

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 18/2010 OF 26TH MARCH, 2010

BETWEEN

M/S WAMO CONSTRUCTION CO.APPLICANT

AND

DISTRICT TENDER COMMITTEE,

IJARA DISTRICT.....PROCURING ENTITY

Review against the decision of the District Tender Committee, Ijara District dated 1st March, 2010 in the matter of Tender No.IJR/29/2009-2010 for Erection and Completion of the Proposed New Female Ward at Masalani District Hospital.

BOARD MEMBERS PRESENT

Ms. Judith Guserwa	-	Member (In the Chair)
Eng. C. A. Ogut	-	Member
Mr. Akich Okola	-	Member
Mr. Sospeter Kioko	-	Member

IN ATTENDANCE

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

PRESENT BY INVITATION

Procuring Entity, District Tender Committee, Ijara District

Mr. Kiarie Ngua - Secretary, Ijara District Tender Committee

Applicant, Wamo Construction Co.

Mr. Andrew Ombwayo - Advocate, Odawa, Ombwayo &
Ochichi Advocates

Mr. Musa Abdi - Director

Ms. Hamida Ahmco - Director

Interested Candidate, M/S Hariet Construction Co.

Mr. Mutuma Kibanga - Advocate

Mr. Haref Maalim - Director

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 OF AWARD

This tender was advertised by the Procuring Entity in the Daily Nation Newspaper on 30th November, 2009. The tender was for Proposed Erection of a New Female Ward at Masalani District Hospital. The tender closed/opened on 21st December, 2009 in the presence of the bidders' representatives. Tenders were received from the following bidders:

	NAME OF CONTRACTOR	TENDER SUM (KSHS)
1.	M/s Ogle construction Company	13,506,010.00
2.	M/s Wamo Construction Company	14,010,140.00
3.	M/s Haret Construction Company	14,031,650.00
4.	M/s Sangole Construction Company	15,415,320.00
5.	M/s Mumaka Construction company	15,781,985.00
6.	M/s Al-Munawara Construction Company	16,629,690.00
7.	Engineers Estimate	15,990,430.00

TECHINICAL EVALUATION

The technical evaluation was based on the following parameters:

1. Form security/bond
2. Tender Questionnaire
3. Confidential Business Questionnaire
4. Contractors Key Personnel
5. Financial Reports for the last five years
6. Schedule of Construction Equipment/Plant.
7. Registration category with the Ministry of Roads and Public Works

A summary of the evaluation was as follows:

REQUIREMENT	Haret Constr. Co	Mumaka Constr. Co. Ltd	Ogle Constr. Co. Ltd	M/S AL-Munawara Constr.Co.	Wamo Constr. Co. Ltd	Sangole Constr. Co. Ltd
Form of Tender	y	y	y	y	y	N
Form of tender security[Bid Security]	Y	X	Y	X	Y	X
Qualification information	Y	Y	Y	Y	Y	N/A and N

Tender Questionnaire	Y	Y	Y	Y	Y	N
Confidential Business	Y	Y	Y	Y	Y	N
Contractors Key Personnel	Y	Y	Y	Y	Y	Y
Financial Report	N	Y	Y	Y	Y	N
Contracts completed in the last 5 years	Y	Y	Y	Y	Y	N
Schedules of construction equipment/plant	N	Y	Y	Y	Y	N
Tax Compliance Certificate	Y	Y	Y	Y	Y	N
Registration	Y	Y	Y	Y	Y[Category E]	Y[Category E]
Remarks	R	NR	R	NR	R	NR

KEY: R-Responsive: NR-Non-Responsive

Arising from the above information, three bidders, namely Al-Munawara Construction Co, Sangole Construction Co. and Mumaka Construction Co. were found non-responsive for failing to comply with some of the technical requirements of the tender. Thus their tenders were disqualified from further evaluation. The other three bidders, Ogle Construction Co. Ltd, Wamo Construction Co. and Haret Construction Co. qualified for financial evaluation.

Financial Evaluation

The tenders submitted by the three technically responsive tenderers, Ogle Construction Co, Wamo Construction Co. and Haret Construction Co. were

subjected to financial evaluation. This involved corrections of errors and comparison of critical unit rates.

