

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

**APPLICATION NO. 57/2015 OF 13<sup>TH</sup> NOVEMBER, 2015**

**BETWEEN**

**REAL APPRAISAL LIMITED .....(Applicant)**

**AND**

**NATIONAL SOCIAL  
SECURITY FUND..... (Procuring Entity)**

Review against the decision of the National Social Security Fund in the matter of Tender No.02/2015 - 2016 for Leasing of Car Park along Kenyatta Avenue

**Board members present**

1. Mr. Paul Gicheru - Chairman
2. Mrs. Josephine W. Mong'are - Member
3. Mrs. Gilda Odera - Member
4. Mr. Hussein Were - Member

**In attendance**

1. Philip Okumu - Secretariat

2. Shelmith Miano - Secretariat

**Present by invitation**

**Applicant -Real Appraisal Ltd**

1. A. Mengich - Advocate
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**Procuring Entity - National Social Security Fund**

1. MarySheila Oduor - Advocate
2. Teddie Onyango - Advocate
3. George Mwandembo - Ag. Procurement Manager
4. Judy Kailemia - Procurement Officer

**Interested Parties**

1. Brenda Muthee -Advocate, Summit Cove Lines Co.
  2. J. Kiremia - Director, Summit Cove Lines Co.
  3. Ms. Amina Hashi - Advocate, Hasmo Agencies
  4. Ms. Phyliss - Advocate, Hasmo Agencies
  5. Hassan Mohamed - Director, Hasmo Agencies
  6. Benson Kalwande - Operations, Mason Services
  7. Fredrick Njiru - Operations, Mason Services
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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:-

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## **Background of award**

The Tender NSSF TENDER NO. 02/2015 -2016 For Leasing of NSSF Car Park along Kenyatta Avenue was for leasing of the Procuring Entity's Car Park along Kenyatta Avenue, Nairobi. The purpose of the tender was to acquire the services of a management firm for leasing of the car park situated along Kenyatta Avenue, Nairobi, comprising of 455 open-air parking bays. The management firm shall undertake collection and remission of monthly collections at own cost. The term of the contract is one year subject to one month notice of termination.

Tenderers were required to submit bids for management, collection and remissions of monthly collections at their own cost of the said property.

## **Advertisement**

The tender was advertised in two dailies; *The Daily Nation* and *Standard* Newspapers of 2<sup>nd</sup> September 2015. As a result a total of Twenty Five (25) Tender Documents were bought by potential and interested bidders.

## **Closing/Opening**

On 17<sup>th</sup> September 2015 the opening of the Tender was conducted at the NSSF Seminar Room on 4<sup>th</sup> Floor Social Security House Nairobi and was attended by Eight (8) representatives of the bidders. The Procuring Entity received Twelve (12) Bids, as follows:

<b>Bid No.</b>	<b>Bidder Name</b>	<b>Bid Sum</b>
1.	Danco Real Estate	2,900,000.00
2.	Legend Management Ltd	3,003,591.50

3.	Summit Cove Lines Ltd	1,638,000.00
4.	Tamam Enterprises Ltd	1,600,000.00
5.	Sedco Consultants	2,800,000.00
6.	Advent Valuers Ltd	1,750,000.00
7.	Hasmo Agencies	2,684,500.00
8.	Garyl Agencies	4,375,200.00
9.	Real Appraisal Ltd	3,298,750.00
10.	Mason Services Ltd	3,087,630.00
11.	Regent Management Ltd	1,500,000.00
12.	Value Zone Ltd	2,700,000.00

### **Evaluation**

The evaluations were carried out in following three stages

- (i) Preliminary and Mandatory Evaluation where all requirements set had to be met to qualify for stage two
- (ii) Technical Evaluation stage as set out in the evaluation criteria in the Tender documents (Tender scoring 70% or more to proceed for financial evaluation).
- (iii) Financial Evaluation stage

On preliminary evaluation save for the bids from Hasmo Agencies Limited and Value Zone Limited, the other bids were considered non responsive for failing to meet the mandatory requirements and did not proceed to Stage II i.e. the Technical Evaluation Stage.

