

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD

APPLICATION NO. 58/2015 OF 16TH NOVEMBER, 2015

BETWEEN

**SUMMIT COVE LINES
COMPANY 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 - 2016for 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 - Summit Cove Lines Company Ltd

1. Ms. Brenda Muthee - Advocate
2. Mr. J. Kiremia - Director

Procuring Entity - National Social Security Fund

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

Interested Parties

1. Ms. Amina Hashi - Advocate, Hasmo Agencies
 2. Ms. Phyliss - Advocate, Hasmo Agencies
 3. Hassan Mohamed - Director, Hasmo Agencies
 4. A. Mengich - Advocate, Real Appraisal Limited
 5. Benson Kalwande - Operations, Mason Services
 6. 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:-

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 2nd September 2015. As a result a total of Twenty Five (25) Tender Documents were bought by potential and interested bidders.

Closing/Opening

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

Bid No.	Bidder Name	Bid Sum
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
 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.
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 29th 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 Summit Cove Lines Company Limited, the above named Applicant, whose address for the purposes of these proceedings is c/o Messrs Brenda Muthee & Associates Advocates of P. O. Box 87118-80100, Mombasa, on 16th 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 Respondent be directed to rescind its decision dated 29th October, 2015 and withdraw the award of Tender No. 02/2015-**
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2016: Leasing Car Park along Kenyatta Avenue to the Successful Tenderer;

- 2) The procurement proceedings commenced by the Respondent be annulled in its entirety;**
- 3) The Respondent be directed to furnish the Applicant with written reasons as to why the Applicant's submission to the tender was unsuccessful and a copy of the final evaluation and comparison report of the tender;**
- 4) The Respondent do issue a new tender for provision of leasing of its car park located along Kenyatta Avenue in strict compliance with the Public Procurement & Disposal Act, Cap 412C and any other written laws applicable in Kenya;**
- 5) The costs of this review be borne by the Respondent;**
- 6) Any other relief this Honourable Board deems fit to grant.**

The Applicant commenced its submission by stating that the Procuring Entity's failure to provide it with Written Reasons as to why the Applicant's Tender was unsuccessful contravened provisions of Regulation 66(2) of the Public Procurement & Disposal Regulations, 2006. It was the Applicant's submission that it purchased the tender document on 4th September 2015 and upon perusal noticed that it contained some requirements which it deemed to be discriminatory and on 14th September 2015 the Applicant wrote to the Procuring Entity asking it to remove the requirements of membership to Institute of Surveyors of Kenya (ISK) and

registration by Estate Agents Registration Board(EARB) as the same amounted to discriminatory clauses that were aimed at locking out persons without such registration. The applicant further submitted that on 16th September 2015 the Procuring Entity wrote back on 16th September 2015 reiterating that it would proceed with the tender as it was without any amendment. The Applicant further submitted that it went ahead and submitted the tender all the same despite its reservations on the said clauses.

It was the submissions of the Applicant that it received a letter from the Procuring Entity notifying it that its bid was unsuccessful and by a letter dated 10th November, 2015 the Applicant requested the Respondent to furnish it with, inter alia, Written Reasons as to why the Applicant's submission to the Tender was unsuccessful. It was the Applicant's submissions that as per the date of filing the Request for Review the Respondent had failed to provide the written reasons for non-success of the Applicant's bid. The Applicant further submitted that the Respondent had also failed to provide it with a copy of the final evaluation and comparison report of the Leasing of Car Park along Kenyatta Avenue Tender contrary to the mandatory provisions of Section 45(3) of the Act.

It was the Applicant's submissions that by a letter dated 10th November, 2015 it requested the Respondent to furnish it with, inter alia, a copy of the final evaluation and comparison report of the Leasing of Car Park along Kenyatta Avenue Tender. The Deponent further avers that the Respondent has failed to provide a copy of the final evaluation and comparison report of the Tender. This information sought to be obtained

from the Respondent, according to the Applicant, was not confidential information and the Respondent was obliged to provide the said information under the mandatory provisions of Sections 45(2)(e) and (3) of the Act. The Applicant further averred that the Evaluation and Comparison of Tenders section of the Tender Document listed mandatory or statutory requirements for any intended participants, including:-

- *Directors' membership with Institute of Surveyors of Kenya (ISK)*
- *Valid Practicing Certificate from Estate Agents Registration Board (EARB)*
- *A valid professional indemnity cover of Kenya Shillings Twenty Million (Kshs. 20,000,000.00)*

was contrary to Section 34 of the Act, and that the Procuring Entity included mandatory requirements or characteristics for intended tenderers which effectively precluded a fair and open competition amongst the intended Tenderers.

