

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 1 OF 2016

BETWEEN

SUPER TAG GENERAL CONTRACTORS.....APPLICANT

AND

PARLIAMENTARY

SERVICE COMMISSION.....PROCURING ENTITY

Review against the Parliamentary Service Commission in the matter of Tender No. PSC/023/2014-2015 Tender for Consultancy Services for Conducting a Security Survey, Design, Documentation & Supervision of Installation of an Integrated Security Management system.

Board members present

- | | |
|--------------------------|------------|
| 1. Mr. Paul Gicheru | - Chairman |
| 2. Gilda Odera | - Member |
| 3. Peter Ondieki, MBS | - Member |
| 4. Eng. Weche Okubo, OGW | - Member |
| 5. Hussein Were | - Member |

In attendance

1. Mr. Stanley Miheso -Holding Brief for Secretary
2. Ms. Shelmith Miano -Secretariat

Present by invitation

Applicant -Super Tag General Contractors

1. Hiram Thimba - Advocate
2. Ongeri Stephen - Manager
3. Edwin Murithi - Assistant Manager

Procuring Entity-Parliamentary Service Commission

1. Anthony Njoroge -Legal Counsel
2. Susan Mukindia -Legal Counsel
3. Beatrice Wanderi - Procurement Officer
4. Naomi Gachara - Legal Assistant

Interested Parties

1. George Kamau - Advocate, Akkad Systems limited
2. Sylvia Waiganjo - Advocate, Akkad Systems limited
3. Bernard Theuri - C.E.O., Akkad Systems limited
4. Marysheila Oduor - Advocate, J. Gordon Consulting Engineers ltd
5. William Muthee - Advocate, Aviation & Gen. Security Consult ltd
6. Aida V. Mutua - Advocate, Aviation & Gen. Security Consult ltd
7. Rachel Chebokati - Advocate, Aviation & Gen. Security Consult ltd
8. Faith Wairimu - Advocate, Aviation & Gen. Security Consult ltd

BOARD'S DECISION

Upon hearing the representations of the parties and the 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 Parliamentary Service Commission advertised the Tender for Consultancy Services for Conducting a Security Survey. Design. Documentation & Supervision of Installation of an Integrated Security Management in two local dailies namely the Standard and the Daily Nation, on Friday. 22nd May, 2015.

Scope of Service

The consultancy service was to comprise the conducting of a security survey, design, documentation & supervision of installation of an integrated security management system

Tender Opening Results

The opening was at the Protection House 4th Floor, Main Boardroom in the presence of the firms' representatives who chose to attend.

Twenty eight (28No.) firms purchased the tender documents, eight (8) responded.

TENDER EVALUATION

The Tender Processing Committee (TPC) was appointed by the Accounting Officer, Clerk of the Senate/ Secretary to the Parliamentary Service Commission pursuant to Sections 27 (3), Section 66 of the Public Procurement and Disposal Act, 2005 and Regulation 5 - 6 of the Public Procurement and Disposal (Amendment) Regulations, 2013.

Preliminary evaluation criteria (mandatory)

All the Bidders were examined for compliance with mandatory requirements by examining the pre-qualification conditions as set out in the tender advertisement notice and the conditions stated in the bid document listed hereunder:-

- (i) Submit an original and one (1 No.) additional copy of the separate technical and financial proposal;
- (ii) Submit a certificate of registration/incorporation;
- (iii) Fill, sign and stamp the Form of Tender in the Format provided;
- (iv) Fill, sign and stamp the Price Schedule Form in the Format provided;
- (v) Fill Technical Proposal Form in the Format provided;
- (vi) Submit a dully filled, signed and stamped Confidential Business Questionnaire in the format provided;'
- (vii) Submit a dully filled, signed and stamped Firm's References Form;
- (viii) Submit a bid bond/security of Kshs. 300,000.00 from a reputable bank or an insurance company approved by PPOA;
- (ix) Tender Security valid for 150 days after date of tender opening;
- (x) Payment of a non-refundable RFP document fee of Kshs. 1.000.00
(Attach copy of the receipt);
- (xi) Submit a joint venture agreement where applicable; and

(xii) Having attended the pre-bid conference held on 3rd June, 2015.

