

IN THE REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 20/2018 OF 26th JANUARY, 2018

BETWEEN

JEPCO SERVICES & RENOVATORS LTD..... APPLICANT

AND

**NATIONAL POLICE
SERVICE COMMISSION..... PROCURING ENTITY**

Review against the decision of the National Police Service Commission (“the Procuring Entity”) in the matter of Tender No. NPSC/T04/2017-2018 for the provision of cleaning services for the Procuring Entity’s offices for one year, 2017-2018.

BOARD MEMBERS PRESENT

1. Mrs. Josephine W. Mong’are - Member (in the Chair)
2. Eng. Weche R. Okubo, OGW - Member
3. Mrs. Rosemary Gituma - Member
4. Mr. Paul Ngotho - Member
5. Mr. Nelson Orgut - Member

IN ATTENDANCE

1. Stanley C. Miheso - Holding Brief for Secretary
2. Ms. Maryanne Karanja - Secretariat (taking the proceedings)

Present By Invitation

Applicant – Jepco Services & Renovators Ltd

1. Isaac Owuor - Advocate, Owuor Nyahanga & Ass. Adv.
2. Dorcas Mwangi - Director
3. Bernad Adede - General Manager

Procuring Entity– National Police Service Commission

1. Daniel Odunga - Legal Officer; National Police Service
2. Wario Tache - Procurement Officer

INTERESTED PARTIES

1. Mrs. W.W. Mbogori - CEO, Super-Broom Services Limited.

Background Information

The Procuring Entity invited Tenders for Provision of Cleaning Services in December, 2017. Five Suppliers participated in the Tender bid as under-listed;

Bid No	Bidder's Name	Bid Amount
1.	Jextreem Logistics Company Limited	Ksh.181,600
2.	Robu Cleaning Services Limited	Ksh.126,432
3.	Jepco Services and Renovators Limited	Ksh.234,000
4.	Stock Twenty Four Suppliers Limited	Ksh.160,000

Bid No	Bidder's Name	Bid Amount
5.	Super-Broom Services Limited	Ksh.260,800

An Evaluation Committee was duly appointed to evaluate the applications received and prepare a report.

Preliminary/Mandatory Evaluation

Evaluation criteria

The Committee examined the preliminary and Mandatory requirements of the bidders which included the following;

No	Item Description
1.	A copy of Registration Certificate
2.	A copy of Valid Tax Compliance Certificate
3.	A copy of PIN and VAT Certificate
4.	Duly filled , signed and stamped Confidential Questionnaire
5.	Duly filled and signed Form of Tender
6.	Copy of Valid City Council Licence
7.	Government Procurement Opportunities(AGPO) Certificate
8.	Tender validity period of 90 days from date of opening of contract
9.	Evidence of physical Address and Administrative Office

Criteria for Qualification

The Committee agreed that any firm which did not provide all the mandatory requirements would not be eligible for technical evaluation. The results for preliminary evaluation were tabulated as follows;

Bidder	Bidder 1	Bidder 2	Bidder 3	Bidder 4	Bidder 5
Results	Pass	Pass	Pass	Fail	Pass

Technical Evaluation

Evaluation criteria

NO	Item Description	Max points
1.	Evidence of previous assignments carried out in the last three years (attach copies of contracts and LSO'S for cleaning services)and reference letters from clients whose contacts firm has serviced in the last three years indicating contract price of each.	30
2.	Provide number of qualified staff currently employed by firm attaching an organization chart	10
3.	Provide number of equipment that firm has.	15
4.	Provision of CV'S for at least 3 supervisory staff that firm intends to to attach during the period contract execution in the event that it is successful.	5
5.	Provision of NSSF and NHIF returns for proposed supervisory staff.	15
6.	Proof of remittance of statutory NHIF returns for proposed supervisory staff	5
7.	Valid Work Injury Benefits Policy or Group Personal Accident Policy	20
TOTAL MARKS		100

Results of the technical evaluation were as shown below:

Bidder Number	Bidder 1	Bidder 2	Bidder 3	Bidder 5
TOTAL MARKS	54.6	52.8	48.0	60

The Pass mark set for all participants was 60 Points being the pass mark reserved for AGPO group categorized for the Youth, Women and Persons with Disability.

