000.00 |
| 2 | Ten Users | $2,700,000.00 / 25 \times 10$ | 1,080,000.00 |
| 3 | Lite users license fee per annum | | 382,500.00 |
| | Sub total | | 4,162,500.00 |
| | 16% Vat | | 666,000.00 |
| | Total Annual fee | | 4,828,500.00 |

Assumptions in the calculations.

- a) The bidder will charge Annual License fee for only one year.

Observations

- As tabulated above, at the end of the first year NCA would have paid the bidder a sum of Kshs. 14,047,600.00 which is 68.3% of the tender sum.
- The bidder indicated under software license fees that the first 3-6 months after signing the contract was setting up and training and thus requires a minimum of 35 users which is expected to reach a maximum of 50 users at the end of the first year.
- The statement indicates that the Authority would pay licenses fee from the first year.
- The bidder stated that, **“the client may drop the service at any time should they feel that there is no value for money”**. Members felt that the statement was unwarranted as the bidder should be giving an assurance that the system would be a success.
- The bidder indicated Reimbursable costs which included Air travel, Accommodation, and Per Diem allowance of Shs. 6,000/- per day per staff without specifying whether the cost would be paid as additional cost or included in the tender sum.
- In the TORs the following software requirements were not expressly provided for in the bidder’s costing.
 - Local Installation, customization/ development and final go live.

- Provision for integrating with NCA systems.
- Provision for base softwares such as operating systems, middleware etc.

Following the above issues the committee sought for clarification from the bidder on 6th July 2015 and the bidder responded on 9th July 2015.

Observations on the Clarification

Point 2 - Indicates that the integration cost is not included in the tender sum hence the Authority would have to pay for integration of the system with its existing systems.

Point 4 - For travel out of Nairobi, NCA would cover the cost of the consultant's travel, accommodation and meals as they are not included in the tender sum.

Point 5 - From the third year NCA would have to pay a minimum of Kshs. 4,828,500.00 annual license fee to the bidder or purchase the software upfront at a price yet to be negotiated with the bidder.

General Observations

- a) The TORs given out were not clear on how payments would be made and the deliverables in each milestone. This left the bidder to suggest how costing/ payment would be carried out at the end of each milestone.
- b) A payment sum equivalent to 68.3% of the tender sum at the end of the first year before implementing the automation is a bit on the

higher side considering that most activities are basically setting up and training.

- c) The statement given by the bidder that the client may drop the service at any time should they feel that there is no value for money does not give assurance of good intention.
- d) The Indication that the integration cost was not included in the tender sum means that the Authority would have to pay extra cost to integrate the system with NCA existing systems.
- e) The TORs had a provision for training of the Board, senior management & other staff. The bidder was supposed to provide for all the consultant's reimbursables i.e. travel, accommodation and meals in the tender sum.
- f) The payment of a minimum of Kshs. 4,828,500.00 annual license fee from the third year or an option of purchasing the software at a price yet to be negotiated with the bidder imposes other unforeseen costs on the Authority.

RECOMMENDATION

Following the above analysis the Committee therefore recommended a retender as NCA would not get value for money from the procurement.

THE TENDER COMMITTEE DECISION

The Procuring Entity's Tender Committee met on 22nd July, 2015 and approved the recommendation for retender for Provision of Consultancy

Services for the Establishment of an Automated Institutional Risk Management & Policy Framework, Tender No. NCA/RT/21/2014-2015.

THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s Protecht Limited, the above named Applicant of P. O. Box 14135-00800, Nairobi, on 10th August, 2015 in the matter of Provision of Consultancy Services for the Establishment of an Automated Institutional Risk Management & Policy Framework, Tender No. NCA/RT/21/2014-2015.

The Applicant sought for the following orders:

- 1) The Respondent be made to reverse its decision that deemed the tender unsuccessful on two grounds**
- 2) The Respondent be ordered to award the Tender to the Applicant immediately.**
- 3) The Respondent meets the costs of the request of review.**

During the hearing of the Request for Review the Applicant was represented by Mr George Nyaanga, Advocate, while the Procuring Entity was represented by Mr. Samson Lukoba, NCA Head of Logistics.

