

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO. 12/2005 OF 6th APRIL, 2005

BETWEEN

THWAMA BUILDING SERVICES LTD APPLICANT

AND

KENYA TOURIST DEVELOPMENT CORPORATION PROCURING
ENTITY

Appeal against the decision of the Tender Committee of the Kenya Tourist Development Corporation, Procuring Entity, dated the 14th day of February, 2005 in the matter of Tender No. KTDC/REH/08/04 for Rehabilitation of Utalii House

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	Chairman
Prof. N. D. Nzomo	Member
Mr. Adam S. Marjan	Member
Mr. P. M. Gachoka	Member
Ms. Phyllis N. Nganga	Member
Eng. D. W. Njora	Member
Mr. John W. Wamaguru	Member
Mr. Kenneth N. Mwangi	Secretary

BOARD'S DECISION

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

BACKGROUND

This tender was advertised in the Daily Nation on 12th May, 2004 by the Kenya Tourist Development Corporation for the Rehabilitation of Utalii House. It closed/opened on 8th July, 2004 and nine tenderers responded and quoted as follows:

FIRM	TENDER PRICE IN KSHS.	COMPLETION PERIOD (WEEKS)
Bullsons Agencies Ltd.	8, 104,580	12
Hussein Glass Mart Ltd.	8635,401.90	8
Thwama Building Services Ltd.	8798,155	11
Nqonq Hills Builders	9483,685	None
Jaswant Sing & Bros Ltd	11 274,334	13
Italbuild Imports	11 654,305.40	10
Dinesh Construction Ltd.	12 738,875	16
Blue Enterprises Building Constructors	13,646,530	16 - 20
Prime Aluminium Casements Ltd	15,886,439	16

The Technical evaluation of the tender was carried out by Mak Consultants, Consulting Quantity Surveyors, based on the following parameters:

(a) Company Profile/CV

(b) Audited bank statements/reports

(c) Registration with all necessary government/ professional bodies

- (d) Experience in areas of specialization with at least 5 certified references of previous clients
- (e) Execution of a bid bond equal to 2% of total price quoted.
- (f) Any other information considered relevant to assist the application

The Consultants evaluated only the four lowest tenderers due to the narrow margin in the figures quoted. These firms were Bullsons Agencies, Hussein Glass Mart, Thwama Building Services Ltd and Ngong Hills Builders. Thwama Building Services Ltd. was recommended for the award of the tender.

The Procuring Entity's Tender Committee meeting of 14th July, 2004 categorized the tenderers according to their registration with the Ministry of Roads and Public Works and only considered those in categories A, Band C. These tenderers were:-

NAME	CLASS	AMOUNT
Dinesh Construction Ltd	A	Kshs. 12,738,875
Italbuild Imports	C	Kshs. 11,654,305.40
Blue Enterprises Building Constructors	B	Kshs. 13,646,530
Bullsons Agencies Ltd	C	Kshs. 8,104,580
Jaswant Singh Bros Ltd	A	Kshs. 11,274,334

The Tender Committee then awarded the tender to Bullsons Agencies Ltd at its offer of Kshs. 8,104,580.00. In the Tender Committee's 3rd meeting held on 14th February, 2005 the members were informed by the management that Bullsons Agencies Ltd. were unwilling to take the project at their tendered price as the validity period of 90 days had expired. It was therefore resolved that the 5th Lowest bidder, Jaswant Singh Bros Ltd. be awarded the tender at its offer of Kshs. 11,274,334. Its tender was the 2nd lowest amongst those in categories A, Band C.

THE APPEAL

This appeal was lodged on 6th April, 2004 against the award of the Tender Committee of the Procuring Entity. The Applicant was represented by Mr. B. G. Maina while the Procuring Entity was represented by Mr. K. N. Mbuvi and Ms. Anne Kahuthu. Interested candidates included Mr. P. M. Mukuha a partner with Ngong Hills BUilders, Mr. Eliud Kamau an Architect with Bullsons Agencies Ltd and Mr. M. K. Kurgat, advocate, representing Jaswant Singh & Bros. Ltd.

