

REPUBLIC OF KENYA

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW

BOARD

APPLICATION NO.34/2007 OF 13TH JUNE, 2007

BETWEEN

**MIJUTO INVESTMENTS
AND RENOVATORS LTD.....APPLICANT**

AND

**CATERING & TOURISM
DEVELOPMENT LEVY TRUSTEES.....PROCURING ENTITY**

Appeal against the decision of the Tender Committee of the Catering & Tourism Development Levy Trustees of 28th May, 2007 in the matter of tender NO.CTDLT 3/2006-2007 for Provision of Office Partitioning and Refurbishments.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Ms Phyllis N. Nganga	-	Member
Eng. D. W. Njora	-	Member
Mr. P. M. Gachoka	-	Member
Mr. J. W. Wambua	-	Member
Mr. John W. Wamaguru	-	Member

IN ATTENDANCE

Mr. C.R. Amoth	-	Holding Brief for Secretary
Mr. P.M. Wangai	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO.34/2007

Applicant, Mijuto Investments and Renovators Ltd

Mr. Eric Otieno - Advocate, Ombaju & Co. Advocates
Mr. John Andati - Advocate, Ombaju & Co. Advocates
Mr. Ambrose O. Oloo - Director
Ms. B. Ongus - Manager

Procuring Entity, Catering & Tourism Development Levy Trustee

Mr. Seth Ojienda - Advocate, Ojienda & Co. Advocates

Interested Candidate

Mr. J.M. Murithi - Implementation Manager, Design Forty

**RULING ON THE PRELIMINARY OBJECTION BY THE
PROCURING ENTITY ON THE BOARD'S JURISDICTION**

At the commencement of the hearing, the Procuring Entity raised a preliminary objection arguing that the Board has no justification to entertain the review filed. The preliminary objection was grounded on Sections 93(2) (c), Section 67, 68 of the Public Procurement and Disposal Act, 2005 and Regulation 73 of the Public Procurement and Disposal Regulations, 2006.

The Procuring Entity argued that a contract was signed in accordance with Section 68 within 14 days from the date of notification, on 12th June, 2007. They submitted that they posted the letters of notification on 28th May, 2007.

In response, the Applicant argued that they first saw the notification of award on 7th June, 2007 when they visited the Procuring Entity's

office. They submitted that they became aware of the notification on that date.

The Board noted that the Procuring Entity did not provide evidence that they had given notification to the Applicant or other bidders. They provided copies of letters of notification dated 28th May, 2007. They also conceded that a notification posted on 28th May, 2007 would be allowed 3 days for communication to be deemed to have been effected.

Even taking the Procuring Entity's argument as correct, the notification would therefore have been effected three days after 28th May, that is on 31st May, 2007. The fourteen days required under Section 68 of the Act within which notification should be effected before signing of the contract would then lapse on 14th June, 2007. As the contract was signed on 12th June, 2007 this was not in accordance with Section 68 of the Act for purposes of ousting the Board's jurisdiction under Section 93(2) (c).

The Procuring Entity's preliminary objection was therefore dismissed and the hearing of substantive appeal ordered to proceed on its merits.

BOARD'S DECISION

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

BACKGROUND

This tender was advertised in the Daily Nation Newspaper by the Procuring Entity on 31st March and 2nd April, 2007. The tender was closed/opened on 24th April, 2007 in the presence of the parties' representatives. Out of the nine tenderers who bought tender documents, five bidders namely, Design Forty, Blossom General

Contractors, Mijuto Investments & Renovators Ltd, Obenjo General Traders and Saen General Hardware & Contractors returned their bid documents before the closing/opening date. The tender opening was conducted immediately after closing.

Technical Evaluation

The technical evaluation was carried out by a committee chaired by a Mr. Peter Otieno. Two bidders, Obenjo General Traders and Saen General Hardware & Contractors, were disqualified for failing to tender for the four branches as per the tender document. The summary of the technical evaluation was as follows:

DESCRIPTION	Specs Details	Points	Design Forty	Mijuto Invest	Blosom Gen Contr
A - TECHNICAL			1	2	3
Certificate of Buss Reg		1	1	1	0
Trade Licence		1	0	1	1
PIN Certificate		1	1	1	1
VAT Certificate		1	1	1	1
Tax Compliance Certificate		1	1	1	1
Audited Accounts last 3 Yrs		4	0	3	3
Years of Practice		5	4	5	2
Provide Min of 3 References for Project Commensurate size, Budget and Type		10	3	9	3
Architectural Design	Details for each specific office	20	20	18	18
Materials to be used	Should be clearly stated	8	7	7	6
Office layout-plan	Clear and graphically drawn	10	10	10	10
Technical staff to undertake Project	Clearly indicated	6	3	6	4
Time frame for completion		12	10	10	10
Total Scores TECH (80)		80.00	61.00	73.00	60.00

Based on this information all the three tenderers qualified for financial evaluation. The results of the financial evaluation were as tabulated below:

			Design Forty	Mijuto Invest	Blosom Gen. Contractor
DESCRIPTION	Specs Details	Points	1	2	3
Amount quoted in Kshs			6,020,500.00	6,537,069.00	14,928,691.00
Add VAT			963,280.00	1,045,931.04	0.00
TOTAL AMOUNT			6,983,780.00	7,583,000.04	14,928,691.00
Total Scores Financial (20)		20.00	20.00	18.42	9.36

COMBINED WEIGHTED SCORES

The technical and financial scores were combined using weights of 80% for technical and 20% for financial scores. The combined scores were as follows:

			Design Fourty	Mijuto Invest	Blosom Gen. Contr
DESCRIPTION	Specs Details	Points	1	2	3
TOTAL SCORES TECH		80.00	61.00	73.00	60.00
TOTAL SCORES FINANCIAL		20.00	20.00	18.42	9.36
TOTAL SCORES TECH/FIN		100.00	81.00	91.42	69.36

RECOMMENDATION

Based on the above results, the evaluation committee recommended the award of the tender to Mijuto Investments & Renovators Ltd for having obtained the highest combined score of 91.42%.

However, in its meeting held on 24th May, 2007 the tender committee differed with the recommendations of the evaluation committee to

award the tender to Mijuto Investments & Renovators Ltd and awarded the tender to Design Forty. It noted that Design Forty had a superior design and had included in their design office receptions and kitchenettes in all stations. The Procuring Entity wrote to the successful and unsuccessful bidders on 28th May, 2007.

THE APPEAL

This Appeal was lodged by Mijuto Investments & Renovators Ltd on 13th June, 2007 against the decision of the tender committee of the Catering & Tourism Development Levy Trustees dated 28th May, 2007 in the matter of tender No.CTDLT 3/2006-2007 for Provision of Office Partitioning and Refurbishment at Mombasa, Kisumu and Nyeri Branches. The Applicant was represented by Mr. Eric Otieno and Mr. John Andati, both Advocates while the Procuring Entity was represented by Mr. Seth Ojienda Advocate and Mr. Fredrick Orego, Legal Officer. Design Forty, an interested candidate was represented by Mr. J. M. Muriithi, Implementation Manager.

The Applicant raised nine grounds of appeal which we deal with as follows: -

Grounds One, Two, Three and Four

These are not grounds of appeal but general statements that are not backed by any breach of the Act/Regulations.

Grounds Five, Six and Eight

These grounds of appeal have been consolidated since they raised similar complaints regarding the evaluation and award of the tender. In these grounds of appeal the Applicant alleged that the Procuring Entity failed to set out the procedure and the evaluation criteria in the tender document. Consequently, it failed to evaluate the tenders in accordance with Section 66(3) (a) and (b) and Regulations 49(1) and 50(1) of the Public Procurement and Disposal Act, 2005 and Public

Procurement and Disposal Regulations, 2006 respectively. In addition, the Applicant alleged that the Procuring Entity breached Section 66(5) and Regulation 51(1) by failing to prepare an evaluation report.

At the hearing, Counsel for the Applicant submitted that the Procuring entity breached Regulation 49(1). He argued that whilst that Regulation required the evaluation committee to conduct a technical evaluation by comparing each tender to the technical requirements of the description of goods, works or services in the tender document, no such requirements were set out in the tender document. He pointed out that Clause 2.4 on the description and specifications did not contain sufficient specifications or the scope of works to enable fair competition amongst the bidders. Further, Clause 2.5 only provided the space, in terms of areas, to be partitioned and had no other details such as the number of rooms required or even specification of the materials to be used for partitioning.

Counsel further submitted that the Procuring Entity failed to evaluate tenders in accordance with Section 66(3) (a) and (b) of the Act. He argued that the Procuring Entity did not set out an objective and quantifiable procedure and the evaluation criteria for evaluation of tenders in the tender documents. It was therefore difficult for the Procuring Entity to prepare an objective summary of the evaluation report as required under Section 66(5) of the Act and Regulation 51(1) of the Public Procurement & Disposal Regulations, 2006.

In response, the Procuring Entity stated that it advertised the tender under reference on 31st March and 2nd April, 2007. The tender was evaluated in accordance with Sections 66(5) and 51(1) and Regulation 16. The evaluation committee prepared an evaluation report which was contained at pages 345-351 of the Memorandum of Response filed by the Procuring Entity on 22nd June, 2007. This report was presented to the Tender Committee on 24th April, 2007 for adjudication. However, the Tender Committee rejected the

recommendation of the Evaluation Committee to award the tender to the Applicant and awarded it to Design Forty, the second lowest evaluated bidder. The tender committee preferred the design provided by Design Forty as it had included extra facilities which were an added advantage. This was done in accordance with Regulation 11(3) and (4) and candidates notified in writing through letters dated 28th May, 2007.