The following firms were not responsive at the Preliminary evaluation stage.

1. M/s Mitkat Advisory Service PVT Limited (Bidder No.1)
2. M/s National Security Project (Bidder No.3)
3. M/s Super- Tag General Contractors (Bidder No.6)
4. M/s International Security Consultancy (Bidder No.7)
5. M/s Loadline Engineering Services (Bidder No.8)

Bidder No.1, 3, 6, 7 and 8 were not responsive at the Preliminary evaluation stage because of the following reasons;

Bidder No.1

- The bidder did not submit a certificate of registration /incorporation:
- The technical proposal form was not in the format requested in the tender document;
- The confidential business questionnaire is not provided; and
- The copy of the payment receipt was not attached as requested in the tender document.

Bidder No.3

- The bidder did not provide a confidential business questionnaire as requested in the tender document; and
- The bidder did not provide a joint venture agreement.

Bidder No.6

- The bidder did not attend the pre-bid conference as required by the tender document

- The bidder did not provide a joint venture agreement as required by the tender document
- The firm reference given by the bidder did not carry out the task/assignment as specified by the bidder.

Bidder No.7

- The bidder did not provide a confidential business questionnaire as requested in the tender document.
-

Bidder No.8

- The form of tender provided was not in the format provided in the tender document;
 - The price schedule form provided was not the format requested in the tender document;
 - The technical proposal form provided was not in the format as requested in the tender document; and
 - The stamped firm's reference form was not signed as requested in the tender document.
 - The copy of the payment receipt was not attached as requested in the tender document.
-

The following firms were responsive in Preliminary evaluation

1. M/s Gordon Consulting Engineers limited (bidder No.2)
2. M/s Akkad Systems limited (bidder No.4)
3. M/s Aviation & General Security Consultant limited (bidder No.5)

The following firms therefore qualified for technical evaluation;

1. M/s Gordon Consulting Engineers limited (bidder No.2)
2. M/s Akkad Systems limited (bidder No.4)
3. M/s Aviation & General Security Consultant limited (bidder No.5)

TECHNICAL EVALUATION

Bidders who qualified for technical evaluation were evaluated on the following criteria:-

Item	Description
1.	Brief Company profile (Maximum of three pages) covering: <ul style="list-style-type: none"> • Human Resource - Staffing levels • Company References • Company core areas of operations Company experiences in security systems designs and installations
2.	Proof of registration with modern security systems organization (s) that regulates all institutions that install and distribute security systems e.g. CCTV, X-ray machines, alarms, intrusion system, etc - (3 marks)
3.	Provide evidence of four (4) past projects of similar nature (both private/ public sector institutions) in the last 5 years by the company, or by one or a combination of individual consultants in the bidding company.
4.	Provide evidence of two (2) past experiences of undertaken large crash-rated vehicular barrier projects in the last 5 years and provide evidence of two (2) past experiences of having undertaken vehicle x-ray systems projects in the last 5 years
5.	Provide evidence of two (2) past experience of undertaken Control Room Design projects in the last 5 years.
6.	Provide Detailed Engineering Drawings <ol style="list-style-type: none"> a. Grand Integrated Security System Layout/ Design b. Equipment Detail! Layout Drawings c. System Architecture Drawings d. Wiring Diagrams Drawings and Single Line Power Diagrams e. Power and Bandwidth Estimates f. Rack Face Elevation Drawings g. IP Addressing Scheme h. Cable and Conduit Drawings
7.	Propose Work plan and Methodology and Recommendations on: <ol style="list-style-type: none"> i. Written Network Security Solution/ design - max. 4 marks ii. Written outlay of Supervision of installation of Integrated Security management System - max. 4 Marks iii. Written Provision/proposal of Trainingto Users - max. 3 marks iv. Provision of 3 Dimension and model in a CD form - max. 3 marks v. Propose appropriate technical qualifications and human resource capacity/ numbers to effectively manage and run the security system to be installed, after having undertaken the clients staffing levels - max. 4 marks
8.	Provide CVs and relevant certificates of at least 1 lead Consultant and 4 Associates:

