

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 49/2009 OF 5th NOVEMBER, 2009

BETWEEN

MAGIC GENERAL CONTRACTORS LTD.....APPLICANT

AND

MINISTRY OF PUBLIC HEALTH & SANITATION.....PROCURING ENTITY

Review against the decision of the tender committee of the Ministry of Public Health & Sanitation dated the 27th day of October, 2009 in the matter of Tender No. W. P. ITEM NO. D11 NB 601-JOB NO.8187A for the Proposed Development of Central Radioactive Waste Processing Facility at Oloolua Forest, Karen.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. Akich Okola	-	Member
Eng. C. A. Ogut	-	Member
Ms. Loise Ruhiu	-	Member
Ms. Judy Guserwa	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Ms. Kerina A. Rota	-	Secretariat

PRESENT BY INVITATION

Applicant, Magic General Contractors Limited

- | | | |
|--------------------|---|---|
| Mr. Nani N. Mungai | - | Advocate, Muriu Mungai & Co.
Advocates |
| Mr. Busei Marak | - | Managing Director |
| Ms. Hellen Wanjohi | - | Operations Manager |
| Mr. A. N. Njoroge | - | Sub- Contractor |

Procuring Entity, Ministry of Public Health & Sanitation

- | | | |
|-----------------------|---|---------------------------|
| Arch. L.L. Kibisu | - | CSA |
| Mr. Nicholas M. Mutua | - | S. S. Quantity Surveyor |
| Mr. E. Odari | - | Chief Procurement officer |
| Mr. Edward Mayaka | - | S.R.P.O |

Interested Candidates

- | | | |
|---------------------|---|---|
| Qs. Steve Mutua | - | Projects Coordinator, Vaghjiyani
Enterprises |
| Mr. Charles Wahome | - | Sub-Contractor, Vaghjiyani
Enterprises |
| Mr. Isaac Kamau | - | Consultant, Achelis |
| Mr. Isaac Thande | - | Technical Sales Engineer,
Schindler |
| Mr. Meshack Machawa | - | Technical Manager, Axis
Engineering Services Limited |

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

The tender for the Proposed Development of Central Radioactive Waste Processing Facility at Oloolua Forest, Karen was re-tendered after the cancellation of the first tendering process. The tender documents were issued on 9th September, 2009 to the list approved in the earlier tender as listed below:-

1. Bomco Building Construction Ltd
2. Terracraft (K) Ltd
3. Njuka Construction Co. Ltd
4. China Jiangsu International Economic-Technical Corporation
5. Magic General Construction Ltd
6. N. K. Brothers
7. Centurion Engineers and Builders Ltd
8. Vaghjiyani Enterprises
9. Intalbuild Imports Ltd
10. Buildmore Construction Company Ltd

The tender closed/opened on 25th September, 2009 at 10.00 am in the presence of tenderers' representatives and officials from Ministries of Public Health and Public Works. Six (6) bids were submitted out of the ten that were issued out. They were:-

- i) Magic General Contractors
- ii) Vaghjiyani Enterprises Ltd
- iii) Italbuild Imports
- iv) Njuca Consolidated Co
- v) Terra Craft (K) Ltd
- vi) N.K Brothers

EVALUATION

Preliminary Evaluation

The bids were then compared to the engineers estimate and the results were as follows

ITEM	TENDERER	TENDER SUM	BID % OF ESTIMATE	VARIANCE
1.	Magic General Contractors	486,000,000.00	94.67%	(-) 5.33%
2.	Vaghjiyani Enterprises Ltd	518,490,508.16	101.00%	(+) 1.00%
3.	Italbuild Imports	526,536,169.07	102.57%	(+) 2.57%
4.	Njuca Consolidated Co.	560,000,000.00	109.09%	(+) 9.09%
5.	Terra Craft (K) Ltd	564,556,821.00	109.97%	(+) 9.97%
6.	N.K Brothers	565,909,101.00	110.02%	(+) 10.02%
7.	OFFICIAL ESTIMATE	513,360,084.52	100.00 %	0.00%

A preliminary evaluation of the tender was carried out on the conformance to the following mandatory conditions:

