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SPECIAL AUDIT REPORT
OF
THE CONTROLLER AND AUDITOR GENERAL
ON THE
PURCHASE OF LAND FOR CEMETERY
BY
CITY COUNCIL OF NAIROBI

FEBRUARY 2010

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1.0 INTRODUCTION

1.1 Background

- (i) In a meeting held in May 2005, the City Council of Nairobi approved an outright purchase of land within Nairobi for use as cemetery. Langata cemetery was fast getting close to exhaustion and hence the critical and urgent need to search for an alternative site.

- (ii) Following successive efforts to search and identify land within Nairobi through open tender and direct procurement which did not yield positive results, the City Council decided to advertise for Purchase of Land for Cemetery within the Nairobi Metropolitan Region. The advertisement was placed in two local dailies on 18th and 22nd September 2008. At the same time, a provision of Kshs.347 million was secured for acquisition of the land under Vote D12 - Office of the Deputy Prime Minister and Ministry of Local Government, in the Printed Estimates for 2007/2008 and 2008/2009.

1.2 Audit Objective

The audit of Purchase of Land for Cemetery was carried out with a view to establishing that:

- (a) The Public Procurement and Disposal Act, 2005 and the Public Procurement and Disposal Regulations, 2006 were adhered to;
- (b) Value for money was obtained in the procurement; and,
- (c) Applicable laws were complied with during the procurement process.

1.3 Audit Scope and Coverage

The scope of audit covered the entire period of the procurement process, i.e from 2004/2005 to 2008/2009. Subsequent events after purchase of the land were also taken into consideration.

1.4 Limitation of Scope

The audit was limited to:

- Examination of available records and documentation at the Office of the Deputy Prime Minister and Ministry of Local Government, Ministry of Lands, City Council of Nairobi and other sources.
- Interviews with key personnel at the two Ministries, the City Council and the Municipal Council of Mavoko.
- Actual physical verification of the land.

2.0 TENDERING PROCESS

2.1 Location

As indicated above, the tender for Purchase of Land for Cemetery was placed in the newspapers in September 2008. According to information available, the City Council targeted land in the Nairobi Metropolitan Region, which includes:-

- (a) City Council of Nairobi
- (b) Municipal Council of Kiambu
- (c) Municipal Council of Limuru

- (d) Municipal Council of Machakos
- (e) Municipal Council of Mavoko
- (f) Municipal Council of Ruiru
- (g) Municipal Council of Thika
- (h) Town Council of Kajiado
- (i) Town Council of Karuri
- (j) Town Council of Kikuyu
- (k) Town Council of Kangundo
- l) County Council of Masaku
- m) County Council of Thika
- n) County Council of Olkejuado
- o) County Council of Kiambu

Additional information seen revealed that the following requirements for the land were necessary and mandatory:-

- The location was to be in the Nairobi Metropolitan Region;
- The soil depth reaches a minimum of 1.8 metres (6 ft);
- The minimum parcel size was to be 50 acres, under one title deed and free from encumbrances;
- The parcel was to be accessible from an all weather road; and,
- Water, electricity and telephone services were available.

Bids

The tender attracted 12 bids as shown below:-

Name of bidder	Size (Acres)	Location	Price Per Acre (Kshs.)	Total Price (Kshs.)
and Homes Ltd.	219.90	Kajiado	1,500,000.00	329,850,000.00
Rech Ltd.	120	Athi River	2,360,000.00	283,200,000.00

(iii)	Stannly Enterprises Ltd	87	Thika	2,800,000.00	243,000,000.00
	"	100	Thika	2,800,000.00	280,000,000.00
(iv)	Impuls Developers (K) Ltd	52.50	Limuru	5,000,000.00	262,500,000.00
(v)	Amusement Gardens	40.67	Lang'ata	5,000,000.00	203,363,300.00
	"	15.20	Langata	5,000,000.00	75,995,605.00
(vi)	Three Steps Investments	149.90	Kamiti Rd	1,214,809.00	182,100,000.00
(vii)	Triton (K) Ltd	55	Kiambu	3,000,000.00	167,400,000.00
(viii)	Busam Holdings Ltd.	45.60	Nairobi	3,000,000.00	136,900,000.00
(ix)	Gitonga Wambugu Kariuki	240	Kajiado	375,000.00	90,000,000.00
(x)	Zinger Enterprises Ltd.	200	Kajiado	375,000.00	75,000,000.00
(xi)	Kalove Advocates	100	Kangundo	228,000.00	22,800,000.00
(xii)	Mary Njeri Muchai	100	Kajiado	100,000.00	10,000,000.00

2.3 Tender Evaluation and Award

2.3.1 The Tender Committee deliberated on the matter and observed the following two key aspects amongst others:

- (i) None of the bidders had offered land with a soil depth of 6 feet; and,
- (ii) None of the land offered was 1 Kilometre from a classified road although all the parcels were within the Metropolitan Region.