Item	Description
	<p>SECURITY CONSULTANT/TEAM LEADER</p> <ul style="list-style-type: none"> - Degree or post graduate diploma in security studies. criminology, political science or related field - (2 Marks) - Experience in security consulting (risk assessments. development of security procedures and designing security systems/ master plans): <ul style="list-style-type: none"> a.5 years and above experience or at least having worked on five and above (5) projects/ assignments: (3 Marks) b.3-4 years' experience or at least having worked on three to four (3-4) projects/ assignments: (2 Mark)
	<ul style="list-style-type: none"> c.1-2 years' experience or at least having worked on one to two (1-2) projects/ assignments: (1 Mark) - Experience in managing complex. broad scope security projects: <ul style="list-style-type: none"> a.5 years and above experience or at least having worked on five and above (5) projects/ assignments: (3 Marks) b.3-4 years' experience or at least having worked on three to four (3-4) projects/ assignments: (2 Marks) c.1-2 years' experience or at least having worked on one to two (1-2) projects/ assignments: (1 Mark) - Proof of registration with relevant certified security bodies - 1 mark - Demonstrate competence in Information Systems installation - 1 mark - Participation in Security Related Courses (Provide evidence): Each course at 0.5mark. Maximum 1 marks) (Maximum 11 Marks) <p>ASSOCIATE'S QUALIFICATIONS:</p> <p>a. SYSTEMS ENGINEER</p> <ul style="list-style-type: none"> - Bsc Degree in Information Technology. Computer Information System or computer science engineering or related fields - (2 Marks) - Experience in designing integrated security systems, including software development - 1 mark. - Working experience in fields of IT. VoIP. Telecom - 1 mark. - Experience in analysis of security threats and weaknesses in IT systems - 1 mark. - Experience in implementing and maintaining security design and integrated security management systems or at least having worked on two (2) projects/ assignments: (1 Mark) -- Experience in Computer Aided Design and 3 Dimension Modelling or software development - (1 mark) - Certified Information Security Management (CISM) and ISO certified/ ISO Auditor on Security (0.5 Mark) - Proof of qualification in systems auditing. security management and any ISO certification especially ISO 27000 on ISMS systems 0.5 mark) -- Membership in a professional association - 1 mark (Maximum 9 Marks)

Item	Description
	<p>b. ELECTRONICS/ ELECTRICAL ENGINEER</p> <ul style="list-style-type: none"> - Degree in Electrical or Electronics Engineering or related field (2 Marks) - Experience designing, implementing and maintaining security design and integrated security management systems or at least having worked on two (2) projects/ assignments: (2 Marks) - Membership in a professional Association - 1 mark (Maximum 5 Marks) <p>c. CIVIL/ STRUCTURAL ENGINEER</p> <ul style="list-style-type: none"> - Degree in civil structural engineering or related field (2 Marks) - Experience designing, implementing and maintaining security design and management systems or atleast having worked on two (2) projects/ assignments: (2 Marks) - Membership in a professional Association - 1 mark (Maximum 5 Marks) <p>d. QUANTITY SURVEYOR</p> <ul style="list-style-type: none"> - Degree in Quantity Surveying or related field (2 Marks) - Experience designing, implementing and maintaining security design and management systems or at least having worked on two (2) projects/ assignments(2 Marks) - Membership in a professional Association - 1 mark (Maximum 5 Marks)

The minimum technical score required to qualify for financial evaluation was 70 marks.

The following bidders did not qualify for financial evaluation because they did not attain the 70% pass mark as required in the tender document.

1. M/s Akkad Systems Limited (Bidder No.4)
2. M/s Aviation General Security Consultant Limited (Bidder No.5)

M/s Akkad Systems Limited (Bidder No.4)

1. The Bidder did not allegedly provide evidence of four (4) past projects of similar nature (both private/ public sector institutions) in the last 5 years by the company, or by one or a combination of

individual consultants in the bidding company as requested in the tender document.