THE APPLICANT'S CASE

When this Request for Review came up for hearing before the Board, Mr. Nyaanga who appeared before the Board on behalf of the Applicant consolidated the Applicant's case into three grounds, namely:-

- (i) That the Procuring Entity took into account matters which were not contained in the Request for Proposals contrary to the**

Provisions of Section 82 of the Public Procurement and Disposal Act 2005.

- (ii) That the manner used by the Procuring Entity in carrying out evaluation violated the Provisions of the tender document and the Act.**
- (iii) That the Proposal submitted by the Applicant met all the requirements and the Applicant ought to have been declared as the successful bidder.**

Counsel for the Applicant submitted that the tender in question was advertised as a Request for Proposals and was therefore governed by the Provisions of Sections 76 to 87 of the Public Procurement and Disposal Act. He stated that upon the submission of the tender, the tender underwent Technical Evaluation to completion and that in accordance with the Provisions of Clause 5.3 of the tender document in order for any bidder to have proceeded to the next stage of evaluation, namely the financial evaluation, the bidder had to attain a minimum score of 70% which the Applicant did leading to the Applicant being invited for the opening of its financial proposal.

It was the Applicant's case before the Board that it was upon the opening of the Applicant's financial proposal that issues started arising. The Applicant submitted that the Procuring Entity started seeking for clarifications on various items which were set out in the letter annexed and marked as Exhibit "No. 3" to the Request for Review to enable them complete the financial evaluation of the Applicant's proposal.

The Applicant stated at the hearing on the basis of the letter dated 9th July, 2015 and which was produced by the Applicant as Exhibit "No. 4" that the Applicant answered the questions that had been raised by the Procuring Entity but stated that even though the Applicant responded to the said issues, the Procuring Entity could not rely on the Provisions of Section 62 of the Act to seek for clarifications since the method used in this Procurement was that of restricted tendering.

Counsel for the Applicant further submitted that in a Request for Proposals, the Procuring Entity could not reject a bid at the financial evaluation stage and the least that the Procuring Entity could do was to award the Applicant a lower mark if it infact felt that the Applicant had failed to comply with any of the financial requirements. While referring to Clause 5.8 appearing at page 14 of the tender document, Counsel for the Applicant stated that all that the evaluation committee was entitled to determine in as far as the financial proposals were concerned was whether the financial proposal was complete, whether the consultant had costed all the items of the corresponding technical proposal and correct any computational error. He further submitted that under Clause 5.8 of the tender document, the cost of any unpriced items was automatically deemed to be included in other costs in the proposal and in all cases the total price of the financial Proposal submitted shall prevail.

Turning to the letter of notification dated 27th July, 2015 sent out to the Applicant informing it that it's bid was unsuccessful and which the Applicant produced as exhibit "No. 1", the Applicant stated that it's tender had been declared unsuccessful because of two reasons, namely:-

- i) That the Applicant did not include the costs of intergrating the proposed system with the existing system in it's tender sum.
- ii) That the Applicant did not include the cost of training board members Senior Management and other staff as indicated in the reference.

Counsel for the Applicant however submitted that under the Provisions of the tender document used in this particular tender, the costing of an item was not a mandatory requirement. This notwithstanding, Counsel for the Applicant referred the Board to annex (5) of the Request for Review and stated that under this item, the Applicant had provided for a sum of Kshs. 2,310,000 for risk management training and that the second reason in the letter dated 27th July, 2015 was not therefore accurate. While referring the Board to the Provisions of Sections 84 and 85 (2) of the Act, counsel for the Applicant stated that the Procuring Entity ought not to have rejected the Applicant's tender because under the said Provisions of the Act, the Procuring Entity was at liberty to negotiate the issue of price with the Applicant if it found any defect in the Financial Proposal and this negotiation would resolve an outstanding issues, if any.

Counsel for the Applicant referred the Board to the Provisions of Clause 5.10 appearing at page 21 of the tender document and stated that there was a weight assigned to both the technical and the financial evaluation and the Procuring Entity was therefore obliged to aggregate and come up with the combined score but not to direct for a re-tender.

