

REPUBLIC OF KENYA

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD**

APPLICATION NO. 37/2007 OF 25TH JUNE, 2007

BETWEEN

SPENCON (K) LIMITED, APPLICANT

AND

**MINISTRY OF ROADS AND PUBLIC WORKS, PROCURING
ENTITY**

Appeal against the decision of the Tender Committee of Ministry of Roads and Public Works in the matter of Tender for Construction of Makutano-Kikima-Tawa-Road (D516/D517).

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

Mr. C. R. Amoth	-	Holding Brief for Secretary
Mr. I. K. Kigen	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO. 37/2007

Applicant, Spenco (K) Limited

Mr. Mohamed Nyaoga	-	Advocate, Mohamed Muigai and Company Advocates.
Mr. Crispine Odhiambo	-	Advocate, Mohammed Muigai and Company Advocates.
Mr. Peter Wanyama	-	Advocate, Mohamed Muigai and Company Advocates.
Mr. Olemapelu Zakayo	-	Chief Executive Officer
Mr. Varum Gaar	-	Area Manager
Mr. Boniface Kamau	-	Chief Supplies Officer
Mr. David Maingi	-	Manager

Procuring Entity, Ministry of Roads and Public Works

Eng. M. S. M. Kamau	-	Chief Engineer (Roads)
Mr. P. M. Girobu	-	Senior Procurement Officer
Ms. Truphosa Achar	-	Administrator, Legal Matters
Mr. P. N. Mulwa	-	Documentation Officer

Interested Candidates

Mr. Nyawara O. J	-	Advocate for Victory Construction Company Limited
Mr. Avtar S. Suri	-	Managing Director, Victory Construction Company Limited
Mr. Amritpal S. Suri	-	Director, Victory Construction Company Limited
Mr. Jasbar S. Suri	-	Director, Victory Construction Company Limited
Mr. Paul Murage	-	Manager, H. Young & Company (E.A) Limited

BOARD'S DECISION

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

BACKGROUND

The tender for the construction of Makutano-Kikima-Tawa Road (D516/D517) was advertised in the local dailies on 13th April, 2007.

The tender closing/opening date was 18th May, 2007. Ten (10) firms bought the tender documents but only six (6) firms duly returned their completed bids. The firms that returned their bids on the due date were the following bidders:-

No.	Name of Tenderer	Tender Sum (Kshs.)
1.	Victory Construction Company Limited	1, 895, 094, 559.84
2.	Nyoro Construction Company Limited	2, 413, 926, 670.00
3.	Hayer Bishan Singh & Sons Limited	2, 072, 511, 675.36
4.	E. A. Roads Reconstruction Limited	2, 419, 222, 113.00
5.	H. Young & Company (E.A) Limited	1, 931, 508, 435.38
6.	Spenco (K) Limited	1, 875, 207, 672.00

THE EVALUATION OF THE TENDER

A preliminary evaluation of the bidders who returned their bids was carried out based on the following requirements:-

1. Bid security;
2. Power of Attorney;
3. Key personnel;
4. Confidential Business Questionnaire; and
5. Work methodology.

Based on the aforesaid requirements, all the bidders were found to be responsive and qualified for the next stage of evaluation.

A post qualification evaluation of the bidders was then carried out based on the following parameters:-

1. Eligibility;
2. Registration;
3. Historical non-performance;
4. Audited Accounts;
5. Working Capital;

6. Current commitments;
7. Annual turnover;
8. Experience;
9. Site staff; and
10. Equipment.

Two firms namely, E.A Roads Reconstruction Limited and H. Young and Company (E.A) Limited failed to meet the specified requirements for the above parameters and did not therefore proceed to the next stage of evaluation. The other four (4) bidders qualified for detailed technical evaluation and subsequent financial evaluation.

The Ministerial Tender Committee awarded the contract to Victory Construction Company Limited at their tender sum of Kshs. 1, 895,094 559.84 (Kenya shillings one billion, eight hundred and ninety five million, ninety four thousand, five hundred and fifty nine and eighty four cents)

THE APPEAL

This appeal was lodged on 25th June, 2007 by Spenco (K) Ltd against the decision of the Tender Committee of the Ministry of Roads and Public Works in the matter of Tender for Construction of Makutano-Kikima-Tawa Road (D516/D517).

The Applicant requested the Board to declare it the lowest evaluated bidder and award it the contract.

Mr. Mohamed Nyaoga, Advocate, represented the Applicant while Eng. M. S. M. Kamau, the Chief Engineer (Roads) represented the Procuring Entity. Mr. Nyawara O. J., Advocate, represented the Interested Candidate, Victory Construction Company Limited.

