

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 04/2010 OF 13th JANUARY, 2010

BETWEEN

ARPLAD ARCHITECTSAPPLICANT

AND

MINISTRY OF HOUSING..... PROCURING ENTITY

Review against the decision of the Tender Committee of The Ministry of Housing dated the 30th December, 2009 in the matter of Request for Proposal for Provision of Architectural Consultancy Services for the Design, Documentation, and Supervision of Construction of the Soweto East - Zone A Redevelopment at Kibera.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka - Chairman
Mr. Joshua W. Wambua - Member
Ms. Judith Guserwa - Member
Ms. N. Mutai - Member

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant, Arplad Architects

Mrs. W. Wambugu - Advocate
Mr. K. Wagaiyu - Architect
Mr. G. Koigi - Quantity Surveyor

Procuring Entity, Ministry of Housing

Mr. E. Ochola Odari - Chief Procurement Officer

Interested Candidates

Mr. M. Wambugu - Architect, Wambugu Mathews Associates
Mr. Mwenda Ikiunga - Quantity Surveyor, Wambugu Mathews Associates
Mr. P. A. Onacha - Quantity Surveyor, Lins Consult
Mr. Eugenia Muoronga - Procurement Officer, Kenchuan Architects

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

This was a restricted tender where ten pre-qualified bidders were invited on 22nd May, 2009 to submit their tenders. The tender was for Provision of Architectural Consultancy Services for Design, Documentation and Supervision of Construction of Soweto East- Zone A: Redevelopment at Kibera-Nairobi. The tender closed/opened on 4th June, 2009 where six tenders were received from the following firms:

1. Otieno & Kungu Associates

2. Wambugu Mathews Associates
3. Kenchuan Architects
4. Arplad Architects
5. Inbred Architects
6. Lins Consult

Evaluation

This was conducted by a committee chaired by Mr. J. G. Wairagu and was based on the following criteria:

| S/No | Parameter | Points |
|-------------|--|---------------|
| 1. | Design Proposal | |
| | Presentation and Clarity of the Design | 20 |
| | Functionality of the Design proposal | 15 |
| | Innovativeness | 10 |
| | Aesthetics | 10 |
| | Accessibility | 5 |
| | Environmental Issues | 10 |
| | Costs Estimates | 30 |
| | Sub-total | 100 |
| 2. | Professional Capability | |
| | Lead Consultant | 6 |
| | Project Architect | 5 |
| | Project Quantity Surveyor | 5 |
| | Project Civil/Structural Engineer | 5 |
| | Project Mechanical Engineer | 5 |
| | Project Electrical Engineer | 5 |
| | Project Land Surveyor | 3 |

| | | |
|----|-------------------------------------|------------|
| | Project Environmental Impact Expert | 3 |
| | Proposed Methodology & Work plan | 3 |
| | Sub-total | 40 |
| 3. | Grand Total | 140 |

A summary of the technical scores were as tabulated below:

| Bidder's Name | Design Proposal | Teams Capability | Total |
|----------------------------|------------------------|-------------------------|--------------|
| Lins Consult | 71 | 39 | 110 |
| Otieno & Kungu Associates | 67 | 28 | 95 |
| Arplad Architects | 72 | 35 | 107 |
| Inbred Architects | 26 | 33 | 59 |
| Wambugu Mathews Associates | 66 | 32 | 98 |
| Kenchuan Architects | 54 | 27 | 81 |

Arising from the above information, three bidders namely, Lins Consult, Arplad Architects and Wambugu Mathews Associates qualified for financial evaluation after scoring above the cut-off mark of 98 marks.

Financial Evaluation

The financial proposals were opened on 10th July, 2009 and the prices were as follows:

| NAME OF FIRM | FINANCIAL PROPOSAL | 16% VAT | TOTAL |
|----------------------------|---------------------------|----------------|--------------|
| Lins Consult | 91,500,000.00 | 14,640,000. | 106,140,000. |
| Arplad Architects | 70,680,000.00 | 11,308,800. | 81,988,800. |
| Wambugu Mathews Associates | 43,572,900.00 | 6,971,664. | 50,544,564. |

The financial scores were calculated using the following formulae:

$$sf = 100\% \times Fm/f$$

Where sf = financial score

Fm = minimum or lowest price (lowest financial proposal)

F = price of proposal under consideration

The financial scores were as follows:

| NAME OF FIRM | FINANCIAL SCORE (POINTS) |
|----------------------------|---------------------------------|
| Wambugu Mathews Associates | 60 |
| Arplad Architects | 37 |
| Lins Consult | 29 |

The financial proposal submitted by Wambugu Mathews Associates was found non-responsive for the following reasons:-

- a) Its financial proposal was not presented in the format set out in the Request for Proposal.
- b) The bidder had indicated unrealistically low time frame of about four months for the works.
- c) Its proposal had a rider that its fee was a mere guide and would change in proportion to contract period.

