

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO.19 /2010 OF 1ST APRIL, 2010

BETWEEN

M/S NJOWAMU CONSTRUCTION CO. LTD.....APPLICANT

AND

RUNYENJES DISTRICT HOSPITAL..... PROCURING ENTITY

Review against the Decision of the Runyenjes District Hospital in Tender No. /PGH/20/09-10 on 23rd March 2010 for proposed Wards at Runyenjes District Hospital.

BOARD MEMBERS PRESENT

Mr. P.M Gachoka	-	Chairman
Mrs. Loise Ruhiu	-	Member
Amb. Charles M. Amira	-	Member
Ms. Natasha Mutai	-	Member

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant

Njowamu Construction Co. Ltd - Mr. George Obanda

Procuring Entity

Runyenjes District Hospital - Dr. Elesban Kihuba

BACKGROUND OF AWARD

Advertisement

The tender under review was advertised on February 2010 in the Daily Nation.

Closing/Opening

The bids were opened on 10th February 2010. The twelve bidders who responded and whose bids were opened were as follows:-

No	TENDERER	TENDER FIGURE (KSHS)
1.	Njega	8,559,441.00
2.	Adolphus	9,768,984.00
3.	Dashit	10,270.166.72
4.	Njowamu	10,667,752.00
5.	Sunker	10,776,078.00
6.	Kamuti	11,833,960.00

7.	Kibetu	12,206,750.76
8.	Brickon	12,367,108.00
9.	Watercore	13,369,533.60
10.	Plansteel	14,546,806.00
11.	Samina	15,076,995.00
12.	Septiemme	15,132,030.64

At tender opening it was noted that the Applicant had not quoted in the Mechanical and Electrical Bill of Quantities and was therefore disqualified.

EVALUATION

Technical Evaluation was carried out by an Evaluation Committee chaired by E.N Muindi. The evaluation was as follows:

Technical Evaluation

Among the mandatory conditions to be complied with as listed in the tender advertisement are; -

- 1) Registration with Ministry of Public Works Category 'G' and above
- 2) Proof of works of similar magnitude in the last 5 years
- 3) Proof of sound financial standing and access to bank credit lines
- 4) Bid bond of one percent of the tender sum from reputable commercial bank or insurance company
- 5) Tax compliance certificate
- 6) Fully completed confidential Business Questionnaires

7) Litigation history of the company (both court and arbitration)

The post qualification forms, which form part of the tender documents as per clause 8, further required all tenderers to state the following: -

8) Equipment which are owned and which the contractor proposes to lease for the works

9) Professional Qualification and experience of key personnel in the firm.

For purposes of determining responsiveness, the technical and financial evaluation committee set the minimum requirements for responsiveness as: -

1. Qualifying in any six out of nine of the above requirements.

Below is the tabulation (Table "B") of the responsiveness of the submitted tenders.

TABLE "B" -TENDER RESPONSIVENESS

	bo nd	Cat e gory	Tax Compli a nce	Finaci al qual	Simil ar works	Equip ment	Perso Nnel	Ques tiona ire	Liti. histo ry	Scor e	Rem arks
Njenga	1	E	0	0	0	0	0	0	0	2/9	Fail
Adolphus	0	F	1	0	0	0	0	1	1	4/9	Fail
Kibetu	1	F	1	0	0	0	1	1	0	5/9	Fail
Njowamu	1	B	1	0	1	1	0	1	0	6/9	Pass
Dashit	0	G	0	1	1	0	1	1	0	5/9	Fail

Sunker	0	G	0	0	0	0	0	1	0	2/9	Fail
Kamuti	1	D	1	1	1	1	0	0	0	6/9	Pass
Watercore	1	G	1	1	0	1	1	1	0	7/9	Pass
Brickon	L	c	1	1	1	0	1	0	0	5/9	Fail
Septiemme	1	F	0	0	0	0	0	1	0	3/9	Fail
Plansteel	1	E	1	1	0	0	0	0	1	5/9	Fail
Samima	1	G	1	1	1	1	1	1	0	8/9	Pass

0 - means not responsive

1 - Means responsive

The responsive tenderers are therefore Njowamu, Kamuti, Watercore and Samima. These four contractors therefore proceeded for financial analysis.

FINANCIAL ANALYSIS

Here below is an analysis of the technically responsive tenders.

TABLE "C": RESPONSIVE TENDERS AND DEVIATIONS FROM OFFICIAL ESTIMATE.

S/NO	BIDDER	TENDER SUM	BID AS A %AGE OF ESTIMATE	DEVIATION
1	Njowamu	10,667,752.00	104.6	+4.6
2	Kamuti	11,833,960.00	116.0	+16.0
3	Watercore	13,369,533.60	131.1	+31.1
4	Samima	15,076,995.60	147.8	+47.8
	ESTIMATE	10,200,000	0	0

Njowamu

M/s Njowamu submitted the First lowest evaluated tender. The tender had no arithmetic error. The rates reflect the current market price for various items and are consistent. The contractor did not put prices against electrical and plumbing works which were issued as an addendum to the main works. He has however included the prime cost sum for these works in his final tender figure.

