

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 65/2010 OF 6th DECEMBER, 2010

BETWEEN

JAP INTERNATIONAL LIMITED.....APPLICANT

AND

LOITOKITOK DISTRICT TENDER COMMITTEE ...PROCURING ENTITY

Review against the decision of the Tender Committee of the Loitokitok District dated 23rd November, 2010 in the matter of Tender No. LTK/DC/2010 - 2011 for the Construction of the Proposed Loitokitok District Headquarters.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Eng. C. A. Ogut	-	Member
Ms. Natasha Mutai	-	Member
Amb. C. M. Amira	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Mrs. Pamela K. Ouma	-	Secretariat

PRESENT BY INVITATION

Applicant, Jap International Ltd

- Mr. Muturi Kamande - Advocate, Muturi Kamande & Co.
Advocates
- Mr. James Mwangi - Managing Director

Procuring Entity, Loitokitok Constituency Development Fund

- Mr. Samuel Ondieki - CDF Fund Manager

Interested Candidate

- Mr. Peter M. Gichuru - Advocate, Gichuki & Muchoki Advocates
- Mr. Peter Kashanga - Director, Cheka Electro Mechanical
Building Services Contractor

BOARD'S DECISION

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

BACKGROUND

The tender for the Proposed Construction of the Loitokitok District Headquarters was advertised by the Ministry of Public Works under the Economic Stimulus Implementation Programme Phase II on 14th September, 2010. The tender was to close on 6th October, 2010 but was postponed to 27th October, 2010.

Closing/Opening:

At the tender opening held on 27th October, 2010 thirteen bids were opened from the following bidders;

Bidder		Tender Price
1. Cheka Electrical/Mechanical Services Contractors	-	27,318,395.00
2. Wigma Enterprises Co. Ltd	-	29,484,735.00
3. Meska Contractors Ltd	-	29,995,717.00
4. Jap International Ltd	-	38,077,070.00
5. Jyan Construction Services	-	38,410,964.00
6. Priska Engineering & Construction CO. Ltd	-	38,943,299.60
7. Webcon Tech. Services Ltd	-	39,107,865.00
8. Kiu Construction Ltd	-	41,687,471.00
9. Pasha Enterprises Ltd	-	45,517,241.00
10. Entawuoh Enterprises	-	45,517,241.00
11. Peto Enterprises Ltd	-	46,180,509.00
12. Gragab Agencies	-	49,700,314.36
13. Teksam Ltd	-	49,945,853.00

The official Ministry of Public Works estimate was given as Kshs. 36,625,051.20

Evaluation

The first evaluation commenced on 29th October, 2010. It consisted of officers from the Ministry of Public Works who were to conduct the technical analysis. Another evaluation was reconstituted on 9th November, to include members of the Constituency Project Tender Committee.

The bids were evaluated on their responsiveness to the tender conditions as stipulated in Clauses 5.5, 5.6, 5.7, 5.8, and 5.9. The evaluation criteria included the following:-

- Proof of works of similar magnitude and complexity undertaken in the last five years.
- A properly filled signed, stamped and witnessed form of tender
- A bid security in form of bank guarantee from a reputable bank

- Proof of registration with Ministry of Public Works
- Proof of sound financial standing and adequate access to bank credit line
- Litigation History of the company
- Confidential Business Questionnaire
- Tax compliance certificate
- Adequate equipment and key personnel for the works

Five bidders namely Wigma, Kiu Construction Ltd, Entawuoh Enterprises, Peto Enterprises, and Teksam Ltd were declared non-responsive for lacking various requirements of the tender.

The remaining bids were further evaluated by comparing them to the official estimate and correcting any arithmetical errors. The results were as tabulated below:

	Bidder	Tender price	Variance from estimate (%)	Corrected Tender Sum	%Error
1.	Cheka Electrical Mechanical Building Services Contractor	27,318,395.00	(-) 25.41	27,622,317.00	(-)1.149
2.	Meska Contractors	29,995,717.00	(-) 18.10	35,801,092.00	(-) 16.778
3.	Jap International	38,077,070.00	(+) 3.96	No error	-
4.	Jyan Construction Services	38,410,964.00	(+) 4.88	No error	-
5.	Priska Engineering & Construction	38,943,299.60	(+) 6.33	No error	-
6.	Webcon Tech. Services	39,107,865.00	(+) 6.78	No error	-
7.	Pasha Enterprises Ltd	45,189,172.00	(+) 23.38	No Error	-
8.	Gragab Agencies	49,700,314.00	(+) 35.70	No Error	-

The bids were then evaluated by comparing the rates of the major items for the responsive bidders. The Evaluation Committee then recommended the tender be awarded to any of the following firms:

- i) Cheka Electrical /Mechanical Services at the sum of Kshs. 27,318,395
- ii) Meska Contractors Ltd at the sum of Kshs. 29,995,717
- iii) Jap International at the sum of Kshs.38,077,070

THE TENDER COMMITTEE DECISION

The Loitokitok District Constituency Project Tender Committee in its Meeting No. CPTC 3/2010 -2011 held on 19th November, 2010 deliberated on the evaluation report and adopted it. The Committee then opted to award the lowest evaluated bidder as it noted that the engineers estimate was above the allocation of the project of Kshs. 30,000,000. M/s Cheka Electro-Mechanical Services & Contractors were therefore awarded the tender for the construction of the District Headquarters at its tender price of Kshs. 27,318,395.