- a) Proper presentation of document as per invitation
- b) Proper filling and signing of the Form of Tender
- c) The Tender be accompanied by Bid Bond for Kshs. 2,000,000 from an approved bank or approved insurance company and be valid for a period of not less than 90 days as per Clause 3.7 and 3.8.
- d) Business Questionnaire must be filled.
- e) Be without material deviation from requirements of the tender.
- f) Proper calculation of VAT on the grand summary page as indicated on page PP/5 Item 'C' of the tender documents
- g) Proper choice of subcontractors as per approved list

The results of the Preliminary Evaluation were as follows:-

Tenderer		Presentation of Docs	Bid Bond	Signed Form of Tender	VAT	Material Deviation +. 10%	Business Questionnaire	Choice of subcontractors	Remarks
Magic Contractors	General	√	√	√	X	√	√	√	Not Responsive
Vaghjiyani Ltd	Enterprises	√	√	√	√	√	√	√	Responsive
Italbuild Imports		√	√	√	√	√	√	√	Responsive
Njuca Ltd	Consolidated Co.	√	√	√	X	√	√	√	Not Responsive
Terra Craft (K) Ltd		√	√	√	√	√	√	√	Responsive
N.K Brothers		√	√	√	√	X	√	√	Not Responsive

Key:

- X - Means not responsive or to be disqualified;
- √ - Means responsive

The following tenderers namely, M/s Magic General Contractors and M/s Njuca Consolidated Co. Ltd were found to be non-responsive as they had excluded VAT for the PC and Provisional sums and therefore deviated from the requirements of the tender. M/s N. K. Brothers was declared non-responsive as its tender amount exceeded the official estimate by 10.02%. The allowable deviation in the contract was plus or minus 10%.

The estimated cost for the works, which was obtained by pricing a sample of the tender Bills of Quantities, was Kenya Shillings Five Hundred and Thirteen Million Three Hundred and Sixty Thousand and Eighty Four and Fifty Two Cents (KShs. 513,360,084.52) only.

The following table shows a price comparison of major items of the works between the official estimate and the lowest three responsive tenderers.

ITEM	UNIT	Vaghjiyani Enterprises Ltd	Italbuild Imports	Terra Craft (K) Ltd	ESTIMATE
VRC (1:1.5:3)	CM	12,000	9,700	14,000	10,400
12mm - 25mm reinf. bars	KG	100	105	120	108
100 x 50 x 3mm RHS rafter	LM	1,200	1,350	1,250	950
Lead sliding door	NO	120,000	400,000	100,000	775,865
Louvre block walling	SM	1,200	2,300	1,600	1,900
Granito tiles	SM	2,000	2,800	2,400	2,072
12mm thick base plate	NO	505	22,400	300	560
4,400 x 4,400 x 2,200 gms tank	NO	495,000	1,920,550	650,000	550,000
Medium duty cast iron cover 600 x 600 x 75mm thick	NO	15,325	12,500	4,000	17,029
Soak pit size 1,500mm diameter	NO	6,750	80,000	12,000	7,500

TECHNICAL EVALUATION

The technical evaluation was carried out on only the three lowest priced bids. The observations of the Evaluation committee on the bids were as follows:-

a) Vaghjiyani Enterprises Ltd

The tender was 1.00% above the estimated cost. The tender had an error of 3.28% to the contractor's disadvantage. The rates compared favourably well to the market rates. The contractor's work experience and technical personnel indicate that he is able to execute works of this nature and magnitude.

b) Italbuild Imports

The tender was 2.57% above the estimated cost. The tender had an error of 5.00% to the contractor's disadvantage. The rates compared favourably well to the market rates. The contractor's work experience and technical personnel indicated that it was able to execute works of this nature and magnitude.

c) Terra Craft (K) Ltd

The tender was 9.97% above the estimated cost. The tender had a negligible error of 0.082% to the contractor's advantage. The rates compare favourably well to the market rates. The contractor's work experience and technical personnel indicate that it was able to execute works of this nature and magnitude.

The Evaluation Committee noted that it was a selective tender where all the bidders were deemed technically competent therefore the lowest responsive

tender submitted by Vaghjiyani Enterprises Ltd at Kshs. 518,490,508.16 was recommended for award.

