

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD

REVIEW NO. 16/2009 OF 30TH APRIL, 2009

BETWEEN

M/S HAGAR CONSTRUCTION CO. LTD.....APPLICANT

AND

TENDER COMMITTEE,

WAJIR SOUTH DISTRICT PROCURING ENTITY

Review against the decision of the District Tender Committee, Wajir South District dated 10th March, 2009 in the Matter of tender No.WJR/DTC/37/08-09 for Proposed Construction of a Typical Twin Workshop Block at Habaswein Youth Polytechnic

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mrs. L. G. Ruhiu	-	Member
Eng. C. Ogut	-	Member
Mr. Sospeter K. Munguti	-	Member
Mr. Akich Okola	-	Member

IN ATTENDANCE

Mr. P. M. Wangai - For Board Secretary

PRESENT BY INVITATION

Applicant, Hagar Construction Company

Mr. Andrew Ombwayo - Advocate, Odawa, Ombwayo &
Ochich Advocates

Mr. Hussein S. Dahir - Representative

Procuring Entity, District Tender Committee, Wajir South District

Mr. Bernard Ooko - District Youth Officer

Interested Candidate, Biyanathom Construction Company

Mr. Mohammed Ali - Representative

BOARD'S DECISION

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

BACKGROUND OF AWARD

This tender was advertised by the Ministry of Youth and Sports on 27th January, 2009. It was for the Proposed Construction of a Typical Twin Workshop Block at Habaswein Youth Polytechnic, Wajir South. Tenders were opened on 17th February, 2009 in the presence of the bidders' representatives. The five bidders who submitted their bids and their respective prices were as tabulated below:

S/No	Bidders Name	Kshs.
1.	M/S Uthole Construction Company	4,535,835
2.	M/S Warfa Construction Company	4,963,431.20
3.	M/S Hagar Construction Company	5,156,690.80
4.	M/S Biyanathon Construction Company	5,556,238.70
5.	M/S Ohiya Contractors Company	8,316,565.25

EVALUATION

Tenders were checked for responsiveness and only substantially responsive bidders were considered for detailed evaluation. Evaluation was based on the following parameters:

1. A bid security of Kshs.50, 000.00 from an established bank
2. Properly filled, signed, stamped and witnessed Form of Tender
3. Proof of registration with Ministry of Public Works in Category 'G' and above
4. Particulars of similar works done
5. Particulars of professional/technical personnel

Three bidders, namely M/S Uthole Construction Company, M/S Warfa Construction Company and M/ S Ohiya Construction Company were found non-responsive for failing to comply with some of the above mandatory requirements. Hence, their bids were disqualified.

The remaining two bidders, M/S Hagar Construction Company and M/S Biyanathon Construction Company were found responsive. M/S Hagar Construction Company was determined as the lowest responsive bid while M/S Biyanathon Construction Company was the second lowest responsive bid. The Evaluation Committee recommended the award of the tender to any of the two tenderers.

In its meeting held on 10th March, 2009, the tender committee awarded the tender to M/S Biyanathon Construction Company, the second lowest evaluated bidder, at Kshs. 5, 556, 238.70. The tender committee noted that it could not award the tender to the Applicant despite being lowest evaluated bidder for the following reasons:

- “1.They are not well known within the district***
- 2. The deviation of their tender sum from their estimated cost quite substantial as to cast doubt on their ability to successfully complete the project.***
- 3. Members could not locate any of the past works within the District neither could they attest to the quality of their work”.***

Prior to the communication of award to the bidders, M/S Hagar Construction Co, Ltd lodged a Request for Review on 16th March, 2009. At the commencement of the hearing of the matter by the Board on 8th April, 2009, the Applicant withdrew the matter to enable the Procuring Entity to finalize the process. This withdrawal was consented to by the Procuring Entity.

In its meeting held on 22nd April, 2009, the tender committee affirmed its award of the tender to M/S Biyanathom Construction Company.

Letters of notification of award to the successful and unsuccessful bidders were dated 22nd April, 2009.

