

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
REVIEW NO. 47/2010 OF 3RD AUGUST, 2010

BETWEEN

EPCO BUILDERS LTD.....APPLICANT

AND

CATERING AND TOURISM

DEVELOPMENT LEVY TRUSTEES.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Catering and Tourism Development Levy Trustees dated 21st July, 2010 in the matter of tender No. CTDLT/005/2009-2010 for Construction of Proposed Office Block on Plot L.R. NO.209/261/1.

BOARD MEMBERS

Mr. P. M. Gachoka	-	Chairman
Mr. Joshua W. Wambua	-	Member
Eng. C. A. Ogut	-	Member
Mr. Sospeter Kioko	-	Member
Mr. Akich Okola	-	Member

IN ATTENDANCE

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

Ms. Julliet Wambulwa - Secretariat

PRESENT BY INVITATION

Applicant, EPCO Builders Ltd

Mr. Andrew Wandabwa - Advocate, Wandabwa Advocates
Mr. Munyasa Khasiani - Advocate, Wandabwa Advocates
Ms. Victoria Kariithi - Advocate, Wandabwa Advocates

Procuring Entity, Catering and Tourism Development Levy Trustees

Mr. Fredrick Orego - Chief Legal Officer
Mr. Eden R. Odhiambo - Levy Manager
Ms. Margaret Njoka - Finance Manager
Mr. Joseph K. Ndung'u - Procurement Manager
Ms. Rachel A. Kidenda - Senior Legal Clerk
Ms. Jackline Owino - Legal Intern

Interested Candidate, Cementers Ltd

Mr. Assa Nyakundi - Advocate
Mr. Devan Jadeja - General Manager
Mr. Edmond Denis - Manager
Mr. Gilbert Kowuocha - Project Coordinator

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

BACKGROUND OF AWARD

This Expression of Interest (EoI) was advertised by the Procuring Entity in November, 2009. The EoI documents were opened on 10th December, 2009. Out of twenty one bidders who responded to the invitation, five bidders were pre-qualified and were issued with the tender documents. The tender closed/opened on 9th June, 2010. However, this procurement was terminated by the Procuring Entity pursuant to Section 36 of the Public Procurement and Disposal Act, 2005 by a letter dated 24th June, 2010. The five prequalified bidders were issued with fresh bids which were opened on 12th July, 2010 in the presence of the bidders' representatives. The bids received were as follows:

S/No.	Tenderer	Fluctuating Price (Kshs)	Fixed Price (Kshs.)	Tender Security	Period (Weeks)
1.	Cementers Ltd	811, 717, 150	830, 000, 000	4,500,000	92
2.	EPCO Builders Ltd	776, 710, 489	790, 710, 489	3,700,000	98
3.	N. K. Brothers Ltd	769, 909, 101	789, 909, 101	4,000,000	101
4.	Seyani Brothers & Co. Ltd	819, 133, 376	845, 733, 390	17,444,486.88	100
5.	Twiga Construction Co. Ltd	806, 888, 759	834, 000, 000	4,050,000	104

Evaluation

Evaluation was conducted in three stages namely preliminary, technical and commercial evaluation stages as follows:

Preliminary Evaluation

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

1. Tender Security
2. Tender Validity
3. Certificate of Registration
4. Tax Compliance Certificate
5. Submission of all required documents and information
6. Submission of the required number of copies of tender documents
7. Submission of the tender document the required format
8. Tender signed by the authorized person

The tenders submitted by Seyani Brothers & Co. Ltd, Twiga Construction Co. Ltd and EPCO Builders Ltd, the Applicant, were found non-responsive for failing to comply with some of the mandatory requirements of the tender. Their tenders were therefore disqualified from further evaluation. Two bidders namely, Cementers Ltd and N. K. Brothers qualified for technical evaluation.

Technical Evaluation

The technical evaluation was based on the following criteria:

- | | | |
|---|---|----|
| 1. Contract period | - | 20 |
| 2. Major items of construction
plant and equipment | - | 30 |

3. Current workload and completion status	-	20
4. Evidence of adequacy of working capital	-	15
5. Qualification and experience of key staff	-	15
TOTAL	-	100

The two bidders, Cementers Ltd and N. K. Brothers Ltd scored 96.29% and 83.71% respectively. These scores were above the cut-off score of 75% and therefore the two bidders qualified for financial evaluation.

