

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 32/2009 OF 18th AUGUST, 2009

BETWEEN

USHIRIKA TILES & BUILDERS LTD (APPLICANT)

AND

KENYA AIRPORTS AUTHORITY (PROCURING ENTITY)

Review against the decision of the Tender Committee of the Kenya Airports Authority dated the 29th July, 2009 in the matter of Tender No. KAA/ES/JKIA/494 for the Proposed Rehabilitation of State Pavilion Washrooms, Jomo Kenyatta International Airport

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Eng. C. A. Ogut	-	Member
Ms. J. A. Guserwa	-	Member
Amb. C. M. Amira	-	Member

IN ATTENDANCE

Ms. Pamela K. Ouma	-	Holding brief for Secretary
Ms. Kerina A. Rota	-	Secretariat

PRESENT BY INVITATION

Applicant, Ushirika Tiles & Co. Ltd

- Mr. Andrew Ombwayo - Advocate, Odawa Ombwayo & Co.
Advocates
- Ms. Fridah Gichia - Secretary

Procuring Entity, Kenya Airports Authority

- Mr. Victor Arika - Legal Officer
- Mr. Allan Muturi - Manager, Procurement & Logistics
- Mr. F. Odawo - Architect
- Mr. F. Mulaku - Quantity Surveyor
- Mr. H. M. Orora - Senior Procurement Officer
- Mr. Sammy Kemboi - Procurement Assistant

Interested Candidates

- Mr. Thomas Musa - Administration, Afcons (A) Ltd
- Mr. Joseph Odhiambo - Quantity Surveyor, Dickways
Construction Co. 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 Rehabilitation of Washrooms at the State Pavilion at the Jomo Kenyatta International Airport was Re- advertised in the local daily newspapers on 15th May, 2009. An earlier tender had been

cancelled after it was discovered that the lowest evaluated bidder had provided false information to the Procuring Entity.

The tender closed/opened on 9th June, 2009. Out of the sixteen bid documents sold, eleven bidders submitted bids before the closing/opening of the tender. The bidders and the tender prices at the opening were as follows:-

BIDDER		TENDER SUM
1. Limelight Creation Ltd	-	23,848,090.00
2. Ushirika Tiles & Builders Company	-	17,486,444.00
3. Rakman Services Ltd	-	37,225,520.00
4. Dickways Constuction Co. Ltd	-	23,719,927.66
5. Flooring & Interior Ltd	-	25,408,809.36
6. Afcons Africa Ltd	-	23,200,000.00
7. Kaguanjai Builders Ltd	-	26,941,744.70
8. Kenya Koch-Light Industries	-	20,831,880.30
9. Metrical Agencies Ltd	-	27,926,192.00
10.Jipsy Civil Building Construction	-	27,378,979.80
11.Thunder Plumbing and Construction Company Ltd	-	25,659,935.10

The bidders' name, tender price and the tender surety were read out loud and recorded in the Tender Opening Register.

EVALUATION

Preliminary Evaluation:

A preliminary Evaluation of the bids was done based on the following evaluation criteria to establish the completeness of the tender:-

- (i) Filling of the Form of Tender
- (ii) Registration with the Ministry of Public Works at Category 'E' and above
- (iii) Registration Certificate
- (iv) Tax Compliance
- (v) Provision of a valid Bid Security
- (vi) Site visit signed by the Procuring Entities representative
- (vii) Original and Copies of the bid documents
- (viii) Audited Accounts submitted (2004 - 2007)
- (ix) Proof of Access to Liquid Assets (letter of Credit, Cash-in-Hand)

The Evaluation Committee declared nine of the bids non responsive at this stage. Two bidders, Dickways Construction Co. Ltd and Thunder Plumbing and Construction Co. Ltd bids were declared responsive as they met all the requirements stipulated in the tender document.

The Applicant's bid was declared non-responsive for having an incomplete Form of Tender not addressed to the Authority; its site visit certificate was not signed; it provided audited accounts for year 2007 only and it had no evidence of access to liquid assets.

