

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO.43/2008 OF 23rd DECEMBER, 2008

BETWEEN

RICHARDSON COMPANY LTD (APPLICANT)

AND

THE REGISTRAR HIGH COURT OF KENYA (PROCURING ENTITY)

Review against the decision of the Tender Committee of the Judiciary dated the 10th of December, 2008 in the matter of Tender No. W.P. ITEM NO. D26 WE/BSA 702 – JOB NO, 1257C for Proposed Construction of a High Court Building and Offices in Busia (K)

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Eng. C. A. Ogut	-	Member
Mr. Akich Okola	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Ms. Pamela K. Ouma	-	Secretariat

PRESENT BY INVITATION

Applicant, Richardson Company Ltd

- Mr. William Ochanda - Advocate, Ochanda Oungure & Co.
Advocates
- Mr. Richard Okwemba Amollo - Managing Director
- Mr. Martin Okwemba - Director

Procuring Entity, The Judiciary

- Mr. Stephen M. Kibunja - Ag. Chief Court Administrator
- Mr. Gilbert Mutembei - Chief Magistrate
- Mr. T. S. Luvuga - Deputy Registrar (Court of Appeal)
- Mrs. S.W. Murimi - Senior Accountant
- Ms. J.W. Macharia - Chief Procurement Officer

Interested Candidates

- Mr. J. N. Mugo - Manager, Northline Ltd
- Mr. Gideon Mutisya - Projects Manager, Northline Ltd
- Mr. I. V. Waiganjo - Consultant, Northline 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 tender for the Proposed Construction and Completion of the High Court Building and Offices at Busia (K) was advertised by the Judiciary on 18th September, 2008. It closed/opened on 13th October, 2008 in the presence of

tenderers or their representatives who chose to attend. The following were the bids and the quoted prices at the tender opening:-

No	Bidder	Bid price in Kshs.
1.	Lunao Enterprises	120,334,862.00
2.	Kaguanjai Builders Ltd	122,547,741.80
3.	Richardson Company Ltd	127,118,490.00
4.	Shafcom Ltd	128,040,945.00
5.	Kenya Koch Light Industries Ltd	130,494,836.00
6.	Makwata Construction Company Ltd	137,195,748.00
7.	Northline Ltd	147,767,712.00
8.	Rapido Construction Co. Ltd	162,748,870.00

The Engineer's estimate on the project was Kshs. 144,195,635.12

EVALUATION

The bid documents were forwarded to the Ministry of Public Works for technical evaluation and checking of arithmetical errors. The criteria used in the evaluation was as follows:-

1. Proper filling and signing of the Tender Form of the document;
2. The Tender must be accompanied by Bid Bond of Kshs. 600,00.00 from an established Bank or insurance company
3. Tenderers must attach information about their litigation history.
4. Tenderers be registered in category C and above with the Ministry of Public Works.
5. Qualification information in terms of :
 - (i) Plant & equipment

- (ii) Projects carried out
- (iii) Qualification of key personnel for extension of the works, and
- (iv) Financial status of the tenderer

6. The tender document must be accompanied by P.I.N. certificate and current tax compliance certificate.
7. The tendered amount shall be within 15% below or above the estimate
8. Annual volume of works be equal to 1.0 times estimated annual cash flow of the project.

M/s Lunao Enterprises was disqualified and not subjected to further evaluation since it had submitted a registration certificate for category D for general building works instead of Category C and above.

It was noted that only the highest bidder had positively responded to the requirements. The committee decided to waive some conditions i.e. giving the litigation history, financial status and qualification information. The results of the evaluation after the waiver is as tabulated below:-

Criteria	Kaguanjai Builders Ltd	Richardson Co. Ltd	Shafcon Ltd	Kenya Koch-Light Industries	Makwata Construction Ltd	Northline Ltd	Rapido Construction Ltd
Form of tender	√	√	√	√	√	√	√
Bid bond	√	√	√	√	√	√	√
Bidders Category	B	C	C	C	B	A	B
P.I.N. certificate	√	√	√	√	√	√	√
Tax Compliance	√	√		√	X	√	√
15%threshold	15.01%	11.84%	11.20%	9.50%	4.85%	2.48%	12.9%
Projects (annual volume)	X	√	X	X	X	√	√
REMARKS	Non responsive	Responsive	Non-responsive	Non-responsive	Non-responsive	Responsive	Responsive

