

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 36/2008 OF 11TH NOVEMBER, 2008

BETWEEN

MIDROC WATER DRILLING

COMPANY LIMITEDAPPLICANT

AND

NATIONAL WATER CONSERVATION & PIPELINE

CORPORATION.....PROCURING ENTITY

Appeal against the decision of the Tender Committee of National Water Conservation & Pipeline Corporation dated 19 October, 2008 in the matter of Tender No. NWC/HQ/06/2008-2009-Badasa Dam Project

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka - Chairman
Ms. J. A. Guserwa - Member
Amb. C. M. Amira - Member
Mr. Akich Okola - Member
Ms. Natasha Mutai - Member

IN ATTENDANCE

Mr. P. M. Wangai - Holding Brief for Secretary

PRESENT BY INVITATION

Applicant, Midroc Drilling Company Limited

- Mr. John Ohaga - Advocate, Ochieng, Onyango, Kibet & Ohaga Advocates
- Mr. Mohamed S. Chute - Managing Director
- Mr. Jeremiah O. Ouma - Engineer
- Mr. Jeremiah Ogolla - Marketing Manager

Procuring Entity, National Water Conservation & Pipeline Corporation

- Mr. George Maina - Advocate, Solonka & Co. Advocates
- Mr. G. Solonka - Advocate, Solonka & Co. Advocates
- Eng. M. M. Saboke - Managing Director
- Ms. M. A. Ochieng - Ag. General Manger, Corporate/Legal Services
- Eng. C. Mbugua - Senior Superintending Engineer
- Eng. B. Kioko - General Manager
- Eng. W. Odhiambo - Consultant
- Eng. Dr. Oonge - Consultant

Interested Candidate, Frabo and Company

- Mr. David Kamari - Engineer

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 procurement in this matter commenced by way of an expression of interest which was advertised by the Procuring Entity on 20th June and 10th July, 2008. The procurement was for construction of large dams. The

pre-qualification documents were opened on 31st July, 2008 in the presence of bidders' representatives.

Out of 44 bidders who submitted their pre-qualification documents, 12 were pre-qualified and were invited to bid for detailed works. The initial opening date was 19th September, 2008 but was extended to 29th July, 2008 after the request by the bidders. Seven bidders submitted their bids before the closing date as follows:.

1. Draft & Develop Engineers
2. Lee Construction
3. Frabo & Company
4. Midroc Water Drilling Co. ltd
5. China Jianxi International Technical Corporation
6. Kundan Singh Construction ltd
7. Intex Construction Ltd

Technical Evaluation

This was conducted by a committee chaired by Eng. B. Kioko. All the bidders were found responsive and therefore proceeded to the technical evaluation stage. This was based on the following parameters.

1. Program of works
2. Key staff and skills suitability
3. Schedule of plants equipments
4. Schedule of work in progress
5. Experience from completed similar works
6. Sub-contractors for specialized works
7. Licensed with relevant bodies as Dam Contractor
8. Compliance with specifications
9. Omission/incomplete tenders

The Applicant was found technically non-responsive due to lack of technical experience and capacity necessary for the proposed dam and associated works. Its bid was therefore disqualified and was not considered in the financial evaluation stage. After financial evaluation, tenders were ranked as follows:

	Bidder	Ranking
1.	Frabo and Company	1
2.	Draft and Develop	2
3.	Kundan Singh	3
4.	China Jianxi International Corporation	4
5.	Lee Construction	5
6.	Intex Construction	6

Arising from the above information, the evaluation committee recommended the award of the tender to Frabo and Company at its corrected tender sum of Kshs. 1, 476, 833, 109.76.

In its meeting held on 28th October, 2008, the Corporation Tender Committee concurred with the recommendations of the evaluation committee and awarded the tender to Frabo and Company at its corrected tender sum of Kshs. 1, 476, 833, 109.76.

Letters of notification of award to the successful and the unsuccessful bidders are dated 29th October, 2008.

THE REVIEW

This Application for Review was lodged on the 11th day of November, 2008 by Midroc Water Drilling Company Limited against the decision of the Tender Committee of National Water Conservation & Pipeline Corporation dated 29th November, 2008 in the matter of Tender No. NWC/HQ/06/2008-2009 for the Construction of Badasa Dam in Marsabit District

The Applicant was represented by Mr. J. Ohaga of Ochieng, Onyango, Kibet and Ohaga Advocates while the Procuring Entity was represented by Mr. George Maina of Solonka & Co. Advocates.

The Applicant in its Request for Review has raised three (3) grounds of appeal.