Technical Evaluation:

The two responsive bids were subjected to a technical evaluation which was based on the following criteria:-

- a. Annual Turnover i.e. average annual turnover of not less than Kshs. 50 million for the last three years
- b. Experience in works of similar nature
- c. Evidence of Construction Equipment
- d. Key personnel i.e. qualification and experience of key personnel

The two bids were declared responsive technically.

Financial Evaluation:-

The financial evaluation of the two responsive bids indicated that the Bills of Quantities of M/s Dickways Construction Co. Ltd had an arithmetical error of Kshs. 1,276.00 while that of M/s Thunder Plumbing & Construction Co. Ltd had an error of Kshs. 91,718.87. The bids were then corrected pursuant to Clause 5.7 of the Instruction to Tenderers.

The Evaluation Committee then recommended M/s Dickways Construction Company Ltd to be awarded the contract at the corrected price of

Kshs. 23,721,203.66

THE TENDER COMMITTEE DECISION

The Tender Committee, in its meeting No. 100 held on 29th July, 2009 deliberated on the recommendation of the Evaluation Committee and confirmed that a budget of Kshs. 26 million had been provided in the financial year 2008/2009. The Committee adjudicated on the matter and

awarded the contract to M/s Dickways Construction Company at the corrected sum of Kshs. 23,721,203.66 Bidders' were notified of the award on 6th August, 2009.

THE REVIEW

The Applicant, Ushirika Tiles and Builders Co., lodged the Request for Review on 18th August, 2009. The prayers of the Applicant include that the award be annulled; the contract be awarded to the lowest qualified bidder; the Procuring Entity pay the costs of Application and any other orders the Board may give.

The Review is based on seven grounds which we deal with as follows:-

Grounds 1 - 3: Breach of Section 64(1), (2) and (3).

The Applicant consolidated grounds 1 to 3 as they raised similar issues on breach of Section 64(1), (2) and (3) of the Act. It stated that it had offered the lowest price of Kshs.17, 486,444 as read out during the Tender Opening. It submitted that having complied with all the mandatory requirements of the tender document it ought to have been declared the lowest evaluated tender and awarded the contract. It stated that, it had since learnt that the Procuring Entity had disqualified its bid because it had not addressed its Form of Tender to the Procuring Entity. It argued that, the omission of addressing the Form of Tender to the Procuring Entity was a minor deviation which should have been treated in line with Section 64(2) of the Act. It argued that the omission did neither go to the substance of the tender nor did it materially deviate from the tender requirements.

In response the Procuring Entity stated that it did not breach Section 64(1), (2) and (3) of the Act, as alleged by the Applicant.

It stated that the Applicant's bid was disqualified justifiably, because it was not responsive in line with the requirements of the Tender document. It stated that the Applicant's Form of Tender, which formed the foundation of the Tender, was incomplete, as it was neither addressed to the Procuring Entity, namely Kenya Airports Authority, nor was it dated. It stated that, this was contrary to Clause 2.2 on Instruction to Tenderers and the Public Procurement and Disposal Act, 2005. In addition, it stated that, since the Form of Tender was not addressed, it was not clear to whom the offer was made.

The Procuring Entity stated that the second reason of disqualifying the Applicant's bid was based on the set of Accounts submitted by the Applicant. It submitted that according to the Tender documents, bidders were required to submit reports on their financial standing such as Profit and Loss Statements and Audited reports for the past five years 2004-2007. The Procuring Entity stated that the Applicant did not submit certified audited accounts as required, but instead, submitted an extract of Income and Expenditure Account and a Balance Sheet for year 2007 only with a heading that it was for year 2005. It submitted that the Applicant did not comply with this requirement and hence its bid was disqualified.

The Procuring Entity further stated that the Applicant failed to provide evidence of adequate working capital for the Contract in line with the requirements of the Tender document. It submitted that the Applicant did not provide evidence of access to liquid assets as required under the Tender

documents. It stated that the Applicant submitted with its bid, a letter dated 8th June, 2009 from the Equity Bank Ltd, which letter simply indicated that the Applicant was their customer. It argued that, the letter did not indicate whether or not the Applicant had any access to a Credit Line of at least shillings 5 million as required under the Tender document.