Three bidders namely, Richardson Company Ltd, Northline Ltd and Rapido Construction Ltd were declared responsive and the Evaluation Committee further analyzed their bids. The Committee then recommended the lowest responsive bidder M/s Richardson Company Ltd for the award of the tender at the total cost of Kshs. 127, 118,490.00

The Registrar of the High Court later appointed another Evaluation Committee named the "Combined Technical and Financial Committee" to analyze the submitted bids. The evaluation criterion was as follows:-

- (i) Contractor must be registered in Category C and above
- (ii) Bid bond of Kshs. 600,000
- (iii) Proof of works of similar magnitude and complexity undertaken in the last five years
- (iv) Adequate equipment and key personnel for the specified type of works
- (v) Sound financial standing and adequate access to bank credit line
- (vi) Litigation history of the company (both court and arbitration cases)
- (vii) Copy of P.I. N. certificate
- (viii) Tax compliance certificate

The three bidders who had qualified in the Ministry of Public Works evaluation also were declared responsive by the combined technical and financial evaluation committee. The committee further adopted the recommendation of the Ministry of Public Works on the litigation history, financial soundness and on the qualification information required from the tenderers.

The Evaluation Committee then subjected the three responsive bids to a financial evaluation on the following:-

- a) Cost comparison schedule
- b) Ratio analysis on the current ratio
- c) Ratio analysis on total non current assets to total capital employed
- d) Ratio analysis on total expenditure turnover

Key indicators of financial stability from the analysis was

- a) Current ration should be not less than 2:1
- b) The percentage total expenditure to turnover should not exceed 95%
- c) The ratio of non current assets to total capital should be greater than 25%

The results of the financial analysis showed that M/s Northline limited who had quoted the second lowest price at Kshs. 147,767,712 had a higher current asset to liabilities ratio. Rapido Construction did not qualify on this parameter as its ratio was below the 2:1. All the three firms qualified on the total expenditure turnover. On the third parameter on the ratio of non current assets to Total capital, Richardson Construction did not qualify as its ratio was 22% while the required one was 25%.

The Committee noted that M/s Northline Ltd had a higher ranking than the other bidders though its tender was above the estimated/allocated funds by Kshs. 3,572,076.88. M/s Richardson was below the Engineers' estimate by Kshs. 17,077,146.88 which was within the 15% margin as stipulated in the tender document. It further stated that the firm's rates were within the market rates and therefore could be able to perform with the quoted price.

It therefore recommended the lowest responsive bidder M/s Richardson Company Ltd at Kshs. 127,118,490.00

THE TENDER COMMITTEE DECISION

The Judiciary Tender Committee in its meeting No. JTC.21/2008 – 09 held on 10th December, 2008 deliberated on the tender and awarded the tender to M/s. Northline Limited at a total cost of Kshs. 147,767,71 after observing that:-

- i) The bidder recommended by the combined evaluation committee did not qualify on the financial evaluation as their non current assets to total capital employed was 22% and not the recommended standard of 25%
- ii) M/s Rapido construction company had a ratio of 1.2:1 while the recommended ratio was 2:1
- iii) That the Combined Evaluation Committee had recommended M/s Northline as the bidder with the highest ranking than all the other firms after the financial evaluation

THE REVIEW

The Request for Review was lodged by Richardson Company Ltd on 23rd December, 2008. The Applicant was represented by Mr. William Ochanda, Advocate, Ochanda Onguru & Co. Advocates, while the Procuring Entity was represented by Mr. Stephen M. Kibunja, the Ag. Chief Court Administrator.

The Interested Candidate present, Northline Ltd was represented by its manager, Mr. J. N. Mugo.

Prior to the commencement of the hearing, the Board observed that the Applicant had filed an affidavit attaching a copy of the minutes of the Combined Technical and Financial Evaluation Committee. The Board raised the issue of how the Applicant had got possession of those minutes, which are confidential pursuant to Section 44 and 45 of the Act. In response, the Applicant stated that it got the minutes from the Procuring Entity. The Procuring Entity however denied that it had given such minutes to the Applicant and challenged it to provide the forwarding letter.

After consideration, the Board ruled that minutes of Evaluation are confidential in line with the requirements of the Act. In the circumstances, the minutes were expunged from the record and the Applicant could not rely on them.

