

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 42/2015 OF 12<sup>TH</sup> AUGUST, 2015**

**BETWEEN**

**JACKWRIGHT (1982) LIMITED ..... APPLICANT**

**AND**

**MINISTRY OF DEFENCE ..... PROCURING ENTITY**

Review against the decision of the Ministry of Defence dated 6<sup>th</sup> August, 2015 in the matter of Tender No. MOD/423 (01022) 2014/2015 for the Supply of Fresh Meat (Beef) on Bone to Nanyuki Based Units.

**BOARD MEMBERS PRESENT**

- |                              |   |          |
|------------------------------|---|----------|
| 1. Mr. Paul Gicheru          | - | Chairman |
| 2. Mr. Peter B. Ondieki, MBS | - | Member   |
| 3. Mr. Paul Ngotho           | - | Member   |
| 4. Mr. Nelson Orgut          | - | Member   |

**IN ATTENDANCE**

- |                       |   |                             |
|-----------------------|---|-----------------------------|
| 1. Mr. Philip Okumu   | - | Holding Brief for Secretary |
| 2. Ms. Shelmith Miano | - | Secretariat                 |

## **PRESENT BY INVITATION**

### **Applicant - Jackwright (1982) Limited**

1. Alex Masika - Advocate
  2. George Drammeh A. - Advocate
  3. Fazal Butt - Director
- 

### **Procuring Entity - Ministry of Defence**

1. Lt. Col. C. Njuguna - Legal Officer
2. Maj. Kibara - Major
3. Mr. Z. G. Ogendi - Ass. Director/SCMS

### **Interested Parties**

1. J. W. Wanjohi - Advocate, Quality Meat Packers
  2. Diamond Vels - Director, Quality Meat Packers
  3. Jadrack K. Mbwika - Accountant, Quality Meat Packers
  4. Abdi Abdullahi - Manager. Habibani Enterprises
  5. K. Oruko - Director, Kernel Africa
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## **BOARD'S DECISION**

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

## BACKGROUND

### Advertisement

The Ministry of Defence (the Procuring Entity) had through Open Tender sought to establish a contract for the supply of fresh meat (beef) on bone to Nanyuki based units under tender number MOD/423(01022) 2014/2015 and advertised for the Tender in the local dailies.

The Tender was closed/opened on 5<sup>th</sup> May, 2015 and six out of nine firms had returned their tender documents.

S/N	FIRM	U/ACC	QUOTED PRICE
1.	M/s Quality Meat Packers	Per Kg	328.00
2.	M/s Jackwright (1982) Ltd		290.00
3.	M/s Habibani Enterprises Ltd		260.00
4.	M/s Mt. Kenya Abattoirs Ltd		298.00
5.	M/s Zosma Trading Company		610.00
6.	M/s Kernel Africa Ltd		680.00
	<b>Previous Contract Price</b>		298.00

## EVALUATION

The Evaluation was first carried out by the DHQ LOGS, who undertook a market survey whose results were as follows:-

S/N	FIRM	U/ACC	QUOTED PRICE
a.	M/s Spring Field Café	Per Kg	420.00
b.	M/s Classic Meat Centre		400.00
c.	M/s Kungumaito Butchery		420.00
Total			1,240.00
Average			413.33

Four firms provided all the documents as specified in the Appendix to Instructions to Tenderers in the Tender Document, i.e.

- a. Bid Bond
- b. Valid County Business Permits
- c. Certificate of Incorporation/Registration
- d. Valid Public Health Certificate
- e. Valid Tax Compliance Certificate
- f. Current CR 12/13

M/s Zosma Trading Company did not provide a copy of Current CR12/13 from the Registrar of Companies. M/s Kernel Africa Ltd did not provide a

copy of a valid County Business Permit, Public Health Certificate and Current CR12/13 from the Registrar of Companies. Both firms were therefore not to further evaluation.

The Procuring Entity's Evaluation Team visited and evaluated the four remaining firms.

DHQ Logs gave the under listed weighted parameters as the criteria for evaluating the firms and awarded marks as follows:-

- |                                  |                  |
|----------------------------------|------------------|
| <b>a. Line Business/Capacity</b> | <b>35 points</b> |
| 1. Existence of business         | 10 points        |
| 2. Standard of cleanliness       | 5 points         |
| 3. Accessibility                 | 5 points         |
| 4. Experience                    | 10 points        |
| 5. Storage facilities            | 5 points         |
| <br>                             |                  |
| <b>b. Transport hired/self</b>   |                  |
| 1. 1 vehicles                    | 5 points         |
| 2. 2 vehicles                    | 10 points        |
| 3. 3 vehicles                    | 15 points        |

## Evaluation Summary Table

COMPANY	QUALITY MEAT PACKERS LTD	JACKWRIGHT (1982) LTD	HABIBANI ENTERPRISES	MT KENYA ABATTOIRS
Existence of business	10	10	8	6
Standard of cleanliness	5	5	4	4
Accessibility	4	5	4	4
Experience	10	10	5	5
Storage facilities	4	5	3	4
Transport	15	15	5	5
<b>TOTAL POINTS</b>	48	49	29	28
<b>RANKING</b>	2	1	3	4

The Evaluation Committee found all the four firms to be viable but due to the quality and quantity of the products required, the firms were ranked as indicated in the table above.