Still on the second reason for the Applicant being declared unsuccessful, namely that the Applicant did not include the cost of training board

Members, Senior Management and other Staff as allegedly indicated in the terms of reference, Counsel for the Applicant referred the Board to page 42 of the tender document and stated that the tender document did not provide for the inclusion of the costs for intergrating the system as part of the tender sum but the requirement was that the equipment or the software brought should be able to integrate and that by requiring an indication of the cost of intergrating the proposed system with the existing system in the tender document was not part of the evaluation criteria and introducing it would not only offend the Provisions of Section 2 but also Section 82 of the Act.

Counsel for the Applicant therefore urged the Board to exercise the powers conferred upon it under Section 98 of the Act and award the Applicant the tender since the Applicant was the only bidder which made it to the financial evaluation stage.

THE PROCURING ENTITY'S RESPONSE

Mr. Lukoba in response to the submission made by Counsel for the Applicant took the Board through the reasons why the Applicant's bid was declared unsuccessful and stated that the integration of the system was part and parcel of this tender and that the Applicant had to demonstrate that the system that was provided would integrate with the Procuring Entity's system. He stated that the sum which the Applicant had provided for softwares was the sum of Kshs. 20 Million while the tenderer was expected to ensure that it provides for training, intergration and further that the Procuring entity would obtain value for money.

While referring to page 75 of the Procuring Entity's response, Mr. Lukoba for the Procuring Entity stated that the Applicant ought to have outlined the full financial Proposal as outlined in the Request for Proposal and provide for all expenses including remuneration for staff and reimburse expenses such as conference facilities, subsistence, transportation and all the other related expenses.

On the second reason why the Applicant's bid had been declared unsuccessful, the Procuring Entity stated that under the Provisions of Section 2 of the Act, the Procuring Entity was within its right to seek for clarification which it had done vide its letter dated 6th July, 2015. The Procuring Entity stated that it sought for a clarification from the Applicant whether requirements in the cost of intergrating the proposed system with the Procuring Entity's system would be included in the tender sum quoted or would be costed separately, but the response from the Applicant was that the extent of intergration for risk management purposes could only be established during implementation. The Procuring Entity stated that by failing to provide the costing for intergration, the Applicant was not sure of the total cost of intergration and it understood the response from the Applicant to mean that the Applicant was not sure of the total cost of integration and that from this statement it was the Procuring Entity's case that integration would be an extra cost that would be provided for at the point that the Applicant got to that stage of the works.

The Procuring Entity submitted before the Board that it was bound to ensure sound financial stewardship and also ensure that there was value for money for any tenders that it awarded and that it would not

therefore proceed to enter into a contract with a tenderer who is not sure about the cost of integration since that would amount to granting an open cheque to the Applicant to demand further payments at the integration stage that may not be budgeted for by the Procuring Entity and thereby the Procuring Entity would be acting in breach of the law.

The Procuring Entity additionally stated that the tenderer ought to have assured the Procuring Entity of the efficiency of the system they were tendering for but a look at their financial proposal, they went ahead to qualify the financial proposal with a statement that the Procuring Entity could drop the service at any time should they feel that there is no value for money.

On the issue of prejudice, Counsel for the Procuring Entity stated that the Applicant had signed the form of tender which indicated that it was aware and understood that the Procuring Entity was not bound to accept the lowest or any tender that the Procuring Entity may receive and the Applicant did not therefore have any reason to complain. He further stated that the Applicant would not be prejudiced by the Procuring Entity's decision to direct for a re-tender since the Applicant would not be precluded from participating in the fresh process. He therefore urged the Board to find that the Applicant's Request for Review lacked merit and urged the Board to dismiss it with costs.

THE APPLICANT'S RESPONSE TO THE PROCURING ENTITY'S SUBMISSIONS

In a short reply to the submissions made by the Procuring Entity, Counsel for the Applicant stated that the Applicant had not been notified that there would be a re-tender as it was clear from the letter of notification that it had been declared unsuccessful. He further submitted that the Procuring Entity had not utilized the Provisions of Section 36 of the Act which would have allowed it to terminate the procurement process and that the process was still alive and kicking. He reiterated his earlier submissions that under the Provisions of Section 84 of the Act, the law allowed for negotiation which permitted parties to negotiate the issue of price among other things and to enter into a contract accordingly.