2.3.2 Separately, and in a letter dated 11 November 2008 and a memo dated 19 December 2008 both addressed to the Town Clerk, the Director of the City Planning Department had observed that the tender documents used in the procurement process lacked the competence to sufficiently facilitate identification of appropriate locations and suitable sites for cemetery use. Additional information in the letter indicated that all respondents to the tender had offered land which was not suitable and appropriate for cemetery use, due to its location, soil profile, accessibility status and environmental conditions.

Notwithstanding the above observations, the Committee proceeded and awarded the tender to M/s Naen Rech Ltd of P.O. Box 5018 – 0056 Nairobi, the sixth lowest bidder, who had offered 120 acres in Athi River area at a price of Kshs.283,200,000.00.

- 2.3.3 (i) According to further records available at the Ministry of Lands however, and specifically a valuation report dated 30 January 2009 from the Deputy Commissioner of Lands (Valuation), the fair current market value of the 120 acres parcel offered by M/s Naen Rech Ltd was Kshs.24,000,000.00 only. At the price of Kshs.283,200,000.00 accepted and approved by the City Council therefore, the parcel was over-priced by a significant amount of Kshs.259,200,000.00.
- (ii) In arriving at the decision to award the tender to the company at a price of Kshs.283,200,000.00, the Tender Committee appears to have based its decision on a valuation report purportedly issued by Ministry of Lands and Settlement on 10 November 2008, by a Mr. A. Otieno. Mr. Otieno had placed a value of Kshs.325,150,000.00 on the parcel.
- (iii) In a letter Ref No.VAL:1360/(19) dated 10 March 2009 however, the Ministry of Lands dismissed the valuation report by Mr. Otieno as a forgery as evidenced by various omissions and commissions, as summarized below:-
- (a) The reference number on the report was not from the Valuation Division of Ministry of Lands;
- (b) The Letter Head used for the valuation report, i.e “Ministry of Lands and Settlement” was no longer in use;

- (c) The Valuation Division does not have a Valuation Officer by the name of "A. Otieno", either at the Headquarters or in the Districts;
- (d) A standard form of communication of the valuation would have had attached to it a comprehensive valuation report and not just a letter bearing a figure;
- (e) There is no designation in the style of "Deputy Commissioner Lands Valuation" at the Ministry of Land on whose behalf Mr. Otieno signed the report; and,
- (f) A letter Ref VAL.1360/6 of 13 November 2008 by the Ministry to the City Council in which the latter was requested to facilitate inspection of the parcel had not been responded to.

Further, there was no evidence to confirm that Mr. Otieno himself was a valuer.

From the foregoing therefore, it is clear that due diligence was not exercised by the City Council in considering, accepting and approving the price of Kshs.283,200,000.00 for the parcel of land offered by M/s Naen Rech Ltd.

2.4 Notification of Award

- (i) On 13 November 2008, the Town Clerk notified M/s Naen Rech Ltd that the City Council had accepted and approved the acquisition of parcel ref. L.R. 14759 measuring 120 acres, situated at the South West of Athi River Township in Machakos District, at a price of Kshs.283,200,000.00. The notification further indicated that the parcel was registered in the name of one Henry Musyoki Kilonzi of P.O. Box 19022-00500 Nairobi.

3.0 PAYMENT

3.1 According to records available, a payment of Kshs.283,000,000.00 for the land by the Office of the Deputy Prime Minister and Ministry of Local Government was made to the Vendor through a firm of Advocates acting on behalf of the City Council. The payment to the Advocates was made as follows:-

Cheque No.	Date	Amount in Kshs.
005643	30.06.2008	175,000,000.00
005915	15.01.2009	<u>108,000,000.00</u>
Total		<u>283,000,000.00</u>

A further sum of Kshs.7,694,000.00 comprising of Kshs.5,664,000.00 relating to Kenya Revenue Authority Domestic Taxes and Kshs.2,030,000.00 representing Advocates' professional fees, was also paid by the Ministry on behalf of the City Council. The Council on its part paid an amount of Kshs.250.00 for transfer fees on registration.

Subsequently, Title number 115561 was processed and issued to the Council by the Registrar of Titles Nairobi on 17 March 2009.