The Applicant in its Request for Review raised eight (8) grounds of appeal. At the hearing, the parties agreed that there was only one issue to be determined. This arose from the qualification criteria under paragraph 4.2 (a) of Section 5 of the tender document. Therefore all grounds of appeal were consolidated and the focus was directed to dealing with this issue.

The Board hereby deals with the appeal as follows:-

Breach of Section 64(2) and Regulation 50.

At the hearing, Counsel for the Applicant argued that the criteria under paragraph 4.2 (a) required the bidders to indicate similar works that they had done and these works were not restricted to road works only. Counsel cited the following three completed projects, as contained in the tender document of the Applicant, to show that the Applicant had complied with the requirement on similar completed works:-

1. Owen Falls Dam Remedial Works, Jinja Uganda

The above project had a contract price of US\$10.67 million and the schedule of commencement and completion were indicated as March, 2000 and July, 2001 respectively. Counsel argued that this project met the minimum requirement of Kshs.450 million specified in the tender document. The scope of works, the equipment required, methodologies of construction and work components were similar to those of the proposed road project. In view of the above, the Applicant satisfied the requirements of the qualification criteria.

2. Proposed Alteration and Completion of the Warehouse Depot at Nakawa, Kampala, Uganda

The above project had a contract price of US\$ 5.6 million and the schedule of commencement and completion was June, 2002 and August, 2002 respectively. Counsel argued that according to the scope of works, the road component was 48 percent of the project. This component involved placing and compacting materials improved with lime, cement and bitumen as is done in road construction projects.

3. Northern Uganda Reconstruction Project Resealing/ Rehabilitation of Urban Streets, Uganda

The above project had a contract price of US\$5.61 million and the schedule of commencement and completion was July, 1996 and October, 1997 respectively. Counsel argued that this project was similar to the proposed road project as envisaged in the scope of works components.

Counsel also pointed out that the Applicant was pre-qualified in the preliminary evaluation state and moved to the next stage of the evaluation process. It was therefore unfair for the Procuring Entity to disqualify the Applicant at a later stage of evaluation on the basis of some factors that had been considered earlier. Counsel further argued that the Applicant had been found to be responsive at the preliminary evaluation stage and the subject of past experience was not an issue in the subsequent stages. It was therefore wrong for the Procuring Entity to re-open the matter after it had been evaluated. Counsel submitted that this was prejudicial to the Applicant.

The Procuring Entity in its response denied the assertions of the Applicant and argued that the award was made after considering the responsiveness of all the bidders pursuant to Section 64(1) of the Public Procurement and Disposal Act, 2005. According to section 5 of the Qualification Criteria at paragraph 4.2 (a) on the specific construction experience, the bidders were required to have participated in at least two contracts within the last seven years, each having a value of at least Kshs.450 million that had been successfully and substantially completed and similar in scope to the proposed works. According to the details of projects contained in the Applicant's original tender document, the Procuring Entity noted that the Applicant did not have the requisite construction experience. The only projects in the Applicant's tender completed within the last seven years similar to the proposed road works were the following:-

- a) Improvement of trunk roads in Kampala which had a value equivalent to Kshs.294, 000,000.
- b) Rehabilitation of Kisumu Airport Road, which had a value equivalent to Kshs.254, 000,000.

The above two projects did not meet the threshold of Kshs.450 million specified in the tender documents.

On the three projects highlighted by the Applicant during the hearing, the Procuring Entity responded as follows:-

1. Owen Falls Dam Remedial Works, Jinja Uganda

The scope of works of the above dam project was not similar to that of the road project specified in the tender document as this involved minor road

works. The similarity drawn by the Applicant between the two projects was therefore incorrect and could not be used as a comparative element in bid evaluation.

2. Proposed Alteration and Completion of the Warehouse Depot at Nakawa, Kampala Uganda

As observed with regard to the dam project, the scope of works of the above building project was not similar to that of the proposed road project. This project therefore could not meet the qualification criteria. Further, the project cost of Kshs.392 million arrived at after applying an exchange rate of Kshs. 70 per dollar was below the mandatory minimum of Kshs. 450 million specified in the tender document.

3. Northern Uganda Reconstruction Project Resealing/ Rehabilitation of Urban Streets, Uganda

The cost of the above project did not satisfy the minimum threshold specified in the tender document. The scope of works was not similar to proposed road project. The completion date of October, 1997 was outside the seven year period specified in the tender document.

