

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 47/2009 OF 30th OCTOBER, 2009

BETWEEN

INTEX CONSTRUCTION LTD/S. S. METHA & SONS JV... APPLICANT

AND

MINISTRY OF ROADS.....PROCURING ENTITY

Review against the decision of the Permanent Secretary, Ministry of Roads dated the 19th day of October, 2009, in the matter of Tender No. EUROPE AID/126354/WKS/KE LOT NO. 3 CONTRACT No. RD 0584 for the Northern Corridor Rehabilitation Programme-Phase III, Rehabilitation of Webuye-Malaba (A 104) Road.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Ms. Loise Ruhui	-	Member
Mr. Sospeter Kioko	-	Member
Ms. Natasha Mutai	-	Member
Mr. Akich Okola	-	Member

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant, IntexConstruction Ltd/S.S. Metha & Sons JV

- | | | |
|-----------------------|---|-------------------------------------|
| Mr. Mohammed Nyaoga | - | Advocate, Mohammed Muigai Advocates |
| Mr. Muthomi Thiankolu | - | Advocate, Mohammed Muigai Advocates |
| Mr. James Singh | - | Advocate |
| Mr. Sanjay Oberoi | - | Manager |
| Mr. P. S. Tak | - | Manager |

Procuring Entity, Ministry of Roads

- | | | |
|--------------------|---|-------------------------------|
| Eng. S. M. Osiro | - | Representative of CECR |
| Ms. Mary N. Mwangi | - | Principal Procurement Officer |
| Ms. Truphosa Achar | - | Legal Officer |

Interested Candidates

- | | | |
|---------------------|---|---|
| Mr. C. N. Kihara | - | Advocate, H. Young & Co. (E.A.) Ltd |
| Ms. Arre Kaguri | - | Legal Assistant, C. N. Kihara & Co.
Advocates |
| Mr. George Lugalini | - | Administration Officer, Sogea Satom |
| Mr. Humphrey Mwavau | - | Human Resource & Administration,
Spenco/Stirling |

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 European Union provided a grant to the Government of Kenya to fund the rehabilitation of the Road from Timboroa - Eldoret - Webuye - Malaba (A 104) in three lots:-

- (a) Timboroa - Eldoret (A104) Road - Lot 1
- (b) Eldoret - Turbo - Webuye (A104) Road - Lot 2
- (c) Webuye - Malaba (A104) Road - Lot 3.

The Ministry of Roads was to co-finance the Northern Corridor Rehabilitation Programme Phase II together with the European Commission (here in after referred as the EU) in accordance with the European Development Fund (EDF). The tenders were opened on 12th February, 2009.

THE EVALUATION

The Evaluation Committee together with EU observers evaluated the tenders on Administrative Compliance. The administrative compliance grid included in the tender dossier was used to assess the compliance of each of the tenders with the administrative requirements of the tender dossier.

The following tenders were administratively non-compliant and were not considered further:

Tender envelope number	Tenderer name	Reason(s)
2 (Lot 3)	Stirling/Kabuito/Spenco JV	Tender Security not in name of J.V., and therefore not fully complying with the Form of Model Tender Guarantee. Tenderers Declaration in respect of the exclusion criteria listed in Section 2.3.3 of the Practical Guide for J.V. partners not included, as required under instructions to Tenderers Art. 14.3.10
3 (Lot3)	Intex-S.S. Mehta JV	Tenderer's Declaration in respect of the exclusion criteria listed in Section 2.3.3 of the Practical Guide not included, as required under instructions to Tenderers Art. 14.3.10
5 (Lot 3)	Sogea-Satom	Taxes column in BOQ not filled in, as required under Instructions to tenderers Art 15.4, and Tender clarifications and modifications.

Technical compliance

Each evaluator on the Evaluation Committee used the technical evaluation grid included in the tender dossier to assess the compliance of each of the tenders with the technical requirements of the tender dossier.