3.2 Additional records seen appear to indicate that Mr. Musyoki Kilonzi received through his Advocates an amount of Kshs.107,500,000.00 out of the entire transaction of Kshs.283,000,000.00, while the balance of Kshs.175,500,000.00 was disbursed and paid to other parties.

- (ii) According to other records available, the approval was also subject to the parcel being free from all encumbrances and the vendor furnishing the City Council with a written acceptance of the award. In addition, a performance bond of Kshs.14,160,000.00 was required from the company with fourteen days from 13 November 2008.

- (iii) The extracts of Tender Committee proceedings and a copy of the letter of notification were formally submitted to the Permanent Secretary, Office of the Deputy Prime Minister and Ministry of Local Government on 14 November 2008.

2.5 Sale Agreement

On 19 December 2008, and in a letter Ref No. MLG/402-01(18), the Permanent Secretary, Office of the Deputy Prime Minister and Ministry of Local Government asked the Town Clerk to execute an agreement for sale between the City Council and the Vendor and also required the Clerk to ensure that the interests of the Council were safeguarded.

On the same day, an Agreement for Sale between the City Council and Mr. Henry Musyoki Kilonzi in respect of 120 acres of land at a purchase price of Kshs.283,200,000.00 was signed, with the Mayor and Town Clerk signing for the purchaser. It has not however been explained why the Agreement for Sale was signed by Mr. Henry Musyoki Kilonzi while the tender had been awarded to M/S Naen Rech Ltd. In the circumstances therefore, and in the absence of such explanation, the Agreement contravened Section 68(1) of the Public Procurement and Disposal Act, 2005 which requires inter alia that "..... the successful tenderer and the procuring entity shall enter into a written contract based on the tender documents and the successful tender".

4.0 OTHER AUDIT FINDINGS

The purchase of land Ref. L.R.14759 raises a number of other issues as summarized below, which have not been explained:-

- (i) The advice of the Director of City Planning on the tender documents and search for land for use as cemetery, pertinent as it was, was not considered during the entire process of the procurement;
- (ii) The Council does not appear to have established existence or otherwise, of a contractual relationship between M/s Naen Rech Ltd and Mr. Musyoki Kilonzi before awarding the tender to the company or how such a relationship, if it indeed existed, would have influenced the pricing of the land;
- (iii) There was no evidence of a due diligence test having been carried out on the company before awarding of the tender;
- (iv) No performance bond of Kshs.14,160,000.00 appear to have been secured before the award was given;
- (v) The Municipal Council of Mavoko does not appear to have granted approval for change of use of the land in question from agricultural use to cemetery;
- (vi) The National Environmental Management Authority (NEMA) does not appear to have granted clearance on the environmental impact, once use of the land is changed;

- (vii) Apart from a restriction which may have been placed on the land by Ministry of Lands, no measures appear to have been put in place by the Council to ensure that the land is not encroached into by unauthorized parties;
- (viii) Although the area with its dry grassland and rocky patches has been variously referred to as a wildlife migratory corridor, there is no evidence that this fact was considered and taken into account during the procurement process.

5.0 SITE INSPECTION

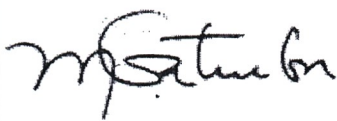
A site visit to the land in question revealed the following additional observations:-

- (i) The land is situated at approximately 7.2 Kilometres West of Kitengela Township and borders Merciful Redeemer Children's Home. The access to the land is a rough road which is not all weather usable and may be impassable during wet seasons;
- (ii) Although the land is of a fairly level gradient, the soils are shallow with a rocky base, and as indicated elsewhere in this report, such soils cannot attain a depth of 6 feet.
- (iii) The land has not been clearly marked with beacons thereby making it susceptible to illegal encroachment; and,
- (iv) There is no water supply or telephone on the land.

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6.0 CONCLUSION / RECOMMENDATION

- (i) The poor and inadequate manner in which the procurement process of land for cemetery use was handled has resulted in Government not obtaining any meaningful value for money against the expenditure of Kshs.290,694,250.00 so far incurred on the land. In addition, and on the basis of the matters discussed above, the City Council may have to search for an alternative site at extra cost should the relevant authorities and stakeholders declare L.R.14759 as inappropriate and unsuitable for use as cemetery.
- (ii) Appropriate measures should be taken by the Office of the Deputy Prime Minister and Ministry of Local Government and the City Council of Nairobi to recover the over-payment of Kshs.259,000,000.00 from the concerned parties. Further, disciplinary action should be considered and taken against officers who administered the procurement and perpetuated the over-payment.



A. S. M. Gatumbu

CONTROLLER AND AUDITOR GENERAL

Nairobi

12 February 2010

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