2. The bidder did not allegedly Provide evidence of two (2) past experiences of undertaken large crash-rated vehicular barrier projects in the last 5 years and provide evidence of two (2) past experiences of having undertaken vehicle x-ray systems projects in the last 5 years as requested by the tender document

3. The bidder did not allegedly provide evidence of two (2) past experiences of undertaken Control Room Design projects in the last 5 years as requested in the tender document.

4. The bidder did not allegedly provide detailed engineering drawings in the following

- I. System Architecture Drawings
- II. Wiring Diagrams Drawings and Single Line Power Diagrams
- III. Power and Bandwidth Estimates
- IV. Rack Face Elevation Drawings
- V. IP Addressing Scheme
- VI. Cable and Conduit Drawings

M/s Aviation General Security Consultant Limited (Bidder No.5)

1. The bidder did not allegedly provide evidence of two (2) past experience of undertaken Control Room Design projects in the last 5 years as requested by the tender document

2. The bidder did not allegedly provide detailed engineering drawings in the following areas

- i. Wiring Diagrams Drawings and Single Line Power Diagrams
- ii. Power and Bandwidth Estimates
- iii. Rack Face Elevation Drawings

- iv. IP Addressing Scheme
 - v. Cable and Conduit Drawings
3. The bidder did not allegedly provide the following under proposed work plan and methodology as requested in the tender document
- i. Written outlay of Supervision of installation of Integrated Security management System
 - ii. Written Provision/proposal of Training to Users
 - iii. Provision of 3 Dimension and model in a CD form
 - iv. Propose appropriate technical qualifications and human resource capacity/ numbers to effectively manage and run the security system to be installed, after having undertaken the clients staffing levels
4. The bidder allegedly provided CVs and relevant certificates of
- Security Consultant /Team leader with no required work experience as required in the tender document
 - Electronic/Electrical Engineer, not a member of any professional association required in the tender document
 - Civil/Structural Engineer not a member of any professional association as required by the tender document
 - Quantity Surveyor does not have required experience

From the above evaluation. M/s Gordon Consulting Engineers Limited (bidder No.2) qualifies for financial evaluation having attained the minimum technical requirement of 70% pass mark of 86.5 %.

FINANCIAL EVALUATION

Only M/s Gordon Consulting Engineers Limited (bidder No.2) qualified for financial evaluation with a quotation as tabulated below:-

No	Item Description	Total Cost in Ksh.
1	Conduct of Security Survey	Kes 16,965,000
2	Design of the system	Kes 42,978,000
3	Prepare specifications including BQ's for installation of the System	Kes 7,917,000
4	Supervision of the installation (expected to take 135 working days)	Kes 45,240,000
5	Sub- total	Kes 113,100,000
6	Taxes	Kes 22,620,000
7	Total Amount	Kes 135,720,000

Recommendation

1. The evaluation committee recommended the award of the tender to M/s Gordon Consulting Engineers Limited (bidder No.2) with a quote of Kenya shilling of one hundred and thirty five Millions, seven hundred and twenty thousand only (135,720,000).
2. The committee recommended that due diligence be carried out before the signing of the contract between the Parliamentary Service Commission and the Consultant M/s Gordon Consulting Engineers Limited to establish the accuracy of the information provided in the tender document in terms of consultancy offered to various other institutions in Israel and other countries.
3. The committee additionally proposed to visit the following sites/institutions where M/s Gordon Consulting Engineers Limited had provided similar services :-
 1. Parliament of Israel and Central Bank of Israel
 2. Singapore - Changi Prison
 3. Germany- Deutsche Post (DHL facilities)
 4. Poland- Protection of Borders
 5. Netherlands - Rotherham Elektrische Tram.
 6. Russia- Commercial Banks.

TENDER COMMITTEE

The Parliamentary Tender Committee in its 13th meeting held on Wednesday 11th November, 2015 at 10.00 am discussed the item and awarded the tender as per the evaluation committee recommendation as follows:-

Firm awarded: **M/s Gordon Consulting Engineers Limited**

Sum awarded: **Kenya Shillings One Hundred Thirty Five Million, Seven Hundred and Twenty Thousand only (Kshs.135,720,000.00)**

THE REQUEST FOR REVIEW

This Request for Review was filed by M/s Super Tag General Contractors Ltd against the decision of the Parliamentary Service Commission in the matter of Tender NO. RFP NO. PSC/023/2014-2015 for Consultancy Services for conducting a Security Survey, Design, Documentation & Supervision of Installation of an Integrated Security Management System at the Parliament Buildings which was awarded to M/s J. Gordon Consulting Engineers Limited the successful bidder herein.