The Committee examined the responsiveness of the bidders on the Preliminary and Mandatory requirements and noted that Four (4) of the firms responded positively. Stock Twenty Four Suppliers Limited had not attached the various mandatory documents and so the firm was disqualified. Furthermore, that firm did not respond in all the areas as required in the technical evaluation.

Financial Evaluation

Each firm's financial bid was evaluated as follows:

1. Super Broom =763832-260800

$$\frac{503032 \times 40}{763832} = 26.34$$

$$= 26.34$$

2. Jextreem Logistics Company Limited

$$763832-181600 = 30.4$$

3. Robu Cleaning Services Limited

$$763832-126432 = 33.3$$

4. Jepco Services and Renovators Limited

$$763832-195000=29.7$$

Combined Technical and Financial Scores

The technical and financial scores of each bidder were added as follows:

Item No	Bidder's Name	Technical %	Financial %	Total %
1.	Super-Broom Services Limited	60	26.34	86.34
2.	Jextreem Logistics Company Limited	54.6	30.4	85
3.	Robu Cleaning Services Limited	52.8	33.3	86.10
4.	Jepco Services and Renovators Limited	48.0	29.7	77.7

The Evaluation Committee noted that the price quoted matches the specifications provided by the Procuring Entity and that Super Broom had more experience in Cleaning Services Industry which was an area of Major focus by the Procuring Entity.

Professional Opinion

Professional Opinion was given by the Head Supply Chain Management to the Accounting Officer. It took into account the following:

That the Procuring Entity invited the tender for cleaning service through the restricted method of tendering which took 7 days as required by the law.

That the time was limited and that the cost required to examine and evaluate the large tender was not applicable. Thus the Procuring Entity opted to employ restricted method of tendering laid down under section 102(b) of the Public Procurement and Asset Disposal Act of 2015

That the tender opening committee was constituted pursuant to sec 78 (1) of the Public Procurement and Asset Disposal Act of 2015

That evaluation committee was constituted to evaluate the documents that were submitted in line with sec 46 of the Public Procurement Asset and Disposal Act of 2015

That all the members of the evaluation committee signed the Public Procurement Code of Ethics for Procurement Entities as part of maintaining highest standard of integrity and professionalism.

Believing that all the required procedures had been followed, the Professional Opinion recommended M/S Super Broom Services Ltd for the award. Subsequently, the Procuring Entity notified the bidders the outcome of the award in letters dated 11th January 2018.

THE REQUEST FOR REVIEW

The request for Review was lodged by M/S Jepco Services & Renovators Ltd, against the decision of the National Police Service Commission ("the

Procuring Entity") in the matter of Tender No. NPSC/T04/2017-2018 for the provision of cleaning services for the Procuring Entity's offices for one year, 2017-2018 on 26th January, 2018 seeking the following orders:

- a) *The entire tender process relating to restricted Tender Number NPSC/T04/2017-2018 for the provision of cleaning services for National Police Service Commission Offices be terminated.*
- b) *That the costs of this Review be borne by the Respondents.*

In its Response to the Procuring Entity prayed that the application be dismissed with cost to the Respondent as it was clearly baseless and an abuse of the legal process.

SUBMISSIONS BY PARTIES

At the hearing of the request for Review the Applicant was represented by Mr. Isaac Owuor Advocate while the Procuring Entity appeared through its legal officer Mr. Odunga Advocate. The Applicant raised two issues namely;

1. *Notification to the bidders on the outcome of the procurement process;*
2. *Evaluation criteria of the tenders at Technical and Financial stages.*

On the issue of the letter of Notification the Applicant submitted that the letter of notification dated 11th January 2018 by the procuring entity was not done in accordance with the law in that it did not give the reasons as to why the Applicants tender was not successful. The Applicant submitted that the notification letter fell short of the dictates of the law especially as set out under section 87 of the Public Procurement and Asset Disposal Act, 2015 in that it failed to provide the Applicant with the reasons for disqualification. The Applicant further submitted that a letter was given to the supervisor who was

stationed at the Procuring entity's premises on the same day they were invited to meet with the successful bidder for a handover of the premises which in the opinion of the Applicant was an improper way of service and not envisioned in the tender document or the law. The fact that they were being notified while at the same being asked to handover the premises was a clear indication that the successful bidder received favourable treatment that was not accorded to the other unsuccessful bidders as it appeared they had been notified ahead of the others. This according to the Applicant was a breach of the law especially section 3 of the Act which calls for transparency and integrity of the public procurement process and as well as section 87 which require that all parties to a tender must be notified at the same time, both the successful and the unsuccessful bidders.

