

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 66/2007 OF 26TH NOVEMBER, 2007

BETWEEN

CASCA TRADERS LIMITED

AND

GOVERNMENT TRAINING INSITUTE, MATUGA

Appeal against the decision of the Government Training Institute, Matuga, Procuring Entity dated the 14th November, 2007, in the matter of Tender No. MGTI/KWC/01/07-08 concerning the Proposed Erection and Completion of New Hostel Block and Associated External Works.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Eng. C. A. Ogut	-	Member
Ms. Judith Guserwa	-	Member
Mrs. L. G. Ruhiu	-	Member
Amb. C. M. Amira	-	Member
Mr. Sospeter K Munguti	-	Member
Mr. Akich Okola	-	Member

IN ATTENDANCE

Mr. I. K. Kigen	-	Holding Brief for Secretary
-----------------	---	-----------------------------

PRESENT BY INVITATION FOR APPLICATION NO. 66/2007

Applicant, Casca Traders Limited

Mr. Alex Masika	-	Advocate, Masika & Koross Advocates
Mr. Festus Kamau	-	Director

Mr. Maitu Muhia - Manager Operations

Procuring Entity, Government Training Institute, Matuga

Mr. Jefwa Ngombo - Director

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

The tender was advertised in the local dailies on the 25th July, 2007 inviting eligible and competent contractors who must be registered in Category "E" and above for the erection and completion of New Hostel Block and Associated External Works. At the tender closing/opening date of 24th October, 2007, ten (10) firms had bought the Tender Documents but only seven (7) returned their completed bids as follows:-

1. Mutec General Contractors;
2. Jeddy General Contractors Limited;
3. Diaspora Design Build Limited;
4. Casca Traders Limited;
5. Semeha Engineering Works Limited;
6. Ifata Engineering Services Limited; and
7. Triospan Limited.

Diaspora Design & Build Limited failed to submit a tender security bond and was therefore disqualified. The remaining six (6) bidders were subjected to detailed evaluation based on the following criteria:-

1. Tender rates and prices
2. Arithmetic errors
3. Standard forms

Arising from the last evaluation, M/s Ifata Engineering Services Limited was awarded the tender at Kshs.33, 696,604/-.

At its meeting of 14th November, 2007, the Ministerial Tender Committee adjudicated and awarded the tender to M/s Ifata Engineering Services Limited at Kshs.33,696,604/-.

The Applicant was notified by the Procuring Entity that its bid was unsuccessful by a letter dated 15th November, 2007

X THE APPEAL

The Appeal was lodged on 26th November, 2007 by Casca Traders Limited against the decision of the Government Training Institute, Matuga in the matter of Tender No. MGT/KWL/01/07-08 for the Proposed Erection and Completion of New Hostel Block and Associated External Works.

At the commencement of the hearing, the Applicant submitted that the Request for Review was based on Regulation 47 of the Public Procurement and Disposal Regulations, 2006 as read together with Section 60 of the Public Procurement and Disposal Act, 2005, Section 64(1) of the Act as read together with Regulation 48; and Section 66 (4) of the Act. The Applicant withdrew ground No.6 of Request for Review as it had already been supplied with a copy of the summary evaluation report.

The Applicant argued the Grounds of Appeal as follows:-

GROUND 2, 3 AND 4 – BREACH OF SECTIONS 60 AND 64 AND REGULATIONS 47 AND 48

These Grounds have been consolidated as they raised similar complaints.

The Applicant submitted that the Procuring Entity breached Regulation 47 as read with Section 60 for failing to carry out a Preliminary Evaluation as required to determine whether the respective tenderers had submitted the required documents and information. The Applicant further submitted that it was the only tenderer which had submitted an original tender and a copy in accordance with clauses 3.14, 3.15 and 4.1 of the Instructions to Tenders. Therefore, if a proper preliminary evaluation had been done, the Procuring Entity ought to have rejected the bids of all the other tenderers including that of Ifata Engineering Works Ltd, the successful bidder.

In Response, the Procuring Entity stated that the Applicant's request to withdraw its Ground 6 of Request for Review was not genuine. It argued that the action reflected unreliability on the part of the Applicant, because the Applicant's letter dated 24th November, 2007 requesting for summary evaluation was hand delivered at the Procuring Entity's office on 28th November, 2007, whereas the Request for Review was filed on 26th November 2007. Moreover, the said letter was addressed to:

“The Managing Director, Government

Training Institute, P.O. Box 31, NAIROBI".

The Procuring Entity contended that the letter dated 24th November, 2007 was addressed to another Institute and this was an indication that the Applicant could not be trusted.

In response to the alleged breach of Regulation 47 and Section 60, the Procuring Entity stated that all the bidders submitted the required number of documents. The Procuring Entity further stated that clause 3.14 of Instructions to Tenderers provided that the tenderers were to submit copies of the Tender in the number specified in the Invitation to Tender. It further argued that the Invitation to Tender did not request for submission of copies.

The Procuring Entity further submitted that it did carry out the Preliminary evaluation as evidenced by the Minutes of tender opening meeting of 24th October, 2007 which the Applicant's representative attended. It further stated that during the tender opening, the issue of the number of copies was raised and addressed as indicated in the Minutes of meeting of 14th November, 2007.

The Board has considered the submissions by the parties and examined the documents submitted.