THE REVIEW

The Applicant was represented by Mr. Andrew Ombwayo, Advocate while the Procuring Entity was represented by Mr. Bernard Ooko, the District Youth Officer. An interested candidate present M/s Biyanathon Construction Company was represented by Mr. Mohammed Ali.

The Applicant has raised five grounds of Review and urged the Board to make the following orders:

- a) "The Procuring Entity's decision to award the tender to the bidder who was not the lowest evaluated price be and is hereby annulled.
- b) The Procuring Entity be and is hereby ordered to award the tender to the Applicant who was the lowest evaluated price.
- c) The Procuring Entity be and is ordered to pay costs of and incidental to these proceedings.
- d) Such or further relief(s) as this Board shall deem just and expedient".

The Board deals with the grounds of review as follows:

GROUND 1, 2, AND 3

These grounds have been consolidated since they raise similar complaints regarding the evaluation and award of the tender.

The Applicant submitted that the Procuring Entity breached section 66(2) and 66(4) of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as the Act) by evaluating the tenders using criteria that was not set out in the tender document. The Applicant stated that the Procuring Entity had admitted that the Tender Committee disqualified the Applicant on the basis that he was not well known within the Wajir District and that it could not locate any past works within the District that had been done by the Applicant.

The Applicant further submitted that the Procuring Entity considered the fact that the Applicant was based in Garissa and that the successful bidder had an ongoing project at the District Hospital which is next to the site the subject of this tender. The Applicant stated that this consideration was contrary to the Act as this was an open tender. The Applicant argued it had met all the requirements of the tender and was eligible regardless of where it was based.

Finally, the Applicant submitted that the Procuring Entity breached Sections 52, 66(2) and 66(4) of the Act by failing to award the tender to the lowest responsive bidder. It stated that the procuring Entity imported

subjective criteria of past performance and availability which were not contained in the tender document. In so doing, the Procuring Entity acted contrary to the objectives of the Act which are geared towards promoting transparency, accountability and confidence in Public Procurement.

In response, the Procuring Entity submitted that evaluation of a tender is a process that continuous until the award of the tender. It stated that the Technical Evaluation Committee conducted the evaluation using the criteria set out in the tender document and thereafter forwarded its report to the Tender Committee. The Tender Committee conducted a further evaluation and analysis and awarded the tender to the successful bidder.

The Procuring Entity further submitted that the Technical Evaluation Committee had recommended award of the tender to the two responsive bidders who were Hagar Construction Company, the Applicant and Biyanathon Construction Company, the successful bidder. It stated that the Tender Committee considered the two tenderers and made the award to the successful tenderer using the criteria set out in the tender document.

The Procuring Entity further submitted that it treated all the bidders equally. It denied that it discriminated against the Applicant as its tender was evaluated alongside the other tenders.

The Procuring Entity argued that the successful bidder was undertaking works adjacent to the project and was therefore easily accessible. It stated that was the reason the Tender Committee considered the question of availability.

Finally, the Procuring Entity denied that it had breached the provisions of the Act and stated that the evaluation and award was done fairly.

On its part, the successful candidate stated that it has been in existence for over thirty years. It stated that it had completed a number of projects in Wajir South and the larger Wajir District. It argued that the award of the tender was done professionally and fairly.

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

The Board has examined the documents submitted by the Procuring Entity and in particular the summary of the evaluation report and the blank copy of the tender document provided to the bidders. The Board notes that the tender document was not specific on the evaluation criteria to be used in the evaluation and comparison of tenders. The parameters used in the evaluation were bid bond of Kshs. 50,000.00, proof of registration with the Ministry of Public Works category 'G' and above, particulars of similar

works done and particulars of professional/technical personnel. These were some of the mandatory requirements under Clause 1.2 of the Instruction to Tenderers which required the bidders to submit the following information and documents:-

- (a) Copies of registration, and principal place of business;
- (b) Total monetary value of construction works performed for each of the last five years;
- (c) Experience in works of similar nature and size for each of the last five years, and clients who may be contacted for further information on these contractors;
- (d) Major items of construction equipment owned;
- (e) Qualifications and experience of key site management and technical personnel proposed for the contract;
- (f) The financial standing of the tenderer, such as profit and loss statements and auditors reports for the last five years;
- (g) Authority to seek references from the Tenderers bankers.