He reiterated that the Applicant's tender had been rejected for two reasons and that all the other defences the Procuring Entity was raising in this Request for Review were an afterthought. He stated that the Procuring Entity having chosen the Procurement method, namely the Request for Proposals it had to follow it through and that Section 62 of the Act on the seeking of clarification was not therefore available to the Procuring Entity.

THE BOARD'S DECISION

The Board has considered the documents placed before it and the arguments made in support and or in opposition to this Request for Review. To begin with, the Board finds that the method used in this tender was that of a Request for Proposals and that the Applicant was

one of the several bidders who submitted a Request for Proposal to the Procuring Entity. The Procuring Entity thereafter proceeded to evaluate the submitted tenders with the aim of arriving at the successful proposal. The undated minutes of the tender technical evaluation committee bearing the month of June 2015 and which were provided to the Board by the Procuring Entity show that the Applicant's bid was subjected to technical evaluation and attained a total mark of 82.5% to qualify for financial evaluation since it surpassed the requirement that a bidder had to score a minimum of 70 points (70%) in order for it to proceed to the next evaluation stage.

The technical evaluation report also shows that upon the conclusion of technical evaluation, it is only the Applicant who made it to the financial evaluation stage and was invited to attend the opening session of the financial proposals scheduled for Tuesday 30th June, 2015 at 10.00 a.m. at the National Construction Authority Boardroom located on the 1st Floor, of the Hill Plaza Building.

The Board has noted from the undated minutes of the Financial Evaluation report headed July, 2015 that the Procuring Entity undertook financial evaluation when it wrote a letter dated 6th July, 2015 asking the Applicant to clarify five issues, namely;

- i) That in the Applicant's financials there was apparently no costing for local installation, customization/development and final go live.
- ii) Under the software requirement in the Procuring Entity's TORS there was a Provision of integration with the NCA systems and the Procuring Entity sought to know if this was going to be costed separately.

- iii) The Procuring Entity wished to know if there was a Provision for base software such as operating systems middleware among other things.
- iv) The Applicant was asked whether reimbursable costs were part of the tender sum.
- v) And finally, whether the second year license fee was included in the total quote from the Applicant.

The Applicant responded to all the issues raised by the Procuring Entity in its letter dated 9th July, 2015 which it produced as annexure "004" and went ahead to propose for a meeting between it and the Procuring Entity in order to provide any further clarification if necessary but what followed from the available documentation was the letter dated 27th July, 2015 addressed to the Applicant by the Procuring Entity informing the Applicant that it's tender was unsuccessful because of the two reasons already set out in the parties submissions but which the Board wishes to set out again since they are central to the determination of this Request for Review.

These two reasons were that:-

- i) The Applicant did not include the cost of integrating the proposed system with other existing systems of the Procuring Entity.*
- ii) The Applicant did not include the costs of training Board members, Senior Management and other Staff as indicated in terms of reference.*

It is clear from a plain reading of the two reasons given by the Procuring Entity for declaring the Applicant's bid as unsuccessful as contained in

the letter of notification that the two reasons are both related to the issue of costs.

The Board has perused the tender document supplied to it by the procuring and particularly has looked at page 42, Section E, terms of reference, scope of works and expected outputs, the software requirement inter-alia provides as follows:-

“The following are key features of the proposed software;

- a)
- b)
- c)
- d)
- e)
- f) **Be capable of intergration with the NCA systems.**

The Board has in its review of the tender document not come across a criteria that required bidders to quote the price for the integration. If the Procuring Entity desired that this be an evaluation criteria then it ought to have specifically made it part of the tender document.

The Board has severally held that a Procuring Entity can only evaluate a tender in accordance with the criteria set out in the tender document and no other criteria shall be applicable. This requirement cuts through an open tender or a tender undertaken pursuant to the Request for Proposals method of procurement under the Provisions of Sections 66(2) or 82 of the Act respectively.

One of such cases is the case of Societe Gerale De Surveillance S. A (SGS) =vs= The Kenya Bureau of Standards (2008 - 2010) PPRB report at page 716 where the Board held that a Procuring Entity can only award a tender based on an evaluation carried out in accordance with the criteria set out in the tender document.

