

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 35/2008 OF 2008**

**BETWEEN**

**MUEMA & ASSOCIATES ..... (APPLICANT)**

**AND**

**TURKANA COUNTY COUNCIL ..... (PROCURING ENTITY)**

Appeal against the decision of the Tender Committee of the Turkana County Council dated the 17<sup>th</sup> day of September, 2008 in the matter of Preparation of Abstracts of Accounts - Tender No. TCC/25/2008/2009.

**BOARD MEMBERS PRESENT**

Amb. C. M. Amira	-	Ag. Chairman
Ms. Loise Ruhiu		Member
Eng. C. A. Ogut	-	Member
Mr. Akich Okola	-	Member

**IN ATTENDANCE**

Mr. C. R. Amoth	-	Secretary
Ms. Sylvia Aluoch	-	Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Muema & Associates**

Mr. Alex Muema - Partner for the Applicant

### **Procuring Entity, Turkana County Council**

Mr. Christopher O. Onanda - Administrator

Mr. James Akoto - Treasurer

### **Interested Candidates**

Mr. Eliud Musembi - Reps Consultant

## **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 for the Preparation of Abstract of Accounts for the year 2007/08 for Turkana County Council. It was advertised on 19th August, 2008 in the Nation newspaper. It closed/opened on 17th September, 2008 at 12.00 noon. It attracted the following tenderers:

- |                                |   |         |
|--------------------------------|---|---------|
| 1. Strategic Design Consultant | - | 290,000 |
| 2. Muema and Associates        | - | 250,000 |
| 3. Odhiambo Okwiri             | - | ?       |
| 4. Reps Consultants            | - | 280,000 |

## **TENDER COMMITTEE DECISION**

The tender committee in its meeting held on 17th September, 2008 analysed the bid documents and noted the following:-

- Strategic Design Consultant - not registered with Institute of Certified Public Accounts for Kenya (ICPAK), no certificate available.
- Mwema and Associates - taken the Council to Court (Case No. 943 of 2006) which is still on therefore the firm cannot transact business with the Council.
- Odhiambo Okwiri - did not put monetary figures.
- Reps Consultants - not registered with Institute of Certified Public Accounts of Kenya (ICPAK), no certificate available.

The Council needed a firm which would assist in preparing the abstracts in accordance with the new local authority template. For this reason the committee decided to re-advertise the tender.

## **THE REVIEW**

This review was lodged on 11th November, 2008 by Muema & Associates against the decision of the Tender Committee of Turkana

County Council, in the matter of the tender for the Preparation of Abstract of Accounts for the year 2007/08.

The Applicant was represented by Mr. Alex Muema, while the Procuring Entity was represented by Mr. Christopher O. Onanda Administrator and Mr. James Akoto, Treasurer Turkana County Council, and the interested candidate, Reps Consultants was represented by Mr. Eliud Musembi.

The Applicant in its request for review raised four grounds for review as set out hereunder:

1. The Council has flouted the tender procedure by re-advertising for the services of preparation of Abstract of Accounts without due consideration of the parties who had submitted their tender bids per Clause No. 36 (2) of the Procurement and Disposal Act of 2005.
2. The Council has not notified the tenderers of its decision to cancel the original advert hence the Council has breached the tender laws per Clause No. 36 (2) of Public Procurement and Disposal Act of 2005.
3. Per Clause No. 36 (3) of Public Procurement and Disposal Act 2005 the Council has not given any reasons for terminate the procurement proceedings within the required period of 14 days.

4. Per Clause No. 36 (7) of Public Procurement and Disposal Act 2005, the Council did not give the Authority a written report on the termination.

The Applicant has requested the Board to make the following orders:

1. Stop the awarding of the tender as re-advertised until the matter is heard.
2. Turkana County Council to finalize the award of the tender to the initial firms who tendered for the services as per tender bids submitted, opened and evaluated by the tender committee.

**Grounds 1, 2, 3 and 4 Breach of Section 36(1), 36(2), 36(3), and 36(7), of the Act on Termination of Procurement Proceedings.**

The four grounds have been consolidated since they raise similar issues.