Though this Request for Review was first filed on 8th January, 2016, all the parties to the review were granted leave by the Board to file further documents which the Applicant did on 27th January, 2016. The Procuring Entity filed its initial response on 13th January, 2016 and a further Response on 28th January, 2016.

The successful bidder entered appearance and filed a memorandum of response together with written submissions on 26th January, 2016.

During the hearing of the Request for Review, two additional parties namely M/s Akkad Systems Limited and M/s Aviation and General Security Limited also appeared and participated at the hearing of the Request for Review.

The Applicant, the Procuring Entity, the successful bidder and the two Interested Parties who have been named above were represented by Mr. ~~Hiram Thimba~~ advocate, Mr. ~~Anthony Njoroge~~ Advocate, M/s ~~Marysheila Oduor~~ Advocate, Mr. George Kamau Advocate and Mr. William Muthee Advocate.

All the parties who appeared before the Board made submissions in support or in opposition to the Request for Review. The two Interested Parties who have been named above supported the Applicant's Request for Review while the Procuring Entity and the successful bidder opposed the Request for Review.

The Board has Considered all the documents placed before it and the arguments made by the parties and it is clear from the totality of the arguments and the documents that the following issues fell for consideration before the Board based on the arguments made before it and the documents filed:-

- a) Whether the Applicant's Request for Review had been filed out of time.*
- b) Whether this tender provided for a tender validity period and if the answer is yes whether the award of the tender had been made during the tender validity period.*
- c) Whether the subject tender had been evaluated and awarded within the period of Thirty days as required by Section 65(2) of the Regulations as amended.*

d) Whether the Applicant had proved that the successful bidder had been accorded preferential treatment.

The Boards will therefore now proceed and consider each of the issues raised in the above order:-

a) Whether the Applicant's Request for Review was filed out of time.

It was the Procuring Entity's case supported by the successful bidder on the basis of the letters annexed to its Request for Review and particularly the letter dated 29th September, 2015 that the Applicant was aware of the issue of the preferential treatment of one of the bidders as far back as 29th September, 2015. Counsel for the Procuring Entity submitted that the Applicant had raised the issue of the Procuring Entity's tender evaluation committee visiting M/s Gordon Consulting Engineers Limited which was one of the bidders at its facility in Israel as far back as on 29th September, 2015 and ought to have therefore filed a Request for Review raising this complaint with the Board within Seven (7) days of having knowledge of this allegation.

This argument was supported by Counsel for the successful bidder in her submissions who urged the Board to find that the Applicant ought to have come before the Board upon learning of the above allegation.

Counsel for the Procuring Entity however submitted that a party could only approach the Board under the Provisions of Regulation 73(2)(c) of the Regulations upon notification that its tender was unsuccessful and that the Applicant had not received any notification of the outcome of its tender up to the time that this Request for Review came up for hearing before the Board.

Counsel for the Applicant further submitted that in any event, a bidder could approach the Board either upon becoming aware of the breach complained of or upon notification that its bid was unsuccessful.

Both Counsel for the Interested Parties supported the position taken by Counsel for the Applicant and submitted that the Applicant's Request for Review was filed within time.

The Board has considered the submissions made by all the parties regarding this issue and finds that though the Applicant made the allegation in the letter dated 29th September, 2015, it is clear from the contents of the letter answering the allegation dated 19th October, 2015 and which appears in the Procuring Entity's response that the Procuring Entity denied the said allegation and indicated that the Procurement process was still ongoing. The Board has also perused the tender document and the admission by the Procuring Entity that a site visit was not provided for in the tender document.

The Board therefore finds that any complaint to it would have been premature and would not have been based on any Provision of the tender document.