Therefore, the proposal submitted by Wambugu Mathews Associates was disqualified and was not considered in the next stage of the evaluation which involved combining the technical and financial scores. The combined scores were as follows:

| NAME OF FIRM | TECHNICAL SCORES | FINANCIAL SCORES | COMBINED SCORES | RANK |
|---------------------|-------------------------|-------------------------|------------------------|-------------|
| Arplad Architects | 107 | 37 | 144 Points | 1 |
| Lins Consult | 110 | 29 | 139 Points | 2 |

In view of the above information, Arplad Architects emerged the lowest responsive bidder and was recommended by the Evaluation Committee for negotiations.

This recommendation was presented to the Tender Committee on 9th November, 2009. After deliberation, the Tender Committee deferred the award to enable the Procuring Entity to get a confirmation from Wambugu Methews Associates that the bidder will stick to its tender sum provided in the form of tender. In another meeting held on 25th November, 2009, the award was deferred again. Meanwhile, by a letter dated 4th December, 2009, the Procuring Entity requested the three bidders that were technically responsive to re-submit their financial proposals in accordance with forms IV to VII of the RFP document by 8th December, 2009 which they did. The proposals were opened on the same day at 11.15 a.m.

The evaluation committee re-submitted the report to the tender committee on 14th December, 2009 with a recommendation to award the tender to Wambugu Mathews Associates. The Tender Committee concurred with the recommendation of the Evaluation Committee and awarded the tender to Wambugu Mathews Associates at Kshs. 50, 554, 556.00.

Notification letters to the successful and unsuccessful tenderers are dated 28th December, 2009.

THE REVIEW

This Request for Review was lodged by Arplad Architects on 13th January, 2010 against the decision of the Tender Committee of the Ministry of Housing dated 30th December, 2009 in matter of Request for Proposal for Provision of Architectural Consultancy for the Design, Documentation and Supervision of Construction of the Soweto East - Zone A Redevelopment at Kibera-Nairobi. The Applicant was represented by Mrs. W. Wambugu, Advocate while the Procuring Entity was represented by Mr. E. Ochola Odari, Chief Procurement Officer. Wambugu Mathews Associates, an Interested Candidate, was represented by Mwenda Ikiunga, Quantity Surveyor.

The Applicant has raised thirteen grounds of appeal and urged the Board to order:

1. "That pending the hearing and final determination of this request for review, the procurement proceedings by the procuring entity the Ministry of Housing in respect of request for proposal (RFP) for Provision of Architectural Consultancy Services for the Design, Documentation and Supervision of Construction of the Soweto East - Zone A Redevelopment at Kibera - Nairobi, be suspended.
2. That the decision of the procuring entity in respect of request for proposal (RFP) for Provision of Architectural Consultancy Services for the Design, Documentation and Supervision of Construction of the Soweto East - Zone A Redevelopment at Kibera - Nairobi, as communicated in its letter dated 30th December 2009 determining the Applicant's proposal as unsuccessful be annulled.

3. That the decision of the procuring entity in respect of request for proposal (RFP) for Provision of Architectural Consultancy Services for the Design, Documentation and Supervision of Construction of the Soweto East - Zone A Redevelopment at Kibera - Nairobi, as communicated to the Applicant vide the letter dated 30th December 2009 be submitted with a decision of the review Board determining the Applicant's proposal in respect thereof as successful.
4. That the cost of the proceedings to this request for the review be awarded to the Applicant.
5. That the review Board do make any other or further order as it may deem just in all the circumstances".

The Board deals with the grounds raised by the applicant as follows:

Grounds 1-5, 8-11, 13 Breach of Section 82(5), Regulations 50(3), 52(1), 52(2)

These grounds have been consolidated because they raise similar issues.