Financial evaluation

The Evaluation Committee checked the technically compliant tenders, for each lot for arithmetical errors which were corrected on the following basis:

- where there was a discrepancy between amounts in figures and in words, the amount in words prevailed;
- except for lump-sum contracts, where there was a discrepancy between a unit price and the total amount derived from the multiplication of the unit price and the quantity, the unit price as quoted prevailed, except where the Evaluation Committee agreed that there was an obvious error in the unit price, in which case the total amount as quoted prevailed;
- where unconditional discounts applied to financial offers for individual lots, the discount was applied to the financial offer as a whole.

The arithmetically corrected financial offers of the only technically compliant tenderer were compared with the Engineer's estimate and further comparison made with those of the non-compliant tenders in order to give an indication of how reasonable and competitive the rates of the only technically compliant tenderer for each lot are.

Comparisons between the tenderers' prices and the Engineer's Estimate have generally been undertaken on combined BOQ totals that cover main work activities.

The Evaluation Committee ensured that there was no detection of the recommended tenderer or members in their consortium in the early warning system (W5). The Evaluation Committee recommended that the project be awarded to Maltauro/H. Young J.V.

THE REVIEW

The Request for Review was lodged on 30th October, 2009 by Intex Construction Limited/S.S. Metha and Sons JV. It is requesting the Board to cancel the tender awarded to M/s Maltauro-H. Young JV and be awarded to it.

At the hearing, the Applicant was represented by Mr. Mohammed Nyaoga, Advocate, Mohammed Muigai Advocates. The Procuring Entity was represented by Eng. S. M. Osiro. The Interested Candidates present included Malturo - H. Young JV represented by Mr. C. N. Kihara, Advocate; Sogea Satom was represented by Mr. George Lugalini; while Spenco/Stirling was represented by Mr. Humphrey Mwanau.

The Board noted that this Request for Review was made against the decision of the Permanent Secretary, Ministry of Roads dated 19th October 2009 in the matter of Tender No. Northern Corridor Rehabilitation Programme - Phase III, Rehabilitation of Webuye-malaba (A 104 Road), Tender No. Europe Aid/1263354/WKS/KE LOT NO.3, Contract No. RD 0584.

PRELIMINARY OBJECTION

At the commencement of the hearing the Board noted that the Procuring Entity and the successful candidate had filed preliminary objections and the Board directed that the Preliminary Objection be argued first in accordance with Regulation 77 (4).

1. PROCURING ENTITY'S PRELIMINARY OBJECTION

The Procuring Entity argued that the contents of the new appeal were not different from those under Case No. 39/2009 of 14th October, 2009, whose ruling was in their favour. It further stated that the fresh preliminary objection it was raising was based on the following facts:

- i) The tender was carried out in accordance with the European Union procurement procedures that are contained in the Practical Guide to Contract Procedures for EC external actions for the 9th European Development Fund.
- ii) The above was occasioned by a financing agreement between the Government of Kenya and the European Union
- iii) The EU procurement procedure had different bid protest procedures as stated by Article 37 of Instructions to tenderers of volume 1, section 1 page 1-18 of the tender dossier which was as follows:-
 - a) A tenderer who believed that it had been harmed by an error of irregularity during the award process may petition the Contracting Authority directly and inform the European Union Commission.
 - b) The Contracting Authority must reply within 90 days of receipt of the complaint.

- c) The European Union Commission should then communicate its opinion to the Contracting Authority and do all it can to facilitate an amicable solution between the complainant (tenderer) and the Contracting Authority.
 - d) If the above procedure failed, the tenderer may have recourse to procedures established under the National Legislation of the state of the Contracting Authority, that is, the Public Procurement Administrative Review Board, under the Public Procurement and Disposal Act, 2005, of the Laws of Kenya.
- iv) When the European Union protest procedure under Article 37 of Instructions to Tenderers was followed, the first expected step was supposed to be from the tenderer if they believe they have been harmed by an error of irregularity during the award process to petition the Contracting Authority, direct and inform the EU Commission.

