

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 11/2009 OF 26TH MARCH, 2009

BETWEEN

GEOMAPS GEOINFORMATION SERVICES.....APPLICANT

AND

MINISTRY OF LANDS.....PROCURING ENTITY

Review against the decision of the Ministry of Lands dated 12th March, 2009 in the matter of Tender Nos. MOL/08/2008-2009, MOL/09/2008-2009 & NA/09/2008-2009 for:-

- (i) Acquisition of Colour Aerial Photography
- (ii) Acquisition of Digital Aerial Imagery and Vector sets of Selected Towns
- (iii) Creation of a Digital Topographical data Base & Creation of a Digital Cadastral Database

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. Joshua W. Wambua	-	Member
Mr. Akich Okola	-	Member
Ms. Judith Guserwa	-	Member

IN ATTENDANCE

Mr. C.R. Amoth - Secretary to the Board
Mr. Peter Wangai - Secretariat
Mr. Gilbert K. Kimaiyo - Secretariat

PRESENT BY INVITATION

Applicant, Geomaps Geoinformation Services

Mr. Elisha Z. Ongoya - Advocate
Hon. Lenny Kivuti - Chairman

Procuring Entity, Ministry of Lands

Mr. Peter Mulavu - Chief Procurement Officer

Interested Candidate, Ramani Geosystems

Ms. Susan Kimanzi - Business Development
Ms. Nancy Wambui - Business Development Administrator

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 tenders were advertised by the Ministry of Lands on 13th January, 2009. The tenders were for Acquisition of Colour Aerial Photography, Acquisition of Digital Aerial Imagery and Vector sets of Selected Towns

and Creation of a Digital Topographical data Base & Creation of a Digital Cadastral Database.

The closing dates for the tenders were indicated in the Tender Advertisement Notice as 10th February, 2009. However, the Procuring Entity discovered that the bidding documents, especially the batch that was sold to prospective bidders during the first week after advertisement, erroneously carried the wrong tender closing date as 17th February, 2009. The Procuring Entity made corrections in the Daily Nation of 23rd January, 2009 stating that the tender closing date was 10th February, 2009 and not 17th February, 2009 as it had appeared in the Tender Documents. It further indicated that all the other terms and conditions remain unchanged. Consequently, the tenders were opened on 10th February, 2009 at 10.30 a.m in the presence of the bidders' representatives. The bidders who submitted their Tender Documents were as follows:

Tender No. MOL/10/2008-2009 for Creation of Digital Topographical Database & Creation of Digital Cadastral Database.

1. Geomaps
2. Somo Geomaps
3. Maptech Geomatics
4. Icaros Geosystems (USA)
5. Tourist Maps
6. Oakar Services
7. Geodev (K) Ltd
8. Regional Centre for Mapping & resource Development.

Tender No. MOL/08/2008-2009 for Acquisition of Coloured Aerial Photography

1. Ramani Geo systems
2. Aero Photo Systems Engineering
3. Geomaps
4. Geodev (K) Ltd
5. Icaros Geosystems (USA)

Tender No.MOL/09/2008-2009 for Acquisition of Aerial Photography & Vector Sets of Selected Towns

1. Ramani Geo systems
2. Geomaps
3. Icaros Geosystems (USA)
4. Geodev (K) Ltd

The Procuring Entity observed that as evaluations were still going on several bidders turned up on 17th February, 2009 delivering their Tender Documents as per the date contained in the Bidding Documents. The Procuring Entity further discovered that the specification given on the Tender No. MOL/9/2008-2009 for Acquisition of Digital Aerial Imagery and Vector Sets of Selected Towns were not adequate and were not likely to give the desired output. It felt that there was need to rework on the specifications. On 11th March, 2009, the Procuring Entity vide letters referenced PRO/5/4/VOL.II informed the tenderers including the Applicant that the tenders had been cancelled and were required to collect their bid bonds. The letter further informed the tenderers that the same

have since been re-tendered and the closing date is 7th April, 2009 at 10.00 a.m.

On 12th March, 2009 the Procuring Entity re-advertised the tenders in the two local newspapers namely: - The Daily Nation and The Standard Newspaper. The advertisement prompted the Applicant to collect the Tender Documents from the Procuring Entity free of charge since it had bought the documents when it was first advertised. However, on 18th March, 2009 the Applicant vide its letter Ref: C34269 complained to the Procuring Entity that there was no reason to re-advertise the tenders since the technical specification had not been changed. It further requested the Procuring Entity to intervene and stop the intended fraud. The letter was copied to the Secretary of the Administrative Review Board. The Procuring Entity on 24th March, 2009, responded to the Applicant's letter stating the reasons why it cancelled the Tenders and re-advertised it. The letter was also copied to the Secretary of the Administrative Review Board.

On 26th March, 2009, the Applicant lodged an appeal with the Public Procurement Administrative Review Board against the termination/re-advertisement of the tenders advertised by the Procuring Entity. The Secretary of the Board vide its letter dated 26th March, 2009 informed the Procuring Entity that the procurement proceeding has been suspended until the matter is heard and determined by the Board.