The Board deals with them as follows:-

Grounds 1 & 2 - That the Procuring Entity failed to promote the integrity and fairness of the public procurement procedures, breaching Section 2 of the Act; that the Procuring Entity disqualified the Applicant using criteria that were not stated in the Tender Documents, breaching Section 31 of the

Act; that the Procuring Entity failed to evaluate the tenders in accordance with the provisions of Section 82 of the Act.

These grounds have been consolidated because they raise similar issues.

The Applicant submitted that it was invited by the Procuring Entity in a letter dated 4th September, 2008, to submit its tender for the construction of various large dams, pursuant to Section 81(1) of the Act, after it had been pre-qualified by the Procuring Entity as communicated in the Procuring Entity's letter dated 14th August and 4th September, 2008, to the Applicant. This was in conformity with Sections 31 and 32 of the Act.

It further submitted that it submitted its bid in accordance with the Instructions to the Bidders contained in the tender document. It was the lowest evaluated bidder as conceded by the Procuring Entity in its response. However, it was notified by the Procuring Entity that its bid was not successful because it failed to demonstrate technical competence and capability and that its credit facility and turnover were inadequate. The Applicant argued that the Procuring Entity, having pre-qualified it, was precluded from relying on the reasons set out in the notification of award letter to disqualify the Applicant's tender. The Applicant stressed that the issue of capacity had already been addressed in the pre-qualification stage. The Applicant further argued that the Tender Documents did not require it to demonstrate technical competence or capability as evidenced by the response of the Procuring Entity and therefore the Applicant cannot be faulted for a breach committed by the Procuring Entity. Therefore, by using this criteria to disqualify its tender, the Procuring Entity breached Section 31 of the Act by applying an evaluation criteria that was not provided for in the Tender Documents. It further argued that the Procuring Entity breached Section 82 of the Act by failing to evaluate the tenders in accordance with the provisions of the said Act; and also Section 2 of the Act by failing to promote the integrity and fairness of the tender procedures.

With regard to the Procuring Entity's response that it had underquoted an item on rock excavation; the Applicant stated that the Instructions to the Bidders had no directions as to the minimum amount to be quoted by the bidders for each item. Without such guidelines, it was wrong for the Procuring Entity to claim that that the Applicant under quoted and could not undertake the works at its quoted rates.

Finally, the Applicant stated that its letter dated 17th October, 2008, was meant to indicate the Applicant's preference if it emerged the lowest evaluated

bidder in all the projects it had tendered for. This was in line with the Instruction to the Bidders which required them to indicate their preferences. It argued that the contents of the letter cannot be construed as an attempt to influence the evaluation of the tenders as alleged by the Procuring Entity.

In its response, the Procuring Entity submitted that the bids were sourced through a transparent process whereby the Expression of Interest for pre-qualification was advertised in the newspapers. The Procuring Entity stated that the Applicant was erroneously pre-qualified and invited to participate in the procurement proceedings. However, during the evaluation of the construction tenders, most bidders made reference to their pre-qualification documents thus prompting the Procuring Entity to re-visit the pre-qualification documents. This was done pursuant to the Tender Document's General Provisions clause 3.2 which required bidders to provide evidence of their continued eligibility. It was upon the perusal of the Applicant's pre-qualification documents that the Procuring Entity established that the Applicant had no technical and financial capacity to undertake the works being procured. The Procuring Entity argued that the Applicant had been erroneously pre-qualified and therefore it would not have been prudent for the Procuring Entity to perpetuate the error that had been made in the expression of interest at the pre-qualification stage.

The Procuring Entity submitted that upon examining the Applicant's pre-qualification documents, pursuant to Sections 81(e)(i) and 82(2) of the Act, it established that the Applicant had a turn-over of Kshs. 167 million and a credit facility of Kshs. 10 million which were below the turn-over of Kshs. 300 million and credit facility of Kshs. 100 million required by the Procuring Entity for pre-qualification to carry out the works. It argued that the Applicant's experience was on small works mainly water pans and boreholes whose maximum value was Kshs. 74 million. It pointed out that the Applicant was licensed to undertake construction of earth or rockfill dams of height not exceeding 20 metres whereas the Badasa Dam had a height of 50 metres. This was far much below the Badasa Dam project valued at Kshs. 1.5 billion. Thus the Applicant's tender was determined as non-responsive as it had no technical capacity to undertake the works.

The Procuring Entity further argued that whereas the Tender Document did not require tenderers to include technical proposals in their bids, the submission of technical proposals is a requirement under Section 81(c) of the Act, and that the Act being superior to the Tender Document, the Applicant had to be subjected to a technical evaluation pursuant to Section 81(e) (i) of the Act. Citing Clause 4.1, the Procuring Entity further argued that bidders were

required to submit proposals of work methods and schedule in sufficient details to demonstrate their adequacy to meet the technical specifications.