The appeal is based on seven (7) grounds which we deal with as follows:-

Ground of Appeal No.1

The Applicant alleged that the Procuring Entity did not send any notification of award to it contrary to Regulation 33 (1). It argued that since the 1st and 2nd lowest tenders were not responsive and that it had fulfilled all the tender requirements it expected to be considered for the award of the tender being the 3rd lowest bidder price wise. It later learnt that the tender was awarded to another bidder.

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In its response, the Procuring Entity submitted that it had not communicated its award to tenderers, as it had not received authority from Treasury for an allocation to finance the project. It however sent notification to three tenderers on 1st February, 2005 after awarding the tender to Jaswant Singh & Bros Ltd.

We have carefully considered the arguments of the parties and the information availed to the Board. We have also noted that the notification letters were sent to only three (3) tenderers namely; Bullsons Agencies Ltd, Jaswant Singh & Bros Ltd and Dinesh Construction Ltd on 17th February, 2005. In its representations the Procuring Entity also conceded that it had to date not notified the Applicant about the outcome of the tender. In view of the foregoing, we find that the Procuring Entity breached Regulation 33 (1), which requires the Procuring Entity to simultaneously notify the successful and unsuccessful tenderers, the outcome of the tender.

Accordingly this ground of appeal succeeds.

Grounds of Appeal No.2 and 3

These grounds of Appeal relate to discrimination. The Applicant alleges that Regulation 11 was breached as it was subjected to evaluation conditions that were not applied to other tenderers. It argued that it submitted a bid bond as required in the tender conditions while the successful bidder had not. Bidders in Category "E" in which the Applicant is registered, were also discriminated.

On its part, the Procuring Entity responded that it intended to demand a bid bond from the successful bidder after the award of the contract. It further stated that it had received the categorization of contractors from the Ministry of Roads and Public Works and used those categories in determining the award of the tender.

We have considered the arguments herein and noted that the Applicant participated in this tender fully and its bid was evaluated and recommended by the evaluation team. Regulation 11 which required that "candidates shall not be excluded from participation in public procurement on the basis of nationality, race or any other criterion not having to do with their qualifications" was therefore not breached, as the Applicant was not excluded from participating in this tender.

Accordingly these grounds of Appeal fail.

Ground of Appeal 4

The Applicant alleges that the successful bidder did not meet all the requirements set out in the tender document particularly the provision of a bid bond. In its response the Procuring Entity submitted that it was not mandatory to submit a bid bond. Further, it was not aware on what basis the applicant was alleging that the successful bidder had not met all the requirements while it had not communicated to bidders the outcome of the tender.

We have perused through the advertisement notice and tender document and noted that they did not include a requirement for provision of a bid bond. However, the Procuring Entity confirmed during the hearing that an

addendum was issued to the tenderers when they collected the tender document, which had mandatory requirement for the execution of a bid bond equal to 2% of the total price quoted. The mandatory requirements in the addendum are reproduced here below:-

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- I. Company Profile/CV.
- II. Audited bank statements/reports.
- III. Registration with all necessary government/ professional bodies.
- IV. Experience in areas of specialization with at least 5 certified references of previous clients.
- V. Execution of a bid bond equal to 2% of total price quoted.
- VI. Any other information considered relevant to assist the application. "

The Board has examined the tender documents submitted, and is satisfied that the successful tenderer Jaswant Singh and Bros Ltd had submitted its tender document containing only the Bills of Quantities. Its tender had no company profile, Audited Bank statements/report, registration with necessary government/professional bodies, bid bond and certified references of its previous clients. This firm was clearly non - responsive and should not have been awarded the tender. Bullsons Agencies Ltd., Prime Aluminium Casement, Ngong Hills Builders and Hussein Glass Mart did not all submit bid bonds and also failed to meet other mandatory requirements of the tender. They were all therefore non - responsive.

Since it was a mandatory requirement for submission of bid bonds, the Procuring Entity cannot now claim that it intended to demand the bid bond from the successful bidder after the award of the contract. The purpose of a bid bond is to ensure that only serious bidders are allowed to compete in tenders by holding their prices firm over a specified period of time as prescribed by Regulations 24(2) (c) and 27(1). There is no logic in demanding a bid bond after the tender has been awarded. In tenders such as this one, it is a performance security that is required to be furnished by the successful tenderer as the Procuring Entity had illustrated in Clause 31 of the tender document and as stipulated in Regulation 27 (2)

This ground of appeal therefore succeeds.