ADJOURNMENT

The Applicant lodged the Request for Review on 6th December, 2010. The Procuring Entity had not provided a reply to the Request for Review nor submitted the documents as requested by the Board at the time and date of the hearing of this matter on 4th January, 2011. At the hearing held on 4th January, 2011 the Applicant was represented by Mr. Muturi Kamande, Advocate and Mr. James Mwangi. The Successful Bidder was represented by Mr. Peter Kashonga. The Procuring Entity was absent.

The Board in the Circumstances adjourned the meeting to 5th January, 2011 to give the Procuring Entity more time to be able to submit the requisite documents and attend the meeting accordingly.

THE REVIEW

The Procuring Entity submitted the documents requested by the Board on 5th January, 2011 and hence the hearing commenced.

The Applicant was represented by Mr. Muturi Kamande, Advocate while the Procuring Entity was represented by Mr. Samuel Ondieki, CDF Manager. The Interested Candidate was represented by Mr. Peter M. Gichuru, Advocate.

The Applicant requested the Board for the following orders:

1. *"The decision of the tendering committee made 23.11.2010 on awarding the tender for the construction of the Loitokitok District headquarters being tender number LTK/DC/10/2010-2011 be annulled.*
2. *The decision of the said tender committee be substituted with a decision that JAP INTERNATIONAL LIMITED were the most responsive tenderers and therefore the most acceptable tenderer.*
3. *The costs of this review be awarded to the Applicant."*

The Applicant raised four grounds of review which the Board deals with as follows:

Grounds 1 and 2 – Breach of Sections 31, 64, and 66 and Regulations 48

We combine these grounds as they raise similar issues on responsiveness of bids.

The Applicant alleges that the Procuring Entity awarded the tender to a non-responsive bidder contrary to the provisions of Section 31 and 64 of the Public Procurement and Disposal Act, 2005 (hereinafter "the Act"). It stated that the tender notice had provided various requirements which were mandatory. It added that the tender notice indicated that a bidder who did not meet any of these requirements was to be considered non-responsive and be automatically disqualified. The Applicant stated that it was a requirement that the bidder's tender sum should be within plus or minus 10% of the official estimate. The

Applicant added that the Engineers Estimate as read out at the tender opening was Kshs. 36,625,051.20 and therefore the acceptable tender amount considering plus or minus 10% of this estimate ought to have been between Kshs. 32,962,546.08 and Kshs. 40,287,556.32. The Applicant stated that the Successful Bidder's price of Kshs. 27,318,395 therefore was far below the minimum requirement of plus or minus 10% of the official estimate.

The Applicant averred that it submitted a most responsive bid as provided for in Section 66 and that its price was within the range of the official estimate provided by the Procuring Entity. On the averments by the Procuring Entity that the tender used the provisions of the Economic Stimulus Programme Framework, it argued that the bidders should have been informed before submitting the tenders. The Applicant stated that the letter relied on by the Procuring Entity from the Ministry of Public Works was dated 27th October, 2010 the day the tenders were being opened. It further added that the same letter was received by the Ministry Public Works Kajiado on 11th November, 2010 which was when the tender process was underway. It concluded that the said letter was of no effect.

In response, the Procuring Entity stated that the official estimate of the project was Kshs. 36,625,051.20 but the fund that was released was only Kshs. 30,000,000. It stated that it had to base its award on the available funds and not the official estimate. The Procuring Entity added that it had to award the lowest bidder who had indicated willingness to complete the project within its quoted price. It averred that the Successful Bidder met all the requirements of the tender and that it acted within the law in awarding the tender to the lowest evaluated bidder.

The Interested Candidate, Cheka Electrical Mechanical Building Services Contractor, the Successful Bidder stated that the allegation made that the award was contrary to the provisions of Sections 31 and 64 of the Act and Regulations 48 had no basis. It added that the award was made in accordance to Section 64 of the Act . It further stated that the Applicant had not provided evidence to show that the Successful Bidder was not qualified as per the requirements of the tender documents. The Successful Bidder stated that the issue of plus or minus 10 % of the official estimate should not arise as the project was awarded based on the funds available. It further stated that there was no communication of the official estimate to the bidders.

