REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 42/2010 OF 6TH JULY, 2010

BETWEEN

BETECH CONTRACTORS .....APPLICANT

AND

TENDER COMMITTEE,

MOGOTIO DISTRICT.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Mogotio District dated 15th June 2010 in the matter of Tender No. No. MGT/7/2009-2010 for the Proposed Construction of Kimngorom Secondary Girls Secondary School.

BOARD MEMBERS

Mr. P. M. Gachoka	-	Chairman
Mr. Sospeter Kioko	-	Member
Ms. Judith Guserwa	-	Member
Eng. C. A. Ogut	-	Member

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant, Betech Contractors

Mr. Seth Ojienda	-	Advocate, Ojienda & Co. Advocates
Mr. Kibet Noah	-	Managing Director

Procuring Entity, Tender Committee, Mogoti District

Mr. Obadiah K. Maina	-	District Procurement Officer
Ms. Mary W. Gichanga	-	District Works Officer

Interested Candidates

Mr. Moses Rutto	-	Director, Tuiokim Contractors
Mr. Simon Chesire	-	Managing Director, Belion Contractors

BOARDS DECISION

Upon hearing the representations of the parties and the Interested candidates, and upon considering the information in all the documents before it, the Board decides as follows:-

BACKGROUND OF AWARD

This tender was advertised by the Office of the Deputy Prime Minister and Minister for Finance under Economic Stimulus Programme on 12th November, 2009. The tender was for Proposed Construction of Kimngorom Girls Secondary School Centre of Excellence. The tender closed/opened on 4th February, 2010 in the presence of the bidders' representatives. Tenders were received from the following firms:

- Zepheli Construction Ltd
- Alewa Builders & Renovators
- Belion Hardware & Contractors
- Betech Contractors
- Besko Investment Ltd
- Tuiokim Contractors
- Lelkutwo Contractors

Evaluation

Evaluation was based on the following mandatory parameters:

1. Proof of works of similar magnitude and complexity undertaken in the last five years.
2. Bid bond in form of Bank guarantee from a reputable bank or approved insurance company.
3. Adequate equipments and key personnel
4. Sound financial standing and adequate access to bank credit line.
5. Litigation history
6. Confidential business questionnaire
7. Tax compliance certificate
8. Proof of registration with the Ministry of Works in category "H" and above

Other reasons for declaring a tender non-responsiveness were as follows:

i) A tender from a tenderer whose on-going project(s) is/are behind schedule and without approved extension.
ii) A tender from tenderer who has been served with a default notice on on-going project
iii) A tender from a tenderer with more than four on-going projects
iv) A tender from a tenderer whose tender $\pm$10% of the Official Estimate

After evaluation, the evaluation committee recommended the award of the tender to Belion Hardware and Contractors at Kshs. 107, 481, 838.10.

This award was appealed against by Betech Contractors in Application No.20/2010 of 8th April, 2010. After the hearing, the Board annulled the award of the tender and ordered the Procuring Entity to re-tender using restricted procurement method.

In line with the Board's ruling, the Procuring Entity invited all the seven bidders who had participated in these procurement proceedings. Tenders were opened on 2nd June, 2010 in presence of the bidders' representatives. The prices quoted by the bidders were as follows:

S/No.	Contractor's Name	Tender Sum (Kshs.)
1.	Belion Hardware & Contractors	28, 425, 291.90
2.	Lelkutwo Contractors	29, 412, 845.00
3.	Tuiokim Contractors	32, 882, 210.00
4.	Alewa Builders & Renovators	23, 408, 608.00
5.	Betech Contractors	29, 566, 140.00
6.	Besko Investment Ltd	30, 658, 177.00
7.	Zepheli Construction Ltd	28, 059, 451.00

Technical Evaluation

This was done to determine the responsiveness of the tenders on the following requirements:

1. Proof of works of similar magnitude and complexity in the last five (5) years.
2. Bid bond
3. Sound financial standing and adequate access to bank credit line
4. Adequate equipment and key personnel for specified types of works

5. Litigation history
6. Confidential business questionnaire
7. Tax compliance certificate
8. Registration with MOW in category "H" and above

Other reasons for declaring a tender non-responsiveness were as follows:

i) A tender from a tenderer whose on-going project(s) is/are behind schedule and without approved extension.

ii) A tender from tenderer who has been served with a default notice on on-going project(s)

iii) A tender from a tenderer with more than four on-going projects

iv) A tender from a tenderer whose tender is (+) or (-) 10% of the Official Estimate

Four bidders namely, Alewa Building and Renovators, Zepheli Construction Co., Loikutwo Contractors and Besko Investment Ltd were disqualified for failing to comply with specific technical requirements.