On the second issue of the criteria for evaluation used by the procuring entity to arrive at a successful bidder the Applicant submitted that the Procuring Entity, by awarding the Tender to the highest bidder who bid over and above the Applicant's bid, contravened the Provisions of Section 3 of the Public Procurement and Disposal Act 2015. The Applicant averred that the tendering process was not conducted in accordance with the guiding principles contained in section 3 of the Act by the way in which its bid was treated. The Applicant further stated that it was actually hounded out of the premises of the Procuring Entity by the successful bidder even before the process was completed hence necessitating the filing this request for review. The contract thereafter signed by the successful bidder and the procuring entity was a nullity since a request for review had already been filed and accordingly under the provisions of section 168 of the Act the procurement process was deemed to have come to a stop by operation of the law and yet the Procuring

Entity and the successful bidder colluded to take over the premises when the case was still pending.

The Applicant further submitted that on 18th December, 2017, when it attended the tender opening its bid was the third lowest priced at a bid price of Kshs. 2,340,000/- while the successful bidder's M/s Suppliers Ltd bid price was Kshs. 3,129,600/- but it was awarded the above mentioned tender. The Applicant therefore urged the Board to allow the request for review and set aside the Contract signed by the Successful bidder and the Procuring Entity.

In its response the Procuring Entity raised a preliminary objection on the issue of Jurisdiction. Counsel submitted that although the Applicant had filed its application on 26th January, 2016 which time was within the period allowed by law under section 167 of the Act, the application and the letter from the Board was not served upon it until the 30th January, 2018, a day after it had entered into contract with the successful bidder. The Procuring Entity submitted that by virtue of section 167 of the Act the Board lacked jurisdiction to entertain the Request for review and urged the Board to down its tools for want of jurisdiction to entertain the request for review as filed. It urged the Board to dismiss the request of review for want of jurisdiction and award to the procuring entity with costs.

In responding to the substantive issues raised in the Request for review, on the issue of notification the procuring entity submitted that it notified all the parties in accordance with the law although it omitted to include reasons for disqualification in the letter sent out to the applicant and other bidders whose bids were found to be unsuccessful. The Procuring Entity stated that failure to include the reason did not in any way prejudice the Applicant as all bidders were treated the same. On the second issue of evaluation the Procuring Entity

submitted that its tender documents required a combined evaluation process of both the financial bids and the technical bids and that even though M/s Super Broom Services had a slightly higher financial bid, it emerged with the best technical bid thus cumulatively emerging the best, as shown above.

The procuring Entity urged the board to dismiss the request for Review for lacking merit and allow it to proceed with the procurement process to its logical conclusion.

THE BOARD'S FINDINGS

Preliminary objection

The board has noted that the Procuring Entity has raised a preliminary objection citing jurisdiction of the board in line with section 167(4) which prohibits the board to hear a matter where a contract has been signed.

Section 167. (1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

(2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.

(3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act.

Subsequently once a matter has been filed the Act under section 168 prohibits any further dealing with the process until the request for review is heard and determined. The onus to serve the other party is however placed on the Board and not on the party filing the Request for review.

Section 168. Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed.

The Board has noted that the notification letters were issued by the Procuring entity on the 11th January, 2018 but received by the Applicant on the 13th January, 2018. The Applicant approached the Board on the 26th January, 2018 while the window for bringing the request for review was still open. Section 135 of the Act reproduced herein below allows parties to enter into contract after the lapse of 14 days from the date of notification;-

section.135. (1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.

(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.

(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.

(6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—

(a) Contract Agreement Form;

(b) Tender Form;

(c) price schedule or bills of quantities submitted by the tenderer;

(d) Schedule of Requirements;

(e) Technical Specifications;

(f) General Conditions of Contract;

(g) Special Conditions of Contract;

(h) Notification of Award.

(7) A person who contravenes the provisions of this section commits an offence.