The Procuring Entity submitted that the tenderer complied with the above requirement vide their letter Ref. MOR/HO/Pst/so/rm/660/09 dated 9th October, 2009

It stated that the second expected step was supposed to be from the Contracting Authority, which was expected to reply within 90 days. The Contracting Authority replied vide their letter Ref. No. MOR/A.82.02/A (TY) dated October, 2009.

It further stated that the third expected step was supposed to be from the European Union Delegation which was to give their opinion. The Delegation had not given its opinion.

It observed that the Applicant had ignored the third step and proceeded to file their case No. 47/2009, dated 14th October, 2009, hence the Procuring Entity's reason for raising a preliminary objection as the European Union procurement procedures had been breached by the Tenderer contrary to both Sections 6(1) and 7(1) of the Public Procurement and Disposal Act, 2005 which state as follows:-

i) Section 6(1)

Where any provision of this Act conflicts with any Obligations of the Republic of Kenya arising from a treaty or other agreement to which Kenya is a party, this Act shall prevail except in instances of negotiated grants or loans.

ii) Section 7(1)

"If there is a conflict between this Act, the regulations or any directions of the Authority and a condition imposed by the donor of funds, the condition shall prevail with respect to a procurement that uses those funds and no others."

In view of the above, it urged that the Review Board had no jurisdiction to

hear this matter, at this stage, as it was premature.

It argued that if this substantial case was heard, it would be in contravention of the Public Procurement and Disposal Act, 2005 and its Regulations 2006 and it would precipitate a negative response from the Development Partners.

The Procuring Entity quoted the fundamental principle of res judicata which states that at final judgment already decided between the parties and on the same subject matter was conclusive and could not be raised again. It stated that the issues raised in Application No. 39/2009 of 14th October, 2009 were the same issues raised in the present application.

It stated further that Pursuant to the provisions of Clause 77 of the Regulations 2006, the Procuring Entity prayed that the Review Board declares the Applicant's appeal pre-mature, as was in case No. 39/2009 of 14th October, 2009.

2. PRELIMINARY OBJECTION BY MALTAURO-H YOUNG JOINT VENTURE

MALTAURO- H. YOUNG & CO. EA. J.V. raised a preliminary objection and stated as follows:

- i) The Request for Review dated 30th October, 2009, and filed on the same day, had been filed out of time, and hence the same should be struck out/dismissed without hearing it on merit, as the same was

substantively concerning the decision of the Respondent made by letter dated 28th September, 2009, but tactically disguised as concerning the decision of 19th October, 2009

- a. The aforesaid was in breach of Regulations 73 (1), (2), (c) of the Public Procurement and Disposal Regulations, 2006.
- ii) That the Public Procurement Administrative Review Board had no jurisdiction to hear and/or determine, the Request for Review due to the following reasons:-
- a) The tender relevant hereof was not subject to the application of the provisions of the Public Procurement and Disposal Act, 2005 and/or the Public Procurement and Disposal, Regulations, 2006
 - b) Further Given the circumstances and the rules/regulations provided as governing the subject tender in view of the Provisions of Sections 6(1) and 7(1) of the Public Procurement and Disposal Act, 2005, read together with Regulations 77 (1) of the Regulations, 2006, and as considered against the clauses.
 - c) And the same was based on confidential information obtained and/or retained illegally and/or in contravention of Law. For instance, in breach of Sections 44 (1) (a), (b), (c) and (d) of the Public Procurement and Disposal Act 2005 and Regulations 66(3) of the Public Procurement and Disposal Regulations, 2006, and should be

ordered expunged/excluded whenever such information was referred to.

iii) For (a) and (b) of ground 1 of the Request for Review it was incorrect to say that there was no Clause 2.3.3 in the Practical Guide to the Contract Procedures under the 9th European Development Fund as there was a clear reference of it in Clause 3.4 of the tender document and a further substantive provision was also set out in Administrative Compliance Grid 9th column to be used by the evaluation committee.

