

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.12/2008 OF 28TH MARCH, 2008

BETWEEN

POWER PUMP TECHNICAL CO. LTD.....APPLICANT

AND

KITUI TEACHERS SACCO..... PROCURING ENTITY

Appeal against the decision of Kitui Teachers Sacco, the Procuring Entity, in the matter of Tender No.KTI/KTS/001/2007-2008 for Proposed Construction of Commercial Building at Mutomo Market of 17th March, 2008

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Amb. C.M. Amira	-	Member
Mrs. L.G. Ruhiu	-	Member
Eng. C.A Ogut	-	Member
Mr. S. K. Munguti	-	Member
Mr. C. R. Amoth	-	Board Secretary

IN ATTENADANCE

Mr. P. M. Wangai	-	Secretariat
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PRESENT BY INVITATION FOR APPLICATIO NO.12/2008

Applicant, Power Pump Technical Co. Ltd

Mr. Philip Kioko	-	Managing Director
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Procuring Entity, Kitui Teachers Sacco

Mr. Maingi Kiema	-	General Manager
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Mr. Anthony Mbiti	-	Chairman
Mr. Dominic K. Ngovi	-	Treasurer
Mr. Wilson Mwonga	-	Quantity Surveyor
Mr. Pius Muthiva	-	Project Designer

Interested Candidate, Buttex Enterprises Ltd

Mr. Jacob Mbao	-	Director
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BOARD'S DECISION

Upon hearing the parties and upon examining the documents submitted, the Board decides as follows:-

BACKGROUND OF AWARD

The tender notice was dated 21st February, 2008 and required the bidders to submit their tenders on or before 6th March, 2008 at 10.00 a.m. The tender opened on 7th March, 2008 in the presence of the bidders' representatives. Five bidders returned their tenders and their respective tender prices were as follows:

S/No	Bidders' Name	Tender Sum (Kshs)
1.	Butex Enterprises	11, 926,975
2.	Power Pump Technical Co. Ltd	11, 157, 490
3.	Kitho Civil & Engineering Co. Ltd	14, 976, 841.20
4.	Kyamboo Building & Civil Engineering	13, 421, 322
5.	General Terrazzo & Marble Contractors	8, 893, 667.80

Evaluation

Technical Evaluation was conducted by Mr. Pius Muthuva, District Maintenance Officer and Wilson K. Mwonga.

The bids submitted by General Terrazzo & Marble Contractors and Kyamboo Building Contractors were disqualified at the preliminary evaluation stage for not being registered under category D and above.

The other three bidders qualified for detailed evaluation. The evaluation committee noted that the Applicant's tender price of Kshs. 11,157,490.00 was below the estimated cost of Kshs.15,000,000.00. The committee also noted that the Applicant's tender was not accompanied by a bid bond as required. Accordingly, its bid was disqualified.

The bid submitted by Buttex Enterprises was also disqualified for for the same reason.

The evaluation committee recommended the award of the tender to Kitho & Civil Engineering Co. Ltd. In its meeting held on 17th March, 2008, the Tender committee concurred with the recommendation of the evaluation committee and awarded the tender to Kitho Civil & Engineering Co. Ltd.

Letters of notification of award to the unsuccessful bidders were dated 19th March, 2008 while that of the successful bidder is dated 25th March, 2008.

X THE APPEAL

This Request for Review was lodged by Power Pump Technical Limited on 28th March, 2008 against the decision of the Tender Committee of Kitui Teachers Sacco, the Procuring Entity in the matter of tender Proposed Construction of Commercial Building at Mutomo Market.

GROUND 1 - BREACH OF SECTION 55(1) OF THE ACT AND REGULATION 40

The Applicant argued that the Procuring Entity breached Section 55(1) of the Public Procurement and Disposal Act, 2005 as read together with Regulation 40 as the tender was open for 15 days instead of 21 days as required by the law. The Applicant submitted that the tender advertisement was made on 21st February, 2008. The tender notice required the bidders to return the tender documents by 6th March, 2008 by 10.00 a.m. The period of 15 days was less than the 21 days stipulated in Section 55(1) of the Act and Regulation 40.