It is clear therefore that no valid contract can legally be created before the lapse of fourteen days from the date of notification. It is also quite clear from the chronology of events that although the letters of notification were issued on 11th January, 2018 it was not until the 13th January, 2018 that the Applicant was notified and served with the letter a fact not disputed by the parties. This therefore meant that effective date for purposes of computing time was 14th January, 2018 and the fourteen days would have lapsed on the 29th January, 2018. The Applicant approached the Board on the 26th January, 2018 and filed the request for Review on the same date well within the time allowed for a party to approach the Board for request for review. The onus of service of the Request for review was placed on the Board to effect service under the provisions of section 168 of the Act cited above. It is therefore apparent and clear to the Board that at the time the contract was signed by the procuring Entity and the successful bidder a valid request for review existed and therefore any action relating to the procurement process of the tender in question had by operation of the law being stayed. The Board is of the view that the contract therein signed is invalid and an illegality having been entered into while a Request for review was pending before the Board. The Board

therefore holds that in view of the same it has merit to hear the request for Review. The Preliminary Objection filed by the Procuring Entity is therefore found to be lacking in merit and is hereby dismissed. The Board having therefore found the Preliminary objection to have no merit will proceed to examine the Request for Review on its own merit.

The Board having heard the submissions from the parties and having perused the documents submitted to it by all the parties notes as follows;

1. The tender was a restricted tender sent to five pre-qualified bidders from a pool of prequalified suppliers;
2. The Tender was opened on 18th November, 2017. A register and minutes for tender opening signed by all members of the committee were produced;
3. The tender was evaluated and a report produced and signed by all members on 19th December, 2017;
4. The evaluation was of the tender was in three stages that is:-

Stage 1 – Mandatory requirements

Stage II – Technical Evaluation

Stage III – Financial Evaluation

5. The Professional Opinion recommended the award to M/s Super Broom Services;
6. The bidders were all notified of the outcome by letters dated 11th January, 2018.

From the foregoing the Board notes that the Applicant's bid was evaluated up to the financial evaluation and although it had the lowest priced bid it was not

the bid with the highest combined score. The tender was awarded to the bidder with the highest combined score that is M/s Super Broom Services Limited. The Board further observes that the Procuring Entity used a combined technical and financial evaluation to get the score of the bidder with the highest combined score.

However, on perusal of the blank tender document the Board could not locate the evaluation score criteria. The Procuring Entity was unable to explain to the Board how each bidder was scored. It could also not explain what percentage was reserved for the technical evaluation and what percentage for financial evaluation. The Act under Section 80(2) is clear on how the evaluation of tenders should be conducted and states that:-

Section 80(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

Section 86(1)(a) and (b) of the Act which is also relevant to the matter provides that that:-

Section 86(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

- (a) the tender with the lowest evaluated price;*
- (b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for*

proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;

In the absence of a clearly defined technical evaluation criteria the Board is at a loss as to how the scores were arrived at. The Board further notes that no explanation was availed to it by the Procuring Entity as to how the scores allocated to each bidder at the technical evaluation stage were arrived at even though the bid document did set the pass mark at 70%. It is not clear where the scores or weight were being drawn from as the technical criteria had no weights against each category. Secondly this was an open tender and once a bidder had attained the pass mark at the technical stage then it followed the lowest evaluated bidder would be awarded the contract. Both parties agree that the Applicant offered a much lower priced bid as compared to the Successful bidder. It is also not in dispute that the Applicant had been providing the said service to the Procuring entity, a clear indicator the firm had the technical capacity to carry out the services. The decision to combine the scores seemed to have been only made by the evaluation committee and not communicated to the bidders at the time of tendering hence creating an opportunity for mischief. Under article 227 of the Constitution of Kenya, public entities are required to carry out public procurement process in a manner that is clear of ambiguities and one that is transparent and accountable. From the information availed to the Board it is not clear from the tender document availed to the bidders how the procuring entity was going to select a successful bidder and the method used is left to conjecture and guess work and it therefore leads the Board to conclude that the criteria therefore used was extrinsic and in contravention of the law under section 80(2) of the Act cited above and the guidelines set out in the constitution.