a) Further in the tender document Clauses 3.4 (participation) and 3.5 they state that the eligibility requirements detailed in sub Clause 3.1 to 3.4 also apply to all parties in a Joint Venture/Consortium, sub contractors.

b) In tender clause 14 it was very clearly required the content and presentation of the tender and in particular Clause 14.3.10 made it mandatory for a tenderer to provide a Statement of the Facts under Clause 2.3.3 of the Practical Guide to Contract Procedures Financial from the 9th European Development Fund.

c) Further in tender Clause 28.3 it is explicitly provided that "if a tender does not comply with the requirements of the evaluation grid, it will be rejected by the evaluation committee when checking compliance.

iv) The Applicant's tender was not "the lowest bid satisfying the administrative and technical criteria" as required by Clause 31.1 of the tender conditions more so when one looked at the criteria for award set

out in tender Clause 31.1 and/or in the alternative, it was not the lowest evaluated tender, as the same, was not found to be Administratively responsive, in the first instance, so as to proceed for the technical and commercial evaluation as prescribed.

- v) The Request for Review was fatally defective for want of jurisdiction and want of merit as demonstrated by Clauses 33, 33.1, 33.2, 33.3, 33.4, 34.1, 34.2, 34.3 (second most advantageous), 36.5 (respect for human rights) 37.1 (procedure provided of the appeal and a reply by the procuring entity must be done within 90 days of receipt of the complaint), and 37.3 in default of foregoing, recourse to procedures established under the national legislation of the state of the Procuring Entity. Official Journal of the European Communities of 23.11.2002 referenced page L320/1 provides that Decision No.2/2002 of the ACP-EC council of Ministers of 7th October 2002, by Article 1 under General Regulations, provided that;

“The preparation and awarding of contracts financed from the resources of the European Development Fund shall be governed by the general regulations on works, supply and service contracts financed by the European Development Fund”

- vi) In the alternative and without prejudice to the above, the applicant's request for review aforesaid is fatally defective and barred from being heard on merit, as the same was res judicata, and in breach of the equitable principle estopped by record, has no merit at all and should be rejected with costs.

vii) Further, it argued that this Board had already made those findings in Application No. 39/2009. It stated that the Application made earlier was on the same tender, same parties and same substantive issue and so the Applicant in re- filing the proceedings was an abuse of the Board's powers and the process of the review. It submitted that the Applicant did not try to set aside the findings by the Board, on this applicable law or facts entered into by the Board in Application No. 39/2009. It stated that what matters is that the Board had made a decision whether wrong or right. Further, there was no attempt made by the Applicant to arrest the ruling made in the first Application. This application he concluded was frivolous and Section 93 (2) provides that where an appeal was frivolous the Board would have no jurisdiction to review such an appeal.

Finally the Interested Candidate relied on a High Court decision **Daltas Shipping Company Ltd vs. Expo Chindavi, 1966 Queens Bench page 630**, on the jurisdiction of the Board. The holding in this case he stated was that even in a situation where an issue has been decided in an interim award, you cannot reopen it, and even in a quasi judicial body like this Board one cannot keep hearing the same matter. Based on this argument it urged the Board to apply the principle of res judicata

In response, the Applicant argued that the respondent and the Procuring Entity took contradictory positions in that they argued on one end that the procedure had not been exhausted at the same time that the appeal was out

of time. It argued that Clause 37 sets out in the tender documents the appeal procedure and that to exhaust the procedure beyond fourteen (14) days, it required ninety (90) days. Clause 37.2 was open ended as it did not state within which period the European Union must communicate its opinion. It further stated that if the procedure therein failed, the tenderer had recourse to exhaust the domestic mechanism. It argued that it had petitioned the Contracting Authority directly and only informs the commission, and that the Contracting Authority had replied. It argued further that the appeal was not based on the letter dated 19th October, 2009. It submitted that the effect of the ruling of the case No. 39/ 2009 was that the Application was made prematurely, yet this was not the case. The Applicant referred the Board to the letter dated 19th October, 2009 and submitted that the Procuring Entity had sealed their fate in that it stated in the last paragraph that the appeal be rejected by the Board. The Applicant argued that Section 7 (1) of the Public Procurement and Disposal Act, 2005 did not apply as this project was not purely donor funded and urged the Board to relook at its earlier decision. It argued further that the project was co-financed by the Kenyan Government and the European Development fund and so Section 7 (1) did not apply.