The Applicant took the position that the mandatory requirements or characteristics were not of a technical nature but instead of a professional nature and specifically referred to registered Surveyors and/or Estate Agents to the exclusion of and discriminated against other participants and the Applicant in particular yet the Tender was for provision of leasing services not limited to that particular class of professionals. Further, the Applicant submitted that the mandatory requirements or characteristics, not being of a technical nature, were not within the prescribed preferences allowed under Section 39 of the Act and discriminated against the Applicant.

For these reasons, the Applicant urged the Board to Allow the Application and either annul the entire procurement process or and in the alternative award the tender to it.

In its response, the Procuring Entity submitted that by a letter dated 10th November 2015, the Applicant requested to be furnished with written reasons on why the Applicant's Bid was unsuccessful as well as a copy of the final evaluation and comparison report of the tender. The Procuring Entity further submitted it indeed provided the reasons as to why the Applicant's Bid was unsuccessful vide its letter to the Applicant dated 29th October 2015 and which letter the Applicant had acknowledged receipt. According to the Procuring Entity its action were in compliance with the provisions Regulation 66(2) of the Public Procurement and Disposal Regulation which provides as follows:

"Where so requested by an unsuccessful tenderer, a procuring entity shall within fourteen days after a request, provide written reasons as to why the tender, proposal or application to be pre-qualified was unsuccessful."

In its response, the Procuring Entity states that the Act under Section 44(1)(c) prescribes against disclosure of certain information detailed thereunder.

The Procuring Entity submits that the provision provides as follows:

" 44. Confidentiality

- (1) *During or after procurement proceedings no procuring entity and no employee or agent of procuring entity or member of a board of or committee of the procuring entity shall disclose the following:*
 - a. ...
 - b. ...
 - c. *Information relating to the evaluation, comparison or clarification of tenders, proposals or quotations"*

The Procuring Entity further submits that the Act however at Section 44(2) makes proviso as to when such information may be disclosed and the conditions for such disclosure as follows:

- "(2) This section (read section 44) does not prevent the disclosure of information if any of the following apply-*
- (a.) The disclosure is to an employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;*
 - (b.) The disclosure is for the purpose of law enforcement*
 - (c.) The disclosure is for the purpose of a review under Part (VI) or an investigation under Part (VIII) or as required under Section 105*
 - (d.) The disclosure is pursuant to a Court Order*
 - (e.) The disclosure is under the regulations"*

The Procuring Entity states that none of the exemptions applies and accrues in the instant request by the Applicant by its letter dated 10th November 2015 and the prohibition on disclosure under section 44(2)

of the Act applies and the Procuring Entity could not proceed and disclose the 'confidential' information without lawful cause.

The Procuring Entity further relies on Section 44(3) of the Act that provides that a procuring entity may proceed and disclose to an Applicant seeking review. The Procuring Entity further states that the Applicant at the time they wrote the letter had not applied for review and it cannot be said that the Procuring Entity was in breach as the obligation had not legally accrued and consequently form a basis for this application for review.

The Procuring Entity further submits that to the extent that the letter and request was lodged with the Procuring Entity on 10th November 2015, six days before the request for review was filed, no breach of the Act can be said to have accrued by failure to attend to the request if at all.