1. The bid from Danco Limited was considered non responsive at the preliminary stage as it did not submit a valid NSSF Compliance Certificate
2. The bid from Legend Management Limited was considered non responsive at the preliminary stage as it did not undertake to put in place 15 No. private guards and 2 no. armed guards to protect against potential encroachment at its own cost
3. The bid from Summit Cove Lines Co. Limited was considered non responsive at the preliminary stage as they did not submit directors' membership with the Institution of Surveyors of Kenya (ISK), they did not submit a valid practicing certificate from the Estate Agents Registration Board (EARB) and they also did not submit a valid professional indemnity cover of at least Kshs 20,000,000.00.
4. The bid from Tamam Enterprises Limited was considered non responsive at the preliminary stage as they failed to submit a valid NSSF compliance Certificate, a valid tax compliance certificate, audited accounts for the last two years, directors' membership to ISK, a valid professional indemnity cover of at least Kshs 20 Million, a valid business permit; a valid EARB Certificate, they did not undertake to put in place 15 No. private guards and 2 no. armed guards to protect against potential encroachment at its own cost

5. Each of the bids from Sedco Consultants Limited and Advent Valuers limited were respectively considered non responsive at the preliminary stage as they did not undertake to put in place 15 No. private guards and 2 no. armed guards to protect against potential encroachment at their own cost

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6. The bid from Garyl Agencies Limited was considered non responsive at the preliminary stage as it did not submit a valid Tax Compliance Certificate, a list of directors and directors' membership with the ISK.
7. The bid from Real Appraisal Limited was considered non responsive at the preliminary stage as they did not submit a valid business permit.
8. The bid from Mason Services Limited was considered non responsive at the preliminary stage as it did not submit a valid NSSF Certificate nor did it undertake to put in place 15 No. private guards and 2 no. armed guards to protect against potential encroachment at their own cost.

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9. The bid from Regent Management Limited was considered non responsive at the preliminary stage as it did not submit a valid EARB certificate.

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10. The bids by Hasmo Agencies Limited and Value Zone Limited proceeded for Technical Evaluation and Value Zone Limited was considered technically non responsive after evaluation by the

Tender Evaluation Committee for attaining 64.6% which was less than the minimum score of 70%.

11. From the results of the Technical Evaluation, the Tender Processing Committee found Hasmo Agencies Limited had attained 79.5% which was above the minimum score of 70% which was required to proceed to the financial stage as per clause contained at page 25-26 of the tender documents.
12. Hasmo Agencies Limited proceeded to Stage 3 where Financial Evaluation was conducted by the Tender Processing Committee and found Hasmo Agencies Limited to have qualified as follows:

BID NO	BIDDER	BID SUM (KES per month)	RANK
1	HASMO AGENCIES	2,684,500.00	1

#### **Committee's recommendation**

The Committee recommended that M/s Hasmo Agencies be awarded the contract for Tender No. 02/2015-2016 for leasing of the car park situated along Kenyatta Avenue Nairobi at their bid sum of Kes. 2,684,500.00 per month, inclusive of taxes.

#### **The tender committee decision**

The Procurement Entity's Tender Committee met on 29<sup>th</sup> October, 2015 and awarded the contract for Tender No. 02/2015-2016 for leasing of the

car park situated along Kenyatta Avenue Nairobi to M/s Hasmo Agencies at their bid sum of Kes. 2,684,500.00 per month, inclusive of taxes.

### **THE REQUEST FOR REVIEW**

The Request for Review was lodged by M/s Real Appraisal Limited, the above named Applicant, whose address for the purposes of these proceedings is c/o Messrs Ondabu & Company Advocates of P. O. Box 12584-00100, Nairobi, on 13<sup>th</sup> November, 2015 in the matter of leasing of the car park situated along Kenyatta Avenue Nairobi Institutional Risk Management & Policy Framework, Tender No. 02/2015-2016.

The Applicant seeks for the following orders:

- 1) The Award Committee's decision be reversed and the award nullified forthwith;**
- 2) The tender be awarded to the Applicant as provided for under Section 66 of the Act and Regulation 50(3) of the Public Procurement & Disposal Regulations, 2006.**

At the hearing of the Request for Review the Applicant was represented by Mr. Mengich Advocate while the Procuring Entity appeared through the firm of Ochieng, Onyango, Kibet & Ohaga Advocates and was represented by Ms Oduor from the said law firm.

The Applicant started its submissions that submitted that the tendering process was not fair in that although it failed to provide a business permit as required, the Procuring Entity ought to have not disqualified it was exempt on account of it having been a professional body and not required from obtaining a business permit and that the Procuring ought to have



been aware about this fact which was a matter in public domain from the year 2009. The Applicant attached to its Request for Review the said letter indicating that Professional bodies in Kenya were not required to take out business permits as they were already licenced within their professional organisations. Counsel for the applicant argued that the tender process was not done in accordance with the provisions and the objectives set out under section 2 of the act whose aim is to promote the integrity of the process by ensuring that the same was fair and was aimed at promoting competition among the bidders. It was the applicant submission that under section 39 of the Act, parties were allowed to participate in a procurement process without discrimination and if any such discrimination was to occur then the same ought to have been applied in accordance with Act and the Regulations. The applicant stated that the reasons for which it was locked out of the tender process amounted to discrimination as it was a professional body and that it was exempt from producing a business permit as required by the Procuring Entity in the Tender document. For this reason the Applicant urged the Board to allow the Request for Review and order that it be re-evaluated afresh as it had offered a competitive bid that was going to benefit the Procuring Entity.