The Procuring Entity further submitted that though the procurement under reference was for works, it used a Request for Proposal document to solicit for tenders. It argued that it could not use the standard tender documents for works since bidders were required to prepare their own design as the specifications set out in the tender document were merely minimum requirements of the Procuring Entity. Consequently, Clause 1.3 of Section C/Information to Vendors required Vendors to obtain more information from the Procuring Entity to enable them prepare their designs before submitting their proposals.

Mr. J.M. Muriithi, who represented Design Forty, an interested candidate submitted that the tender did not give scope of work and the specifications. However, bidders were required to come up with their own designs which were user friendly after obtaining the relevant information from the Procuring Entity. The candidate was also informed by the Procuring Entity that the designs for the four branches should be similar to the design at the head office of the Procuring Entity for the purposes of ISO-certifications. Consequently, he visited all the four branches of the Procuring Entity to ascertain their requirements which enabled him to prepare bills of quantity and the design for partitioning. He further submitted that Design Forty was awarded the tender and has already been paid a mobilization fee of 40 % of the tender price in accordance with the contract agreement. He further pointed out that all the materials have been bought and taken to the site since the contract period was 28 days from the date of signing the contract.

The Board has carefully considered the submissions of the parties and interested party, and all the documents before it. It is apparent from the tender notice and the tender document issued to the bidders that tender which is the subject of appeal was an open tender duly advertised by the Procuring Entity. The tender was for provision of office partitioning and refurbishment.

The Board has also perused the copy of the tender document issued to the tenderers. The Board notes that there are various standard tender documents for different kinds of procurements. In the matter before the Board, the Procuring Entity used a Request for Proposal document instead of a Standard Tender Document for procurement of works. This would have been the most ideal document for the kind of procurement the Procuring Entity was involved in. Under Clause 2.5 of Section I of the Request for Proposal document used by the Procuring Entity, only the spaces or area of each of the four premises which were to be partitioned, were provided. The Request for Proposal document did not contain the scope of work to be done and the bill of quantities which would have enabled tenderers to prepare their tenders that were comparable on a like-for like basis. This was a serious omission that could not be filled by Clause 1.3 of Section B which allowed tenderers to obtain more information on the requirements of the Procuring Entity. Further, for a procurement to be conducted using a Request for Proposal, that procurement must meet the requirements set out under Section 76 of the Act which restricts Requests for Proposal to procurement of services or a combination of goods and services which are purely advisory or intellectual in nature.

With regard to the evaluation and award of the tender, the Board noted that the evaluation criteria set out in the tender document lacked sufficient information to permit fair competition amongst the tenderers. This notwithstanding, the evaluation was carried out and the recommendation that the tender be awarded to the bidder with highest combined score at Kshs. 7,583,004.00 was passed to the tender committee for adjudication. However, the tender committee differed with that recommendation and awarded the tender to the bidder

with the second lowest highest combined score at Kshs. 6,983,780.00. This was contrary not both to Clause 1.7.2 which required the contract to be awarded to the bidder with the highest combined score, and Section 66(4) of the Public Procurement & Disposal Act, 2005. The Board further noted that the reasons of the tender committee to award on the ground that the successful bidder had a superior design, was not tenable since its bid had a lower score in the technical evaluation.

Accordingly, these grounds of appeal succeed.

Ground 7

This ground of appeal was abandoned by the Applicant during the hearing since it was argued in the preliminary objection and therefore we need not comment on it.

Ground 9

This ground of appeal was also abandoned by the Applicant during the hearing.

Before making our decision, the Board has made the following observations:

1. The tender committee acted in breach of Regulation 11(2) (b) by rejecting the decision of the evaluation committee. No evidence was placed before the Board to demonstrate that the tender committee reported its rejection of the recommendation of the evaluation committee to the accounting officer as required by Regulation 11(3).
2. The contract agreement dated 12th July, 2007 between Design Forty and the Procuring Entity was not signed in accordance with Section 68 of the Public Procurement & Disposal Act, 2005 as noted in the preliminary objection.

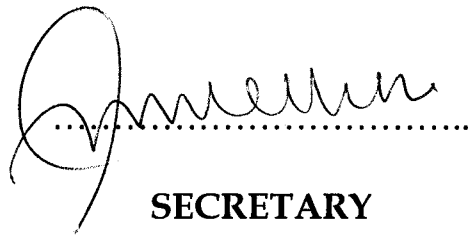
3. The mobilization fee of Kshs. 2,973,512.00 paid to the successful bidder was improperly paid since the contract was irregularly entered into.
4. No evidence was placed before the Board to demonstrate that the successful bidder had executed a performance bond of 10% as required by Clause 1.10 of the Section 1 of the tender document.

Taking into consideration all the above matters, the appeal succeeds and we hereby annul the award of the tender. The Procuring Entity may re-tender using the appropriate standard tender document, containing clear evaluation criteria and specifications. In addition, the Procuring Entity may liaise with the relevant department in the Ministry of Roads & Public Works and the Public Procurement Oversight Authority in preparation of the tender document, the specifications and evaluation of tenders.

Dated at Nairobi this 9th day of July, 2007



CHAIRMAN



SECRETARY