The Board has further noted that in its meeting held on 10th March, 2009 the Tender Committee made the following observations on the Applicant's tender:-

- “ 1.They are not well known within the district***
- 2. The deviation of their tender sum from their estimated cost quite substantial as to cast doubt on their ability to successfully complete the project.***

3. Members could not locate any of the past works within the District neither could they attest to the quality of their work”.

The Board has noted that after making these observations, the Tender Committee awarded the tender to Biyanathon Construction Company.

The Board has noted that the Tender Document did not have a criterion on past works within Wajir South District. This criterion was introduced during the meeting of the Tender Committee. Clearly, this was wrong as a Procuring Entity can only use the evaluation criteria set out in the tender document as stipulated in Section 66(2) of the Act. Further, the Procuring Entity breached Regulation 11 of the Public Procurement Regulation 66 as the Tender Committee conducted an evaluation and on the basis of that purported evaluation it disqualified the Applicant. Regulation 11 clearly sets out the powers of the Tender Committee 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 reason; or**
- (c) Approve a submission, subject to minor clarifications by the procurement unit or evaluation committee.**

(2).....

(3).....

(4).....”

It is clear that the purported evaluation by the Tender Committee flies in the face of Regulation 11.

The Board has also noted that the evaluation committee recommended two bidders for consideration of the award of the tender by the Tender Committee. These bidders were the Applicant and the successful bidder. This was a breach of Regulation 16(10)(f) which states as follows:-

“an evaluation committee shall prepare a report on the analysis of the tender received, and final ratings assigned to each tender and submit the report to the tender committee.

.....

.....

.....

.....(10)(f) A recommendation to award the tender to the lowest evaluated tenderer or to the person who submitted the proposal with the highest total score.

It is clear that under Regulation 11 the Evaluation Committee can only recommend an award to the lowest evaluated tenderer and not to two bidders as was done by the evaluation committee in this tender.

In the premises, it is clear that the action of the Procuring Entity to disqualify the Applicant was based on extraneous factors which were not contained in the tender document.

According to these grounds succeed.

GROUND 4 AND 5

These are not grounds for Review but just statements of facts and the Board therefore need not make any findings on them.

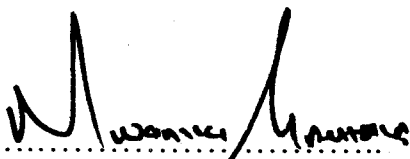
Taking the above matters into consideration, this Request for Review succeeds and the award of the tender to the successful bidder, Biyanathon Construction Company is hereby annulled pursuant to section 98(a) of the Act.

The Board is alive to the fact that this is a tender for construction of a twin typical workshop at Habaswein Youth Polytechnic. This is a vital project in the North Eastern Province and in public interest the Board hereby invokes its powers under Section 98(c) of the Act and substitutes the decision of the Procuring Entity with an order that this tender be awarded to the Applicant at its quoted price of Kshs. 5,156,690.80. The reason for this is that the Evaluation Committee had already determined in its evaluation

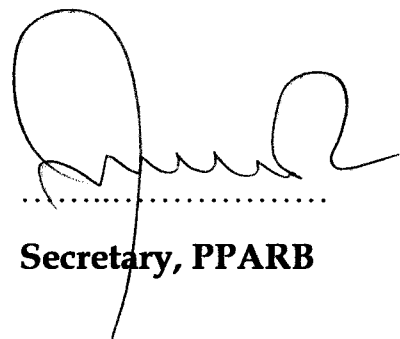
that the Applicant was the lowest evaluated bidder. This was also noted by the Tender Committee in its meeting held on 10th March, 2009. Accordingly, there was no basis for the Procuring Entity to disqualify the Applicant and it will serve public interest if this project proceeds without a re-tender being done.

The Board further orders that the Applicant should sign the contract with the Procuring Entity in accordance with Section 68 of the Act and also issue a performance bond.

Dated at Nairobi on this 22nd day of May, 2009



Chairman, PPARB



Secretary, PPARB