A closer look at the tender document revealed gaps in the document and references made to clauses not to be found in the tender document itself rendering the Board to surmise that the tender document was not done following the law and regulations as set out in the Act but was cobbled up in a hurry to serve a mischievous end. A case in point in the tender document is when under the evaluation criteria in the Clause 2.24.3 of the tender document referred to "paragraph 2.29" which was not even in the tender document, while the Instructions to Tenderers made reference to a non-existent Clause 2.30. This therefore indicated that the Procuring Entity did not pay close attention to the preparation a clear and unambiguous tender document as is required by the Act. The Board is therefore satisfied that because of these anomalies, the Procuring Entity did not comply with section 80(2) of the Act in the evaluation of this tender.

On the issue of notification the board noted and it was not disputed that the purported letter of notification dated 11th January, 2018 fell short of the requirements set down by the law as set out under section 87.(3) of the Act that stipulates as follows:

Section 87(3) "When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof." (emphases added)

It is undisputed that the subject letter merely informed the Applicant that its bid was unsuccessful. The letter disclosed neither the successful bidder nor the reasons as to why the Applicant's bid was unsuccessful.

Subsequently the Applicant was forced to write and seek reasons for its disqualification vide a letter dated 18th January 2018 and which reasons were then provided to it in the Procuring Entity's letter of 24th January 2018. These omissions the Board notes amount to a contravention of the above statutory provision as the reasons should have been in the notification letter of 11th January, 2018 itself. It is clear from the foregoing that the Procuring Entity had difficulties understanding the breadth and depth of its obligation set out by the act and the regulations. It clearly did not understand that the requirement to give reasons in the notification letter is a statutory requirement not a discretionary recommendation and went about disregarding the law with abandon. The board notes that the above statutory provision is self-explanatory. It puts an obligation on the Procuring Entity to disclose reasons in the notification letter itself not later or on request. The Board finds that the Procuring Entity did not comply with section 87(3) of the Act when notifying the Applicant of the outcome of the tender. The mode of service of the letter of notification the board notes was also quite casual. The Applicant also complained that it was served with the notification letter by hand instead of by post, which the Procuring Entity said was the mode used to notify the other bidders. Although the Procuring Entity submitted that the hand delivery was practical with respect to the Applicant, which had staff in the Procuring Entity's premises at the time and that it was, in any case, faster than post, the Board notes that the same was done in a very casual manner and to an employee of the Applicant and not the bidder itself leaving a chance of the communication not reaching the intended recipient which fortunately was not the case in this one. The modality of service for which the procuring entity set out for itself was through registered post. Part of the Bidders were served by mail while the Applicant's letter was handed over to one of its employees, a

clear deviation of the provisions set out in the tender document. From the foregoing the Board is satisfied that the Procuring entity treated the tender process very casually, a fact demonstrated in the Letter of notification and also the manner in which the notices were served. The Board is therefore satisfied that the Request for review has merit and will allow it.

COSTS.

Costs follow the event. The Applicant has been successful in its request for review and is entitled to costs. However emanating from the orders of the Board the Applicant will be accorded an opportunity to participate in the procurement process once more and will therefore not make any orders as to costs.

FINAL ORDERS

In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, 2015 the Board makes the following orders on Request for Review No. 20 of 2018 for the Tender No. NPSC/T04/2017-2018 for the provision of cleaning services:

- (i) The request for Review was lodged by M/S Jepco Services & Renovators Ltd, against the decision of the National Police Service Commission (“the Procuring Entity”) in the matter of Tender No. NPSC/T04/2017-2018 for the provision of cleaning services for the Procuring Entity's offices for one year, 2017-2018 is hereby allowed.**

- (ii) The Contract dated 29th January 2018 between the Entity and the Successful Bidder M/S Super Broom Limited in respect of Tender No. NPSC/T04/2017-2018 for the provision of cleaning services for the Procuring Entity's offices for one year, 2017-2018 is hereby vacated and set aside.
- (iii) The procuring entity is hereby ordered to prepare a fresh tender document with proper and clear evaluation criteria and in accordance with the Public Procurement and Asset Disposal Act, 2015 and the Regulations therein and float a new tender for the said services within thirty(30) days from the date hereof.
- (iv) Each party to bear its own costs for the request for review.

Dated at Nairobi on this 15th day of February, 2018.



CHAIRMAN
PPARB



SECRETARY
PPARB