Financial Evaluation

The financial scores (SF) were calculated using the following formula:

$$SF = 100 \times FM / F$$

Where SF is financial score; FM is the lowest tender price

Thereafter, the technical and financial scores were combined using the following formula:

$$S = (ST \times T \%) + (SF \times P \%)$$

Where S is combined technical and financial scores

ST is the technical score and SF is the financial score

The weight given to technical scored was .08 % while the financial scores had a weight of 0.2%.

The combined scores were as tabulated here below:

NAME OF FIRM	FLUCTUATING PRICE	FIXED PRICE	RANK
CEMENTERS LTD	95.96	96.06	1
N.K. BROTHERS LTD	86.97	86.97	2

In view of the above information, the Evaluation Committee recommended the award of the tender to Cementer Ltd at a Fluctuating tender sum of Kshs. 811, 717, 150.00 and a Non-fluctuating price of Kshs. 830, 000, 000.00.

In its meeting held on 21st July, 2010, the Tender Committee concurred with the recommendation of the evaluation committee and awarded the tender to Cementers Ltd at the fluctuating price of 811, 717, 150.00 and contract period of ninety two weeks.

Notification letters to the successful and unsuccessful bidders are dated 21st July, 2010.

THE REVIEW

This Request for Review was lodged on 3rd August, 2010 by EPCO Builders Ltd against the decision of the Tender Committee of Catering and Tourism Development Levy Trustees dated 21st July, 2010 in the matter of tender No. CTDLT/005/2009-2010 for Construction of Proposed Office Block on Plot L.R. NO.209/261/1. The Applicant was represented by Mr. Andrew Wandabwa, Advocate while the Procuring Entity was represented by Mr. Fredrick Orego, Chief Legal Officer. Cementers Ltd, an Interested Candidate, was represented by Mr. Assa Nyakundi, Advocate.

The Applicant has raised five grounds of review 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".*

The Board deals with the grounds of the Review as follows:

Grounds One, Two and Four : Breach of Sections 34 and 66(2) of the Act and Regulation 50(3)

These three grounds have been consolidated as they raise similar issues regarding the tender specifications and the evaluation process.

The Applicant submitted that the Procuring Entity breached Section 34 of the Public Procurement and Disposal Act, 2005 (herein after referred to as "the Act") by preparing its requirements in a manner that did not allow fair and open competition amongst the bidders. It argued that the technical specifications provided in the tender document were not specific.

It stated that the evaluation criteria were subjective and not specific, measurable or quantifiable. It argued that the weighting on the financial and the technical aspects were subjective and skewed against the lowest priced bidder.

The Applicant further submitted that the Procuring Entity failed to evaluate the tender in accordance with Section 66 of the Act and Regulation 50. It stated that at the tender opening, its tender price was the lowest and considering that it had met all the requirements of the tender, it ought to have been awarded the tender. It argued that, it had learnt that its tender was disqualified for the reason that its bid bond sum was 0.48% of its bid price, whereas the Procuring Entity's requirement was 0.5% of the bid price. It argued that the Procuring Entity should have treated the omission as minor deviation pursuant to Section 64 of the Act and awarded it the tender considering that its bid price was Kshs.40 million lower than that of the Successful Bidder.

In response, the Procuring Entity denied that it breached Section 34 of the Act as alleged by the Applicant. It stated that it prepared the tender documents in accordance with the guidelines issued by the Public Procurement Oversight Authority and that the documents contained all the necessary information. It further stated that the procurement process was done through a prequalification process pursuant to Part VI (c) of the Act and that the five bidders who were prequalified invited to submit their tenders. The Procuring Entity contended that the Applicant had misconceived the procedure it applied in this procurement.

With regard to the question on the bid bond, the Procuring Entity stated that it evaluated all the tenders using the evaluation criteria that were set out at page 47 of the tender documents. It further stated that the Applicant's tender was disqualified at the Preliminary Evaluation stage for submitting a bid bond which was not adequate. It pointed out that whereas it was a mandatory requirement that the tender security was to be 0.5% of the tender sum, the Applicant submitted a bid bond of Kshs. 3, 700, 000.00, which was less than 0.5% of its tender sum. It argued that the minimum security that the Applicant should have submitted was Kshs. 3, 888, 552.45.

It submitted that, the Applicant did not seek for any clarification, if the tender requirements were not clear. It requested the Board to find no breach on these grounds.

On its part, the Interested Party, Cementers Ltd, supported the submissions of the Procuring Entity and urged the Board to dismiss the Request for Review.

The Board has carefully considered the representations of the parties and examined the documents that were presented before it.