The Applicant alleged that the Procuring Entity breached the said Section and Regulations by failing to award it the tender in spite of it having emerged as the bidder with the highest combined technical and financial score calculated on the basis of the formula set in Clause 3.2.3.2 of the Tender Document. It further alleged that the successful bidder should not have been awarded the tender because its financial bid had not been submitted in the format stipulated by Forms IV to VII of the Tender Documents as evidenced by the Procuring Entity's letter dated 4th December, 2009. It averred that, on this basis, the successful bidder's tender should have been rejected for being non-responsive at that stage and not subjected to further evaluation. It stated

that it had submitted its financial proposal in accordance with Forms IV to VII of the Tender Documents and later re-submitted the same in response to the Procuring Entity's letter dated 4th December, 2009. It further stated that it was aware of the technical scores for each bidder and their respective tender sums because they were read out at the opening of the financial proposals on 10th July, 2009. It argued that had the Procuring Entity applied the formulae set out at Clause 3.2.3.2 of the Tender Document, its bid would have been successful. The Applicant concluded that by not awarding it the tender, the Procuring Entity must have then taken into account unlawful and extraneous considerations contrary to the conditions set out in the Tender Document.

In its response, the Procuring Entity submitted that the Applicant was not the lowest responsive bidder and therefore could not have been awarded the tender. It stated that the tender was awarded to the lowest evaluated bidder who scored the highest combined technical and financial score which was 158 marks as scored by the successful bidder, whereas the Applicant scored 144 marks. It argued that had the tender been awarded to the Applicant, the Procuring Entity would have paid an extra KSh 30 million.

The Successful Candidate fully aligned itself with the submissions of the Procuring Entity. It confirmed that its financial bid had not been presented in accordance with Forms IV to VII of the Tender Documents. It submitted that this was not reason enough to have its bid rejected as argued by the Applicant. It stated that the Procuring Entity in its letter dated 4th December, 2009, to the three technically responsive bidders who included both the Applicant and successful bidder, was merely requesting the bidders to clarify their financial bids and to re-submit them in accordance with Forms IV to VII of the Tender Document.

Another interested candidate, Lins Consult, stated that in response to the Procuring Entity's letter dated 4th December, 2009, it submitted a revised financial bid which was lower than its original bid. It argued that based on this revised lower bid and its technical scores, it should have emerged as the lowest evaluated bidder.

The Board has carefully examined the documents submitted before it and the parties' submissions.

From the Tender Document issued to the bidders, the Board notes that Clauses 5.2.2, 5.2.3 and 5.2.3.2 of the Terms of Reference provided detailed evaluation criteria for both technical and financial evaluation together with a formula for combining the scores of both evaluations.

The Board further notes from the Evaluation Report that after technical evaluation of the bidders, three candidates were declared as technically responsive, namely, the successful bidder, Wambugu Mathews Associates; the Applicant, Arplad Architects; and Lins Consult; and their financial bids were opened on 10th July, 2009.

The Board observes that the Evaluation Committee in its Evaluation Report dated 31st July, 2009 recommended the Applicant for award and not the successful bidder for the following reasons:- that the successful bidder had not submitted its financial proposal in accordance with Forms IV to VII of the Tender Document; that the bid was based on a total of 4 months project period which was unrealistic; and that there was a rider in the proposal that the fee offered was a guide and that it would change in proportion to the contract period. The Board has perused the three technically responsive bidders' financial proposals and finds that the bids of both the Applicant and

Lins Consult were submitted in the required forms whereas that of the successful bidder was not submitted in accordance with Forms V to VII of the Tender Documents. The Board also takes note of the successful bidder's confirmation at the hearing that its financial bid had not been submitted as per the required forms. The Board notes the requirements of clause 5.2.2 of the Terms of Reference as follows:-

*“the financial proposal which must state the professional fees payable and other out of pocket expenses **shall** include:-*

- (i) A breakdown schedule of estimated professional staff time input charges given in accordance with Financial Proposal Form IV.*
- (ii) Breakdown of fees and other expenses given following the formats shown in the Financial Proposal Forms IV to VII.*
- (iii) Professional fees per professional discipline involved.*
- (iv) Breakdown of estimated professional input schedule.*
- (v) A statement of proposed mode of payment”.*

The Board finds that the submission of the financial proposal in accordance with Forms IV to VII was a mandatory requirement. Accordingly, the Board finds that the Procuring Entity should have disqualified the successful bidder at that stage and awarded the tender to the Applicant who would have emerged with the highest combined technical and financial score. The Board also finds that the Procuring Entity's decision to request the three technically responsive bidders to review and furnish a breakdown of their financial proposal strictly in accordance with Forms IV to VII of the Tender Document as per its letter dated 4th December, 2009 was irregular as it was done after the deadline for submission of tenders.