The Applicant further submitted that the tender documents were availed to the bidders on 29th February, 2008 which was a Friday. As a result, the bidders only had three working days to prepare their bid documents and obtain bid security from the banks.

In addition, the Applicant submitted that it was unable to obtain the bid security due to the short notice given to the bidders. Therefore, it included a letter dated 5th March, 2008 in the tender documents explaining why its bid was not accompanied by a bid security.

In response, the Procuring Entity admitted that the period in the tender notice was less than the 21 days stipulated in Regulation 40.

The Procuring Entity denied the allegation that the Applicant had included a letter dated 5th March, 2008 in its tender document explaining why it had not provided a bid security.

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

Upon perusal of a copy of the blank tender document, the Board has noted that the tender invitation notice is dated 21st February, 2008. The tender invitation notice required the bidders to submit their bids by 6th March, 2008 by 10.00 am. It is clear that the tender was open for 15 days instead of at least 21 days as required by Section 55(1) of the Act as read together with Regulation 40 which provide as follows:-

Section 55(1)

"The time allowed for preparation of tenders must not be less than the minimum period of time prescribed for the purpose off this subsection".

Regulation 40

"The time minimum for the preparation of tenders for the purposes of Section 55(1) of the Act shall be a period of twenty one days".

The Board finds that the Procuring Entity breached Section 55(1) of the Act and Regulation 40.

Accordingly, this ground of Appeal succeeds.

GROUND NO. 2-BREACH OF REGULATION 44

The Applicant submitted that the tender notice stated that the tender was to close/open on 6th March, 2008 at 10.00 am. The Applicant argued that it delivered its tender documents on 6th March, 2008 and waited until the closing time of the tender. It argued that the Procuring Entity did not seal the tender box on 6th March 2008 at 10.00 am and that the opening was not done on that day.

The Applicant further submitted that it later learnt that the tender was opened on 7th March, 2007.

Finally, the Applicant submitted that the tender box failed to meet the standards set out in Regulation 44, in that it only had one padlock.

In response, the Procuring Entity admitted that the tenders were opened on 7th March, 2008. It submitted that the bidders were advised on 6th March, 2008 that the opening of the tenders would be done on 7th March, 2008. The Procuring Entity denied the allegation that the Tender Box was not sealed on 6th March, 2008. It stated that the General Manager sealed the tender box on 6th March, 2008 and kept the keys. However, the Procuring Entity admitted that the

tender box had only one lock and that the key was in the custody of the General Manager.

Butex Enterprises, an Interested Candidate submitted that it obtained its tender documents on 6th March, 2008 and returned the completed tender documents on 7th March, 2008. It stated that the opening of the tender was done on 7th March, 2008.

The Board has noted that the tender invitation notice provided that the tender closing/opening date was on 6th March, 2008 at 10.00 am. It is therefore clear that the opening of the tenders on 7th March, 2008 was contrary to the provisions of Section 60(2) which provides as follows:-

"Immediately after the deadline for submitting tenders, the tender opening committee shall open all tenders received before that deadline".

The Board further noted that the tender box only had one padlock and the key was in the custody of the Procuring Entity's General Manager. This was in contravention of the provisions of Regulation 44 which provides as follows:

"A Procuring Entity shall for purposes of Section 58(4) of the Act, ensure that:-

- (a) A tender box has two locks;*
- (b) The keys for each lock are kept by a different officer; and*
- (c) The tender box remains locked until the time for tender opening".*

In view of the foregoing, the Board holds that the Procuring Entity breached Section 60(2) of the Act and Regulation 44.

Accordingly, this ground of Appeal also succeeds.

GROUND NO. 3 - BREACH OF SECTIONS 67(2) AND 68(2) OF THE ACT

The Applicant submitted that the Procuring Entity failed to communicate to the tenderers on the award of the tender in accordance with the provisions of Section 67(2).