THE REVIEW

This Request for Review was lodged on the 26th day of March, 2009 by Geomaps Geoinformation Services, against the decision of the Ministry of Lands dated 11th March, 2009 in the matter of Tender Nos. MOL/08/2008-2009, MOL/09/2008-2009 & MOL/10/2008-2009 for Acquisition of Colour Aerial Photography, Acquisition of Digital Aerial Imagery and Vector sets of Selected Towns and Creation of a Digital Topographical data Base & Creation of a Digital Cadastral Database.

The Applicant was represented by Mr. Elisha Z. Ongoya, the Advocate, while the Procuring Entity was represented by Mr. Peter Mulavu, the Chief Procurement Officer.

The Applicant has raised fourteen grounds of appeal all of which are grounded on Breach of Section 36(1) and (2) of the Public Procurement and Disposal Act. These grounds are consolidated into one as the Applicant argued them together. We now deal with the grounds of review as here under:-

Breach of Section 36(1) and (2)

The Applicant argued that it participated in tenders that were advertised on 13th January, 2009. The tenders were opened on 10th February, 2009 and bid prices were read out. It stated that it did not receive any communication from the Procuring Entity on that tenders and it was surprised when a re-advertisement of the same tenders were done on the 12th March 2009. It immediately wrote to the Permanent Secretary of the Procuring Entity complaining about this irregularity.

The Applicant further argued that as at 26th March 2009 which was the 14th day after the re-advertisement of the tenders, it had not received any communication from the Procuring Entity.

The Applicant stated that after filing this appeal, it received a letter dated 11th March, 2009 notifying it that the tenders had been terminated. The Applicant argued that there was no basis for the re-advertisement of the tenders as there were no material variations in the technical specifications in the re-advertised tenders. It further argued that the re-advertisement was done after the bid prices of the various bidders had been read out at the tender opening meeting on the 10th February, 2009, thereby presenting a possibility of the Applicant being deprived of the benefit of free and open competition, which was one of the mischiefs' that the Act was enacted to prevent.

It urged the Board to determine whether there had been any cancellation and/or termination in law, of the tenders that were closed/opened on 10th February, 2009. It submitted that there was no valid cancellation or termination in accordance with the Act. It further argued that the Procuring Entity had not complied with the provisions of Section 36 (1) and (2) of the Act which gave it the discretion to terminate procurement proceedings at any time. Accordingly, the Applicant argued that since the Procuring Entity had not complied with the provisions of Section 36, the jurisdiction of the Board had not been ousted as envisaged under Sections 36 (6) and 93(2)(b).

In addition, the Applicant argued that the Procuring Entity's letter dated 11th March, 2009, purporting to cancel the tenders was posted in an envelope that had a franking date of 17th March, 2009, and was received on 25th March 2009. To the Applicant, this meant that either the letter was backdated to 11th March, 2009, or was posted to the bidders after the termination. This meant that by 12th March, 2009, there was no communication to the bidders on the cancellation of the tenders. It therefore submitted that the Procuring Entity had no capacity in law as at 12th March, 2009, to re-advertise the subject tenders, and therefore the said advertisement had no basis under the provisions of the Act.

Finally, the Applicant argued that as at the time the Procuring Entity purported to re-advertise the tenders, the bidders who had submitted their bids had been informed that the evaluation process was ongoing and therefore an award of the tenders would have been expected instead of the re-advertisement. Therefore, it urged the Board to annul the re-advertised tender which constituted a Breach of the Act.

In response, the Procuring Entity stated that the tenders were advertised on 13th January, 2009. However, on 22nd January, 2009 the Procuring Entity discovered that the tender documents that had been sold to the prospective bidders had a wrong tender closing/opening date, which was indicated as 17th February, 2009 whereas the tender advertisement notice had 10th February, 2009. It stated that it corrected the tender closing/opening date in the remaining tender documents to read 10th February, 2009. Further, it placed a notice in the Daily Nation Newspaper of 23rd January, 2009 informing the bidders that the tender closing date was 10th February, 2009.

The Procuring Entity further stated that the tender evaluation committee was constituted vide a letter dated 13th February, 2009 and the evaluation commenced on 17th February, 2009. As the evaluation process was going on, some bidders presented their bid documents and indicated that they were not aware of the tender advertisement notice in the newspaper.

In addition, the Procuring Entity submitted that during the evaluation it was noted that the technical specifications in the tender documents were not clearly stated. Accordingly, a decision to re advertise the tenders so as to give the bidders equal opportunity was made and that was the reason why the tenders were re advertised on 12th March, 2009.

Finally, the Procuring Entity informed the Board that it had allowed the bidders who had bought the previous tenders to pick the fresh tender documents at no cost. It submitted that the re advertised tenders had not been opened awaiting the determination of this Request for Review and urged the Board to allow it to proceed with the tender process to its conclusion as it had already corrected the anomalies in the tenders that were terminated. It stated that the Applicant has not suffered any prejudice as it had participated in the re advertised tenders.