The Successful Bidder stated that there was no violation of Section 66 of the Act. It added that the tender was processed under the Economic Stimulus Programme Framework as contained in the Economic Stimulus Programme manual of September 2010. It reiterated that the advertisement notice indicated that the tender was to be done under the Economic Stimulus Programme. The Successful Bidder further added that Clause 5.5 (f) of the Economic Stimulus Programme obligates the tender evaluation committee to award the tender to the lowest evaluated bidder or the highest combined score. It averred that the Procuring Entity complied with the provisions of Regulation 94 of the Public Procurement and Disposal Regulations 2009 which allowed for a positive discrimination in light of the provisions of Section 39 (4) of the Act which provides for the tenders to be awarded to a local company. It concluded that it was based in Loitokitok District unlike the Applicant whose registered address indicated that it was based outside the District.

The Board has considered the submissions of the parties and the documents submitted which include the tender documents, the evaluation report, the tender advertisement notice and the Economic Stimulus Programme issued by the Ministry of Finance in September, 2009.

The Board notes that the Tender was advertised by Ministry of Public Works and the tender were to be submitted to the District Commissioner Loitokitok on 27th October, 2010 at 10:00 am. The Board further notes that this was an Economic Stimulus Project and was to be adjudicated by the Constituency Development Fund Tender Committee.

The Board has noted that the manner in which the evaluation was done has anomalies as follows:

- i) Although the Engineer's estimate was Kshs. 36 million, the available budget was Kshs 30 million therefore the criteria of $\pm 10\%$ of the estimate was not objective as a basis for disqualifying a bidder who did not meet this criteria as envisaged by Section 66 (3) (a).
- ii) The tender advertisement notice clearly provided that the tender falls under the National Economic Stimulus Programme Phase II and therefore the evaluation should have been done in accordance with the guidelines set out therein. The Procuring Entity should therefore take note of Regulation 94 in the evaluation process.
- iii) On examination of the bidders tender documents, the Board has noted that the Procuring Entity did not properly check for pricing and arithmetic errors;

iv) The Board has also noted that the Evaluation Committee recommended that the tender be awarded to any of the three lowest responsive bidders instead of making a recommendation for one in accordance with Regulation 16 (9) (f)..

Consequently these grounds of review succeed.

Ground 3 - Breach of Sections 67 (2) and 83 (2)

The Applicant alleged that the Procuring Entity did not notify it in accordance to Sections 67 (2) and 83 (2) of the Act. The Applicant stated that it went to the Procuring Entity on 2nd December, 2010 when it did not get communication regarding the tender. The Applicant alleged that the Procuring Entity gave it the notification letter which was however dated 23rd November, 2010.

The Procuring Entity did not respond to this ground.

The Interested Candidate stated that the Applicant was notified within the period that the tender was still valid as stipulated in Section 67.

The Board notes that the letters of notification to the Successful Bidder and the Applicant bears the same date. The Procuring Entity did not dispute the allegation of the Applicant that it received its notification on 2nd December, 2010. The Board notes that the Successful Bidder accepted the offer of award on 25th November, 2010. The Board further notes that the Procuring Entity did not provide evidence on how it dispatched the letters of notification to the bidders. The Board therefore finds that the Procuring Entity did not notify the bidders simultaneously as envisaged in Section 67 of the Act. However the

Board notes that the Applicant did not suffer any prejudice as it was able to file this Request for Review on time.

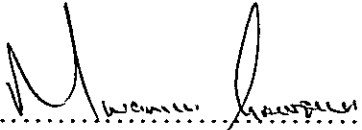
Ground 4 – Statement of Loss

The Applicant states that as a result of the Procuring Entity's failure to grant the tender to it as the most responsive tenderer, it had suffered loss. It added that based on the results of the tender opening it had commenced arrangements to undertake the project.

The Board has on several occasions, held that costs incurred by tenderers at the time of tendering are commercial risks borne by people in business and therefore each bidder carries its own costs.

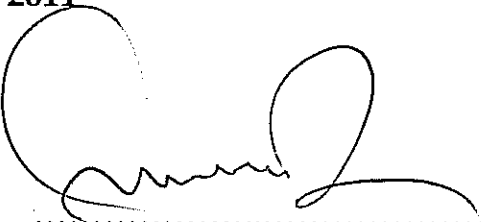
In view of the above, the Request for Review succeeds and the Board orders pursuant to Section 98 (b), that the tender award to the Successful Bidder be annulled. Further, the Procuring Entity is directed to conduct a fresh evaluation of the bids which should involve the relevant technical personnel including a registered Quantity Surveyor from Ministry of Public Works.

Dated at Nairobi on this 5th day of January, 2011



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**CHAIRMAN
PPARB**



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**SECRETARY
PPARB**

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