Kamuti

M/s Kamuti submitted the second lowest evaluated tender. The tender has no arithmetic error. The rates are generally above the current market price for various items but they are consistent.

Watercore

M/s Watercore submitted the third lowest evaluated tender. The tender has an arithmetic error of negative 2.5% which is negligible. The rates are generally above the current market price for various items but they are consistent.

Samima

M/s Samima submitted the fourth lowest technically responsive tender. This tender is too expensive (51% above the official estimate) to warrant detailed financial analysis.

RECOMMENDATION

It was recommended that Njowamu Construction co. LTD of P.O. BOX 7736 -00300 NAIROBI be awarded the tender at the quoted price of Kenya shillings ten million six hundred and sixty seven thousand seven hundred and fifty two only (KES 10,667,752.00) due to the following reasons:

- (i) Their tender was the lowest technically and financially responsive tender.
- (ii) The fact that it had not put a price against the plumbing and electrical works was brought to its attention vide letter refer. No EBU/PQS/GLN/71. It confirmed that it had included

their costs in the other rates and the provisional sums as per the requirements of clause 3.3(instructions to bidders) and clause 23.5 of the conditions of contract.

(iii) It had provided a bid security guarantee for its tender price

TENDER COMMITTEE'S DECISION

The tender committee met on 17th March 2010 to award the tender. An evaluation report was presented to the Committee and its recommendation rejected after a number of irregularities were noted. These were the concerns:

- The Bid from Njowamu Construction Co, which was rejected for failure to comply with instructions, had been included in the evaluation report.
- It was noted that after the tender opening, communication did occur between the evaluation team and the contractor (Njowamu Construction Co.) without the procurement entity knowledge pertaining the tender sum.(attached here in)
- Four Bidders were said not to have bid Bond which was not the case. (All bidders had valid bid bonds).

After taking into consideration the above corrections, especially the requirement that a bid should not be too expensive (>10% of the Estimate) and yet not too low (<10% of the estimate) Adophus, Dashit and Sunker were noted to be within the limit and were also responsive following the corrections.

In conformity to Section 66 (4) the tender was awarded to Adophus and Associates Co. at Kshs. 9,768,984.00 and a written confirmation made on 23rd March 2010. At the same time, all unsuccessful bidders' were notified.

THE REVIEW

This Request for Review was lodged on the 1st day of April, 2010 by Njowamu Construction Company Limited against the decision of the Runyenjes District Hospital dated 23rd March, 2010 in the matter of Tender No. Embu/PGH/20/09-10 for Proposed Ward at Runyenjes District Hospital. At the hearing, the Applicant was represented by Mr. George Obanda while the Procuring Entity was represented by Dr Elesban Kihuba.

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

1. That this tender has not been awarded in accordance with the Public Procurement and Disposal Act 2005 and hence the award is null and void.
2. That the Officer in Charge (Runyenjes District Hospital) be compelled to do a proper technical and financial evaluation.
3. That Njowamu fulfilled all the technical and financial evaluation criteria and hence should be awarded this contract.
4. That the Officer in Charge (Runyenjes District Hospital) should pay Njowamu the cost of filing this appeal.

The Board deals with the raised six grounds of appeal as follows:

Ground 1- Breach of Section 53(3) of the Act

The Applicant alleged that the Procuring Entity did not provide adequate time for preparation of the issued addendum contrary to Section 53(3) of the Public Procurement and Disposal Act 2005 (herein after referred to as the Act). It submitted that at the time it collected the Tender Documents, the Mechanical and Electrical works Bills of Quantities were not ready, and that it had been advised that it would be informed when to collect them. It further alleged that when it was informed to collect the two bills, only the Electrical Bills were available, and as such it only returned the Electrical Bill.

In its response, the Procuring Entity claimed that the alleged addendum was part and parcel of the main tender document and was not a supplement. It admitted at the hearing, that the Mechanical and Electrical works Bills of Quantities were not ready at the time the tenderers collected the documents and that the tenderers had been advised that they would be alerted when the two bills were ready for collection. It further claimed that all the bidders had been alerted to collect the Mechanical and Electrical works Bills, and that all bidders except the Applicant completed these Bills as part of the tenders they returned.

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

The Board notes that the Procuring Entity admitted at the hearing that the Mechanical and Electrical Bills were not issued at the same time as the main Tender Documents.

The Board further notes from the Procuring Entity's tender report Ref EP/EBU/PQS/GEN/72 dated 2nd March, 2010, clause 3.03 '...the contractor did not put prices against Electrical and plumbing works which were issued as an addendum to the main works....'