The Applicant further argued that the Procuring Entity signed the contract and handed over the construction site to the successful tenderer two days after the award of the tender. The Applicant stated that this was a breach of Section 68(2) of the Act which provides that a contract should not be signed until expiry of at least fourteen days from the date of notification.

In response, the Procuring Entity submitted that all the letters of notification of award were signed on 19th March, 2008. It then signed the contract with the successful tenderer on 27th March, 2008.

Finally, the Procuring Entity informed the Board that construction had commenced and that it had already paid a sum of Kenya Shillings Four Million to the successful tenderer.

On its part, the successful tender confirmed that it was already on site and that it had commenced work.

Butex Enterprise, an Interested Party submitted that it had not received any communication from the Procuring Entity on the outcome of the tender. It only learnt later that the award was made and construction had commenced.

The Board has noted that the letters of award to the unsuccessful bidders are dated 19th March, 2008. However, the letter to the successful tenderer is dated 25th March, 2008. This is contrary to Section 67(2) of the Act that requires simultaneous communication to the successful and unsuccessful bidders.

The Board has further noted that the letter to the successful tenderer which is dated 25th March, 2008 partly read as follows:-

"... You are hereby instructed to proceed with the execution of the said works in accordance with the documents. Your commencement date shall be taken as 26th day of March, 2008... ..".

The Board holds that by instructing the successful tenderer to commence work on 26th March, 2008, the Procuring Entity breached Section 68(2) as a contract could only be signed upon expiry of 14 days from the date of notification.

Further, the signing of the contract on 27th March, 2008 between the Procuring Entity and the successful tenderer was also done in breach of Section 68(2) of the Act.

Accordingly, this ground of Appeal also succeeds.

GROUND 4

This is not a ground of Appeal but a mere statement that is not supported by an allegation of breach of the Act or Regulations as provided by Regulation 73(2) (a).

BOARD'S OBSERVATIONS

1. The Board has noted that the tender document used by the Procuring Entity was not the appropriate standard tender documents for works. Further, the tender document used by the Procuring Entity lacked salient features like the evaluation criteria to be used.
2. The Board has also noted that this Request for Review was filed on 28th March, 2008. The Procuring Entity was notified on 31st March, 2008. The letter notifying the Procuring Entity of the Request for Review clearly stated that the procurement process was to be suspended until the hearing and determination of the Request for Review. It is therefore, rather surprising for the Procuring Entity to state that it has already paid a sum of Shillings Four Million which is about 30% the entire contract sum. It is inconceivable how the successful candidate would have carried out mobilization, delivered materials and

commenced work within four days and be entitled to a 30% payment of the contract sum.

3. The estimated value of the works being procured by the Procuring Entity was Kshs. 15, 000, 000.00. This amount was above the threshold of Kshs. 6, 000, 000.00 which required the Procuring Entity to use open tender method of procurement. Hence the Procuring Entity breached Section 54(2) of the Act by advertising the tender on its notice board only.

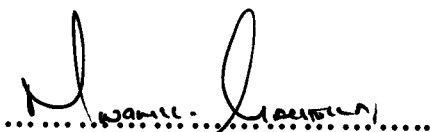
Taking all the above into consideration, the Appeal succeeds.

The award of the tender to the successful candidate is annulled. The Board further orders the Procurement Entity to re-tender afresh after taking into consideration the quality and quantity of works done by the successful candidate and the materials on site.

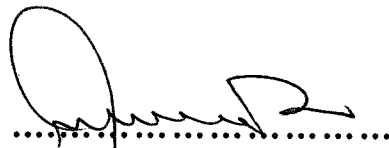
Further, the Board directs that upon certification by a registered Architect and Quantity Surveyor, the Procuring Entity should recover any overpayment to the successful candidate from the performance bond.

The Procuring Entity is further advised to follow the provisions of the Public Procurement and Disposal Act, 2005 and the Regulations there under in its future procurements.

Dated at Nairobi on this 28th day of April, 2008.



CHAIRMAN
PPARB



SECRETARY
PPARB

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