

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 12/2009 OF 31ST MARCH, 2009

BETWEEN

PERMA STRUCTURAL

ENGINEERING COMPANY.....APPLICANT

AND

RIFT VALLEY WATER SERVICES BOARD..... PROCURING ENTITY

Review against the decision of the Tender Committee of the Rift Valley Water Services Board, the Procuring Entity dated 25th March, 2009 in the Matter of tender No. RVWSB/WC/NN/03 for Augmentation and Improvement of the Ol-Kalou Town Water Supply Project

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mrs. L. G. Ruhui	-	Member
Amb. Charles Amira	-	Member
Mr. Sospeter K. Munguti	-	Member
Ms. Natasha Mutai	-	Member

IN ATTENDANCE

Mr. P. M. Wangai	-	Holding Brief for Board Secretary
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PRESENT BY INVITATION

Applicant, Perma Structural Engineering Company

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|---------------------|---|---------------------------------|
| Mr. C. M. Muoki | - | Advocate, Muoki & Co. Advocates |
| Mr. Peter M. Kimuyu | - | Director |
| Mr. Kioko M. Kiilu | - | Director |
| Mr. David M. Nthusi | - | Director |

Procuring Entity, Rift Valley Water Services Board

- | | | |
|------------------------|---|------------------------------------|
| Mr. Stephen Kimemia | - | Advocate, Humphrey & Co. Advocates |
| Ms. Irene Njenga | - | Advocate, Humphrey & Co. Advocates |
| Ms. Rachel Osendo | - | Advocate, Humphrey & Co. Advocates |
| Mr. Geoffrey Asanyo | - | Chairman |
| Eng. Japheth Mutai | - | Chief Accounting Officer |
| Eng. S. Kitwili | - | Technical Manager |
| Mr. Henry K. Cheruiyot | - | Assistant Development Officer |
| Mr. Elijah M. Nyaga | - | Chairman, Ol Kalou Town Council |

Interested Candidates

- | | | |
|-----------------------|---|---|
| Mr. Martin Kaurai | - | Manager, Consky Engineering Services Ltd |
| Mr. Peter Musitei | - | General Manager, Consky Engineering Services Ltd |
| Ms. Ann Mumbi | - | Advocate for Penelly Construction & Engineering Ltd |
| Mr. Simon K. Chelugui | - | Managing Director, Penelly Construction & Engineering Ltd |
| Mr. Onesmus Mutinda | - | Engineer, Penelly Construction & Engineering 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 OF AWARD

This tender was advertised by the Procuring Entity on 19th and 20th January, 2009. The tender was for Augmentation and Improvement of the Ol-Kalou Town Water Supply Project. The tender closed/opened on 13th February, 2009 in the presence of the bidders' representatives. Out of the twenty bidders who responded to the tender notice, 14 bidders submitted their bids before the deadline for submission of tenders. They were as follows:

S/No	Bidders Name	Tender Sum (Kshs)
1.	Consky Engineering Services Ltd	95, 611, 615.00
2.	Rumcee Enterprises & Engineering Ltd	102, 894, 214.00
3.	Penelly Construction & Engineering Ltd	95, 726, 208.00
4.	Soliton Telmec Ltd	136, 399, 132.00
5.	Dfaff Construction Ltd	85, 652, 303.00
6.	Joycott General Contractors	157, 533, 805.80
7.	Magic General Contractors	234, 625, 710.00
8.	Samima Investment Ltd	115, 088, 902.50
9.	Carol Construction Ltd	153, 091, 367.00
10.	Gesa Building & Civil Eng. Ltd	159, 070, 103.00

11.	Victory Construction Ltd	179, 899, 042.40
12.	Perma Structural Engineering Company	101, 727, 246.00
13.	Irrico International Ltd	116, 365, 419.00
14.	Oriental Construction Ltd	122, 786, 810.08

Technical Evaluation

Technical Evaluation was conducted by Batiment Consulting Ltd and was based on the following parameters:

1. Legal Registration
2. VAT and PIN Registration
3. Tax Compliance
4. Complete tender form
5. Construction period
6. Completeness of the tender
7. Qualification and experience of staff
8. Similar projects undertaken
9. Audited accounts
10. Details of equipment and plan
11. Bid bond
12. Financial liquidity

Eleven bidders were disqualified at this stage for failing to comply with some of the above requirements. The other four bidders, namely, Penelly Construction & Engineering Ltd, Joycott General Contractors, Carol

Construction Ltd and Perma Structural Engineering Ltd qualified for the next stage of the evaluation.