The Procuring Entity states that the rider to Section 44(3) of the Act is not absolute and the discretion has been provided for the format under which the disclosure would thereafter be allowed *viz*;

“(3)Notwithstanding the provisions of subsection (2), the disclosure to an applicant seeking a review under part VII shall constitute only the summary referred to in Section 45(2)(e)

The Procuring Entity further submitted that by Section 45(2)(e) of the Act the disclosure is limited to a summary of the evaluation and criteria used but does not entitle the Applicant to “ the Final Evaluation

Report' or extend to " reasons" as it seeks in abuse of the process herein. The Procuring Entity submitted that the disclosure only comes into effect where a Review is already pending, and the Applicant cannot as a bidder lodge a Request for Review with this request for disclosure as a premise. The attempt by the Applicant to use this as a basis for review was an abuse of the process of this Board and without any legal or factual basis, the Respondent further avers.

The Procuring Entity further submitted that the list of documents to be provided in a tender and which included as mandatory items was at its discretion and it was not for the Applicant as a bidder to set such terms.

The Procuring Entity denied the allegations of discrimination or that it is in breach of Section 34 and or 39 of the Act and that the tender was very specific that it was for the leasing of the Car Park and the Tender documents at Section E clearly provided that it involved the management, collection and remission of monthly collections from the open air parking bays. It was the Procuring Entity's positions that as the tender involved the management, collection and remission of monthly collections from the parking pay on the said property, the eligible tenderers were Property Management Firms and there was no discrimination by such description of eligible tenderers.

To this end the procuring entity urged the board to hold that the Request for review was not merited and dismiss it as the Applicant had failed to establish breach of the law by the procuring entity or even violation of the Constitution as alleged or at all.

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 heard the submissions by all parties and has perused the pleadings and the submissions filed by the parties finds as follows:-

Firstly, that the Applicant upon purchasing the tender document observed that the same contained clauses which it deemed discriminatory and in violation of the Act, the Regulations and as well as contravening the Constitution in that in its opinion such requirements were aimed at locking out a large section of the society from participating in the tender.

These requirements as stated earlier required that;

- a. Directors' membership with Institute of Surveyors of Kenya (ISK)*
- b. Valid Practicing Certificate from Estate Agents Registration Board (EARB)*
- c. A valid professional indemnity cover of Kenya Shillings Twenty Million (Kshs. 20,000,000.00)*

The Applicant further submitted that the offending clauses, being listed as mandatory/statutory requirements, were false, erroneous and/or deliberately misleading as the governing law compelling such requirements was not given, and that neither the Act, the National Social Security Fund Act, Cap 258 nor the Estate Agents Act, Cap 533 required that only registered Estate Agents and/or Surveyors may take part in a Tender Process or otherwise offer the service of leasing a car park, the subject matter of the Tender.

Secondly, the Board further notes that the letter of Notification also did indeed provide the reasons as to why the Applicant's bid was not successful which were that:-

- “(a) The Applicant did not submit directors' membership with the institution of Surveyors of Kenya*
- (b) The Applicant did not submit a valid practising certificate from Estate Agents Registration Board*
- (c) The Applicant did not submit a valid Professional indemnity cover of at least 20 million shillings”*

In view of all the foregoing the question which the Board must answer is whether the inclusion of the above requirements in the tender document was discriminatory and whether by virtue of those provisions, the Applicant is justified in seeking an annulment of the procurement process. As the Board has already stated the Applicant became aware of these provisions way before it submitted its tender and sought to have them expunged. However the Board further finds that the Procuring

Entity did inform the Applicant that the requirements were deemed necessary for the type of services the tender sought to procure and would that the requirements would not be removed or varied. Provisions of Section 52 of the Act provides as follows:-

52.(1) The procuring entity shall prepare tender documents in accordance with this section and the regulations.

(2) The tender documents shall contain enough information to allow fair competition among those who may wish to submit tenders.