In conclusion, the Procuring Entity submitted that the Applicant's bid was disqualified procedurally, with due regard to the requirements of the Act and Tender documents. It submitted that failure to complete the Form of Tender, providing of audited accounts and giving evidence on liquidity and access to Credit Line(s), were not minor and therefore, the Procuring Entity acted correctly by disqualifying the Applicant's bid. The Procuring Entity submitted that the Applicant's bid could not therefore have been the lowest qualified bidder, in line with Section 66(4) of the Act.

The Board has considered the submissions of all the parties and examined the documents presented before it. The issue to be determined by the Board is whether the Applicant's bid complied with the requirements of the Tender document in so far as the following matters are concerned;

- i) Completion of the Form of Tender;
- ii) Whether the accounts submitted by the Applicant were Audited Accounts or not; and
- iii) Whether the Applicant provided evidence on access to cash or credit Line(s) amounting to Shillings 5 million and liquid assets thereof.

The Board has examined the Form of Tender submitted by the Applicant. The Board notes that the Applicant completed the Form of Tender, making an offer to do the job at Shillings 17,486,444 and among other details provided, was that the offer was dated June 9, 2009. However, the Board notes that the Form of Tender was not addressed to any Employer. The Board observes that the Form of Tender is the document through which the offer is communicated to a specified person. It is the offer that the Procuring Entity would consider and either accept or reject. The Board holds that the Form of Tender is a very vital document which communicates very essential information, based on which a Contract is created. In this case, the Applicant did not fill the name of the Procuring Entity to show to whom the offer was made. Consequently, the Board finds that this omission was very serious and hence the Procuring Entity was right in treating it as a major omission that could not be cured using the provision on treatment of minor deviation under Section 64(2) of the Act.

With regard to the issue of audited accounts, the Board notes that this was a requirement under Clause 1.4 (f) of the Instructions to Tenderers. Bidders were required to submit Profit and Loss Statements and Auditor's reports for the years 2004 to 2007. The Board notes that the Applicant submitted a report of the Auditors headed "Orwa & Company Associates Certified Public Accountants (K), Report of the Auditors for the five years Financial Statements." Further, the Board has found that the Income and Expenditure Account submitted by the Applicant is for the period ended 31st December 2007, but with one column carrying figures for the year 2007 and the other for year 2006. The next page of the accounts is headed "Ushirika Tiles and Builders Ltd, Income and Expenditure Account, year ended 31st December

2007" which contains income and expenditure items and figures for years 2004, 2005, 2006 and 2007.

Another page of the same accounts is headed "The Balance Sheet as at 31st December 2007", but carries Balance Sheet figures for years 2006 and 2007.

The last page of the accounts submitted is headed "Ushirika Tiles and Builders Ltd Balance Sheet, as at 31st December 2007" and it carries Balance Sheet figures for years 2003, 2004, 2005, 2006 and 2007.

After analysing the purported Financial Statements as detailed above, the Board finds inconsistencies between the periods on the headings of the Accounts and the periods under which the figures are reported.

The Board therefore concludes that the Financial Statements, as submitted by the Applicant, did not meet the requirements of what is expected of Audited Financial Statements. The Procuring Entity therefore acted correctly by disqualifying the Applicant's bid, for not meeting the requirements on the Profit and Loss statements and Auditors' Reports for the last five years.

The last issue to determine is whether the Applicant provided evidence on adequacy of working capital in line with the requirements of Clause 1.4(g). The Board finds that the Applicant obtained a letter from Equity Bank, dated June 8th 2009; which letter partly stated as follows:-

"customer of long standing and operates an active Account with us to our satisfaction"

The letter went further to state that the Applicant had maintained its Account with the Bank in accordance with the terms and conditions "there to". The Board finds the Letter to be too general, as it did not specify whether the Applicant had access to Line(s) of credit which the Procuring Entity was looking for.