Financial Evaluation

This involved correction of arithmetical errors, comparison of the corrected tender sum with engineer's estimate and comparison of major cost items.

The Consultant noted that Penelly Construction & Engineering Co. had quoted too low on uPVC pipes, reinforcement steel, concrete and GI pipes and excavation in trenches (Main Pipeline). Accordingly, its tender sum on this item was 27.42% lower than the engineer's estimate. The tender was therefore declared non-responsive.

The Consultant recommended the award of the tender to M/S Perma Structural Engineering Co. at the corrected tender of Kshs. 114, 005, 826.60.

In its meeting held on 6th March, 2009, the Tender Committee differed with the recommendation of the evaluation committee to award the tender to M/S Perma Structural Engineering Co. and awarded it to Penelly Construction & Engineering Ltd at Kshs.95, 496,527.50.

Letters of notification of award to the successful and unsuccessful bidders are dated 18th and 25th March, 2009 respectively.

THE REVIEW

This Request for Review was lodged by Perma Structural Engineering Co. on 31st March, 2009 against the decision of the Tender Committee of the Rift Valley Water Services Board, the Procuring Entity dated 25th March, 2009 in the matter of tender No.RVWSB/WC/NN/03 for Augmentation and Improvement of the Ol-Kalou Town Water Supply Project.

The Applicant was represented by Mr. C. M. Muoki while the Procuring Entity was represented by Stephen Kimemia, both Advocates. Penelly Construction & Engineering Ltd, Consky Engineering Services Ltd and Samima Investment Ltd, Interested Candidates, were represented by Ms. Anne Mumbi, Advocate, Peter Musitei, General Manager and Mr. George Mwangi respectively.

In its Request for Review, the Applicant raised four grounds of review which the Board deals with as follows.

GROUND 1, 2 and 3

These grounds are general statements that are not supported by any breach of the Act or Regulation as required under Regulation 73(2) (a) of the Public Procurement and Disposal Regulation, 2006. Therefore, the Board need not make any finding on these grounds.

GROUND 4: BREACH OF SECTION 66 (3) (a) and (b) OF THE ACT

The Applicant submitted that the Procuring Entity's Tender Committee acted outside its jurisdiction in awarding the tender to Penelly Construction and

Engineering Co, and that it failed to take into account matters that were raised in the report by its own Evaluation Committee.

It further submitted that the Evaluation Committee had carried out an evaluation and gave a detailed report with recommendations thereof in accordance with Regulation 51.

It argued that the Tender Committee acted *Ultra Vires* by setting aside the recommendations of the Evaluation Committee and carrying out its own evaluation. It stated that this was in Breach of Regulation 11(2) which states as follows:

"11(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 and objective reasons"**

The Applicant argued that the options available to the Tender Committee under Regulation 11 were clear and added that there was no justifiable reason why the Tender Committee decided to ignore the recommendations of the Evaluation Committee.

The Applicant submitted that the work of the Evaluation Committee was comprehensive in that it took into account both the technical and financial bids. It further submitted that the in-depth evaluations undertaken by the Evaluation Committee proved that the tender by Penelly Construction &

Engineering Ltd was non-responsive. It argued that the report stated clearly that Perma Structural Engineering Co. was the most responsive bidder and that the Evaluation Committee had therefore recommended it for the award of the tender. This recommendation was ignored by the Tender Committee.

It submitted that it was outside the law, for the Procuring Entity, to engage in discussion with Penelly Construction & Engineering Ltd, during the evaluation process without the knowledge of the other bidders. It argued that it was wrong for the Procuring Entity to engage in communication with the successful bidder to confirm whether the successful bidder was in a position to carry out the works at their quoted price.

The Applicant stated that it had obtained the detailed evaluation report from the Procuring Entity. It stated that its Managing Director, had called the Chief Executive Officer of the Procuring Entity requesting for the same, and was advised to collect the document from a secretary. It argued that it was justified in requesting for the evaluation documents since the Procuring Entity had failed to notify all the bidders simultaneously as required by law. It asserted that by the time it called for the documents, only the successful bidder had been notified while other bidders were still in the dark.

