

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 11/2015 OF 27th FEBRUARY, 2015

BETWEEN

SCOPE DESIGNS SYSTEMS.....Applicant

AND

MINISTRY OF INDUSTRIALIZATION.....PROCURING ENTITY
/1ST RESPONDENT

AND

INDUSTRIAL AND COMMERCIAL
DEVELOPMENT CORPORATION.....PROCURING ENTITY
/2ND RESPONDENT

The Review against the decision of Ministry of Industrialization and Industrial and Commercial Development Corporation in the matter of Tender No. M01/RPF/013/12-13 for proposal for the provision of consultancy service for the proposed small and medium enterprise (SME) parks at Eldoret, Juja and Taveta, in Uasin Gishu, Kiambu and Taita Taveta counties.

BOARD MEMBERS PRESENT

1. Mr. Paul Gicheru - Chairman
2. Mrs. Josephine W. Mong'are - Member

2023



3. Mr. Paul Ngotho - Member
4. Mr. Hussein Were - Member
5. Mrs. Gilda Odera - Member

IN ATTENDANCE

1. Mr. Henock K. Kirungu - Secretary
2. Mr. Stanley Miheso - Secretariat
3. Ms. Shelmith Miano - Secretariat

PRESENT BY INVITATION

Applicant - SCOPE DESIGNS SYSTEMS

1. Job O. Ochieng - Advocate
2. Loise Kabiru - Student

Procuring Entity 1 - MINISTRY OF INDUSTRIALIZATION

1. Anne Kaiga - State Counsel
2. David Onwong'a - ADSCM
3. Simon Kanyi - SCMOI

**Procuring Entity 2 - INDUSTRIAL AND COMMERCIAL
DEVELOPMENT CORPORATION**

1. Mwaniki Gachuba - Advocate
2. Joseph Weku - CS
3. Barbara Lunani - SNO



BOARD'S DECISION

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

BACKGROUND OF AWARD

The tender was opened on the 28th November, 2012 at 10.00 a.m. The

TECHNICAL EVALUATION

The tender was evaluated on a two stage evaluation i.e.

1. Section A: Preliminary Evaluation
2. Section B: Technical Evaluation

Section A carried the mandatory requirements for the proposal while Section B carried the technical requirements as per the issues in the Request for Proposals.

Section A: Preliminary Evaluation

Two bidders attached all the relevant documents as per Section A as per the conditions in the request for proposal and qualified for the next stage of evaluation:-

1. Bidder No.1
2. Bidder No.2

Section B: Technical Evaluation

From the technical analysis the two firms scored as follows:-

S/No	Bidder No.	Bidder Name & Address	Points	Ranking
1	Bidder 1	M/s. Habitech Consultants,	85	2
2	Bidder 2	M/s. Scope Design Systems,	90	1



The technical evaluating committee set the pass mark at 70%. The two (2) bidders above were found to be technically responsive and qualified to carry out the consultancy work.

The technical evaluation committee recommended that the work be divided into two categories in order to ensure that the assignment is executed within the twelve (12 No.) weeks proposed in the terms of reference as follows: -

Category 1: Comprised of Lot B - Eldoret SME Parks (135Acres)

Category 2: Comprised of Lot A - Juja SME Parks (32Acres) and Lot C - Taveta SME Parks (20Acres)

The scope of work in this assignment was mainly determined by the acreage of the SME Park among other factors.

The technical evaluation committee recommended that the bidder with the highest score be assigned the category deemed to have greater proportion of the work.