Further, the Board notes that the Applicant did not provide any evidence to show access to other financial resources in line with the requirements of Clause 1.4(g) of the Instruction to Tenders.

In the circumstances, the Board finds that the Procuring Entity acted appropriately by disqualifying the Applicant.

Taking into consideration all the above, these grounds of appeal fail.

Grounds 4, 5 and 6 - Breach of Section 66(2) and 66(4) of the Act.

The Applicant submitted that the Procuring Entity breached Section 66(4) of the Act by not awarding the tender to the lowest qualified bidder. It argued that its bid was disqualified unfairly. It submitted that it had met all the Criteria of Preliminary Evaluation as set out at Clause 5.5 of the Instructions to Tenderers. It submitted that its bid should not have been disqualified at the Preliminary Evaluation stage, but rather, it should have proceeded to the Technical and Financial Evaluation stages. It argued that its bid was disqualified based on a criteria not set out at Clause 5.5 of the Instructions to Tenderers. Finally, it requested the Board to find that the disqualification was improper and a breach of Section 66(2) and therefore the Procuring Entity based on such improper criteria could not arrive at the Lowest Evaluated bidder in line with Section 66(4) of the Act.

In response, the Procuring Entity denied breach of Section 66(2) and 66(4) of the Act. It averred that the bids were evaluated in line with the requirements of the Act and the Tender documents. It stated that the Preliminary Evaluation Criteria as set out at Clause 5.5 of the Instructions to Tenderers was applied in evaluating all the bids. The Procuring Entity further stated that the Applicant's bid was disqualified at the Preliminary Evaluation stage because it did not indicate to whom the offer was made to; failed to provide Profit and Loss statements and Auditors Report and failed to show evidence of access to cash or credit line(s). It stated that the Applicant did not provide evidence of turnover of Shillings 50 million per annum as required under the tender document. It argued that, having failed at the Preliminary stage, the Applicant's bid did not proceed to the Technical and Financial Evaluation stages. The Procuring Entity concluded by stating that the Applicant's bid could not turn out to be the Lowest Evaluated bidder in line with the requirements of Section 66(4) of the Act, because it did not meet the Preliminary Evaluation Criteria. The Procuring Entity therefore requested the Board to find that it did not breach Sections 66(2) and 66(4) of the Act as alleged by the Applicant.

The Board has considered the submissions of the parties and examined the documents presented before it. The Board earlier observed that the Applicant's bid was disqualified due to failure to fully complete the Form of Tender with a clear indication to whom it made its offer. The other reasons for the disqualification were failure to submit Profit and Loss statements with an Auditors' Report and for failing to show evidence of access to cash or line(s) of credit. The Board observes these are fundamental attributes that unless met, the Procuring Entity would find it

difficult to evaluate bidders' tenders. The Board therefore agrees with the Procuring Entity that the disqualification of the Applicant's bid was in line with the requirements of the Tender document.

To the above end, these grounds of appeal also fail.

Ground 7 - Loss to the Applicant

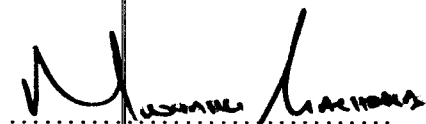
The Applicant submitted that if the tender was not annulled and awarded to it, it stood to lose substantially in terms of financial cost.

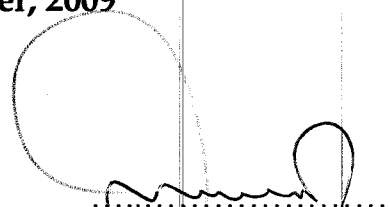
The Board notes that this ground is on the losses the Applicant could incur if not awarded the tender. In our view, costs incurred by tenderers at the time of tendering are commercial risks borne by people in business; this being an open tender where business risks are involved, each bidder carries its own costs.

Taking into consideration all the above, this Request for Review fails and is hereby dismissed.

The Procurement process may proceed.

Dated at Nairobi on this 16th day of September, 2009


.....
Signed Chairman


.....
Signed Secretary