TENDER COMMITTEE DECISION

The Ministerial Tender Committee in its meeting No MPHS/09/2009-2010 deliberated on the recommendation of the Evaluation Committee approved the award be made to M/s Vaghjiyani Enterprises Ltd at a total cost of Kshs. 518,490,508.16

THE REVIEW

This Request for Review was lodged by Magic General Contractors Ltd on 5th November, 2009 against the decision of the Tender Committee of Ministry of Public Health & Sanitation in the matter of Tender No. W.P. ITEM NO.D11 NB 601-JOB NO.8187A for Proposed Development of Central Radioactive Waste Processing Facility at Oloolua Forest, Karen.

The Applicant was represented by Mr Nani N. Mungai, Advocate while the Procuring Entity was represented by Arch. L.L. Kibisu, C.S. Arch. Interested candidates Ms. Vaghjiyani Enterprises was represented by Qs. Steve Mutua projects coordinator , Ms Aehelis was represented by Mr. Isaac Kamau, a consultant , Ms Schindler was represented by Mr. Isaac Thande and Ms Axis Engineering Services General Contractors Ltd was represented by Mr. Meshack Machawa.

The Applicant raised two grounds of review and urged the Board to make the following orders:

- 1) The Procuring Entity's decision awarding the Tender to Vaghjiyan Enterprises be set aside and nullified.
- 2) The Procuring Entity's decision notifying the Applicant that it had not been successful in the Tender purportedly dated 27th October 2009 be set aside and nullified.
- 3) The Board to review the entire records of the procurement, including the evaluation of the tender price and substitute the decision of the Review Board for the decision of the Procuring Entity and award the Tender to the Applicant.
- 4) The Procuring Entity be ordered to negotiate and sign a contract with the Applicant in accordance with the Tender.
- 5) Further and/or in the Alternative and without prejudice to any of the other prayers sought herein the Review Board do direct the Procuring Entity to;
- 6) Undertake the evaluation of all bids afresh in strict adherence to the Tender, the Act and the Regulations.
- 7) The Procuring Entity be ordered to pay the costs of and incidental to these proceedings; and
- 8) Such other or further relief or reliefs as this board shall deem just and expedient.

GROUND 1 - Breach of Section 66(4) & Regulation 50(1)

The Applicant stated that it submitted the lowest bid at the opening of the tenders. It alleged that the Procuring Entity was in breach of Section 66(4) of the Public Procurement and Disposal Act 2005 (hereinafter called "the Act") as read together with Regulation 50(1) in awarding the tender to a Tenderer who did not have the lowest evaluated price. It submitted that the Procuring Entity was required under clause 5.9 of the tender document to make certain adjustments in determining the evaluated tender price. Clause 5.9 of the bid document provided as follows:

"In evaluating the tenders, the Employer will determine for each tender the evaluated tender price by adjusting the tender price as follows:

- a)*
- b) Excluding provisional sums and the provision, if any for contingencies in the Bill of Quantities, but including Day works where priced competitively.*
- c)"*

The Applicant submitted that the Procuring Entity in its response had stated that

"The Tender Evaluation was done as per clause 5.7 of the tender document. However, the tender document does not say that in determining the evaluated price, the provisional sums and contingencies in the Bills of Quantity should be excluded as the Contractor claims."

It further submitted that the Procuring Entity by its response had conceded that it did not read its own tender document. It alleged that the Procuring Entity had

actually disputed that there was a requirement to exclude provisional sums in its response under item (g) which states as follows:

“No provisional sums were to be excluded in arriving at the evaluated price. Provisional and PC sums form part of the tender sum and the evaluation in arriving at a decision considers the tender sum which form the offer as stated in the form of tender.”

The Applicant stated that it was not recommended for award as the Procuring Entity had deemed it to be non-responsive pursuant to Clause 3.3 in that it omitted to price for VAT for provisional sums. It argued that the provisional sums were figures inserted by the Procuring Entity in the tender. It further argued that the provisional sums were not supposed to be factored in the evaluation. It stated that the Procuring Entity was in breach of Regulation 50(1) which provides as follows:

“Upon completion of the technical evaluation under Regulation 49, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.”