Secondly, the Applicant stated that the Procuring Entity used other criteria and/or considerations other than those set out in the tender document in the evaluation of the tenders thereby acting in breach of section 66(2) the mandatory requirements of the Act. It further submitted that that the Procuring Entity failed to strictly follow the procedures set out in the tender document in evaluation and comparison, as made mandatory by Section 66(2) of the Act, and was thus in breach of the Act. It was the submissions of the counsel for the Applicant that a business

permit is not a requirement for professional bodies like the Applicant and that the Applicant was exempt from obtaining a Business Permit, for which it availed a letter to the Procuring Entity. Counsel went further to submit that this exemption was within the public domain and therefore the procurement entity ought to have been aware of its existence. Indeed the applicant further submitted that although it recollected having attached the said letter to its bid document if it was missing as alleged then the Procuring Entity ought to have treated the absence of the said letter as a minor deviation and should not have penalised the Applicant for it. It should have allowed its bid to proceed to the next level of evaluation since its bid sum of Kshs. 3,298,750 was offering a benefit of at least Kshs. 600,000 more than that of the Successful bidder.

The Applicant, for the above stated reasons and in accordance with Regulation 51 and 52, thus urged the Board to allow its request for Review and return it to the procurement process and allow it an opportunity to be re-evaluated at the next level. In the alternative the Applicant submitted that the tender be awarded to it as provided for under Section 66(4) of the Act and Regulation 50(3) of the Regulations.

In its response, the Procuring Entity, stated that it carried out the evaluation of the subject tender in full compliance with the Law and specifically Articles 2, 10, 20 and 227 of the Constitution of Kenya, 2010 as well as Sections 2, 39, 45, 62 and 66 of the Act, and Regulations 10(2)(a) and (b), 7(c), 16(10)(f) and 50 of the Public Procurement & Disposal Regulations made thereunder.

In responding to the Applicant the Procuring Entity stated that the evaluation of the Applicant's bid was determined to have failed at the

preliminary stage as they did not provide a valid business permit despite them indicating in their table of contents that they had attached the same. It was The Procuring Entity submissions that the Applicant bid included in the list of the schedule of documents a Business Permit but failed to annex a copy of such business permit. Instead the Procuring Entity further submitted that the Applicant had chosen to annex the letter of exemption to its pleadings in the Request for Review and yet the same was not among the documents so submitted in the tender document by the by the Applicant to the Procuring Entity as alleged or at all.

The Procuring Entity submitted that after evaluation it found the Applicant's bid non-responsiveness for want of a mandatory requirement (i.e. the business permit) and for such reasons the Applicant's bid did not progress to the technical and financial evaluation stages.

The Procuring Entity further submits that the evaluation and award was in compliance with the requirements of the Tender Document, and that it restricted itself to and used the criteria and conditions set out in the Tender Document, neither did it use any other conditions or criteria as alleged by the Applicant. Although the Applicant had alleged breach of section 2 of the Act by the Procuring Entity, Counsel for the Procuring Entity further submitted that the Applicant had failed to particularise the breaches it was alleging to have been committed by the Procuring Entity under section 2 of the Act.

The Procuring Entity further averred that the evaluation and award was in compliance with the requirements of the Tender Document, and that it restricted itself to and used the criteria and conditions set out in the Tender Document, neither did it use any other conditions or criteria as

alleged by the Applicant. The Procuring Entity went further to state that the Applicant did not meet the mandatory requirements at the preliminary stage and could not proceed to the subsequent stages and the tender could not be awarded to it.

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HASMO agencies limited the successful bidder supported the position of the Procuring Entity and associated itself with the submissions of the Procuring Entity. It went further to state that it was properly awarded the tender as its bid complied with all the mandatory requirements and that it had won the tender fairly and squarely as its tender was evaluated and emerged the best out of all the Applicants who submitted the tender.