A price comparison schedule was as follows:

	CONTRACTOR	TENDER SUM(KSHS)	ESTIMATE	VARIANCE
1.	Ogle Construction Co.	13,506,010.00	15,990,430.00	2,484,420.00
2.	Wamo Construction	14,010,140.00	15,990,430.00	1,980,290.00
3.	Haret Construction Co.	14,031,650	15,990,430.00	1,958,780.00

In view of the above information, the Evaluation Committee recommended the award of the tender to Wamo Construction Co. at its tender price of Kshs. 14, 010, 140.00.

The evaluation report was presented to the District Tender Committee by the Secretariat which made certain observations as follows:

1. That the tender was advertised in the daily Nation newspaper of 30th November 2009.
2. That seven tender documents were sold and six bidders responded.
3. That the technical/financial evaluation recommended award to the second lowest bidder M/S Wamo construction Company to carry out the works at a total cost of Kshs. 14,010,140/=
4. That the lowest evaluated bidder M/S Ogle Construction Company was disqualified for the contractors' critical rates being too low making it uneconomical to the contractor.

5. That the second lowest evaluated bidder recommended for award by the technical/financial committee did not meet the following evaluation criteria:
 - i) Proof of similar magnitude and complexity undertaken for the last four years
 - ii) The key personnel employed by the contractor such as structural engineers, electrical engineers etc. Without satisfying these conditions it is not possible to assess the capability of the contractor to undertake the works of this magnitude and complexity
6. That the evaluation criteria i.e. 'the bidder has no previous experience in Danida works was not set out in the tender document or the tender advertisement notices as an evaluation criteria. So the evaluation committee should not have used these criteria.
7. That the secretariat concurs with the technical/financial evaluation committee that bidder No'1 M/S Haret construction company is responsive.
8. That table No. 2: attached to the technical evaluation refers to tender analysis for the proposed OPD Block at Bura District Hospital and NOT the Proposed New Female Ward at Masalani as was expected indicating a 'cut and paste' situation.

9. That on the part of Schedules of construction equipment/plant, the table shows that, contractor No. 1 attached two (2) copies of logbooks and was given an 'N' while contractor No.5 attached three (3) copies of logbook and was given a 'Y'

10. The committee is to note that the method used in checking for arithmetical errors was in itself erroneous, in that the rates for M/s Ogle Construction Company and Wamo Construction Company are V.A.T inclusive while the 16% V.A.T for the rates of M/S Haret Construction Company was to be calculated and distributed from that quoted on the Grand Summary on page M/S1 an omission which is a material arithmetical error which gave M/S Haret Construction a comparative disadvantage in the evaluation process.

11. That table No. 2: attached to the technical evaluation refers to tender analysis for the proposed OPD Block at Bura District Hospital and NOT the Proposed New Female Ward at Masalani District Hospital".

12. That the department confirmed availability of funds.

In view of the above information, the secretariat rejected the recommendation of the evaluation committee to award the tender to Wamo Construction Co. Ltd noting that the bidder had not provided proof of

works of similar magnitude and complexity undertaken in the last four years and key personnel. The secretariat recommended the tender to Haret Construction Company.

In its meeting No.4 held on 1st March, 2010, the District Tender Committee did not concur with the recommendation of the Evaluation Committee to award the tender to Ms Wamo Construction Company. After noting the secretariat comments, the tender committee approved the award of the tender to Haret Construction Co. at a corrected bid sum of Kshs. 14, 509, 570.00.

Notification letters for the successful and unsuccessful bidders are dated 1st March, 2010.

THE REVIEW

This Request for Review was lodged by Wamo Construction Co on 26th March, 2010 against the decision of the Tender Committee of Ijara District in the matter of Tender No. IJR/29/2009-2010 for Erection and Completion of the Proposed New Female Ward at Masalani District Hospital.

The Applicant was represented by Mr Andrew Ombwayo, Advocate while the Procuring Entity was represented by Mr. Kiarie Ngua, Secretary, Ijara District Tender Committee. An Interested Candidate, M/S Harriet Construction Co. was represented by Mr. Mutuma Kibanga, Advocate.