The other three bidders, Belion Hardware & Contractors, Betech Contractors and Tuiokim Contractors qualified for the financial evaluation.

Financial Evaluation

This involved correction of arithmetic errors and comparison of prices quoted by the three bidders as follows:

S/No.	Tenderer	Tender Sum	Variance from Estimate	Corrected tender sum	% Error
1.	Belion Hardware & Building Contractors	28, 412, 845.00	-5.00%	28, 434, 711.90	.002%
2.	Betech Contractors	29, 566, 140.32	-1.19%	29, 566, 140.32	Nil
3.	Tuiokim Constructions & Civil Works	32, 882, 210.00	+9.88%	32, 882, 210.00	Nil

Arising from the above information, the Evaluation Committee recommended the award of the tender to Belion Hardware & Building Contractors at its tender sum of Kshs. 28, 412, 845.00.

In its meeting held on 18th June, 2010, the District Tender Committee concurred with the recommendation of the evaluation committee and awarded the tender to Belion Hardware & Building Contractors at Kshs. 28, 412, 845.00.

Notification letters to the successful and unsuccessful bidders are dated 22nd and 23rd June, 2010 respectively.

THE REVIEW

This Request for Review was lodged on 6th July, 2010 by Betech Contractors against the decision of the District Tender Committee, Mogotio District dated 15th June, 2010 in the matter of tender No. MGT/7/2009-2010 for Proposed Construction of Kimngorom Secondary Girls Secondary School.

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

"1. Annulment of the procurement procedure and award

2. Substitute the award by the procurement entity with award to the appellant on the powers conferred to you under section 98 of the Act".

PRELIMINARY ISSUE

The Procuring Entity has stated in its Response to the Request for Review that it signed a contract with the Successful Bidder on 8th July, 2010, after the expiry of 14 days appeal window arguing that notification letters to both successful and unsuccessful bidders were written on 23rd June, 2010. The Procuring Entity further stated that it received a notification of this Request for Review from the Board on 13th July, 2010. It therefore stated that the time of signing the contract, it was not aware that the application for review had been filed against the award of the tender.

In response, the Applicant stated that whereas the notification letters were dated 23rd June, 2010, it collected the same from the Procuring Entity on 29th June, 2010. It therefore argued that the Request for Review was properly before the Board as it was filed on 6th July, 2010 within time. It relied on the copy of the delivery register it had obtained from the Procuring Entity.

On its part, an Interested Candidate, M/S Tuiokim Construction Ltd, stated that it also collected its notification letter on 29th June, 2010.

Upon perusal of the documents filed by the parties, the Board has noted that the notification letters to the Successful and the Unsuccessful Bidders are dated 22nd and 23rd June, 2010 respectively. However, no evidence has been availed by the Procuring Entity to prove that the notification was effected on 23rd June, 2010 as alleged by it. The Board further notes the date set out in the Procuring Entity's delivery register shows that the notification letters were collected on 29th June, 2010. Therefore time started running on 30th June, 2010 and would have lapsed on 14th July, 2010. The Board further notes that the Applicant filed the request for Review on 6th July, 2010 which was within the appeal window. The Board therefore holds that the contract which was signed on 8th July, 2010 was not in accordance with Section 68 (2) of the Act. Accordingly, the Board holds that it has jurisdiction to hear and determine the Request for Review on merit.

The Board deals with the grounds of Review as follows:

Grounds One and Two: Breach of Section 64(1) and Regulation 48(1)

These grounds have been consolidated as they raise similar issues on responsiveness and evaluation of tenders.

The Applicant submitted that the Procuring Entity breached Section 64(1) of the Public Procurement & Disposal Act, 2005 (hereinafter referred to as

"the Act") read together with Regulation 48(1) of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the Regulations") by awarding the tender to a bidder who was not responsive. The Applicant stated that one of the conditions of the tender was that tenderers with more than four (4) ongoing projects would be automatically disqualified. It submitted that the Successful Bidder had more than four (4) on-going projects and that was contrary to the tender conditions as specified in the tender notice.

The Applicant further submitted that it had been on the ground and had established that the Successful Bidder had nine (9) projects currently on going. It stated that the Procuring Entity was aware of the Projects being undertaken by the Successful Bidder and therefore it was irregular for the Procuring Entity to award the tender to the Successful Bidder.