The technical evaluation committee therefore recommended that the bidders be considered for award as follows: -

S/No	Category	Description	Bidder
1	Category 1	Lot B comprises of - Eldoret SME Parks (135Acres)	<u>Bidder No. 2</u> M/ s Scope Design Systems P. o. Box 10592-00100, Nairobi
2	Category 2	Lot A comprises of - Juja SME Parks (32Acres) and Lot C comprises of - Taveta SME Parks (20Acres)	<u>Bidder No. 1</u> M/ s Habitech Consultants P. o. Box 66495-00800, Nairobi



TENDER COMMITTEE RECOMENDATION

The Ministerial Tender Committee in its meeting No. 11/2012-2013 held on 10th January, 2013, minute No. MTC. 3/11/2012-2013 deliberated on the tender and concurred with the recommendations of the evaluation committee and awarded as follows:-

S/No	Category	Description	Bidder
1	Category 1	Lot B comprises of - Eldoret SME Parks (135Acres)	<u>Bidder No. 2</u> M/ s Scope Design Systems P. o. Box 10592-00100, Nairobi
2	Category 2	Lot A comprises of - Juja SME Parks (32Acres) and Lot C comprises of - Taveta SME Parks (20Acres)	<u>Bidder No. 1</u> M/ s Habitech Consultants P. o. Box 66495-00800, Nairobi

REQUEST FOR REVIEW

The Request for Review was lodged by M/s Scope Design Systems on 27th February, 2015 in the matter of Tender No. M01/RPF/013/12-13 namely for a proposal for the provision of consultancy services for the proposed small and medium enterprise (SME) parks at Eldoret, Juja and Taveta, in Uasin Gishu, Kiambu and Taita Taveta counties.

At the hearing of the Request for Review the Applicant was represented by Mr. Job O. Ochieng, Advocate from the firm Ogola Okello and Company Advocates while the Procuring Entity was represented by Anne Kaiga, State Counsel. The 2nd Respondent was represented by Mr. Mwaniki Gachuba, Advocate from the firm Onyoni Opini Gachuba Advocates.



PRELIMINARY OBJECTION

The 2nd Respondent raised the following points of Preliminary Objection in paragraph 19 of the Request for Review.

- (1) That the Request for Proposal does not lie by virtue of section 26(6) of the Act;
- (2) That invitation of the Applicant to submit a proposal offended sections 2(b),(c),(d) and(e) and 32 of the Act;
- (3) That the application does not lie by virtue of sections 2(a) and 84(2) of the Act;
- (4) That the Applicant's proposal is incompetent for want of consideration;
- (5) That the proposal having been awarded over 2 years ago is does not ensure fair competition as the character and capacity of the consortium have changed;
- (6) That the application does not lie by virtue of Regulation 18(3) and (4) of the Regulations, 2006; and
- (7) That the Board has no jurisdiction to entertain this application.

When the Request for Review came up for hearing, Counsel for the 2nd Respondent addressed two points of Preliminary Objection and reserved the remaining grounds of objection to be canvassed during the hearing of the main Request for Review in the event that both or any of the Preliminary Objections fail.

As already alluded to above, the Applicant was represented by Mr. Ochieng while the 2nd Respondent was represented in this matter by Mr. Mwaniki Gachuba.



Mr. Gachuba's first point of objection was based on the Provisions of Sections 26 and 96 of the Public Procurement and Disposal Act. Mr. Gachuba submitted that the entire tender process which was the subject matter of this Request for Review was commenced by the 1st Respondent upto the point of making of an award.

Counsel for the 2nd Respondent further submitted that the advertisement, the evaluation process and the subject award of the tender were all undertaken by the 1st Respondent and further that it was conceded by all the parties to this review that an award of the tender was made to the Applicant in the letter dated 10th January, 2013. The Applicant produced the letter of award and annexed it to its Request for Review as annexure "SDS 1".

In answer to the submissions made by Counsel for the 2nd Respondent on the first limb of the Preliminary Objection, Counsel for the Applicant submitted that the Board has very wide powers under the Provisions of Section 98 of the Act while dealing with a Request for Review and that nothing precluded the Board from directing the two Respondents to enter into a contract with the Applicant.

The Applicant further submitted that though the tender process herein was commenced by the 1st Respondent, the 2nd Respondent had later participated in the process at the negotiations stage and could not therefore approbate and reprobate when it became expedient for it to do so.

Counsel for the 1st Respondent supported the position taken by the 2nd Respondent and particularly supported the view that the 2nd Respondent was part and parcel of the tender process and it could not



therefore run away from it at this late stage. The 2nd Respondent however conceded that it commenced the Procurement process herein and issued a letter of award to the Applicant.