The Board has carefully considered the submission of the parties and examined the documents that were submitted.

The issues to be considered in this Request for Review are:-

- (a) Whether the termination of the tenders by the Procuring Entity was lawful and in accordance with Section 36 of the Act.
- (b) Whether the re-advertised tenders were proper in light of the provisions of Section 36(1) and (2) of the Act.
- (c) Whether the re advertised tenders should be annulled.

The Board has noted that Section 36(1) and (2) provides as follows:-

"A Procuring Entity may, at any time, terminate procurement proceedings without entering into a contract" and it "shall give prompt notice of a termination to each person who submitted a tender, proposal or quotation or, if direct procurement was used, to each person with whom the Procuring Entity was negotiating".

It is clear that the Act has given the Procuring Entity the discretion to terminate procurement proceedings without entering into a contract. In such a case the Procuring Entity is required to give prompt notice of the termination to the bidders who had participated and a written report is to be made to the Public Procurement Oversight Authority. Further, on request by a bidder who had participated in a tender the Procuring Entity is required to give its reasons for termination.

The Board has noted that by a letter dated 11th March, 2009 the Procuring Entity notified the bidders that the tender No. MOL/08/2008-2009, MOL/09/2008-2009, and MOL/10/2008-2009 that were advertised on 13th January, 2009 had been terminated. It is not in dispute that the franked stamp on the envelop that contained the notification letter to the Applicant was dated 17th March, 2009. Clearly, the posting of the notification letter was done after the re advertisement of the tenders on 12th March, 2009. The question that arises is whether this anomaly made the re advertised tenders irregular and unlawful.

It is clear to the Board that Section 36(2) does not require that the notice of termination must be issued before the tenders are terminated. All that the Act requires is that bidders must be issued with prompt notice of termination. In this case, the termination was communicated to the Applicant by a letter dated 11th March, 2009 though posted on 17th March, 2009. To the Board, the delay of a few days from 12th March, 2009 when the tenders were re advertised is not unreasonable and indeed the Applicant was issued with the fresh tender documents and has submitted them.

The Board further finds, that there was confusion on the tender closing/opening date and as a result some bidders submitted their tenders after the tender opening date on 10th February, 2009. Further, the Board has also confirmed after perusal of the tender documents that new specifications were introduced in the re advertised tenders as follows:-

(a) The Specifications on Tender No. MOL/9/2008-2009 was inadequate. The following are the additional specifications that were added in the re-advertised Tender:-

- Area(s) to be photographed (Contract Map attached to the Tender Document)
- Camera
- Camera Calibration and Testing
- Photographic Quality
- Marking of Photographs
- Information and Material to be supplied with the Tender.
- Information to be supplied after the Tender has been accepted.
- Inspection for acceptance or Rejection of Photography.
- Material to be supplied by the Contractors.

(b) The following changes were made regarding Tender NO.MOL/10/2008-2009 advertised on 13th January, 2009 and the same changes were reflected on the re-advertised tender.

- Schedule 3: Creation of Parcel Information Database Activities, item no. (b) was changed from "Implement the database design" to "implement the database at Survey of Kenya"

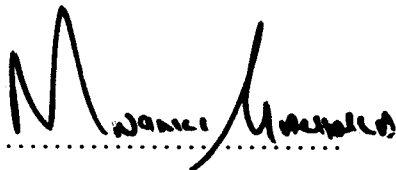
Accordingly, the Board finds that there were good reasons for terminating the tenders.

The Board has noted that the re advertised tenders have not been opened. Therefore, the bidders who participated in that tenders are not known save for the Applicant. It was therefore not possible to invite those

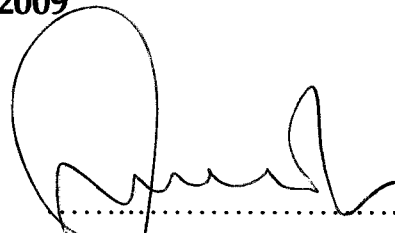
bidders to participate in the hearing of this Request for Review. Further, the issues arising in the re advertised tenders were not the subject of this Request for Review. It will therefore defeat the ends of justice if the Board was to annul the re advertised tenders as argued by the Applicant. As already stated, the Applicant has participated in the re advertised tenders and will be evaluated alongside other bidders and therefore has suffered no prejudice.

Taking all the above matters into consideration, the Request for Review has no merit and it is hereby dismissed. The opening of the re-advertised tenders may now proceed.

Dated at Nairobi on this 24th day of April, 2009

A handwritten signature in black ink, appearing to read 'Nancy Mwangi', written over a horizontal dotted line.

**Signed Chairman,
PPARB**

A handwritten signature in black ink, written over a horizontal dotted line.

**Signed Secretary
PPARB**