The Board observed as follows in the said decision:-

"The Board notes that this conversion was contrary to the requirements of Section 66(2) of the Act which requires that the evaluation and comparison of the tenders shall be done using the procedures and the criteria set out in the tender documents and no other criteria shall be used. The Board finds that there was no criteria for conversion provided for in the tender documents and the assumptions made by the Procuring Entity in the conversion were arbitrary and were not based on any requirement in the tender document".

Before proceeding to the next reason for the Applicant being declared unsuccessful, the Board notes from the minutes of the tender technical evaluation report that the Applicant was declared responsive in all the mandatory requirements and particularly the mandatory requirement number 6. Item number 6 required a bidder to provide evidence that the bidder was capable of providing a system that is capable of intergration with the NCA systems and for this item, the tender evaluation committee's answer at page 3 of the Technical evaluation report was "yes".

Infact under Clause 6(c) of the report the tender evaluation committee stated as follows:-

(6) (c) Bidder no. 3 M/s Protecht Limited met all the mandatory and software requirements and this qualified it for Technical Evaluation”.

Having therefore found as it did, the Procuring Entity could not now turn back and claim that the Applicant had not assured it of the efficiency of the system or that the proposed system was not capable of integration with the NCA systems. This submissions on the part of Counsel for procuring entity therefore clearly contradicted what was contained in the technical evaluation report.

On the allegation that the Applicant did not indicate the cost of training of the Board members, Senior Management and other staff, the Board has perused the Applicant’s financial proposal and finds that the Applicant quoted the **Risk Management Training under Activity No. 5** and gave a figure of Kshs. 2,310,000 at page 4 of 20 of its financial proposal and **Activity No. 7 Training in ERM software** at Kenya Shillings 1,350,000 which also appears in the tender document.

At pages 13 and 18 to 20 of the Financial Proposal of the Applicant, the Applicant provided a breakdown of its Activity under Item No. 5 Risk Management Training and Activity and Item No. 17 Training on ERM Software, although only indicating the remuneration to its staff members. The Board finds that in Applicant’s Technical Proposal, it

indicated the breakdown of the types of training to be conducted on the different categories of staff as required in the Request for Proposals document.

In the Evaluation report submitted to the Board by the Procuring Entity, the Tender Processing Committee observed that *"the TORs had a Provision for training of the Board, Senior Management and other staff and that the bidder was supposed to provide for all the consultant's reimbursables i.e travel, accommodation and meals in the tender sum"*. The Board notes on page 20 of the Applicant's Financial Proposal where the Applicant stated that *"reimbursables will arise where there is travel outside Nairobi for the Consultants"*.

The position adopted by the Procuring Entity was therefore not correct.

The Board further finds that the criteria for the evaluation of the financial bids was clearly set out in the tender document and more particularly clause 5.8 appearing at page 14 of the Request for Proposals states as follows on the issue of costing:-

"5.8: 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".

The said Provision is to the effect that the costs of any unpriced items shall be assumed to be included in other costs in the proposal and that in all cases the total price of the financial proposal as submitted shall prevail.

In view of the above Provision, it was therefore not proper for the Procuring Entity to declare the Applicant's bid as unsuccessful for the reason that it had omitted costing some items while Clause 5.8 deemed omitted or unpriced items part of the costs of the financial proposal.

On the other issues raised by the parties, the Board finds that the Procuring Entity did not exercise the right of termination under Section 36 of the Act and neither were all the tenders submitted to the Procuring Entity declared non-responsive under the Provisions of Section 65 of the Act and the bidders notified accordingly.

The Board has severally held that where a Procuring Entity elects to tender for services and the Procurement process commences, the Procuring Entity should proceed with it to the end unless lawfully terminated. In the case of **Microhouse Technologies Ltd -vs- The National Industrial Training PPARB No. 36 of 2015** the Board stated as follows:-

"The Board wishes to state that procurement is a serious process and that once a Procurement process has commenced, the Procuring Entity is bound by law to evaluate the tenders submitted to it to their logical conclusion unless the process is terminated or all the bids are declared as non-responsive and notifications given in accordance with the

Provisions of Section 65 of the Act. The law does not therefore envisage a situation where a tender is advertised and upon the submission of tenders, a procuring entity unilaterally decides to "cancel" and restart the process endlessly merely because the bidder who won or is likely to emerge the winner is not the bidder that the Procuring Entity desires to award the tender to. The Provisions of the Act and the Regulations do not permit for an endless tender process and where this happens such as it did in the present case, the process cannot be said to be fair, transparent or economical. Such a process does not also inspire public confidence in the Procurement process".