#### **The Board's decision**

The Board has considered the submissions made by the parties in respect of the Request for Review and finds that this was an open tender which was open to all provided that one met all the mandatory provisions set out in the tender document. One such mandatory requirement was the production of a business permit by all bidders. In this case, the Board having had the opportunity of looking at the Applicant's original tender document and finds that no business permit was annexed to the tender document. The board also finds that although the Applicant argued that it was exempt from obtaining a Business permit by operation of the law having been a professional firm the Applicant did not incorporate in the tender document and only attached it to the Request for Review which the Board notes was not supported by any statement of facts under the Provisions of Regulation 73 of the Regulations. It is the observation of the Board that the onus of proving that the Applicant was entitled to

exemption lay upon the Applicant Tender and the Board on a random search of other bid documents observed that the said letter of exemption was attached to bids by other bidders and the same accepted by the evaluation committee as a proof of exemption from producing a business permit.

As the Board has already observed above and this is evident from the tender document the Applicant produced a certificate of registration showing that it was a limited liability and did not produce any other evidence to show the nature of its business or that it was exempt from producing a business permit.

This Board has however held on several occasions as demonstrated by the case of **Kenbright Insurance Brokers =vs= Kenya Medical Training College (PPRAB No. 26of 2009)** that if a document is omitted as at the date of tender closing/deadline then the Procuring Entity cannot be faulted for declaring a bidders bid as non-responsive.

It is not also permissible to introduce a document in a Request for Review and seek to overturn the decision of the Procuring Entity on the basis of a document annexed to a Request for Review but which did not form part of the tender document. The Applicant should therefore blame itself for failing to produce evidence that it fall within the category of persons who were exempted from producing Business Permit and the evidence of such exemption in its tender document.

The Board has also looked at the blank tender document and is satisfied that the tender was an Open Tender and any bidder was eligible to participate without any discrimination as long as they were "**registered Property Management Firms**". The Board has consider the submissions

made by the parties in respect of the above grounds and has perused the tender documents and the submissions filed therein by the parties. The Board finds based on the above that the Applicant's bid was considered non-responsive by the Procuring Entity for non-submission of a valid business permit. The Board has also had the opportunity to perusing the blank Tender Document and has observed that one of the mandatory/statutory requirements of the tender was for bidders to submit as following:-

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***“ 10 A valid/current business permit from the relevant local authorities”***

However Upon perusal of the Applicant's tender document, the Board notes that the Applicant had indicated in its table of contents at ***“Part C: Appendices”*** that it had attached the ***“Letter From The Ministry Of Local Government Exempting Professional Firms From Obtaining Local Authority Licenses”***. As already stated that letter was not however part of the Applicant's tender document and was only attached to the Request for Review, instead of making it part of the bid document where it rightly belonged.

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Section 66(2) of the Act which is relevant to this issue states as follows:-

***“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.”***

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While Section 66(4) of the Act states as follows:-

**“66(4) The successful tender shall be the tender with the lowest evaluated price.”**

Regulation 50(3) of the Regulations further states as follows:-

**“50(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be the tender with the lowest evaluated price in accordance with section 66(4) of the Act.”**

The Board is therefore satisfied that the evaluation was done in accordance with the tender document and the law and that the Applicant was unsuccessful for failure to provide a material document which was mandatory or produce evidence in its tender document that it was exempted from complying with that requirement. To treat the absence of such an important document in the bid document as minor deviation would have amounted to according the Applicant special treatment as all other bidders who fell in the same category as the Applicant annexed documents showing that they were exempted from that requirement and were this not disqualified. The Board also notes that the Applicant's bid having failed to pass the preliminary evaluation stage it was not evaluated further and cannot therefore be said to have been offering the best financial bid which would have been beneficial to the Procuring Entity. Subsequently the board finds that the Request for Review lacks merit and is dismissed.

### **FINAL ORDERS**

In view of the above and in light of all the foregoing matters and in exercise of the powers conferred upon it by provisions of Section 98 of the Act, the Board makes the following orders;

- a) **The Request for Review by the Applicant in respect of Tender Number; ~~02/2015-2016 For Leasing of NSSF Car Park along~~ Kenyatta Avenue, Nairobi filed before the Board on 13<sup>th</sup> November 2015 be and is hereby dismissed with no orders as to costs.**
- b) **That the Procuring Entity is directed to proceed and conclude the procurement process with the successful bidder forthwith.**
- c) **Each Party shall however bear it's won costs of this Request for Review.**

**Dated at Nairobi on this 11<sup>th</sup> day of December, 2015**

  
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**CHAIRMAN  
PPARB**

  
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**SECRETARY  
PPARB**