The Committee recommended that the tender for the supply of fresh meat (beef) on bone to Nanyuki based Units be awarded to M/s Jackwright (1982) Ltd.

a) *THAT the Board annuls in whole the decision of the Tender Committee of the Procuring Entity;*

b) *THAT the Board awards the tender to the Applicant;*

c) *THAT the Procuring Entity be condemned to pay costs of this Request for Review to the Applicant.*

3. The Procuring Entity, on the other hand, asked the Board to dismiss the Request for Review.

4. The Public Procurement Administrative Review Board ("the Board") conducted a hearing of this matter at its premises on the 10<sup>th</sup> Floor of the National bank Building on Harambee Avenue in Nairobi on 20<sup>th</sup> August 2015. The Applicant was represented by Mr. Alex Masika, Advocate while the Procuring Entity was represented by Lt. Col. C. Njuguna, Legal Officer. Quality Meat Packers, the allegedly Successful Bidder, was represented by Mr. J. W. Wanjohi, Advocate.

5. The substantive issues for determination by the Board in this case are:-

i) Whether or not the Procuring Entity was justified in disqualifying the Applicant on the basis of the market survey.

## **THE TENDER COMMITTEE DECISION**

The Ministerial Tender Committee in its meeting No. 01/15/16 held on 17<sup>th</sup> July, 2015 deliberated on the recommendation for award and awarded the tender for the supply of fresh meat (beef) on bone to Nanyuki based Units to M/s Quality Meat Packers Ltd at a cost of Kshs 328.00 per kilogram delivered on an as and when required basis for the period 23<sup>rd</sup> August, 2015 to 22<sup>nd</sup> August, 2016.

The Tender Committee gave the following reasons for the award:-

- (i) That the awarded firm was ranked second by the physical evaluation team;
- (ii) That the awarded firm is the current and reliable supplier who has not requested for price adjustment in the past.

## **THE REQUEST FOR REVIEW**

1. M/s Jackwright (1982) Limited ("The Applicant") received a letter dated 6<sup>th</sup> August 2015 from the Procuring Entity stating that its bid was unsuccessful because its "quoted price is far below the existing market prices". This parameter has a direct relation to the end quality of intended supply". The Applicant lodged its Request for Review on 12<sup>th</sup> August, 2015 against that decision.
2. The Applicant requested the Board for the following orders.



ii) Whether the Procuring Entity acted properly by awarding the tender even after the tender evaluation committee had recommended the award of the tender to the Applicant.

iii) Whether the Procuring Entity awarded the tender in question in accordance with the Provisions of Section 66(4) of the Act.

6. It is common ground that the Procuring Entity used the market survey in the evaluation of this tender and that the tender documents did not list a market survey as an evaluation criteria.

7. The Applicant submitted that the Procuring Entity, by using the market survey, breached the Provisions of Section 66(2) of the Act by employing a new criteria which was not provided for Contrary to the Provisions of Section 66(2) of the Act which stipulates as follows:-

*"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"*

(emphases added)

8. Counsel for the Procuring Entity argued before the Board that it used market survey routinely in its procurements and that it did so even in this tender, even though the market survey was not provided for in the tender documents in order to fulfil its overriding mandate to safeguard public funds.

9. The Board has carefully looked at the tender document and has not found any criteria that required bidders to be evaluated on the basis of the market survey. If the Procuring Entity sought to evaluate any bidder on the basis of a market survey, it ought to have included that criteria in the tender document.

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10. The Board therefore finds that the Procuring Entity breached the Provisions of Section 66(2) of the Act by adopting a market survey as an evaluation criteria for this tender since the procedure and that criteria was not provided for in the tender document.

11. The Applicant submitted that this particular Procuring Entity had gained notoriety for using market surveys unlawfully as this was not the first time this had happened and that there were several proceedings brought before the Board by tenderers challenging this requirement and which the Board had faulted. The Applicant argued that market surveys, when adopted, must be used lawfully starting with the inclusion of the criteria in the tender documents.

12. The Applicant's submissions led the Board to pay a closer attention to this particular market survey, which raised several issues. Firstly, the figure of Ksh.413.33 was well above the prices given by the four tenderers who made it to the financial evaluation stage which were

evaluated and found to have offered prices from Kshs.260.00 - 328.00. The Board was informed at the hearing that the previous contract price was Kshs. 298.00 while Habibani Enterprises Ltd's price which currently has a contract with the Procuring Entity's units in Isiolo was Ksh.260/=.

13.Secondly ,the Board finds that meat on bone is sold in various grades, according to the information supplied to the Board at the hearing. The so-called market survey does not disclose which grade of meat it was referring to.

14.It also emerged during the hearing of the Request for Review that the Procuring Entity had obtained what it called the market survey price from "Kungumaito Butchery" and other *nyama choma* joints in Nanyuki town. The Procuring Entity did not bother to carry out a market survey of prices in the wholesale or the bulk sale market. A market survey, if adopted as an evaluation criteria must be handled professionally like any other stage in the procurement process.