The Applicant has raised six grounds of Appeal and urged the Board to make the following orders:

- a) The Procuring Entity's decision to award the tender to the bidder who was not the lowest evaluated price be and is hereby annulled.
- b) The Procuring Entity be and is hereby ordered to award the tender to the Applicant as recommended by its evaluation committee and or so.
- c) Such or further relief(s) as this Board shall deem just and expedient".

The Board deals with the grounds of review as follows:

GROUND 1-5: BREACH OF SECTIONS 31, 66(1) AND (4) AND REGULATIONS 51(2) AND 52

These grounds have been consolidated as they raise similar issues regarding the evaluation and the award of the tender.

The Applicant submitted that the Procuring Entity breached Section 66 (4) of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Act") by failing to award the tender to the lowest bidder. It alleged that its offer of Kshs. 14,010,140 was lower than that of the successful bidder M/s Haret Construction Company at Kshs. 14,031,650 which was modified to Kshs 14,509,570 by the Tender Committee. It stated that from the contents of paragraphs one (1) and three (3) of the Procuring Entity's

response, it is clear that the Tender Committee took over the role of the evaluation committee by evaluating the bids contrary to Regulation 11(2)(a) of the Public Procurement and Disposal Regulations, 2006 (herein after referred to as "the Regulations"). It further stated that contrary to the recommendation of the evaluation committee, the tender committee declared its bid non responsive and awarded the tender to Ms Haret Construction Company.

The Applicant submitted that pursuant to Regulation 47(1) (f), the Procuring Entity was supposed to determine that all bidders had provided all the required documents and information at the preliminary evaluation stage. It stated that it had complied with all the requirements of the tender documents as set out at Section 1.5 of the Instruction to Tenderers and in line with Section 31 of the Act. It further stated that its tender was responsive.

In addition, the Applicant alleged that the Procuring Entity breached Regulation 51(2) by ignoring the recommendation of the Evaluation Committee to award it the tender. It stated that the Tender Committee awarded the tender to another bidder at a higher price which was different from the one it had quoted in its tender. It stated that the functions of the Tender Committee were clearly defined under Regulation 10(2). It further stated that pursuant to Regulation 11(2), the Tender Committee was not allowed to modify any submissions with respect to recommendations for

award of a tender. It submitted that the tender committee should have sought clarifications from the evaluation committee.

Finally, the Applicant stated that the Tender Committee proceeded irregularly to award the tender to M/S Haret Construction Company, the Successful Bidder. It urged the Board to nullify the tender award to the Successful Bidder and award it instead to the Applicant.

In response, the Procuring Entity denied that it breached the said Sections of the Act and Regulations as alleged by the Applicant. It submitted that the Applicant was not the lowest evaluated bidder in accordance with Section 66(4)) which provides as follows:

“the successful tender shall be the tender with the lowest evaluated price”.

The Procuring Entity further submitted that the Tender Committee had reviewed the technical and financial evaluation reports pursuant to Regulation 10(2) (a) and found some anomalies. It argued that the Applicant was non-responsive since it failed to comply with the following mandatory requirements as set out in the advertisement notice dated 30th November, 2009.

1. Provide proof of work of similar magnitude and complexity undertaken in the last four years;
2. Key personnel for specified type of works; and

3. A tender from a tenderer whose tender sum is plus or minus (10%) Ten percent of the official estimate.

The Procuring Entity stated that the Applicant had no capacity to undertake the works worth Kshs, 14, 010, 140.00. It further stated that the Tender Committee only evaluated the tenders that were responsive pursuant to Section 66(1) of the Act. It submitted that the failure by the Evaluation Committee to declare the Applicant non-responsive was an oversight on the part of the evaluation committee which was corrected by the Tender Committee.