The review was based on four grounds which we deal with as follows:-

GROUND 1, 2 AND 3 – BREACH OF SECTIONS 64(1), 66(2) (3) AND (4) AND REGULATIONS 44(F), (G), 48 AND 49 (2) AND (3)

These grounds have been combined as they raise similar issues, however the Board notes that Regulations 44 (f), (g) and 49 (3) do not exist.

The Applicant submitted that the Procuring Entity acted illegally and arbitrarily by awarding the tender to Northline Ltd, whereas the Applicant was the lowest responsive tenderer. The Applicant further argued that Section 66(2) of the Public Procurement and Disposal Act 2005 (hereinafter

referred to as the Act) provides that a tender should only be awarded to the lowest responsive tenderer.

The Applicant stated that they had met all the requirements and it had quoted a lower figure as compared to the successful bidder. It argued that the Procuring Entity stood to lose a sum of Kshs. 20.6 Million as it had quoted a sum of Kshs. 127,118,940 as compared to the sum of Kshs. 147,767,712 by Northline Company Ltd, the successful bidder. The Applicant informed the Board that the Engineer's estimate for the project was Kshs. 144,195,635.12. The price quoted by the successful bidder exceeded the estimate by a sum of Kshs. 3,572,076.88. It argued that although the price quoted by the successful bidder was within the 15% margin which was allowed, there was no justification for the Procuring Entity to award the tender to a bidder whose price was higher, whereas the Applicant was responsive and its price was within the limit of 15% variation from the Engineer's estimate as required.

Finally, the Applicant argued that the decision by the Tender Committee to award the tender contrary to the recommendations of the Evaluation Committee was contrary to the Act and Regulations.

In response, the Procuring Entity denied that it acted illegally or arbitrarily by awarding the tender to the successful bidder. It argued that it used the criteria of evaluation as set out in the advertisement notice and the tender document.

The Procuring Entity further submitted that after technical evaluation, only three bidders were responsive. These were Richardson Company Ltd, (the Applicant) Northline Company Ltd (the successful bidder) and Rapido

Construction Co. Ltd. The three firms were subjected to a financial evaluation and ranked in the order of financial stability. The Procuring Entity informed the Board that it awarded the tender to the firm that had ranked the highest in the financial evaluation, which was the lowest evaluated bidder.

The Procuring Entity submitted that the three responsive firms were subjected to a financial evaluation based on the following:-

- (a) Current ratio analysis.
- (b) Total non-current assets to capital employed analysis.
- (c) Cost comparison and variance analysis.

The Procuring Entity stated that Rapido Construction Company failed on the evaluation on the current ratio analysis and was therefore disqualified.

The Procuring Entity further stated that the Applicant failed to meet the set score of the analysis based on the criteria on total non-current assets to capital employed basis. The Procuring Entity informed the Board that the evaluation committee had recommended the total non-current assets to total capital employed minimum score should be 25%. It argued that the total non-current to total capital employed analysis demonstrated the tenderers investments in non-current assets. This was a measure of the tenderers assets worth in non-current assets. It also indicated the firm's ability to mobilize operating capital in the event of a liquidity requirement.

The Procuring Entity submitted that after evaluation on this criterion, Rapido Construction and Northline Company Ltd scored 34% and 33% respectively

which was above 25% the set score. On its part, the Applicant scored 22% which was below the 25% requirement and it was therefore disqualified.

Finally, the Procuring Entity submitted that although the Evaluation Committee had recommended the Applicant, the Tender Committee considered all the factors that were raised in the financial evaluation report and awarded the tender to the successful bidder as it is the only bidder which qualified on all the items being considered in the financial analysis. The Procuring Entity further argued that there was a difference between the lowest evaluated bidder and the lowest responsive bidder. According to the Procuring Entity, though the Applicant was the lowest responsive bidder, the tender was awarded to the tenderer who was the lowest evaluated.

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

The issue for determination is whether the award of the tender to the successful bidder was done in accordance with the Act and the Regulations.

To answer the question, it is imperative that the Board do examine the criteria for evaluation which was contained in tender document and the manner the evaluation of the tender was done. The Board has noted that the evaluation was done by two committees as follows:-

1. The first Evaluation Committee was made up of officers from the Ministry of Public Works. The minutes of this Evaluation Committee were forwarded to the Secretary of the Judiciary Tender Committee on 28th October, 2008.