Ground of Appeal No.5

The allegation here is that the Applicant was the 3rd lowest bidder price-wise and since the 1st and 2nd lowest bidders' price wise were not responsive then the applicant should have been further evaluated to ascertain its suitability in performing the contract. Mr. Maina who represented the Applicant argued that the Procuring Entity introduced job categories of the Ministry of Roads and Public Works in the award of the tender, which was not a tender requirement. Further, it argued that being in category "E", it still qualified for consideration of award since it could undertake a contract worth up to Kshs. 25 million and that it had performed similar works elsewhere.

In response, the Procuring Entity submitted that it disregarded the recommendation of the Consultant, as its report was contradictory in that it stated the four lowest tenderers did not fully understand the job

requirements and yet at the same time it went ahead and evaluated and recommended the Applicant who was the 3rd lowest price wise. The Procuring Entity therefore introduced categorization of the contractors and only considered contractors registered with the Ministry of Roads and Public Works in categories A, Band C. However, the Procuring Entity conceded that the categorization criteria was not a tender requirement.

We have considered the arguments of both parties and find that the Procuring Entity introduced an evaluation criteria that had not been set forth in the tender document, contrary to Regulation 30 (7). This was prejudicial to some of the tenderers.

Accordingly, this ground of appeal succeeds.

Grounds of Appeal No.6 and 7

These are not grounds of appeal but statements of perceived losses. In our view, such losses are commercial risks normally borne by any person in business. As these are tendering costs that are borne by tenderers, the Procuring Entity is not liable for such costs.

The Board therefore need not make any findings on these grounds of appeal.

Finally, the Board would like to make the following observations:

The tender document was vague, imprecise and unsatisfactory in that it did not contain mandatory information with respect to: -

- i) Instructions for the preparation and submission of tenders

- ii) The period during which the tender must remain valid
- iii) Performance guarantee. The bidders were given an option of providing in their bid either a bond or cash, the procuring costs of which are different

The Procuring Entity contravened Regulation 24 (2) (a) and (i) by not including the above mandatory information in its tender document

The Procuring Entity started the procuring process without ascertaining that it had funds to meet the resultant expenditure contrary to Regulation 17 (6).

The Procuring Entity unjustly denied the award of the tender to the Applicant who was responsive to tender requirements. Bullson Agencies Ltd and Jaswant Singh & Bros Ltd were not responsive to the tender conditions and yet the Tender Committee of the Procuring Entity awarded them the contract in its meetings held on 14th July, 2004 and 14th February, 2005 respectively.

The Board also notes that the Consultants' technical evaluation report is inconsistent. For example in its General Comments, the Consultant states that all the four lowest tenderers do not seem to fully understand what was required of them and that none of them has a balanced tender. The Consultant then goes ahead to evaluate only the four lowest tenderers and excludes the others on the basis that their prices were too high and far down in ranking to be considered. It further states that the four lowest tenderers have out of misunderstanding, failed to carry forward or omitted a figure of Kshs. 330,000.00 for the 30 No. Panic bolts. In its individual analysis of the Applicant who is included in the four lowest tenderers, the report then states

that its preliminaries are priced low but other sections balanced and that "he seems to know exactly what is required of him"

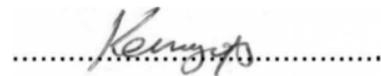
The evaluation process was incomplete in that the Consultant evaluated only the four lowest tenderers out of the nine tenderers who submitted their tender documents.

In view of the foregoing, and having considered that the tendering process was fatally flawed, the Appeal succeeds. However, we do not consider award to the Applicant appropriate due to the glaring omissions in the tender documents and blatant breach of the Regulations, coupled with an inconsistent and incomplete Technical Evaluation Report, accordingly, we hereby annul the tender order that it be re-tendered afresh in accordance with the Public Procurement Regulations.

Delivered at Nairobi on this 29th day of April 2005



Signed Chairman



Signed Secretary