It argued that the Procuring Entity was in breach of Regulation 50(1) in that it failed to evaluate the tenders according to requirements set out in Clause 5.9 of the bid documents.

The Applicant submitted that the Procuring Entity was in breach of Regulation 51(1) which provides as follows:

“An evaluation report prepared under section 66(5) of the Act shall include

.....

(f) The evaluated price of each tender showing any discounts, corrections or adjustments to the tender price and any conversions to a common of currency.

.....”

It urged the Board to look at the evaluation report as proof that the Procuring Entity did not make adjustments as required by Regulation 51(1)

The Applicant admitted that it put VAT for sums that were payable to the contractor but did not include VAT for the provisional sums. It argued that under clause 5.9 of the tender documents, provisional sums were supposed to be omitted in the evaluation of the price and its VAT was not payable to the contractor. It further argued that it had complied with the requirements of provisional sums in accordance with provisions in the instructions to tenderers.

In response, the Procuring Entity submitted that Provisional and Prime Cost sums formed part of the tender sum which it had considered during the evaluation of the tender price. It argued that no provisional sums were excluded in arriving at the evaluated price. It stated that the Applicant did not include VAT for item 18 on the grand summary page, which comprised of prime costs and provisional sums.

The Procuring Entity submitted that Clause 3.3 of the bid document which the Applicant read partially in its submissions provides as follows:

“ The tenderer shall fill in rates and prices for all items of the works described in the Bills of quantities. Items for which no rate or price is entered by the tenderer will not be paid for when executed and shall be deemed covered by the other rates and prices in the bill of Quantities. All duties and taxes and other levies payable to the contractor under the contract , or for any cause relevant to the contract as of 30 days prior to the deadline for submission of tenders , shall be included in the tender price submitted by the tenderer.”

The Procuring Entity stated that Clause 3.3 clearly provided that taxes and levies to the contractor were payable for all relevant works within the contract. It further stated that the taxes and levies should be included in the tender price. It submitted that under the section on “Particular Preliminaries” in the bid document, the tenderer was supposed to include VAT at the grand summary of the bid document which formed part of the tender price. It further submitted that it was very clear to bidders that any bidder who did not price for VAT at the end of the bid document would be disqualified

The Procuring Entity stated that in evaluation of tenders, adjustments can only be done on errors and not omissions. It alleged that in this particular case, the Applicant did not make an error by miscalculating the VAT but provided for VAT for ITEMS 1-17 but failed to include VAT for item 18 on prime cost and provision costs. It further submitted that if it were to award the bid to the Applicant, the Procuring Entity would have to pay for VAT on those items which would lead to a different offer that was not given by the Applicant.

The Board has considered the submissions of all parties and examined the documents presented before it. The issues to be determined by the Board are whether:

1. the Applicant was rightfully disqualified for failing to include VAT in its prime costs and provisional sums and;
2. the Procuring Entity evaluated bids pursuant to Clause 5.9 which provides as follows:

“In evaluating the tenders, the Employer will determine for each tender the evaluated tender price by adjusting the tender price as follows:

- a.***
- b. Excluding provisional sums and the provision, if any for contingencies in the Bill of Quantities, but including Day works where priced competitively.***
- c.”***

The Board has scrutinized the bid documents and observes that the Procuring Entity did a prequalification as provided for by clause 1.4 of the bid document. The Board further observes that the Procuring Entity conducted a preliminary evaluation pursuant to Clauses 5.5, 5.6, 5.7, 5.8 and 5.9 of the bid document. On responsiveness, the Board notes Clause 5.5 of the bid document provided that only substantially responsive tenders would be subjected to detailed evaluation and that a responsive tender is one that conforms to all the terms, conditions and specifications of the tender documents without material deviation and reservations. Clause 5.6 of the bid document clearly provided that if a tender was not substantially responsive it shall be rejected and may not subsequently be made

responsive by correction or withdrawal of the non-conforming deviation or reservation.

The Board has examined the bid document submitted by the Applicant. The Board notes that the Applicant did not provide VAT for item 18 on the grand summary sheet. However the Board notes that the Applicant provided VAT for items 1-17.