Citing the Board's ruling in **Application No.15/2008 of 9th April, 2008 between Sorento Ltd and Nairobi City Council**, the Applicant urged the Board to revoke the award and order that the tender be awarded to it.

In response, the Procuring Entity submitted that the Request for Review was frivolous, vexatious and solely for the purpose of derailing the procurement proceedings. It urged the Board to exercise its mandate under Section 95 and dismiss this request for review.

The Procuring Entity referred the Board to Section 66 (4) of the Act which states *“that the successful tender shall be the tenderer with the lowest evaluated price”*. It further referred to Regulation 10 (2)(a) where the functions of the Tender Committee are clearly set out as; *“Review, verify and ascertain that all procurement and disposals have been undertaken in accordance with the Act and in accordance to these Regulations and the terms set out in the tender documents.”*

It argued that the Tender Committee was not a mere rubber stamp and was not bound to blindly accept all the recommendations of the Evaluation Committee. It further argued that in rejecting the recommendations of the Evaluation Committee, the Tender Committee acted within its mandate as granted under Regulation 11(1) (b).

The Procuring Entity stated that Regulation 16(9) mandated the Evaluation Committee, to prepare and submit to the Tender Committee, a report on the analysis of all the tenders received and to show thereon the final ratings on each tender.

It further stated that the Evaluation Committee was under a mandatory statutory duty under Regulation 10(f) to include in the report, a recommendation to award the tender to the lowest evaluated tenderer.

It submitted that the Evaluation Committee had short listed four bidders as being substantially responsive, of which, Penelly Construction and Engineering Company had the lowest price. It argued, therefore, that Penelly Construction and Engineering Company was the lowest evaluated bidder and that the Tender Committee did not undertake another evaluation, but merely followed the Act in awarding the tender to the lowest evaluated bidder.

The Procuring Entity further argued that it was wrong for the Evaluation Committee to use the items on "deviation from Engineers estimate" as a way of eliminating Penelly Construction and Engineering Co since this was not included as part of the criteria in the tender document.

It stated that by awarding the tender to Penelly Construction and Engineering Company and not to Perma Structural Engineering Company, it would save Kshs 18.5 million which would go a long way in improving water services in its area.

It informed the Board that the successful candidate had already given an undertaking to do a good job at their quoted price, though the price fell short of the Engineers' estimate by Kshs 30 million.

Finally, the Procuring Entity denied that its Chief Executive Officer had advised the Applicant to collect a copy of the evaluation report as alleged.

Councilor Elijah M. Nyaga of Ol Kalou Town Council urged the Board to move speedily in resolving this matter, as otherwise the funds might revert back to the donors.

Penelly Construction and Engineering Co, the successful candidate, stated that it had been consulted by the Procuring Entity in regard to its bid being lower than the Engineers estimate, upon which it gave an undertaking that it would complete the work within the quoted price.

It stated that on 18th March 2009, it was notified that its bid had succeeded and it executed a performance bond. It further stated that it had agreed with the Procuring Entity to reduce the contract period from 52 to 32 weeks. The successful candidate explained to the Board that due to the urgency demands in regard to the project, it had mobilised a lot of resources and stood to incur heavy losses if the tender was annulled. Therefore, it urged the Board to dismiss the Request for Review.

Consky Engineering Services Ltd, an Interested Candidate, urged the Board to award the tender to it, since it had quoted much lower than either the Applicant or the successful candidate.

Samina Investment Ltd, an Interested Candidate, claimed that it was denied information even after the tender was opened. It wondered why the successful candidate was notified on 18th March 2009 whereas it only got the notification a few days prior to the hearing.

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

The Board has noted that the Procuring Entity engaged the services of a consultant to carry out the evaluation of tenders. The consultant, Batiment Consulting Ltd, recommended Perma Structural Engineering Company, the Applicant, for the award of the tender. The Board also notes the consultant disqualified Penelly Construction & Engineering Ltd on the ground that its tender price on the Main Pipeline was 27.42% below the engineer's estimate. The Board further notes that the consultant sought for clarification from Penelly Construction & Engineering Ltd regarding the rates it quoted on the Main Pipeline works. By a letter dated 2nd March, 2009, Penelly Construction & Engineering Ltd confirmed that it was able to undertake the works at the quoted prices. The report of the consultant was submitted to the evaluation committee and adopted. The evaluation committee recommended the award of the tender to Perma Structural Engineering Company.