The Board further agrees with the submissions made by the Applicant that the Procuring Entity ought to have completed the procurement process by aggregating the total technical and the financial scores which the Applicant had attained at the end of the exercise. As rightly stated by Counsel for the Applicant, Section 84 (1) of the Public Procurement and Disposal Act 2005 provides for negotiations in a Request for Proposal and the two reasons on the basis of which the Applicant's tender was declared unsuccessful could be addressed at the point of negotiations but these issues had in any event been resolved by Clause 5.8 of the tender document which the Procuring Entity failed to take heed of.

Turning to the Procuring Entity's argument that it was not bound to accept any proposal and reserved the right to annul the selection process at any time prior to contract award without thereby incurring any liability to consultants, the Board respectfully rejects this line of argument and wishes to restate that a termination or a declaration of non-responsiveness of a bidder's tender can only be done in accordance

within the Provisions of Sections 36 or 65 of the Act and that such a right must be based on valid grounds. A procuring Entity is also bound to follow the steps set out in the said Provisions of the Act. The Procuring Entity did not follow any of the procedures set out in the Act to bring to an end the procurement process but instead evaluated the tenders resulting into the issuance of letters of notification to the bidders.

The Board therefore finds on the basis of all the foregoing reasons that the reasons given by the Procuring Entity for declaring the Applicant's tender as being unsuccessful lack basis and the Applicant's Request for Review dated 10th August, 2015 and which was lodged with the Board on the same date therefore succeeds and is allowed.

Before making its final decision in this matter, it was not disputed that the Applicant was the only bidder which proceeded upto the stage of financial evaluation and that its tender price was the sum of Kshs. 20,585,000 which under clause 5.8 of the tender document catered for all the costs including the undisclosed costs; if any.

The Board finds that this is therefore a proper case for the Board to intervene under the Provisions of Sections 98 of the Act by annulling the Procuring Entity's decision and substituting therewith an order awarding the subject tender to the Applicant.

As the Board has stated severally, the Board will not sit back and watch Procuring Entities failing to carry out their mandates or acting capriciously while inviting or evaluating tenders and one of the reasons why the Provisions of Article 227 of the Constitution and Section 2 of the

Act were enacted was to curb such a mischief. These Provisions require Procuring Entities to among other things promote integrity and fairness and to increase transparency and accountability in the tender processes. It is a matter of common knowledge that the process of inviting tenders is an expensive one both to a Procuring Entity and to the bidders who have to expend a lot of time and resources in the preparation of tender documents. The proposition by Counsel for the Procuring Entity that the Applicant will not suffer any prejudice since it will have an opportunity to re-tender for the same services once they are re-advertised is not therefore correct and such a re-tender in the circumstances of this case will put the public to unnecessary expenses.

FINAL ORDERS

In view of the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 98 of the Public Procurement and Disposal Act 2005, the Board makes the following orders on this Request for Review: -

- a) The Applicant's Request for Review dated 10th August, 2015 and which was filed with the Board on the same day is hereby succeeds.
- b) The decision of the Procuring Entity declaring the Applicant's Request for Proposal as unsuccessful and which is contained in the letter dated 27th July, 2015 is hereby annulled.
- c) In the exercise of the powers conferred upon it by the Provisions of Section 98 (c) of the Act, the Board substitutes the decision of

the Procuring Entity dated 27th July, 2015 and hereby awards the Tender No. NCA/RT/2014 - 2015 for the establishment of an automated Institutional Risk Management and Policy Network and Policy Framework to the Applicant.

- d) Pursuant to order No. (c) above, the Board directs the Procuring Entity to issue a letter of award to the Applicant and complete the entire procurement process within Seven (7) days from today's date and notify the Board through its secretary of compliance with the Board's Orders within Seven (7) days from today's date.
- e) In view of the orders made by the Board and in order to maintain a cordial working relationship between the parties, the Board orders that each party shall bear its own costs of the Request for Review.

Dated at Nairobi on this 2nd day of September, 2015.



**CHAIRMAN
PPARB**



**SECRETARY
PPARB**