The Procuring Entity argued that the Tender Committee was guided by Regulation 10(2) (o) and the comments of the Secretariat in arriving at its decision. It further argued that it did not modify or amend the evaluation committee's recommendation for award as alleged by the Applicant

The Procuring Entity submitted that Regulation 52(1) allowed it to confirm the qualifications of the tenderer submitting the lowest evaluated responsive tender in order to determine whether the tenderer was qualified for the award of the tender. It stated that the Tender Committee corrected arithmetic errors pursuant to Section 63 of the Act. It further stated that it informed the Successful Bidder of the correction of the arithmetic errors but failed to inform the Applicant. In conclusion, it urged the Board to dismiss the Application.

On its part, the interested candidate associated itself with the submissions of the Procuring Entity. It submitted that its bid was properly evaluated and that it satisfied all the conditions required in relation to the other bidders. It further submitted that the issues being pointed out were in relation to the process of awarding the tender and related more to procedure rather than substance. It argued that if the correction of bid sums by the Tender Committee as mentioned were to be found inappropriate, the corrections did not make the interested party less successful than the Applicant. It further argued that even if the evaluation process was to be undertaken once again, the interested party would still emerge successful.

The interested party stated that it had submitted a letter dated 19th December, 2009 on its letter head indicating it had undertaken works worth Kshs. 16.2 million as required by Clause 1.5(b) of the Instruction to Tenderers. It further submitted that the letter in question had an attachment confirming that it had undertaken works of similar magnitude in terms of monetary value.

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

The issue to be determined is whether the evaluation process and the award of the tender were correctly done.

The Board, upon scrutiny of the evaluation report notes that the tenders were evaluated in two stages namely technical and financial evaluation

stages. Three bidders, namely Mumaka Construction Co, Munawara Construction Co. and Sangole Construction Co. were disqualified at the technical evaluation stage for failing to comply with some of the tender requirements, and three bidders namely Haret Construction Co., Ogle Construction Co and the Applicant qualified for financial evaluation having complied with all the requirements of the tender which included corrections of arithmetic errors. The Board notes that the Evaluation Committee recommended the award of the tender to Wamo Construction Co. at Kshs. 14, 010, 140.00.

The Board further notes that from the minutes of the Ijara District Tender Committee meeting of 1st March, 2010, the recommendation of the Evaluation Committee to award the tender to Wamo Construction Co. was reversed by the Tender Committee and the tender was awarded to Hariet Construction Co. The Board notes that the decision by the Tender Committee to reverse the recommendation of the Evaluation Committee was based on comments made by a body referred to as the Secretariat. The Board notes that the Secretariat made twelve observations. The Board further notes that the Secretariat considered the issue of VAT and arithmetic errors which amounted to an evaluation. The Board holds that under the Act and the Regulations, the Secretariat has no such powers.

The Board finds that according to requirements set out at Clause 1.5 of the Instruction to Tenderers, the Evaluation Committee determined the Applicant to be the lowest evaluated bidder and recommended for award

to the Tender Committee. Notwithstanding this recommendation, the secretariat which is a body that is not established in accordance with Section 26 of the Act and Part 11 of the Regulations, and therefore not empowered to play any role in the tender process, recommended to the tender committee to award the tender to the Successful Bidder. The Board finds that the recommendation by the secretariat was a nullity and should not have been acted upon by the Tender Committee. The Secretariat did an evaluation after the technical evaluation committee had finished its part and by extension the Tender Committee also did an evaluation contrary to the provisions of Regulation 11(2).

The Boards notes that the Applicant's tender conformed to all the mandatory requirements as scored by the Evaluation Committee. The Board further finds that notwithstanding that table 2 had a wrong heading, the analysis was in respect to the tender in question and that it is the same table that was presented to the Tender Committee that made the award to Haret Construction Co. The Board notes that though M/S Haret Construction Co. was recommended by the Evaluation Committee for financial evaluation, it had been marked non-responsive on two parameters, namely financial standing and schedule of construction equipments and plant. The Board observes that the interested party had attached two copies of log books for two vehicles only as evidence on the requirements on equipments.