In view of the foregoing, the Applicant did not qualify on the specific construction experience criteria and therefore was not eligible for award of the tender.

The Board has carefully considered the submission of the parties and examined all the documents before it.

The Board has also noted that Section 5, Qualification Criteria, paragraph 4.2(a) on Specific Construction Experience provided that the bidder must have experience as follows:-

“Participation as contractor, management contractor or subcontractor, in at least two (2) contracts within the last seven (7) years, each with a value of at least Kshs.450 million (Four Hundred and Fifty Million), that have been successfully and substantially completed and that are similar to the proposed works. The similarity shall be based on the physical size, complexity, methods/technology or other characteristics as described in Scope of Works.”

The scope of works against which the bidders' past projects were to be compared were stated in the tender advertisement notice as follows:-

- “(i) Provision of work facilities to the Supervising Engineers;*
- (ii) Site clearance and top soil removal;*
- (iii) Earthworks;*
- (iv) Preparation of sub grade to receive the pavement layers as per the standard specifications;*
- (v) Provision of specified sub base;*
- (vi) Provision of base;*
- (viii) Provision of a double surface dressing using 14/20 mm and 6/10 mm pre-coated class 4 chippings for both the carriageway and the shoulders;*
- (ix) The shoulders shall be constructed with the same materials and thickness as for sub base, base and surfacing;*
- (x) Construction of pipe culverts, box culvert and other drainage works;*
- (xi) Installation of road furniture;*
- (xii) Maintenance of passage of traffic through and around the works; and*
- (xiii) Maintenance of works during construction. The defects liability period shall be 24 months.”*

The above requirement is worded in mandatory terms and bidders were required to submit documentary evidence in their tender documents as proof of qualification. After perusal of the original tender document of the Applicant, the Board has made the following observations:-

1. The contract sum of the Owen Falls Dam Remedial Works project was US\$10.67 million and the project was carried out within the last seven years. However, the scope of works of the dam project was not similar to that of the proposed road project specified in the tender document. Therefore, the project did not comply with the provisions of paragraph 4.2 (a) set out in Section 5 of the tender document.
2. The Proposed Alteration and Completion of the Warehouse Depot at Nakawa was a warehouse building project and its scope of works was not comparable to that of the proposed road project. The road component under this project based on the area of the bitumen surfacing works was equivalent to about only 3 km for a 7m wide

carriage way, yet the project that the Applicant tendered for was 42 km long. In addition, the road project did not meet the threshold of Kshs.450 million set out in the tender document. This project did not comply with the specific construction experience required in the tender document.

3. The Northern Uganda Reconstruction Project Resealing/ Rehabilitation of Urban Streets had a similar scope as the proposed road project but was below the threshold of Kshs.450 million specified in the tender document. In addition, the indicated schedule of commencement and completion of July 1996 and October 1997 respectively was outside the seven (7) years period specified in the tender document. This project did not also comply with the tender requirements.
4. The projects on the Improvement of Trunk Roads in Kampala and Rehabilitation of Kisumu Airport had similar scope as that of the proposed road project but did not meet the required threshold of Kshs.450 million.

On the question whether the Procuring Entity was entitled to invoke Section 5 paragraph 4.2 to disqualify the Applicant, the Board has observed that Clause 30.1 of the tender document provided as follows:-

"The Employer will carry out evaluation of the details and information provided in the Post Qualification Questionnaire and any bidder who does not qualify shall not have his/her bid evaluated."

The Board noted that the Procuring Entity carried out a post qualification evaluation based on the following parameters:-

1. Eligibility;
2. Registration;
3. Historical non-performance;
4. Audited Accounts;
5. Working capital;
6. Current commitments;
7. Annual turnover;
8. Experience;
9. Site staff; and

10. Equipment.

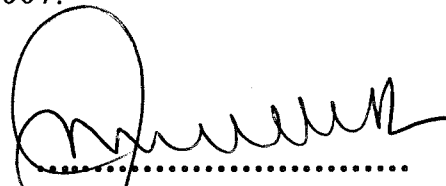
The Board finds that based on this qualification evaluation, the Applicant did not meet the Specific Construction Experience Criteria set out in Section 5 of the tender document and should have been disqualified at this stage and not evaluated further.

Accordingly, the grounds of appeal fail.

The upshot of our finding is that taking into account the foregoing, the appeal fails and is hereby dismissed. The procurement process may proceed.

Dated at Nairobi on this 17th day of July, 2007.


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CHAIRMAN
PPARB


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SECRETARY
PPARB