

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 37/2008 OF 13<sup>TH</sup> NOVEMBER, 2008**

**BETWEEN**

**GEODEV (K) LIMITED..... (APPLICANT)**

**AND**

**MINISTRY OF EDUCATION..... (PROCURING ENTITY)**

Review against the decision of the Tender Committee of Ministry of Education dated the 30<sup>th</sup> day of October, 2008 in the matter of Tender No. MOE: RFP/01/2008 for Consultancy Services for the Spatial Analysis of School Mapping Data (School Mapping Phase II)

**BOARD MEMBERS PRESENT**

|                   |   |          |
|-------------------|---|----------|
| Mr. P. M. Gachoka | - | Chairman |
| Mr. J. W. Wambua  | - | Member   |
| Ms. Loise Ruhiu   | - | Member   |
| Ms. J. A. Guserwa | - | Member   |
| Amb. C. M. Amira  | - | Member   |

**IN ATTENDANCE**

|                 |   |             |
|-----------------|---|-------------|
| Mr. C. R. Amoth | - | Secretary   |
| Ms. P. K. Ouma  | - | Secretariat |

## **PRESENT BY INVITATION**

### **Applicant, Geodev (K) Limited**

- Mr. Eric Mutua - Advocate, E. K. Mutua & Co.  
Advocates
- Mr. Nthuku Judicaster - Advocate, E. K. Mutua & Co.  
Advocates
- Mr. David K. Gichuki - Managing Director
- Mr. Christopher M. Murityi - Physical Planner

### **Procuring Entity, Ministry of Education**

- Mr. J. Okungu - Director
- Mr. P. N. Momanyi - Senior Principle Procurement Officer
- Mr. S. Nthenge - Economist
- Mr. I. I. Mutungi - Senior Procurement Officer
- Mr. John N. Kuria - Deputy Secretary, Teachers Service  
Commission

### **Interested Candidates**

- Mr. Steven Chege - Advocate, Oakar Services Ltd
- Mr. Harun Kamau - Court clerk, S. M. Chege & Co  
Advocates, for Oakar Services Ltd
- Mr. Thomas Ndegwa - Managing Director, Oakar Services  
Ltd
- Mr. John B. Kyalo Kiema - Team Leader, Oakar Services Ltd
- Mr. Timothy Gituma - GIS Analyst, Oakar Services Ltd
- Mr. David N. Kuria - GIS Analyst, Lynesom Associates Ltd
- Mr. Wasomi B. Charles - GIS Analyst, Lynesom Associates Ltd
- Mr. Douglas Musiega - Lead Expert, Lynesom Associates Ltd

## **BOARD'S DECISION**

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

## **BACKGROUND**

The Ministry of Education with financial assistance from USAID advertised a Request for Proposal (RFP) for Consultancy Services to carry out spatial analysis of School Mapping Data (School Mapping Phase II) on 7<sup>th</sup> August, 2008 in the Nation and Standard newspapers. The RFP was closed/opened 28<sup>th</sup> August, 2008. Five out of fifteen firms which bought the tender documents submitted their proposals. The technical proposals from the following firms were opened:-

- i). Oakar Services Ltd
- ii). Lynesom Associates
- iii). Geodev (K) Ltd
- iv). Spatial Information Technologies Ltd
- v). GeoInformatiks Ltd.

## **EVALUATION**

The Evaluation was carried out by the Evaluation Committee from 8<sup>th</sup> September, 2008 to 12<sup>th</sup> September, 2008. The Committee comprised of officers drawn from various sections of the Ministry, the Teachers Service Commission and a representative of the USAID. The technical evaluation criteria and the scores per criteria were as follows:-

- Expertise of firm/organization submitting proposal - 10 points
- Proposed work-plan and approach weight - 40 points