At the commencement of the hearing, the Board requested the Procuring Entity to provide it with the bid documents for the tender for the Preparation of Abstracts of Accounts for the year 2007/08 that the Procuring Entity had sold to the bidders. The Procuring Entity informed the Board that that there were no bid documents sold to bidders but that it had it verbally requested bidders to submit their proposals upon payment of Kshs. 2000/-.

In its submissions the Applicant informed the Board that it travelled to Turkana County Council to buy the bid document for the tender that

had been advertised on 19<sup>th</sup> August, 2008. The Applicant stated that upon payment of a non refundable fee of Kshs. 2000 to the Procuring Entity, it was verbally asked to prepare a competent proposal for submission by or on 10<sup>th</sup> September, 2008. It further stated that on 10<sup>th</sup> September, 2008 it travelled to Turkana County Council to witness the closing/ opening of the tender for Preparation of Abstracts of Accounts. However, instead of the bids being opened on that day, as stated in the advertisement, the Procuring Entity verbally informed the bidders that the Council was unable to open the tenders on that day, and that they would be opened on September 17<sup>th</sup>, 2008. Accordingly, it attended the bid opening on 17<sup>th</sup> September, 2008 where the Procuring Entity read out the tender sums and bidders were informed that the tender committee would give them a feed back after the bids were analysed.

The Applicant further stated that it filed its Application on 11<sup>th</sup> November 2008 after it read an advertisement in the Daily Nation newspaper of 23<sup>rd</sup> October 2008 re-advertising the bid. It submitted that the decision by the Procuring Entity to re-advertise the tender without notifying the bidders, was in breach of Section 36(2) (3) and (7) of the Act.

The Applicant stated that the Procuring Entity opened the re-advertised bids on 7<sup>th</sup> November, 2008, adding, that the Tender Committee had awarded this tender to Ms Peter Githae & Associates. It alleged that Ms Peter Githae & Associates commenced work on Monday 10<sup>th</sup> November, 2008. It pointed out that the evaluation and

award of the tender had been done hurriedly. In conclusion it argued that despite writing to the Procuring Entity requesting for reasons for the re-advertisement, the Procuring Entity had not responded to date.

In response, the Procuring Entity stated that the Applicant had bought a bid document after the tender was advertised in the newspaper. It further stated that during the tender closing/opening meeting the Applicant's representative noted the anomaly that one of the bidders did not quote its price for the bid. It alleged that the Applicant's representative had been canvassing with one of its members and that was the reason the Applicant had mentioned that it had been awarded the contract.

The Procuring Entity submitted that while the Applicant was a capable entity, it had "restricted" the Applicant from undertaking the work because of the complexity it entailed. It further submitted that the County Council felt that it was not proper to award Muema & Associates the advertised tender because it had a case against the County Council.

The Procuring Entity further stated that its investigations had revealed that apart from one firm which did not give financial figures, the rest of the firms were Muema proxies. It argued that Muema & Associates and the other two bidders were one person hence the need to re-advertise the tender.

Regarding the claim by the Applicant that it had written to the Procuring Entity requesting the reasons for the re-advertisement of the tender, the Procuring Entity denied receiving the letter. It further stated that due to the limited number of staff, it was unable to constitute a tender opening committee, evaluation committee and a tender committee. In conclusion, it urged the Board to allow it proceed with the tender award of 7<sup>th</sup> November, 2008 to Messrs Githae & Associates for purposes of continuity, and service delivery to the public.

The Interested candidate, Reps Consultant represented by Mr. Eluid Musembi, submitted that there was nothing wrong with one bidder buying documents for the other bidders. It further submitted that it was not Muema's proxy. It stated that the County Council had not notified it of the outcome of the bid process.

The Board has carefully considered the submissions by the parties and all documents placed before it and decides as follows.