15.The use of the defective tool which was not included in the evaluation criteria not only locked out competitive bids but also hiked the price for the Procuring Entity. Thus the overriding objective of safeguarding public funds which the Procuring Entity touted as the basis for a market survey was not achieved.

16. The Procuring Entity's notification to the Applicant alleged that the Applicant, which has been supplying similar beef to the Procuring Entity, attempted to increase the price in the course of the last procurement period. The fact that this reason surfaced at the hearing and was not given in the Procuring Entity's notification letter to the Applicant is itself irregular.

17. The Applicant vehemently denied having made such a request and challenged the Procuring Entity to produce the evidence, which was not presented to the Board. The Procuring Entity did not also demonstrate that it terminated or attempted to terminate the contract due to the alleged untimely price increase. Thus the Procuring Entity shot itself in the foot by failing to substantiate the serious allegation made by it against the Applicant.

18. On the issue of the source of the meat to be supplied, Counsel for the Procuring Entity conceded that the successful bidder was a Nairobi based firm which would have to transport meat to Nanyuki using refrigerated vehicles if and when the meat was required.

19. The Board has further read the evaluation report and finds that the tender evaluation committee had specifically recommended the award of the tender to the Applicant **M/s Jack Wright (1982) Limited**

but the Procuring Entity ignored that recommendation by awarding the tender to M/s Quality Meat Packers Ltd.

20. The Board however notes that though this tender was not restricted to Nanyuki-based firms, Clause 2.25.1 of the Invitation to Tender and Clause 13 of the Appendix to the Instructions to Tenderers in fact explicitly allowed for preference of up to 15% of the evaluated price for firms based in Nanyuki and its environs. The Board finds that the Tender Evaluation Committee never took this into account and therefore disadvantaged Nanyuki-based firms by not giving them preference while evaluating the tenders which was contrary to the Provisions of Clause 2.25.1 on preference.

21. Having ignored the recommendations of the Tender Evaluation Committee, the Tender Committee usurped the powers of the Tender Evaluation Committee by carrying out a further but an unlawful evaluation of the tenders. The Board wishes to state that where there is a consideration of the element of preference, it should be done in a systematic manner by the Tender Evaluation Committee and not arbitrarily or by the Tender Committee.

22. On the issue of Section 66(4) of the Act, the Board finds that the award criteria for this tender is provided for under Clause 2.27.4 of the instructions to tenderers and it stipulates as follows:-

*"The Procuring Entity will award the contract to the successful tenderer(s) whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily" (emphasis added)*

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23. The parties did not specifically address the Board on this Clause. However, the question of how the Applicant's and the other tenderers' qualification to perform the contract was assessed is central in this case. The objective was achieved through the evaluation procedure stipulated in the tender documents and so it was not necessary for the Tender Committee to interrogate the matter further.

24. In view of the above, the Board finds that the financial evaluation of this tender was flawed in two respects namely; that the Procuring Entity introduced the issue of a market survey as part of the evaluation criteria though it was not provided for in the tender document and also purported to award the tender to the bidder who was not the lowest evaluated bidder price wise contrary to the Provisions of Clause 2.27.4 of the tender document and therefore contravened the Provisions of Section 66 (4) of the Act that requires a tender to be awarded to the lowest evaluated bidder. In view of all, the above findings the Request for Review No. 42 of 2015 succeeds. The Board is however reluctant to

give a direct award as prayed by the Applicant because it would like to give the Procuring Entity an opportunity to apply the elements of the financial/evaluation criteria in the tender documents which it failed to take into account.

25. On the issue of costs the general rule is that costs follow the event. The Applicant has succeeded and ordinarily would be entitled to costs. In this case, however, the Board is not inclined to award costs in view of the order for re-evaluation that may lead the bidders into a further relationship depending on the outcome of compliance with the orders given below.

### **FINAL ORDERS**

In view of all the foregoing factors 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 Procuring Entity's notification letters dated 6<sup>th</sup> August 2015 to the Applicant and to the other bidders, including to the "successful bidder", are hereby annulled.
  
- b) The Procuring Entity's Tender Evaluation Committee shall partially repeat the financial evaluation of the tender no. MOD/423(01020) 2014/2015 in order to ensure:-

- i) That it applies the preference set out in Clause 2.25.1 of the tender document by giving a preference of 15% to all tenderers based in Nanyuki and it's environs.
- ii) That the Procuring Entity shall thereafter proceed to award the tender to the lowest evaluated price as provided for under Section 66(4) of the Act and for the avoidance of doubt, the prices to be taken into account in the partial re-evaluation shall be those that were quoted by the bidders as set out in the evaluation report and in the bidders respective tender documents.
- c) The Procuring Entity shall re-evaluate and award the tender within 14 days from the date of this decision and shall supply the Board with the evidence of compliance with the above orders within 15 days from today's date.
- d) For the reasons already stated above each, each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 25<sup>th</sup> day of August, 2015.

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**CHAIRMAN**  
**PPARB**

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**SECRETARY**  
**PPARB**