In any event the Board has looked at the other complaints raised by the parties such as the failure to provide for the tender validity period in the tender document and that the evaluation was undertaken out of time and finds that even if the Applicant was aware of the issue of preferential treatment as early as on 29th September, 2015 it would have been perfectly entitled to appear before the Board and lodge the other complaints since those complaints arose after 29th September 2015.

Finally on this issue, the Board has held that a bidder can approach the Board either upon becoming aware of the breach of the Provisions of the Act, the Regulations or the tender documents or upon receiving a notification that it's tender was unsuccessful and that each case must be looked at depending on the prevailing circumstances and the nature of the complaint in order to consider the stage at which it ought to have been instituted.

In the circumstances of this case, the Applicant complained that it had not been served with any letter of notification by the Procuring Entity. The Procuring Entity asserted that this was done on 8th January, 2016 by ordinary post and produced a record containing a list of letters which were allegedly posted.

The Board has looked at the record produced and finds that other than setting out the names of bidders and their addresses, there was no proof of personal service or service by registered post produced by the procuring entity. The Posta Book itself which is headed Record of Outward Registered Articles would have naturally entailed the production of evidence that the letters of the notification were indeed registered, which the Procuring Entity did not produce.

Regulation 66(2) of the Public Procurement and Disposal Regulations which governed this Procurement provides as follows:-

"A procuring Entity shall immediately after tender award notify an unsuccessful tenderer in writing and shall in the same letter provide reasons as to why the tender, proposal or application to be pre-qualified was unsuccessful".

As rightly observed by Mr. Muthee advocate for the Interested Party Aviation & General Security Consultants Ltd (A.G.S.C), where the issue of service is denied, the burden of proving that service was indeed effected lies with the Procuring Entity which in this case did not prove service of the notification on a balance of probability.

The preliminary objection raised by the Procuring Entity on the issue of jurisdiction therefore fails and is disallowed.

b) Whether this tender provided for a tender validity period and if the answer is yes whether the award of the tender was made during the tender validity period.

On the issue of whether this tender provided for a tender validity period it was the Applicants case that it did not. This fact was readily conceded by the Counsel for the Procuring Entity. The Board has perused the advertisement of the tender in the Daily Nation Newspaper dated 22nd May, 2015 and page 13 of the tender document headed a **Preliminary Evaluation Criteria (Mandatory requirements)** and finds that all that the advertisement and the tender document required bidders to provide was a tender security in the form of a bid bond of Kshs. 300,000 and that the tender security be valid for 150 days after the date of tender opening.

It is the Board's view that the prescription of a tender validity period in a tender document is not equivalent to the requirement for the Provision of a bid bond and that the two serve different purposes.

A tender validity period prescribes the period when a procurement process must begin and come to an end while a tender security serves the purpose of ensuring that a abider meets its obligations from the date of submitting a bid to the date of the award.

The Board therefore finds that the failure to provide for a tender validity period in the tender document rendered the entire document uncertain and fatally defective and the document together with all the steps taken pursuant thereto cannot stand.

Turning to the alternative proposition by Counsel for the Procuring Entity that the requirement for a tender security was for 150 days and therefore the tender validity period should be taken as 150 days, the Board has looked at the minutes of the tender evaluation committee and finds that this tender closed/opened on 23rd June, 2015 and was evaluated from 24th June, 2015 and the original minutes of the tender evaluation committee are dated 14th August, 2015.

The minutes of the tender committee which awarded the tender are dated 11th November, 2015 but were signed on 16th November, 2015.

The Procuring Entity without providing any evidence of service stated that letters of notification to the successful and the unsuccessful bidders were dispatched on 8th January, 2016.

Counting the number of days from 24th July, 2015 to 8th January, 2016 therefore shows that the Procuring Entity purported to award the tender outside the period of 150 days prescribed for the validity of the tender security.

The Provisions of the Regulations however require that prior to the expiry of the tender validity period or extension thereof the Procuring Entity shall notify the successful tenderer that it's tender has been successful and shall simultaneously notify the other tenderers of the fact that their tenders were unsuccessful.

This Board has held on several occasions as demonstrated by the case of **Lantech (Africa) Limited =vs= Ministry of Finance (PPARBA 2 of 2007)** that a tender can only be awarded during the tender validity period and once that period lapses the tender dies a natural death and no further step can be taken after that including the extension of the tender validity period if the extension is sought after the expiry of the tender validity period.