(3) The tender documents shall set out the following –

(a) the specific requirements prepared under section 34 relating to the goods, works or services being procured and the time limit for delivery or completion;

(b) if works are being procured, relevant drawings and bills of quantities;

(c) the general and specific conditions to which the contract will be subject, including any requirement that performance security be provided before the contract is entered into;

(d) the tender number assigned to the procurement proceedings by the procuring entity;

(e) instructions for the preparation and submission of tenders including –

(i) the forms for tenders;

(ii) the number of copies to be submitted with the original tender;

(iii) any requirement that tender security be provided and the form and amount of any such security; and

(iv) any requirement that evidence be provided of the qualifications of the person submitting the tender;

(f) an explanation of where and when tenders must be submitted, a statement that the tenders will be opened immediately after the deadline for submitting them and an explanation of where the tenders will be opened;

(g) a statement that those submitting tenders or their representatives may attend the opening of tenders;

(h) a statement of the period during which tenders must remain valid;

(i) the procedures and criteria to be used to evaluate and compare the tenders;

(j) a statement that the procuring entity may, at any time, terminate the procurement proceedings without entering into a contract; and

(k) anything else required, under this Act or the regulations, to be set out in the tender documents;

Sections 52 of the Act therefore empowers Procuring Entity to include terms and conditions in a tender which it deems necessary in accordance

with it needs for the services it seeks to procure. In this case the Procuring Entity sought to procure Management services of a car park and hence the board is persuaded that these requirements were necessary and it was within the Procuring Entity's rights as provided by law to set out such terms in the tender document. The Board is therefore persuaded that the said terms were not discriminatory and the Applicant having chosen to participate in the tender after noticing the said requirements it ought to have complied or stayed away from participating in the said process. In any event if the Applicant strongly felt that these requirements were limiting it had ample time from the 16th of September, 2015 to come before the Board for its intervention.

This High Court and this Board has severally held that where an Applicant chooses to participate in a flawed process it cannot raise issues which were within it's knowledge from the start of the tender process at the end of the process. This position is illustrated by the High Court's decision in the case of **Republic -vs- The Public Administrative Review Board and Another exparte GIBB Africa INC (Nai JR 92 of 2011)** where the court stated as follows:-

“Finally, it is now well established that judicial review remedies are discretionary in nature. The applicants have admitted that the Procurement documents had two different scores for the technical evaluation parameters. They nevertheless went ahead to submit their bid in a Procurement process, which in their view, was founded on flawed document. It is only after they failed to attain the minimum technical evaluation marks that they started complaining. The document had clearly provided room for seeking

clarification but they did not take this opportunity. Even if they had established grounds for review of the decision, I think they would not have been entitled to the orders sought”.

The Second issue that the Board must address is whether the Applicant was entitled to an evaluation report and a comparison of tenders as demanded from the procuring entity on 12th November 2015. The Board finds that although the Applicant wrote to the Procuring Entity requesting to be provided it with the evaluation report pursuant to the Provisions of Section 45(3) of the Act.

Section 45(3) of the Act Provides as follows:-

“45(3) After a contract has been awarded or the procurement proceedings have been terminated, the procuring entity shall, on request, make the records for the procurement available to a person who submitted a tender, proposal or quotation or, if direct procurement was used, a person with whom the procuring entity was negotiating.”

The Board however finds that Section 45(2) of the Act however provides as follows:-

“45(2) The records for a procurement must include –

.....

.....

(e) a summary of the evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used;”

The Board has however severally held that Section 44 read together with Section 45(3) of the Act limit disclosure of the evaluation and comparison of tenders by the Procuring Entity to bidders until after an award has been made and a valid contract entered into and bidder seeking documents before that is done is only entitled to a summary of the evaluation report.

This is aimed at safeguarding other bidders' interest and the need to keep other bidders information confidential in the event that a tender is set to be repeated. The Board further finds that in this case, the Applicant sought to be provided with the evaluation report of all bids and a comparison of tenders. The Board however respectfully finds that this request was premature and could not be complied with as the tender process was still in progress and had not been concluded on the date that the request was made namely on 12th November 2015. The Board is therefore persuaded that the information sought by the Applicant could not be provided as at the time it was sought. In view of the above and the Boards findings on the two issues identified above the board therefore finds that the Applicant's Request for Review lacks merit and is hereby 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 16th November 2015 be and is hereby dismissed but with no orders as to costs.**
- b) **That the Procuring Entity is at liberty to proceed and conclude the procurement process with the successful bidder forthwith.**

Dated at Nairobi on this 11th day of December, 2015

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**CHAIRMAN
PPARB**

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**SECRETARY
PPARB**