This Evaluation Committee recommended the award of the tender to the Applicant at its quoted price of Shillings One Hundred and Twenty Seven Million One Hundred and Eighteen Thousand Four Hundred and Ninety (Kshs. 127,118,490.00).

2. The second evaluation was done by a combined Technical and Financial Evaluation Committee appointed by the Registrar, High Court. This Evaluation Committee also recommended the Applicant.

The Board has further noted that on 10th December, 2008, the Procuring Entity's Tender Committee met to deliberate on the award of this tender, amongst others. The Tender Committee made its decision as follows:-

"The Judiciary Tender Committee deliberated on the item and awarded the Tender for main works for the proposed erection and completion of a High Court at Busia (K) Tender No. W.P.ITEM NO.D26 WE/BSA 702 – JOB NO. 1257C to M/s Northline Limited the lowest evaluated bidder at a cost of Kenya Shillings One Hundred and Forty Seven Million Seven Hundred and Sixty Seven Thousand Seven Hundred and Twelve (Kshs. 147,767,712.00) only after observing the following"

- (i) The bidder recommended by the Combined Evaluation Committee M/s Richardson Company Limited did not qualify on the financial evaluation as their non current assets to total capital employed is 22% as indicated in the financial evaluation table III while the recommended standard is 25%.***

(ii) M/s Rapido Construction Company has a ratio of 1.2:1 in the current ratio while recommended ratio is greater than 2.

(iii) The Judiciary Tender Committee observed that the Combined Technical and Evaluation report had recommended Northline as the bidder with the higher ranking than all the firms after the financial evaluation”.

It is clear that the Procuring Entity's Tender Committee awarded the tender to Northline Co. Ltd, whereas the two evaluation committees had recommended the award to the Applicant. The decision by the Tender Committee was not in accordance with Regulation 11 of the Public Procurement and Disposal Regulations 2006 which provide as follows:-

"11 (1) in considering submissions made by the procurement unit or evaluation committees, the tender committee may-

- (a) Approve a submission or**
- (b) Reject a submission with reasons; or**
- (c) Approve a submission, subject to minor clarifications by the procurement unit or evaluation committee.**

(2) The tender committee shall not:-

- (a) modify any submission with respect to the recommendations for a contract award or in any other respect;**
- (b) reject any submission without justifiable objective reasons;**

(3) Where tender committee rejects the recommendation of the evaluation committee the decision shall be reported to the head of the procuring entity or to the accounting officer.

(4) Any submission rejected by the tender committee may be resubmitted and the tender committee shall provide an explanation and a justification for its decision thereof".

The Board has noted that Regulation 11 is worded in mandatory terms. A Tender Committee cannot modify any submission with respect to the recommendations for a contract award or in other respect. In this tender the Procuring Entity's Tender Committee modified the recommendations of the Evaluation Committees and substituted it with its own recommendations. As already stated, this was contrary to Regulation 11.

The other issue that arise from the evaluation process is on the criteria used by the Procuring Entity. The Board has noted that the combined Technical and Evaluation Committee used the following criteria to determine the "sound financial standing" of the bidders:-

- i) Current ratio analysis
- ii) Total non-current assets to total capital employed analysis.
- iii) Total Expenditure to turnover analysis.

The Board has examined the Tender documents and noted that the financial evaluation parameters were not set out in the Tender Documents. At the hearing, the Procuring Entity stated that those parameters are set out in the International Financial Reporting Standards (IFRS). However, the Tender

Documents did not provide that those parameters or the IFRS would apply. As the Board has held severally, a Procuring Entity can only use the criteria set out in the Tender Document for Evaluation. This is clearly stated in Section 66(2) which states as follows:-

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used".

- As the Board has already held, the criteria that was used by the Procuring Entity in financial evaluation was not set out in the Tender Documents. Upon examining the Tender documents, the only criteria set out in the Tender Document was in clauses 6(1), 1.2 and 1.7 which provided as follows:-

6(1) states "subject to Clause 6.2, the award of the contract will be made to the tenderer whose tender has been determined to be substantially responsive to the tendering documents and who has offered the lowest evaluated tender price, provided that such tenderer has been determined to be (a) eligible in accordance with the provision of Clauses 1.2 and (b) qualified in accordance with the provisions of clause 1.7 and 1.8".