- Personnel – professional and experience qualifications - 50 points

The summary results of the evaluation were as tabulated below:

|              | Evaluation Criteria                              | Max Score  | Bidders Technical Score |             |             |             |             |
|--------------|--|------------|-------------------------|-------------|-------------|-------------|-------------|
|              |  |            | Firm 1                  | Firm 2      | Firm 3      | Firm 4      | Firm 5      |
| 1.           | Expertise of the firm/organization               | 10         | 9.4                     | 4.8         | 7.9         | 5.0         | 7.0         |
| 2.           | Proposed Workplan and Implementation Strategy    | 40         | 36.5                    | 23.1        | 28.6        | 16.0        | 19.9        |
| 3            | Competence of Key Staff                          | 50         | 49.6                    | 37.4        | 35.0        | 41.6        | 24.3        |
|              | a) Team leader/lead Consultant                   | 14         | 13.9                    | 12.8        | 6.0         | 9.6         | 8.3         |
|              | b) GIS Analyst                                   | 12         | 11.8                    | 10.4        | 9.0         | 11.3        | 4.0         |
|              | c) Education Analyst (Any other member of staff) | 12         | 12                      | 2.6         | 8.0         | 9.3         | 8.0         |
|              | d) Demographer (Any other member of staff)       | 12         | 11.8                    | 10.3        | 12.0        | 11.5        | 4.0         |
| <b>TOTAL</b> |  | <b>100</b> | <b>95.5</b>             | <b>65.3</b> | <b>71.5</b> | <b>62.6</b> | <b>51.1</b> |

Bidders No. 1 and 3 scored qualifying marks of above 70 points to proceed to the financial evaluation. The two bidders were invited to the financial opening of their bids which was done on 19<sup>th</sup> September, 2008.

The financial proposals excluding local taxes were as tabulated:-

| Costs                     | BIDDER No.1<br>Proposed Amount in<br>(Kshs.) | BIDDER No. 3 Proposed<br>Amount in (Kshs.) |
|---------------------------|--|--|
| 1. Remuneration           | 18,515,000                                   | 18,051,500                                 |
| 2. Equipment              | 5,600,000                                    | Nil  |
| 3. Reimbursable           | 14,320,000                                   | 14,500,000                                 |
| 4. Dissemination          | 8,475,000                                    | Nil  |
| 5. Miscellaneous Expenses | 2,970,000                                    | 3,500,000                                  |
| Sub - Total               | 4 9,880,000                                  | 36,051,500                                 |
| Taxes: VAT 16%            | 7,980,800                                    | 5,768,240                                  |
| <b>Total Amount</b>       | <b>57,860,800</b>                            | <b>41,819,740</b>                          |

The Lowest Financial Proposal was given a Financial Score of 100 points. The Proposals were then ranked according to their combined technical and financial scores using the following formula:

$$S = St \times T \% + Sf \times P \%$$

Where;

St = Technical score

Sf = Financial score

T=the weight given to the Technical Proposal - 80 points

P = the weight given to the Financial Proposal - 20 points

Bidder No. 1 Oakar Services Ltd scored a total score of 90.9 points while bidder No. 3 Geodev (K) Ltd had a total score of 77.2 points

Bidder No. 1 was therefore recommended to be invited for negotiations.

### **NEGOTIATIONS:**

The negotiations between the Ministry of Education and M/s Oakar Services Ltd were conducted on 23<sup>rd</sup> September, 2008. The negotiating team recommended that the tender committee awards the contract to M/s Oakar Services Ltd at a cost of Kshs 49,880 excluding taxes of Kshs. 7,980,800.

### **THE TENDER COMMITTEE DECISION**

The Ministerial Tender Committee in its meeting No. 05/2008-2009 held on 21<sup>st</sup> October, 2008 deliberated on the recommendation of the

Evaluation Committee and negotiating team and awarded the contract for Spatial Analysis for School Mapping Data (School Mapping Phase II) to M/s Oakar Services Ltd at a total cost of Kshs. 57,860,800 including taxes.

Bidders were notified of the outcome of the tender vide notifications letters dated 30<sup>th</sup> October, 2008

### **THE REVIEW**

The request for review was lodged by GEODEV (K) LTD, the Applicant, on 13<sup>th</sup> November 2008 against the decision of the tender committee of the Ministry of Education, the Procuring Entity, dated 30<sup>th</sup> October 2008, in the matter of request for proposal for consultancy services for a spatial analysis of school mapping data (school mapping phase II).