Based on the above, the Board therefore finds and holds that the letter of award issued to the successful bidder and any other letter addressed to any other bidder are all null and void first because this tender was fatally defective for not providing for a tender validity period and secondly and even assuming that the 150 days for the validity of the tender security was to be presumed to be the tender validity period, the awards were made long after that period had lapsed.

This ground of review therefore succeeds and is allowed.

c) Whether the subject tender had been evaluated and awarded within the period of Thirty days stipulated by law.

On the third issue framed for determination, it was conceded by the Procuring Entity and this is borne out by the minutes that this tender closed/opened on 23rd June, 2015, a fact that is also borne out by the tender advertisement dated 22nd May, 2015. It was further conceded and this is also evidenced by the minutes of the evaluation committee that the evaluation process began on 24th July, 2015 and was completed on 14th August, 2015 and a recommendation of award made to the tender committee for purposes of award which award was made on 11th

November, 2015. Letters of notification were thereafter purportedly dispatched to the bidders on 8th January, 2016.

“Regulation 18 of legal notice number 106 of 18th June, 2013 which amended Regulation 65 of The Public Procurement and Disposal Regulations 2006 provides as follows:-

18”Regulation 65 of the principal Regulations is amended by:-

a)

b)

(2) The period of tender award shall not exceed Thirty (30) days from the date of the tender opening”.

Under the Provisions of the law therefore a Procuring Entity is enjoined to evaluate and make an award of a tender within Thirty (30) days from the date of tender opening. The above set of events however shows that the award by the tender committee was made well over a period of over 120 days from the tender opening date and notifications allegedly dispatched over a month from the date of the award.

This ground of review therefore succeeds and is allowed.

d) Whether the Applicant had proved that the successful bidder had been accorded preferential treatment.

On this issue, it was the Applicant’s case that the Procuring Entity accorded the successful bidder preferential treatment by visiting the premises of one of the bidders namely M/s Gordon Consulting Engineers Limited in Israel which was one of the bidders in this tender but did not

visit the premises of the other bidders. The Applicant's Counsel submitted that if the Procuring Entity had produced the passports of members of the tender evaluation committee then that would have proved this fact.

Counsel for the Procuring Entity denied this allegation both in the Procuring Entity's response and referred the Board to its earlier denial dated 19th October, 2015 annexed to its response in which it had similarly denied the allegation.

The Board has considered the rival arguments made on this issue and finds that the allegation made, if proved was a serious allegation. The Applicant did not however swear any affidavit through any of its directors to prove the said allegation heavy as it was. The Applicant did not also produce any evidence from any person who was present during the visit or any documentary evidence that this visit indeed took place.

The Board has looked at the tender evaluation committee minutes and has similarly been unable to trace any minute indicating that there was any site visit to Israel. The Board therefore finds this allegation not proved and this ground of the Request for Review is therefore dismissed.

Before concluding this decision, the Board has perused the tender document and finds that this tender was conducted through the Request for Proposals (RFP) method and was not an open tender under the Act. The Board further finds that the tender document assigned 70 marks to technical evaluation and 30 marks to financial evaluation.

The minutes of the tender evaluation committee that carried out technical evaluation however shows that instead of using 70 marks in scoring, the committee used 100% as the basis of awarding the scores.

The same report shows that no marks were awarded at the financial evaluation stage and no combined technical and financial score was used in arriving at the winning bidder contrary to the Provisions of Section 82(5) of the Act that governed the evaluation of the said tender at the time. In the case **Runji & Partners Consulting Engineers Ltd -vs- Kenya Rural Roads Authority (PPRAB No. 35 of 2010)** the Board held that where a Procurement is undertaken under the Request for Proposals method the Procurement is entirely governed by the Provisions of Sections 76 to 87 of the Act and a recommendation of an award of the tender to a successful bidder can only be made in favour of the bidder who scored the highest aggregate combined technical and financial score in accordance with Section 82(5) of the Act.