In response, the Procuring Entity denied that it breached Section 64(1) of the Act as read together with regulation 48(1) as alleged by the Applicant. It submitted that at the time of bidding, it was not aware that the Successful Bidder had more than four (4) on-going projects contrary to the tender requirements. It stated that it relied on the bid documents submitted by the Bidders. The Procuring Entity further submitted that it was not possible to establish the number of projects a bidder was undertaking particularly where contracts were awarded from a different district as there are no circulations of such information. It stated that the Applicant should

have supplied it with the details of the alleged on-going projects that the Successful Bidder was undertaking at the material time.

The Procuring Entity stated that, upon receipt of the allegation as contained in the Request for Review on the alleged ongoing projects by the Successful Bidder, it carried out investigations into the matter and found out that the Successful Bidder had only two ongoing projects at the time.

On its part, an interested candidate M/S Tuiokim Construction Ltd associated itself with the Applicant in support of the Request for Review. It stated that the Procuring Entity erred in:-

1. Awarding the tender to a non-responsive bidder who had more than four ongoing projects contrary to the conditions of the tender notice and Section 64(1) of the Act and

2. By alleging to have entered into a contract with the Successful Bidder before the lapse of the mandatory fourteen days appeal window.

The Interested Candidate argued that it was the responsibility of the Procuring Entity, and not of the bidders, to confirm the number of projects each bidder had at hand before proceeding with the evaluation and subsequent award. Finally, it stated that the Successful Bidder ought to have been disqualified at the preliminary stage of the evaluation on the basis that it had over four ongoing projects. It urged the Board to order for

cancellation of the award and award the tender to the bidder with the second lowest evaluated bid.

The Successful Bidder, M/S Belion Hardware &Contractors associated itself with the Procuring Entity in opposing the Application for Review. It stated that, in as far as it was aware, it only had two ongoing projects and was not aware of the other projects cited by the Applicant.

The Board has considered the submissions of the Parties and examined the documents presented before it.

The Board has noted that the matter under review was earlier on brought before the Board as Application No.20/2010 of 8th April, 2010. After the hearing, the Board annulled the award and ordered the Procuring Entity to re-tender using restricted method of procurement. Consequently, the Procuring Entity invited the seven bidders who had participated in the procurement proceedings.

The Board further notes that tenders were opened on 3rd June, 2010 and were evaluated based on the criteria that were set out in the tender notice. Out of the seven bidders who had responded, four bidders namely, Alewa Building and Renovators, Zepheli Construction Co., Loikutwo Contractors and Besko Investment Ltd were disqualified at the technical evaluation stage. The other three bidders including the Applicant qualified for financial evaluation which involved correction of arithmetic errors and

comparison of rates for major items as quoted by the bidders. The result of the financial evaluation report is as appended here below:

S/No.	Tenderer	Tender Sum	Variance from Estimate	Corrected tender sum	% Error
1.	Belion Hardware & Building Contractors	28, 412, 845.00	-5.00%	28, 434, 711.90	.002%
2.	Betech Contractors	29, 566, 140.32	-1.19%	29, 566, 140.32	Nil
3.	Tuiokim Constructions & Civil Works	32, 882, 210.00	+9.88%	32, 882, 210.00	Nil

From the above evaluation report, the Board finds that the Applicant was not awarded the tender as it was the second lowest bidder. The Board therefore holds that the Procuring Entity acted properly in awarding the tender to the lowest evaluated bidder.

With regard to allegation that the Successful Bidder ought to have been found non-responsive as it had more than four on-going projects, the Board notes that the Applicant had attached, in its Request for Review, a list of projects which were allegedly being undertaken by the Successful Bidder. The Board further notes that the Applicant had also attached a list of projects that the Successful Bidder had rejected after they were awarded to it and another one tender which was terminated after it was realized that the Successful Bidder had more than four incomplete projects. However, the Board finds that the list was authored by the Applicant and had no supporting documents that the Successful Bidder was undertaking the alleged projects.

It is clear to the Board that, under the provisions of Section 64(1) read together with regulation 48(1), Procuring Entities are obligated to reject all non responsive tenders. However, in this case, as the Board finds no proof that the Procuring Entity erred in its evaluation, the bid by the Successful Bidder was properly evaluated and awarded.

Consequently, both grounds of the Request for Review fail.

Taking into consideration the above matters, this request for review fails and is hereby dismissed.

The Board orders, pursuant to the provisions of Section 98(b) of the Act, that the procurement process may proceed.

Dated in Nairobi this 2nd Day of August, 2010

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CHAIRMAN

PPARB

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SECRETARY

PPARB