The question before the Board is to determine whether the Procuring Entity breached Sections 34 and 66 of the Act and Regulation 50(3). The Board notes the requirements of Section 34, which require Procuring Entities to prepare specific requirements relating to the goods, works or services being

procured, which specifications should be clear and should give a correct and complete description of what is to be procured in order to allow for fair and open competition among the bidders.

The Board has noted that the tender document contained the salient features of a standard tender document such as Instructions to Tenderers, Conditions of the Contract, Specifications, Drawings, Bill of Quantities and Standard Forms.

In this regard, the Board finds that the Procuring Entity provided adequate description of the works on the basis of which bidders tendered competitively.

On the question of the bid bond, the Board has examined a copy of the tender document that was issued to the bidders and noted that Paragraph 5 of Appendix B required a bidder to submit a tender security of at least 0.5% of its tender sum. Upon perusal of the Original tender document submitted by the Applicant, the Board has found that the Applicant submitted a bid bond of Kshs. 3, 700, 000.00. The Board has further noted that the Applicant had quoted two alternatives as follows:

1. Fluctuating tender sum Kshs. 776, 710, 489.00
2. Non Fluctuating/ Fixed tender sum of Kshs. 790, 710, 489.00

Based on the above pricing, the Board finds that the Applicant's tender security was 0.483% and 0.468% for fluctuating price and fixed price respectively, which was in both cases less than 0.5 % of the tender sum

requirement stipulated in the tender documents. The Board notes that the requirement for tender security under Section 57 of the Act and Regulation 41, though discretionary becomes mandatory once it is stipulated in the tender documents by a Procuring Entity.

In this regard the Applicant's tender was properly disqualified pursuant to Regulation 47(2).

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

Ground Three

This ground of Review was abandoned at the hearing and therefore the Board need not comment on it.

Ground Five: Breach of Section 2 of the Act

The Applicant submitted that the Procuring Entity breached Section 2 of the Act by conducting the procurement process in a manner that infringed the purpose and spirit of the Act.

It submitted that the Procuring Entity breached Section 2 of the Act, on maximization of economy, transparency and fairness. It stated that its bid was the lowest priced, but the criteria of evaluation of the bids were discriminatory against it. It argued that the criteria of Evaluation and the weighting of 20% for financial and 80% for technical had been designed to discriminate upon the lowest priced bidder. It concluded that the

Procurement process was therefore against the spirit of the provisions of Section 2 of the Act and urged the Board to make a finding to this effect.

In response, the Procuring Entity submitted that the Applicant's bid was not the lowest priced at the tender opening as alleged. It submitted that the lowest priced bid was that of N.K Brothers Ltd, who after the Evaluation process emerged the 2nd lowest evaluated bidder with Cementers Ltd being the lowest Evaluated Bidder. Accordingly, Cementers Ltd was awarded the tender.

It submitted that it did not breach section 2 of the Act as it prepared the tender documents in line with the requirements of the guidelines issued by the Public Procurement Oversight Authority. It stated that all the bidders were given equal opportunities to compete and the evaluation of the tender was done in line with the requirements of the Act and the tender documents.

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

The Board finds that:

- (i) The Procuring Entity invited 5 firms, who had earlier been prequalified to submit Technical and Financial proposals on or before 12th July 2010.

- (ii) The five firms submitted their bids which were opened on 12th July, 2010 at 10 am in the presence of the bidders' representatives and prices announced loudly.
- (iii) The Procuring Entity appointed an Evaluation Team which carried out the Evaluation of the Bids based on the criteria set out in the tender documents, following which some of the bidders were disqualified for various reasons.
- (iv) The Tender Committee made an award to the Successful Bidder based on the recommendation of the Evaluation Committee.

As the Board has already noted, the Applicant failed at the preliminary evaluation stage for failing to provide the required bid bond of 0.5% of its tender sum.

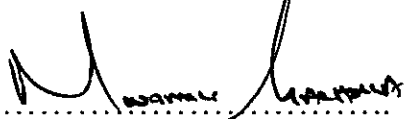
Based on the above findings, the Board concludes that the tender process was conducted fairly, competitively and transparently. In this regard the Board finds that the Procuring Entity did not breach Section 2 of the Act.

In the circumstances, this ground of the Request of review also fails.

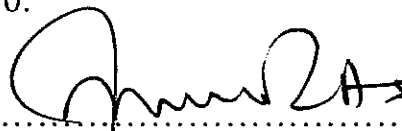
Taking into account all the foregoing matters, the Request for Review fails and is hereby dismissed.

Accordingly, the procurement process may proceed.

Dated at Nairobi on this 30th day of August, 2010.



Chairman, PPARB



Secretary, PPARB