The Board has heard and considered the submissions made by all the advocates who appeared before it.

It is clear from the letter of award produced by the Applicant as annexure "SDS 1" that the entire Procurement process which resulted into the award was undertaken by the 1st Respondent. It is therefore plain that the Procuring Entity in this particular instance was the 1st Respondent which did not deny this position.

In view of the fact that the issue of who conducted this tender is clear and was not disputed, the Board therefore finds that on the basis of the Provisions of the Act and particularly, Section 96 thereof that the 1st Respondent was the proper Procuring Entity and that the Applicant therefore wrongly enjoined the 2nd Respondent as a party to this Request for Review.

The Board further finds that though the Applicant and both Respondents communicated to each other after the award of the tender to the Applicant, this did not alter the fact that the subject tender was advertised, evaluated and thereafter awarded to the Applicant by the 1st Respondent. The parties in this dispute also confirmed before the Board that no agreement had been entered into between the Respondents transferring the Procurement process herein from the 1st Respondent to the 2nd Respondent after the award of the tender.



This ground of the 2nd Respondent's Preliminary Objection is therefore allowed.

Ground 2 of the Preliminary Objection.

On the 2nd ground of Preliminary Objection, Counsel for the 2nd Respondent argued that the reliefs sought by the Applicant in the body of the Request for Review could not be granted as framed.

The 2nd Respondent argued that the only substantive prayers in the body of the Request for Review were for an order that the Procuring Entity award's the tender to the Applicant and for a further prayer for costs.

The 2nd Respondent stated that there was no way the Board could base it's decision on an issue that was not pleaded. The 2nd Respondent submitted that since an award had already been made by the 1st Respondent to the Applicant it was not possible for the Board to award the Applicant the same tender the second time.

Counsel for the Applicant reiterated it's position that the Board has wide powers under the Provisions of Section 98 of the Act and that it could grant the reliefs sought in the Request for Review. He further submitted that the subject tender had not been terminated under the Provisions of Section 36 of the Act. The tender according to the Applicant was still therefore alive and the Board was not powerless in ordering its enforcement.

Counsel for the 1st Respondent associated herself with the submissions made by Counsel for the Applicant.

In a short reply to the submissions made by Counsel for the Applicant, Counsel for the 2nd Respondent contended that the issue of termination



of the Procurement process herein was not raised by the Applicant and that the Provisions of Section 36 of the Act had been wrongfully referred to by the Applicant.

On the second limb of the 2nd Respondent's Request for Review, the Board has perused the prayers set out in the Request for Review. The Board finds that the Applicant sought for the following three reliefs:-

- a) **That the Board directs that the Procuring Entity awards the tender to it.**
- b) **The Procuring Entity be condemned to pay costs of the Request for Review.**
- c) **And that the Board be pleased to make such other incidental orders and or directions as the Honourable Board shall deem just and expedient to determine.**

The Board has perused the Request for Review and the documents annexed thereto and more particularly the letter of award made by the 1st Respondent to the Applicant.

Upon awarding the tender to the Applicant, the Applicant could not therefore lawfully seek for the award of the same tender to be made in it's favour by the Board.

Awarding the Applicant one tender twice would be superfluous. The Applicant already has an award in its favour and the only difficulty it apparently has is in having the relevant party to the tender process signing a contract agreement.

As the Board has previously stated in other Requests for Review it can only grant a relief which is specifically set out in the body of the



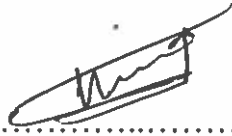
As the Board has previously stated in other Requests for Review it can only grant a relief which is specifically set out in the body of the pleadings. There is therefore not legal basis upon which the Board can grant a prayer that is not specifically pleaded by an Applicant.

The second ground of the 2nd Respondent's Preliminary Objection is therefore also allowed and the Applicant's Request for Review is accordingly struck out but with no order as to costs.

Dated at Nairobi on this 24th day of March 2015


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**CHAIRMAN
PPARB**


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**SECRETARY
PPARB**