The Board has noted that clauses 3.14, 3.15 and 4.1 of the Instructions to Tenderers provided as follows:-

3.14: The tenderer shall prepare one original of the documents the tender documents as described in Clause 3.2 of these Instructions to Tenderers, bound with the volume containing the Form of Tender.

and clearly marked "ORIGINAL". In addition, the tenderer shall submit copies of the tender, in the number specified in the invitation to tender, and clearly marked as "COPIES". In the event of discrepancies between them, the original shall prevail.

3.15: The original and all copies of the tender shall be typed or written in indelible ink and shall be signed by a person or persons duly authorized to sign on behalf of the tenderer, pursuant to Clause 1.5 (a) or 1.6(b), as the case may be. All pages of the tender where alterations or additions have been made shall be initiated by the persons signing the tender.

4.1: The tenderer shall seal the original and all copies of the tender in two Inner envelopes and one outer envelope, duly marking the inner envelopes

“ORIGINAL” and “COPIES” as appropriate. The inner and outer envelopes shall:-

- (a) be addressed to the Employer at the address provided in the invitation to tender;
- (b) bear the name and identification number of the Contract as defined in the invitation to tender; and
- (c) Provide a warning not to open before the specified time and date for tender opening.

It is clear that clause 3.15 of the Instructions to Tenders required a bidder to submit an original of the documents comprising the tender. In addition, the bidders were to submit copies of the tender, in the number specified in the Invitation to Tender. The Board has noted that the Tender Invitation notice did not require bidders to submit copies. Therefore, the Procuring Entity could not have disqualified the bidders who did not submit copies as argued by the Applicant, as there was no such requirement. The Board has further noted that all tenderers including the Applicant were subjected to the Preliminary Evaluation and found to be responsive.

Accordingly, there was no breach of Sections 60 and 64 and Regulation 47 and 48 as argued by the Applicant.

Therefore, these grounds fail.

GROUND 5 – BREACH OF SECTION 66(4)

The Applicant submitted that the Procuring Entity breached Section 66(4) of the Act, by failing to declare the Applicant's bid as the lowest evaluated. The Applicant further argued that the price differential between its bid and that of the successful bidder was in excess of Kshs.1,400,000/- which the Government could have saved. The Applicant stated that its tender should have been declared as the lowest evaluated. It argued that the Procuring Entity breached Section 66(4) by awarding the tender to Ifata Engineering Works Ltd.

In response, the Procuring Entity stated that based on the Technical and Financial Evaluation Reports, the Applicant was not the lowest evaluated bidder. It submitted that the Applicant did meet the criteria on experience and the size of the projects stipulated in Tender Document. Further, the Applicant did not price the preliminary items such as insurance, bid bond, site office, transportation, housing for labourers and testing of materials as required at the grand summary page of the Tender Document. In addition it

stated that the Applicant was blacklisted by the Procuring Entity because its previous work raised audit queries.

The Board has considered the submissions of the parties and examined the documents submitted.

The Board has noted that the Applicant failed to price preliminary items in the grand summary page of the Tender Document. These included items such as insurance, bid bond, site office, transportation, housing for labourers and testing of materials.

Further, the Board has noted that clause 1.7 of the Instructions to Tenderers provided as follows:-

“To qualify for award of the contract, tenderers shall meet the following minimum qualifying criteria:-

.....b..... experience as main contractor in the construction of at least (c)two works of a nature and complexity equivalent to work out the last 10 years to comply with this requirement, works cited should be at least 70 per cent complete.”

The Board has further noted that the Applicant did not meet this tender requirement as it had not handled works of similar nature and size in the last five years.

Accordingly, the Applicant did not meet the technical and commercial criteria specified in the tender documents and the Procuring Entity did not breach Section 66(4) as argued by the Applicant.

Therefore, this ground of Appeal also fails.

GROUND 6 – Breach of Sections 44 and 45.

The Applicant withdrew this ground.

FOUNDATIONS 7 AND 8

The Applicant submitted that its bid fully complied with all the technical specifications and requirements. However, the bid by the successful bidder did not fulfill all the requirements of the tender. Therefore, the Applicant stated it should have been awarded the tender. Finally, it argued that its bid was unfairly disqualified by the Procuring Entity.

In response, the Procuring Entity stated that it evaluated all the bidders equally and the Applicant bid was properly disqualified for failure to meet key technical requirements. The Procuring Entity further stated that all bidders were subjected to the same evaluation criteria as specified in the Tender Document.

The Board has noted these are mere statements that are not backed by any alleged breach of the Act or Regulations.

Accordingly, these grounds also fail

Ground 9 – Loss suffered

This is a statement of perceived losses/ damages arising from anticipated profit, which the Applicant would have made if it were awarded the tenders. Clause 1.10 of Instructions to Tenderers stipulates that “The tenderer shall bear all costs associated with the preparation and submission of its tender, and the Employer will in no case be responsible or liable for those costs.”

In open competitive bidding there is no guarantee that a particular tender will be accepted and just like any other tenderer, the Applicant took a commercial risk when it entered into the tendering process. In view of the foregoing, it cannot claim the cost or damages associated with the tendering process, which resulted in the award of the tender to another bidder.

Taking all the above matters into consideration, the Appeal fails.

Accordingly, the Procurement process may proceed.

Date at Nairobi on this 18th day of December, 2007.

.....
CHAIRMAN
PPARB

.....
SECRETARY
PPARB