Clause 1.2 "All tenderers shall provide the qualifications information, a statement that the tenderer (including all members of a joint venture and subcontractors) is not associated or has not been associated in the past, directly or indirectly, with the Consultant or any other entity that has prepared the design, specifications and other documents for the project or being proposed as Project Manager for the Contract.

A firm that has been engaged by the Employer to provide consulting services for the preparation or supervision of the Works and any of its affiliates shall not be eligible to tender".

Clause 1.7" To qualify for award of the contract, tenderers shall meet the following minimum qualifying criteria;

- (a) Annual volume of construction work of at least 2.5 times the estimated annual cash flow for the contract;***
- (b) Experience as main contractor in the construction of at least two works of a nature and complexity equivalent to the works over the last 10 years (to comply with this requirement, works cited should be at least 70 percent complete);***
- (c) Proposals for the timely acquisition (own, lease, hire etc) of the essential equipment listed as required for the Works;***
- (d) A contract manager with at least five years' experience in works of an equivalent nature and volume, including no less than three years as Manager; and***
- (e) Liquid assets and/or credit facilities, net of other contractual commitments and exclusive of any advance payment which may be made under the contract, of no less than 4 months of the estimated payment flow under this contract".***

The above clauses contained the criteria for evaluation and the Evaluation Committee had no powers to introduce new criteria.

The Board has also noted that the Evaluation Committee waived certain criteria. In the minutes of the Committee by the officers of the Ministry of Public Works, it is recorded as follows:-

".....After subjecting the above conditions on all the tenderers, only the highest tenderer meets all the above conditions. This being the case, the Client will incur higher costs compared to others who may have not met a condition like item No. 3 above. To avoid this loss therefore, the evaluation committee waived the following requirements with reasons as explained below....."

The minutes of the Ministry of Public Works Evaluation Committee were adopted by the Procuring Entity's combined Technical and Evaluation Committee. The Board finds that the waiver of certain parameters for evaluation during the Evaluation Process was wrong. The tendering process is a competition governed by rules that are set out in the Tender documents. There cannot be a fair and transparent evaluation if certain criteria is waived to the benefit of certain tenderers.

Taking all the above issues into consideration, it is clear that the evaluation of this tender was not done in accordance with the Act and the Regulations. Therefore, the award could not have been made to the bidder with the lowest evaluated tender price in accordance with Section 66(4) of the Act.

Accordingly, these grounds of Review succeed.

GROUND NO. 4 – BREACH OF SECTION 62(1)

The Applicant argued that the Procuring Entity did not comply with the requirements of Section 62(1) of the Act by failing to seek for clarification.

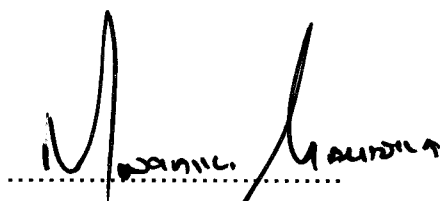
In response, the Procuring Entity stated that the decision to call for clarification was discretionary and that it did not find it necessary to seek clarification from any Tenderer.

The Board has noted that Section 62 gives the Procuring Entity the discretion to seek clarification to assist it in evaluation and comparison of tenders. The Applicant did not demonstrate how this Section was breached.

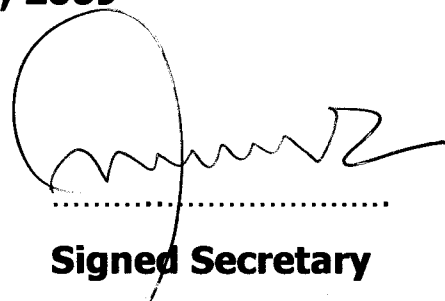
Accordingly, this ground has no merit and is hereby dismissed.

Taking into consideration of all the above matters, this Request for Review succeeds. The award of the tender to the successful tenderer is hereby nullified. For avoidance of doubt, this nullification only applies to the award of the tender for the main works and does not affect the tenders for other works on this project. The Board has noted that this tender was a re-advertisement after the previous contractor was determined for non-performance. Therefore, in public interest, this tender should be concluded as soon as possible as the cost of construction keeps on rising. To hasten the process, the Board directs that the Procuring Entity may use restricted tendering method if it so wishes.

Dated at Nairobi on this 21st day of January, 2009



Signed Chairman



Signed Secretary