Finally, the Procuring Entity submitted that the Applicant breached Section 38 of the Act as read together with Clause 26.2 of the Tender Document, Instructions to Bidders, by making unsolicited communication to the Procuring Entity through the Applicant's letter dated 17th October, 2008. The Procuring Entity submitted that the letter was intended to influence it to award the tender to the Applicant.

The Interested Candidate, Frabo & Company Limited, the successful tenderer, did not make any submissions.

● The Board has carefully considered the submissions of the parties and the information in all the documents submitted before it and makes the following observations on the tender process in general and relevant provisions of the Act and Regulations:-

- i) The Board notes that the Procuring Entity engaged Dam Experts, vide its letter Ref: NWCPD/P&D/ dated 23rd September, 2008, to assist it in the evaluation of tenders including the review of the pre-qualification documents where necessary for the construction of Kiserian, Umaa and Badasa dams. Accordingly, the Experts reviewed the bids submitted and prepared a Tender Evaluation Report.
- ii) At pages 20 to 23 of the evaluation report on the Badasa Dam, the results of the technical evaluation were as follows: Table 5.1 under the Program of Works - the Applicant's program is noted as provided, as is the successful candidate's, but there is no mention as to whether the programs provided by these two tenderers are satisfactory; Table 5.2 under the Key Staff and Skills Suitability - the Applicant's list of staff is noted as provided, the successful candidate is reported to have referred to the list it gave in the pre-qualification documents, but there is no mention as to whether the staff proposed by these two tenderers are satisfactory; Under Table 5.3 Schedule of Plant - the Applicant's list of plant is noted as provided, the successful candidate is reported to have referred to the list it gave in the pre-qualification documents, but there is no mention as to whether the plant proposed by these two tenderers are satisfactory; Table 5.7 Licensed Dam Contractor (registration with MW&I etc.) - the Applicant is reported as having given dam construction and borehole drilling license details with no mention as to whether the license(s) provided are satisfactory, the successful candidate

has a comment 'no details' recorded against it; Table 5.10 Result of Technical Evaluation - the Applicant is reported as having no capability, and the successful candidate is reported as having marginal capability; Table 6.6 Result of Financial Evaluation - the Applicant was not subjected to a financial evaluation, the successful candidate is reported as being marginally satisfactory.

The Board notes that the Experts' submissions at the hearing that dam construction is a complex undertaking with serious repercussions should the dam collapse. Thus a dam construction contract cannot be awarded to a tenderer without first assessing its technical capability and ensuring that the tenderer is indeed qualified, capable and licensed to carry out such complex works. The Board also notes that there is no basis or procedure evidenced in the Tender Evaluation Report to show objectively how the Procuring Entity arrived at the results of both the technical and financial evaluations;

- iii) Clause 4.1 of the Tender Document's General Conditions, states that Bidders shall submit proposals of work methods and schedule in sufficient detail to demonstrate the adequacy of the bidders' proposals to meet the technical specifications and the completion time. The Board notes that the Tender Evaluation Report presented before it does not contain a review of the work methods submitted by the tenderers.
- iv) The Board further notes that the Experts assessed the Applicant's bid and determined the Applicant to be technically incapable for mainly two reasons - its past experience was on small works with a maximum value of Kshs. 74 million and mainly on water pans and boreholes when compared to the large proposed large Badasa dam of Kshs. 1.56billion; and that its rate for excavation in rock of Kshs. 500 per cubic meter was considered as very low compared to the Engineer's estimate of Kshs. 2,500 per cubic meter. The Experts concluded that under these circumstances it would be doubtful whether the Applicant would be capable of undertaking the works and advised that its bid be rejected.
- v) The Tender Document had three Schedules for bidders to complete, namely the Schedule of Works of a similar nature carried out within the last five years (page 52), the Schedule of the Major Items of Plant to be used on the contract (page 53), and the Schedule of Technical Staff to be used on the contract (page 54). The tenderers were required to sign these schedules together with statements confirming that they had the experience and adequate financial resources to carry out the works in the contract, and that notwithstanding the list of plant and staff they had

detailed in the schedules, they would provide suitable and adequate plant and staff required for the works. The Board notes that the Applicant submitted signed schedules appropriately.