The Board has carefully considered the representations of the Applicant, the Procuring Entity and the interested candidate, and examined the documents submitted before it.

It is important to state briefly the factual background to put the Request for Review in context. A brief background of the tender is as follows;

1. The tender was advertised in the Nation newspaper on 30th October, 2008. The tender advertisement notice stated at clause 4 that the tender was to be financed under the financing agreement No.9774/Ke. The notice also stated at clause 21 that the legal basis of the tender was ACP-EC Partnership agreement signed at Cotonou on 23rd June 2000 - Decision No.2/2002 of the ACP-EC Council of Ministers published in OJL 320 of 23.11.2002.

The Board has noted that the Financing Agreement was signed between the Government of Kenya and the European Commission on 23rd November, 2007.

This tender was for rehabilitation of part of the Northern Corridor connecting the port of Mombasa to Uganda and was in three lots as follows;

- (i) Lot 1:Timboroa - Eldoret (73km)
- (ii) Lot 2:Eldoret - Webuye (59km)
- (iii) Lot 3: Webuye - Malaba (61km)

This Request for Review relates to Lot 3, Webuye-Malaba Road only.

2. The tenders were opened on 12th February 2009. Thereafter, the Contracting Authority carried out the evaluation process and the Applicant was disqualified for failing to submit a sworn declaration statement contrary to Rule 2.3.3 of the Practical Guide, Grounds for

Exclusion. The Contracting authority forwarded its recommendation to the EC seeking their "No objection" to the award of the contract. In their letter of "No objection" dated 28th July 2009 the EC observed as follows that:-

- a. The EDF procurement policy is to apply the procedures with some flexibility to ensure fair and wide competition.*
- b. The basis on which the offers were declared administratively non-responsive was in at least one case minor and clarification should have been sought. They felt that the principle of proportionality had not been applied.*
- c. However they noted that the above would not have changed the outcome*
- d. That an explanation in the evaluation report should have shown reasons why the evaluation committee awarded the 3 contracts to the same contractor if they knew that he could not deliver for all three lots together.'*

The Ministerial Tender Committee deliberated the matter on at least two occasions and the Committee resolved to award the tender to M/s. Maltauro/H.Young J.V.

3. On 28th September 2009 the Contracting Authority wrote to the Applicant informing it that it was unsuccessful. The letter stated that the ground for failure was that the tender was not administratively compliant as the Tenderer's Declaration in respect of the exclusion criteria listed in Section 2.3.3 of the Practical Guide was not included as was required under Instructions to the Tenders Articles 14.3.10.
4. On 9th October 2009, the Applicant wrote to the Procuring Entity stating its ground of objection to the award of the tender and requested for a review of the decision awarding the tender to M/s Maltauro/H. Young.
5. On 19th October, 2009 the Procuring Entity wrote a detailed five page letter reiterating the grounds on which the Applicant was disqualified. The said letter concluded as follows:

"In light of the above, your objection in connection with your tender is based on wrong premise and calculated to inhibit finalization of the procurement process for the contract for the project and intended to be injurious to the Procurement Authority without any basis at all and is hereby rejected. By a copy of this letter, we are requesting the European Commission to dismiss your appeal under the Provisions of Article 37 of the Instructions to Tenders contained in the Tender Dossier."

6. On 14th October, 2009 the Applicant filed a Request for Review No.39 of 2009 against the Procuring Entity. That Request was made against the decision to award the tender to M/s Maltauro/H. Young and was based on the letter of notification dated 28th September 2009.

The said Request for Review was heard on 28th October 2009 and the decision of the Board was made on 2nd November 2009.