The Boards further notes that the requirements for the key personnel as specified at Clause 1.5 of the Qualification Information was not objective and quantifiable in that it did not indicate qualification requirements for key personnel, thus leaving it open for each bidder to provide what they found to be suitable. The Board holds that the Procuring Entity was in breach of Section 66 (3) (a) which provides as follows:

66(3) The following requirements shall apply with respect to the procedures and criteria referred to in sub section (2)-

(a) the criteria must, to the extent possible be objective and quantifiable.

In regard to proof of similar works and magnitude, the Board finds that the Applicant provided evidence of completion certificates issued by District Works Officer, Ijara District for Rehabilitation of a Block of 4No. Class Rooms at Masalani Primary School and Coast Development Authority for General Construction Works at Masalani Office compound. In the case of the Successful Bidder, the Board notes that as evidence of proof of similar works, the Successful Bidder only attached handing over certificates. Further in respect to magnitude of works previously undertaken, the Successful Bidder only attached a letter on its letter head. The Board further notes that in the course of the proceedings, the successful bidder claimed that it had attached proof that it had undertaken works of similar monetary value, but there was no reference to the attachments in their letter nor were they found on inspection by the Board. Regarding the claim

by the Successful Bidder that it had attached supporting documents, the Board finds no evidence to support this claim.

The Board notes that by a letter Ref: TY/IJR/3101/VOL.II/196 dated 26th February, 2010, the Procuring Entity allegedly informed the Successful Bidder that its tender had arithmetic errors and that the same would be corrected pursuant to Section 63(1) of the Act subject to confirmation from it. The Successful Bidder concurred to the intended corrections of arithmetic errors by a letter dated 26th February, 2010. The Board further notes that the letter dated 24th February 2010 by the Procuring Entity on correction of arithmetic errors was not addressed to any specific bidder, nor did it contain the said quantum of the arithmetic errors. The Board observes that although, arithmetic errors were found in the case of the Applicant, by the Tender Committee, the Applicant was not notified in accordance with Section 63(2) of the Act.

The Board holds that the evaluation process was skewed by the Tender Committee with a view to awarding the tender to a tenderer who was not the lowest evaluated tenderer thus breaching Section 66 (4) of the Act.

Accordingly, the Board finds that the Tender Committee erred by substituting the recommendations of the Evaluation Committee with their own and in breach of provisions of Regulations 11(2) which provides as follows: -

“the tender committee shall not -

- a) modify any submissions with respect to the recommendations for a contract award or in any other respect*
- b) reject any submission without justifiable and objective reasons."*

Accordingly these grounds of Appeal succeed.

GROUND SIX: BREACH OF SECTION 68(2) OF THE ACT

The Applicant submitted that the Procuring Entity breached Section 68(2) of the Act by giving notice of its decision on or about 12th March, 2010 prior to entering into contract with the successful bidder.

In response, the Procuring Entity submitted that the notices of award to the successful and unsuccessful bidders were issued pursuant to Section 67(1) and (2) of the Act and that no contract has been signed between it and the successful bidder.

The Board notes that all the notification letters were dated 1st March, 2010 and that the letter to the Successful Bidder was specific that "... *contract documents were ready for your signature BUT after the said 14 days...*" The Board finds that this was in line with Section 68(2) of the Act. Therefore, the Procuring Entity did not breach Section 68(2) of the Act.

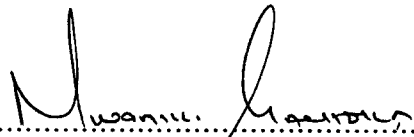
Taking the above matters into consideration, this Request for Review succeeds and the award of the tender to the Successful Bidder, M/S Haret

Construction Company is hereby annulled pursuant to Section 98(a) of the Act.

The Board is alive to the fact that this is a tender for "*Erection and completion of a new female ward at Masalani district Hospital*". This is a vital project in the North Eastern Province and the Board hereby invokes its powers under Section 98(c) of the Act and substitutes the decision of the Procuring Entity with an order that this tender be awarded to the Applicant at its quoted price of KShs. 14,010,140.00.

The Board further orders that the Applicant should sign the contract with the Procuring Entity in accordance with Section 68 of the Act.


Date at Nairobi on this 26th day of April, 2010.



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CHAIRMAN

PPARB



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SECRETARY

PPARB