It was not therefore enough for the Procuring Entity to state that it did not assign a financial score to the successful bidder because it was the only bidder which made it to the financial evaluation stage. The Procuring Entity ought to have evaluated the financial bid following the Provisions of Regulation 50 and based on that evaluation it should have assigned a score either of the maximum 30 marks or less and also aggregate both the technical and the financial scores and then declare a winner based on the combined score.

This rendered the entire evaluation process fatally flawed and the eventual outcome was not based on law.

The Board wishes to observe that the Procuring Entity substantially modified the standard tender document issued by the Authority. The modification ran through the general conditions and not the appendix and a comparison of the manual shows that for example Clause 2.5.4 of the

Standard tender document was amended and Clause 2.5.5 omitted, among many other alterations.

These amendments led to a situation where what was a Request for Proposal was converted into a one envelope and where the tenders were opened at the same time instead of the requirement that the technical envelope be opened and evaluated first before proceeding to open and evaluate the financial bids for bidders who meet the threshold at the technical evaluation stage.

Finally on the issue of the powers of the Board, Mr. Njoroge on behalf of the Procuring Entity stated that the Board could only entertain the issues in the documents subsequently filed by the Applicant and other parties. The Board however finds that the issues and grounds in the subsequent documents were filed pursuant to the leave granted by this Board to all parties. The Documents were filed without protest and most if not all the issues in the additional documents arose from the Procuring Entity's response.

The more crucial issue however was that the Applicant sought leave to respond to the Procuring Entity's response and upon being granted leave proceeded to formally file the documents with the Board. The document therefore formed part of the tribunal's record and the Board could not ignore it.

The High Court in the case of **Republic vs Public Procurement Administrative Review Board and 2 Others Exparte Suzan General Trading JLF High Court JR No. 289 of 2014** the High Court (Justice V. Odunga) held that the Board could not ignore documents already filed on record as this would offend the rules of natural justice. The High Court consequently remitted back the case to the Board for a re-hearing de novo

on the basis of the documents on record and in compliance with the rules of natural justice.

The issue of the scope of the powers of the Board and the matters which it can consider was dealt with by the Court of Appeal in the case of Kenya Pipeline Company Limited -Vs - Hyosung Ebara Company Limited & 2 Others [2012]eKLR where the court of appeal stated as follows:-

“The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist it in the proceedings in which it feels that it lacks the necessary experience. Section 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of the powers given to the Review Board including annulling, anything done by the procuring entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by a procuring entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.”

In the case of Republic -vs - The Public Administrative Review Board and 3 others exparte Olive Communications PVT Ltd (NAI HC J.R. NO.106 of 2014) the High Court held as follows at finding No.134 of its decision:-

134: "From the foregoing, we conclude the issues complained of were pleaded by the parties and were responded to by the Ex parte Applicant as well as the Procuring Entity. Even going by the case of Odds Jobs (supra), if the issues had not been specifically pleaded, they arose in the course of proceedings and were canvassed by the parties. They were, therefore, properly before the Board for determination. Consequently, the framing of issues by the Respondent for determination upon those matters raised in the pleadings and in the trial was in order."

The Board has read through the above case law and finds that the parties to this review were all allowed to address the Board on the issues which were put on the record by the parties with the leave of the Board and the Procuring Entity's submissions cannot therefore stand.

In view of the findings under issues (a) (b) (c) and the further findings contained in this decision, this entire procurement process was flawed and the only remedy open to the Board is to nullify the entire procurement process herein.

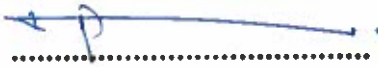
FINAL ORDERS

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

- a) The Request for Review succeeds and is hereby allowed.

- b) The entire procurement process including the letter of award issued by the Procuring Entity to the successful bidder together with the entire procurement process in respect of the subject tender be and hereby annulled and declared null and void.
- c) The Procuring Entity shall retender for the services the subject matter of this procurement process within Thirty (30) days from the date hereof.
- d) In view of the fact that the Procuring Entity and the successful bidder were partly successful in resisting issue No. (d) above, each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 29th of January, 2016.



CHAIRMAN

PPARB



SECRETARY

PPARB