The applicant was represented by Mr. Eric Mutua, Advocate, E. K. Mutua & Co. Advocates, while the Procuring Entity was represented by Mr. P. N. Momanyi, Senior Principle Procurement Officer, Oakar Services Ltd, the successful candidate, was represented by Mr. Steven Chege, advocate of S. M. Chege & Co. Advocates

The applicant raised four grounds of review and requested the Board for orders that it be declared the successful bidder and or in the alternative, the entire procurement process be declared null and void and the tendering process be done afresh.

The Board deals with as follows;

## **GROUND No. 1 and 2**

The two grounds of review have been consolidated since they raise similar issues in regard to the evaluation process.

At the hearing, the Applicant commenced its argument by stating that the whole procurement process was flawed and did not meet the requirements of the Public Procurement and Disposal act, 2005 (the Act) and in particular sections 66 & 82. The Applicant further stated that the major purpose of the Act and the Regulations was to make sure that there was fairness, integrity and transparency in the procurement process. It asserted that the whole process was marred as a result of failure by the Procuring Entity to follow the terms as laid down in the Act, the Regulations and the Request for Proposal (RFP) document. In this regard, the Applicant further asserted that the Procuring Entity had jeopardised the whole Evaluation process by failing to read out the technical scores, at the time of opening of the financial bids which was in breach of clause 5.5 of the Request for Proposal (RFP) document.

The Applicant referred the Board to paragraph 4 of the Procuring Entity's response, where the Procuring Entity stated in part, that the technical scores were read out aloud. It argued that the Procuring Entity's statement to the effect that the scores were read out aloud could not be true since Mr. David Kuria Gichuki, the managing director of the Applicant's firm, in a sworn affidavit, had stated that the bidders were not given the scores of the technical evaluation though he had specifically requested for them. The Applicant pointed out that had the technical scores been read out aloud at the time of the opening of the financial bids, then the Successful Candidate in its written submission would have made mention of it. Instead, the successful candidate had

only stated that out of the six bidders, only two had passed the technical evaluation.

The Applicant raised its concern that the failure of the Procuring Entity to read out the technical scores totally compromised the procurement process in that there was a possibility of the technical scores being changed once the content of the financial bids became known.

In response, the Procuring Entity, stated that though the Applicant's financial bid was lower, it was not the most competitive and that it was wrong for the Applicant to infer that it was the lowest evaluated bidder. It argued that the method used for evaluation, in line with the RFP document clause 5.8, was Quality Cost Based Selection (QCBS), in which the successful bidder was the one with the highest combined score and not merely the one quoting the lowest price. Therefore, Oakar services Ltd, with a combined score of 90.9% was the successful bidder and not the Applicant who's combined score was only 77.2%.

The Procuring Entity further argued that the evaluation was done in line with the stipulations of Section 2 of the act and regulation 16 of the public procurement and disposal regulations, 2006 and the RFP document. The Procuring Entity reiterated the claim as contained in its written submissions, to the effect that the technical scores were read out aloud at the time of the opening of the financial bids. However, the Procuring Entity conceded that it did not prepare minutes for both the technical proposals and financial bids opening meetings.



On its part, the Successful Candidate argued that the Request for Review had no basis in law since the Applicant had failed to show how it had suffered or risked to suffer any damage as required under section 93. It also submitted that the argument of the Applicant that Section 66 of the Act was breached was not tenable as this procurement was governed by Section 82 of the Act. Finally, the successful bidder submitted that the evaluation process was carried out properly and in accordance with the Act and the RFP document.

In its reply the applicant stated that under Section 93 of the Act as read together with Regulation 73 of the Regulations 2006, it was not a mandatory requirement that an Applicant stated the damage or loss suffered or is likely to suffer. It referred the Board to its decision of **Application No. 22/2008 between Enterprise Information Management Solutions and Kenya Medical Supplies Agency (KEMSA)** where the Board had rejected the argument that one needed to specifically state in the Request for Review what prejudice was suffered.

The Board has carefully considered the submissions of the parties and examined the documents presented before it.