The Board further notes that Instruction to tenderers required bidders to be substantially responsive to the requirements of the tender documents. The mandatory conditions to be complied with were:-

1. Proper presentation of document as per invitation
2. Proper filling and signing of the form of tender
3. The Tender should be accompanied by Bid Bond for Kshs.2,000,000 from an approved bank or approved insurance company and be valid for a period of not less than 90 days as per Clause 3.7 and 3.8.
4. Business Questionnaire must be filled.
5. Be without material deviation from requirements of the tender.
6. Proper calculation of VAT on the grand summary page as indicated on page PP/5 Item 'C' of tender documents.
7. Proper choice of subcontractors as per approved list attached (Appendix III)

The Board finds that the Applicant did not meet the mandatory requirement No.6 in that it failed to add VAT to all items at the grand Summary page as required under the section on "Particular Preliminaries" which provides as follows:

“VAT SHALL be added at the Grand Summary page (Page GS/1). Failure to do so will render the tender non-responsive and therefore automatic disqualification.”

The Board notes that the Applicant was disqualified at the preliminary stage for not complying with the VAT requirement for the Prime Cost sums and Provisional Sums. The Board in **Application No. 8/2007 between Kitek 7 VS Ministry of Youth Affairs** held that failure by the tenderer not to have properly filled the VAT as required by the tender conditions rightly led to its disqualification. Consequently, the Board finds that these omissions were very serious and hence the Procuring Entity was right in disqualifying the Applicant at the Preliminary stage.

With regard to the issue of whether the Procuring Entity evaluated the Applicants bids pursuant to clause 5.9, the Board notes that this was a requirement in the instruction to tenderers under clause 5.9 (b) on Tender Opening and Evaluation. The Board observes that the Applicant was disqualified for being non responsive at the preliminary stage and hence its bid was not considered further for the evaluation of the tender price.

With regard to breach of Section 66(4), the Board notes that the Applicant was not the lowest evaluated bid as it was disqualified at preliminary evaluation stage.

In the circumstances, the Board finds that the Procuring Entity acted appropriately by disqualifying the Applicant at the preliminary stage pursuant to regulation 47(2) which provides as follows:

“The Evaluation Committee shall reject tenders, which do not satisfy the requirements set out in paragraph (1).”

Accordingly this ground fails.

GROUND 2 Breach of Section 2

The Applicant alleged that by awarding the tender to a higher priced bidder the Procuring Entity breached Section 2(a), (b), (c) ,(d) and (e) of the Act. It submitted that the law requires the Procuring Entity to award a tender to the lowest bid after evaluation. It further submitted that by awarding the tender to the successful bidder the Procuring Entity did not maximize economy and efficiency.

In conclusion, it stated that the evaluation committee’s work was simple, since it was expected to take all bids, remove all the provisional sums, do a simple arithmetic and award the tender to the Applicant as is required by provisions of the Act and Regulations.

In response, the Procuring Entity stated that it did not award the tender to the Applicant because they were non-responsive in that it did not comply with Clause 3.3 of Instruction to Tenderers on VAT calculations. It further stated that the Applicant omitted to price for VAT for Provisional Sums and Prime Costs Sums which were relevant to the contract and whose VAT was payable as per contract.

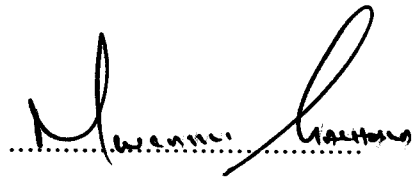
As earlier stated, the Board finds that the Applicant did not quote for VAT for the provisional sums and prime cost sums. The Board notes that the Applicant was therefore not the lowest evaluated as it was disqualified for being non-responsive.

The Board holds that Section 2 of the Act cannot be breached on its own and Section 66(4) could not have been breached as well given that the Applicant was disqualified at preliminary stage.

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

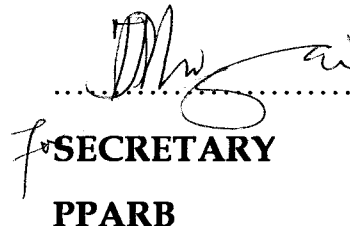
The Procurement Process may proceed.

Dated at Nairobi on this 3rd day of December, 2009



CHAIRMAN

PPARB



SECRETARY

PPARB