- vi) Clause 3.2 of the Tender Document's General Conditions, states that Bidders shall provide such evidence of their continued eligibility satisfactory to the Procuring Entity as it shall reasonably request. The Board notes that the Procuring Entity did not provide evidence that it requested any such information from the bidders during the evaluation process;
- vii) Section 31(3) and 31(4) of the Act require that the criteria to be used by the Procuring Entity in determining whether a tenderer is qualified to be awarded a contract must be set out in the tender documents, and that the Procuring Entity uses that criteria in determining whether the tenderers are thus qualified. The Board notes that there were no instructions in the Tender Documents for bidders to prepare and submit technical proposals alongside their financial bids, and neither was there a clear criteria and procedure for the evaluation of such technical bids;
- viii) Section 38 of the Act prohibits tenderers from making unsolicited communications to the Procuring Entity, after the deadline for the submission of bids, that might reasonably be construed as an attempt to influence the evaluation of the bids; and the Tender Document's General Provisions clause 26.3 provides for the Procuring Entity to reject a bid where any effort by a bidder to influence the Procuring Entity is made.

The Board notes that upon receiving the Applicant's unsolicited communication dated 17th October, 2008, the Procuring Entity did not exercise its right to reject the Applicant's bid during the evaluation process. The letter partly read as follows:

"...In our quotation we had indicated that that our priorities were Badasa Dam, Umaa Dam and lastly Kiserian in that order.

We consequently confirm our priorities and ask to be considered first for Badasa Dam. We feel most competent for Badasa Dam because;

We have most of our machinery in Marsabit currently constructing Bakuri Dam for Northern Water Services Board which we expect to complete by November, 2008

The following machines are in the Northern Region

- (a) **D9 Bull Dozer in Mandera.**
- (b)
- (c)
- (d)
- (e)
- (f)
- (g)
- (h)
- (i)

With these machineries already in the Northern Region and Marsabit in particular, we shall save a lot of tax payer's money on mobilization.

In this regard, we consider ourselves better placed to do the Badasa project because we have over the years operated in the Northern Region.

Our company better understands and can manage the intriguing security problems in the region.

We hope our foregoing sentiments will be considered together with other factors as you finalize your evaluation".

It is clear that this letter was in violation of Section 38 of the Act and should have led to disqualification of the Applicant by the Procuring Entity at an earlier stage before the technical evaluation.

- ix) At the hearing, Eng. B. Kioko confirmed that he was the Chairman of the Procuring Entity's Tender Committee and also a member of its Evaluation Committee. The Board notes that this is contrary to Regulation 16(4) which states that no person shall be appointed as a member of the evaluation committee if such a person is a member of the tender committee of the procuring entity.

In view of the foregoing, the Board finds as follows:-

On the breach of Section 2 of the Act, it is clear that the evaluation process was flawed. Therefore, the Procuring Entity could not have achieved the objectives of promotion of integrity and fairness of the procurement procedures as envisaged by this section of the Act. On the breach of Sections 31 and 82 of the Act, the Board finds that the Procuring Entity conducted a technical and financial evaluation of the tenders whereas there were no instructions in the Tender Documents for bidders to prepare and submit technical proposals alongside their financial bids, and neither was there a clear criteria set out and procedure for the evaluation of such technical bids. The Board also finds that there is no basis provided in the Tender Evaluation

Report to show how the Procuring Entity arrived at the results of both the technical and financial evaluations.

In view of the foregoing, these grounds of appeal succeed.

Ground 3 - That by the Procuring Entity's breaches of the Act, the Applicant has suffered loss and damage

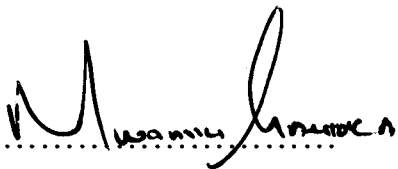
The Applicant alleged that it had suffered loss of income and damage because it had been subjected to unfair competition.

The Board finds that costs incurred by tenderers at the time of tendering are commercial risks borne by persons in business, therefore, the Procuring Entity is not liable for such costs.

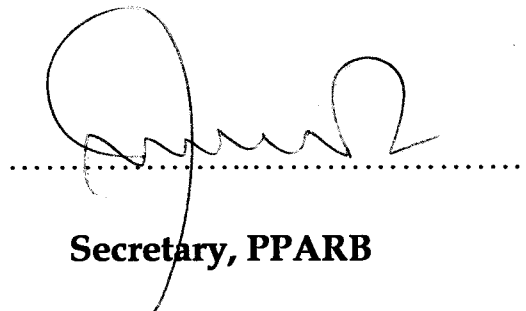
Taking into account all the foregoing matters, the Board orders, pursuant to Section 98 of the Act, that:-

- i) the decision to award the tender to the successful tenderer is nullified; and
- ii) the Procuring Entity shall re-tender for this procurement and complete the procurement process within 90 days.

Dated at Nairobi on this 11th day of December, 2008



Chairman, PPARB



Secretary, PPARB