The Board notes that the Procuring Entity used the correct evaluation method as set out in the RFP document clause 5.8. However, for the evaluation to be fair and transparent the Procuring Entity ought to have complied with clause 5.5 of the RFP document which reads:-

***“The financial proposals shall be opened publicly in the presence of the consultants’ representatives who choose to attend. The name of the consultants, the technical scores and the proposal prices shall***

***be read aloud and recorded when the financial proposals are opened. The client shall prepare minutes of the public opening."***

The Procuring Entity did not produce evidence that it had publicly read out the respective technical scores at the time of opening of the financial bids. Further, the Procuring Entity confirmed that it did not prepare any minutes for the bids opening meetings. Without the minutes, the Procuring Entity could not prove that it had read out the technical scores. The Procuring Entity had only submitted the tender opening register to the Board and not the minutes. In any event, failure to prepare the tender opening minutes is in breach of section 60(8) of the Act as well as Clause 5.5 of the RFP document. The Board wishes to reiterate that in procurement by way of a Request for Proposal, reading of the technical scores is critical. The RFP document always contains a clause giving the formula to be applied in arriving at the combined technical and financial scores. Therefore, before the financial proposals are opened the technical scores must be read out aloud and minutes prepared in accordance with Section 60 (8). This ensures that there is transparency and eliminates the possibility of manipulation of technical scores. Indeed the bidders are then able to compute their respective combined scores with certainty. Therefore, the Board holds that failure to read out the technical scores aloud at the financial bid opening and the failure to prepare and keep minutes on the opening of the bids was fatal.

Accordingly these grounds of review succeed.

### GROUND NO 3

The applicant stated that it became aware that its bid had not succeeded when it received a notification to that effect on 12<sup>th</sup> November, 2008 vide a letter dated 30<sup>th</sup> October, 2008. It produced a post marked envelope as evidence, that though the letter was dated 30<sup>th</sup> October, 2008 it was not posted until 10<sup>th</sup> November, 2008. It wondered why the posting of the letter had been delayed by ten days, arguing that this was intended to deprive it of its right to the fourteen (14) days appeal window. The applicant concluded by stating that though it had not suffered any prejudice it nevertheless had to prepare its review documents hurriedly and therefore it urged the Board to censure the procuring entity for this apparent mischief.

In response, the Procuring Entity stated that the letter of notification was sent on 30<sup>th</sup> October, 2008. However it could not produce any evidence to that effect.

The Board notes that notification letters to successful and unsuccessful bidders are all dated 30<sup>th</sup> October 2008. The Board further notes that the envelope produced as evidence by the Applicant, was clearly post marked 10<sup>th</sup> November 2008. In addition, the Successful Bidder stated that it was called to collect its letter of award on 7<sup>th</sup> November, 2008. Therefore, the Board finds that the Procuring Entity breached section 67(2) by failing to notify all the bidders simultaneously. Although this ground of appeal succeeds, the Applicant did not suffer any prejudice since it was able to file its Request for Review within the fourteen days appeal window.

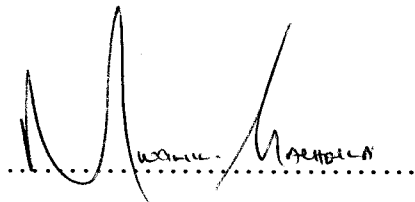
**GROUND NO. 4**

The Board finds the ground to be a general statement but it's not backed by any specific allegation of the breach of the Act or Regulations.

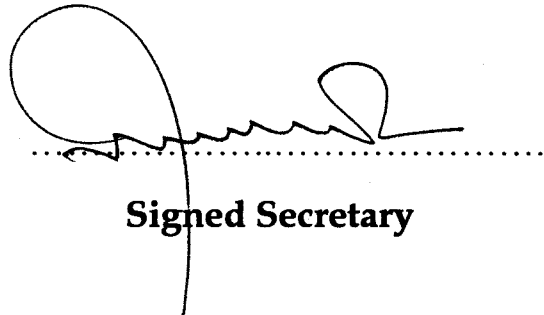
Taking into account all the foregoing matters, the appeal succeeds and the award to the Successful Bidder is hereby annulled.

The Board is alive to the fact that the funds on the project were provided by USAID and that they are to be utilized by 31<sup>st</sup> March, 2009. In view of the time constraints, the Board directs that the Procuring Entity may use any appropriate procurement method so as per the Act in order to beat the time deadline by the donor.

**Dated at Nairobi on this 15<sup>th</sup> day of December, 2008**

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

**Signed Chairman**

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

**Signed Secretary**