The Board further finds that the letter dated 4th December, 2009, amounted to a request for bidders to do fresh financial proposals which changed the substance of the tender.

As the Board has already noted, any bidder who did not comply with Clause 5.2.2 of the Terms of Reference should have been disqualified.

Accordingly, these grounds of appeal succeed.

Grounds 6 & 7 - That by the Procuring Entity's breaches of the Act, the Applicant has suffered loss

The Applicant alleged that it had suffered loss and damage because it had not been awarded the tender.

The Board finds that costs incurred by tenderers at the time of tendering are commercial risks borne by people in business, therefore, the Procuring Entity is not liable for such costs.

Ground 12 - Failure by the Procuring Entity to furnish the Applicant with reasons for rejecting its bid

The Applicant claimed that the Procuring Entity failed to disclose and furnish it with reasons for rejecting its tender.

In its response, the Procuring Entity stated that it was not bound to give reasons for decisions it made.

The Board has carefully examined the documents submitted before it and the parties' submissions and notes Regulation 66(2) which states that:-
"where so requested by an unsuccessful tenderer a procuring entity shall within

fourteen days after a request, provide written reasons as to why the tender proposal or application to be pre-qualified was unsuccessful."

The Board finds that the Applicant did not request from the Procuring Entity reasons as to why its bid was rejected and therefore could not expect the Procuring Entity to furnish it with the reasons for its rejection.

In the course of the hearing, an issue of the tender validity period arose. From the documents submitted to the Board, it was clear that the tender validity period was ninety days from the opening of the tenders.

The Tender was closed/opened on 4th June, 2009, and therefore, the tender validity period was to expire on 2nd September, 2009. The award was made on 14th December, 2009, and the letters of notification were dated 30th December, 2009. Both the date of award and that of the notification letter were outside the tender validity period. The Board enquired from the Procuring Entity whether it had extended the tender validity period in accordance with Section 61(1) of the Act. The Procuring Entity failed to adduce any evidence that it had extended the tender validity period.

The Board notes that Section 67(1) of the Act provides that notification of award must be made before the expiry of the period during which tenders must remain valid.

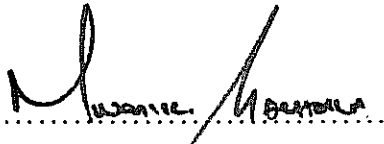
Accordingly, the Board finds that the Procuring Entity had an obligation to extend the tender validity period before the expiry date of 2nd September, 2009 and that by not doing so, notification of award should have been made before 2nd September, 2009. Consequently, the Board finds that the making of the award on 14th December, 2009 and its notification of the award on 30th December, 2009, was done after the tender validity period had expired. The

period had not been extended and therefore the tender was 'dead' by the time the award was being made, and as such there was no tender to be awarded at that time. The Board has on several occasions dealt with the issue of tender validity and come to the same conclusion. Reference is made to **Application No.68/2007 between De La Rue International Ltd and Kenya Revenue Authority** where the Board held that once the tender validity expires, the tender '*dies a natural death*'.

Taking into account all the foregoing matters, it is clear to the Board that the procurement process was flawed and the Board therefore orders, pursuant to Section 98 of the Act, that:-

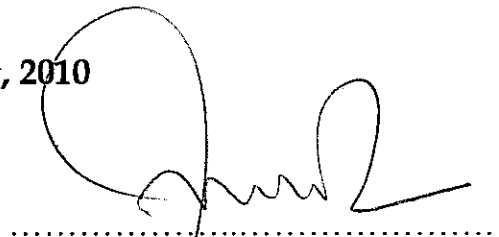
- i) The decision to award the tender to the successful tenderer is nullified;
and
- ii) The Procuring Entity may re-tender.

Dated at Nairobi on this 12th day of February, 2010



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Signed Chairman



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Signed Secretary