The Board in its ruling held that this was a procurement governed by the European Commission Procurement Guidelines and therefore the Applicant had to exhaust the appeal mechanism as set out in Article 37 which provides as follows:

“Tenderers believing that they have been harmed by an error or Irregularity during the award process may petition the contracting authority directly and inform the Commission. The contracting authority must reply within 90 days of receipt of the complaint.

Where informed of such a complaint, the Commission must communicate its opinion to the contracting authority and do all it can to facilitate an amicable solution between the complainant (tenderer) and the contracting authority.

If the above procedure fails, the tenderer may have recourse to procedures established under the national legislation of the state of the contracting authority.”

The Board upheld the preliminary objections raised by the Procuring Entity and the successful candidate and dismissed the Request for Review.

7. On 30th October 2009 (before the delivery of the decision in Application No.39 of 2009), the Applicant filed the present Request for Review.
8. The only difference between Application No.39/2009 of 23rd October, 2009 and this Request for Review is that the former is expressed to be against the decision of the Procuring Entity made on 28th September 2009, while the latter is stated to be against the decision made on 19th October 2009. It is noteworthy that the letter dated 19th October 2009 was one of the documents produced by the Applicant in Request for Review No.39 of 2009.

Taking all the above facts into consideration, it is clear that this Request for Review is similar in all aspects to the Request for Review No.39/2009 of 23rd October, 2009 which was dismissed on 2nd November 2009, in that;

- i) The parties are the same;
- ii) The tender is the same;
- iii) The documents relied on are the same; and
- iv) The award of the tender being challenged is the same.

The Board has noted that in this Request for Review, the Applicant stated that it is challenging the decision of the Procuring Entity communicated in the letter dated 19th October 2009. As the Board has already observed, the letter dated 19th October 2009 was written in reply to the letter by the Applicant dated 9th October 2009. In its letter dated 9th October 2009, the Applicant had given reasons why it should have been awarded the tender. The letter by the Procuring Entity dated 19th October 2009 gave the reasons why the Applicant was not successful. That letter by the Procuring Entity is not and could not be the letter of award. It is clear that the letter only gave the reasons why the Applicant was not successful. It concluded by requesting the European Commission to conclude the Appeal.

As the Board stated in Application No.39 of 2009, this tender was conducted under, the European Commission Procurement Rules. This was clearly stated in the tender advertisement notice and in the Tender Dossier. The Appeal mechanism is clearly stated in Article 37 which at the risk of repetition states as follows:-

"Tenderers believing that they have been harmed by an error or irregularity during the award process may petition the contracting authority directly and inform the Commission. The contracting authority must reply within 90 days of receipt of the complaint.

Where informed of such a complaint, the Commission must communicate its opinion to the contracting authority and do all it can to facilitate an amicable solution between the complainant (tenderer) and the contracting authority.

If the above procedure fails, the tenderer may have recourse to procedures established under the national legislation of the state of the contracting authority”.

The Board notes that Article 37 does not provide the period within which the European Commission must give its decision. A good bid protest mechanism should have a time frame. The bid protest mechanism under the Public Procurement and Disposal Act, 2009 has clearly defined time frames. The question that arises is whether the Board has the power to define the time frame within which the European Commission should give its decision. The obvious answer to that question is that the Board can only exercise the powers donated to it by Section 98 of the Act. The Board has no power to order the European Commission to give its opinion. As already stated in the decision in Appeal No.39/2009 of 23rd October, 2009,

“It is clear that when a tenderer participates in a tender that falls under European Commission Procurement procedures, it is bound to follow all the instructions including the bid protest mechanism. It is also clear that under the European Commission Procurement procedures, the Contracting Authority is given a period of 90 days within which to reply to a complaint. The complaint should also be copied to the European Commission. The Commission shall thereafter communicate its opinion to the Contracting Authority and shall also facilitate an amicable solution between the tenderer and the Contracting Authority. It is only after the Commission has given its