The Board has noted that tender No. TCC/25/2008/2009, for Preparation of Abstracts of Accounts was first advertised on 19th August, 2008 and re-advertised on 23rd October, 2008. The Board has further noted that the opening/closing and evaluation of both bids were done by the Tender Committee. The Board has observed that Section 60(1) - 60(5) sets out the procedure for opening of tenders. Further, Regulation 10(2) sets out the functions of the Tender Committee.



The Board has noted that Section 36(1), 36 (2), 36(3) and 36(7) of the Act provide as follows:

**36(1) A procuring entity may at any time terminate procurement proceedings without entering into a contract.**

**36(2) The Procuring Entity shall give prompt notice of a termination to each person who submitted a tender, proposal or quotation or, if direct procurement was being used, to each person with whom the Procuring Entity was negotiating.**

**36 (3) On the request of a person described in subsection (2), the Procuring Entity shall give its reason for terminating the procurement proceeding within 14 days of the request.**

**36 (7) A Public Entity that terminates its procurement proceeding shall give the Authority a written report on the termination.”**

The Board finds that there is no letter, or evidence, submitted by the Procuring Entity to show that it gave prompt notice to all bidders after terminating the procurement process as required by Section 36 (2) of the Act. Accordingly Section 36 (2) of the Act has been breached.

The Board further finds that the Applicant wrote a letter dated 24<sup>th</sup> October, 2008 to the Procuring Entity requesting for an explanation

as to cancellation of the earlier procurement process. Although the Procuring Entity denies receiving the letter, the Board notes that the letter was attached to the request for review documents. Consequently the Procuring Entity had notice of the letter. Notwithstanding this, it made no comments on it in its written submissions. Section 36(3) requires a procuring entity to state the reasons for cancellation of the procurement proceedings when requested by a bidder. The Board finds that the Procuring Entity did not respond to the letter by the Applicant dated 24<sup>th</sup> October, 2008, and accordingly is in breach of Section 36(3).

The Board further finds that the Procuring Entity did not give a report to the Authority regarding its decision to terminate the proceedings as required by section 36(7) of the Act.

Regarding the decision by the Procuring Entity to restrict the Applicant from participating in the tender, the Board finds that there is no legal basis for this action. The Board holds that the "restriction" is a breach of Section 39 (1) of the Act which states that candidates should participate in procurement proceedings without discrimination except where participation is limited in accordance with the Act and Regulation.

The Board observes that the Procuring Entity did not provide copies of bid documents contrary to Section 56 (1) and 56 (2) of the Act.

The Board further finds that:

- a) There was no Tender Opening Committee and no Evaluation Committee. The Tender Committee opened the tender and evaluated the bids contrary to Section 60 (1) (b) of the Act.
- b) The Procuring Entity did not provide copies of bid documents contrary to Section 56 (1) and 56 (2) of the Act.
- c) Regarding postponement of the closing/opening date of the bids, the Procurement Entity breached 60 (2) of the Act, which states that "immediately after the deadline for submitting tenders the tender committee shall open all tenders received before that deadline".

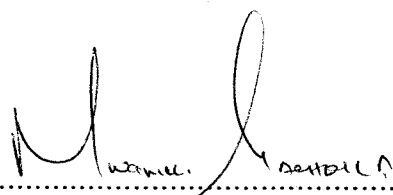
In the circumstances, the Board's finding is that the procurement process was not conducted in accordance with the Act, and the Regulations.

Accordingly these grounds of appeal succeed.

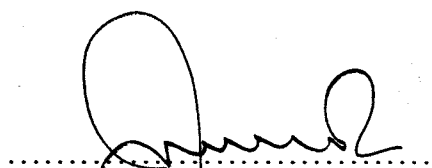
Taking into account all the foregoing, the Appeal succeeds and the Tender is hereby annulled.

Accordingly, the Procuring Entity may adopt any appropriate method of procurement as provided for by the Public Procurement and Disposal Act.

Date at Nairobi on this 9th day of December, 2008.

A handwritten signature in black ink, appearing to be 'M. M. M. M.', written over a horizontal dotted line.

CHAIRMAN  
PPARB

A handwritten signature in black ink, appearing to be 'J. M. M.', written over a horizontal dotted line.

SECRETARY  
PPARB