In its meeting held on 6th March, 2009, the Tender Committee rejected the recommendation of the Evaluation Committee and proceeded to carry out an evaluation by analysing the financial bids submitted by the four bidders who had been declared responsive by the Evaluation Committee. Upon considering the financial proposals, the Tender Committee awarded the tender to Penelly Construction & Engineering Ltd. It is clear to the Board that the evaluation committee wrongly introduced new criteria by using the issue of engineer's estimate during evaluation. However, the action of the Tender Committee of doing its own evaluation was also wrong as its duties are set out in Regulation 11(2) (a) as follows:

"The tender committee shall not-

- (a) modify any submission with respect to the recommendations for a contract award or in any other respect;**

Upon rejecting the recommendation of the Evaluation Committee, the Tender Committee ought to have sent the report back to the Evaluation Committee with the reasons for reconsideration as stipulated under Regulation 11(1) (b).

The Board further notes that, the Procuring Entity did not submit any evidence to demonstrate that the Tender Committee reported its rejection of the recommendation of the Evaluation Committee to the Accounting Officer as required under Regulation 11(3).

The Board also notes that clause 3.24 of the Tender Document provided as follows:

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- **Audited accounts for the past 3 years (minimum turn over 50 Million Kenya Shilling)"**

The Board observes that Penelly Construction & Engineering Ltd did not attain the required turnover in two of the three years while its 3 year average was only Kshs.47.99 million. The Board further observes that other tenderers

like Dfaff Construction Ltd, Gesa Building & Civil Engineering Ltd and Samima Investment Ltd were eliminated on the basis of this Clause, but Penelly Construction & Engineering Ltd was not eliminated. Instead, it was short listed as being one of the four responsive bidders.

The Board notes that whereas the successful bidder was notified of the award on 18th March 2009, the unsuccessful bidders were not notified until 25th March 2009. This is in breach of section 67(2) which calls for simultaneous notification of all successful and unsuccessful tenderers.

The Board has also noted with concern, the breach of the confidentiality rules at the various levels of the process. The Board notes that the Applicant had attached a copy of the evaluation report on its Request for Review which the Procuring Entity denied to have availed to it. It is therefore not clear how the Applicant obtained the copy of the evaluation report. This was a breach of Section 44(3) of the Act which limits the procurement records to be availed to a bidder to a summary of evaluation report.

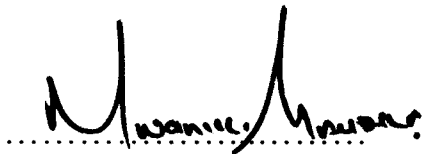
On the issue of communication between the Procuring Entity and Penelly Construction & Engineering Ltd during evaluation, the Board finds that Section 62 of the Act the Procuring Entity to seek clarification from the bidders to assist it in the evaluation of the tenders. The Board notes that Penelly Construction & Engineering Ltd only confirmed that it could perform the works at its quoted rates as requested by the consultant. This did not change the substance of the tender.

Taking into account all the above matters, the appeal succeeds and the award of the tender to Penelly Construction & Engineering Ltd is hereby annulled.

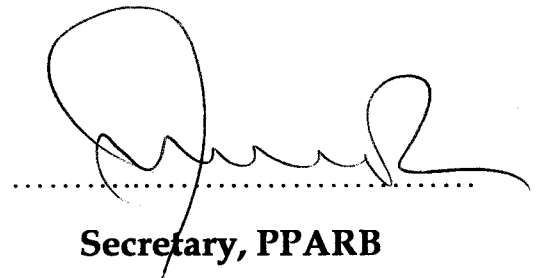
The Board hereby orders that the Procuring Entity re-evaluates all the bids in line with the provisions of the Act, Regulations and the tender documents.

The Board further directs the Procuring Entity to extend the tender validity period, if need be, as provided for under Section 61 of the Act.

Dated at Nairobi on this 29th day of April, 2009

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

Chairman, PPARB

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

Secretary, PPARB

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