The Board notes that Section 53(1) of the Act makes provision for a Procuring Entity to amend the Tender Documents any time before the deadline for submitting tenders by issuing an addendum; and further Section 53(3) of the Act requires the Procuring Entity to provide promptly a copy of such an addendum to each person to whom the Procuring Entity provided copies of the tender document

The Board therefore finds that the Mechanical and Electrical Bills were not part of the Tender Documents issued to the bidders at the time they collected the main Tender Documents, and as such these two bills were in effect an addendum. As regards whether the addendum was issued promptly, the Board notes the admission at the hearing by both the Applicant and the Procuring Entity that there was no covering letter forwarding the addendum and as such it is not

clear to the Board when the addendum was issued to the bidders. The Board further notes that the other bidders submitted completed Mechanical and Electrical Bills whereas the Applicant only returned the Electrical bills and in addition did not provide evidence of having notified the Procuring Entity at the time of bidding that the addendum had not been promptly issued or that it had not been issued with the Mechanical Bills.

Based on the foregoing, the Board finds no evidence to support the Applicant's allegations, and accordingly, this ground of appeal fails.

Ground 2- Breach of Section 34(1) of the Act

The Applicant alleged that the Procuring Entity, contrary to Section 34(1) of the Act, failed to provide clear information which resulted in the main Tender Document not being properly amended to take care of the addendum issued. It argued that this had led to the confusion as to the exact tender sum for each bidder during the tender opening. It further alleged that as a result of this, the Procuring Entity did not, at the tender opening, read the figures stated in the form of tender.

In its response, the Procuring Entity reiterated that the alleged addendum was not a supplement to the main Tender Documents and as such was not an addendum. It argued that from the tender advertisement, it was clear that the tender was for the construction of a ward block which comprised the main, mechanical and electrical works. It submitted that the Applicant was the only bidder who had not completed the Mechanical and Electrical Bills but had included the prime cost sums for these works as provided for in the main Tender Document. It argued that as a result, at the tender opening, it made some arithmetic corrections on the bidders' figures as submitted in the forms of tender to take into account some provisional sums which had been included. It further submitted that in the case of the Applicant, it proceeded to disqualify its bid at the

tender opening for failing to complete the Mechanical and Electrical bills.

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

The Board notes that Section 34(1) of the Act requires the Procuring Entity to prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.

As earlier noted, the Board finds that the Mechanical and Electrical bills issued were an addendum to the main tender document and as also noted, the addendum was not issued with any covering letter.

The Board has examined the Tender Opening Minutes and finds that the minutes record the Applicant's bid as Kshs 10,667,752 which is the same figure stated in the Applicant's form of tender, even though the Procuring Entity conceded at the hearing that at the Tender Opening it made arithmetic corrections to the bidders' figures on the forms of tender to take into account the provisional sums that it stated it did not need.

On examination of the Evaluation Committee's tender report, the Board finds that the committee based its Financial Evaluation of responsive bidders on the figures stated in the forms of tender.

From the foregoing, the Board does not find any evidence that the Tender Document was not clear. However, the Board finds that it is the actions of the Tender Opening Committee at the Tender Opening which caused confusion as to the actual tender sums of each bidder.

Accordingly this ground of appeal fails.

Grounds 3 & 5- Breach of Sections 66(4) and 66(1) of the Act

These grounds have been consolidated because they raise similar issues.

The Applicant alleged that it would have emerged as the bidder with the lowest evaluated price had the Procuring Entity conducted a proper technical and financial evaluation. It argued that by failing to do so, the Procuring Entity did not award the tender to the bidder with the lowest evaluated price contrary to Sections 66(4) and 66(1) of the Act.

In its response, the Procuring Entity stated that it had awarded the tender to the bidder with the lowest evaluated price. It submitted that it had disqualified the Applicant's bid at tender opening for not completing the Mechanical and Electrical Bills. It further submitted that its Tender Committee met on 17th March 2010 to award the tender. It averred that at the Tender Committee meeting, it deliberated the tender report submitted by the Evaluation Committee and it rejected the Evaluation Committee's recommendation to award the tender to the Applicant after noting some irregularities. It stated that at the meeting, the Tender Committee made corrections to the irregularities noted, disqualified the Applicant, and subjected the bids it determined to be responsive to Financial Evaluation. It then proceeded to award the tender to the successful bidder in conformity to Section 66(4) of the Act.

The Board has examined the Tender Opening Minutes, the Evaluation Committee's tender report, the Tender Committee's minutes and the parties' submissions, in respect of the evaluation procedures leading to the award of the tender and makes the following observations:-

- i) The Tender Opening committee, at tender opening, disqualified the Applicant for failing to put prices against the Mechanical and Electrical works;
- ii) The Tender Opening committee, at tender opening, carried out arithmetic corrections on the bidders' figures as submitted in

- the forms of tender to take into account some provisional sums which had been included;
- iii) The Evaluation committee subjected all the bids received to technical evaluation and four bidders including the Applicant were deemed to be technically responsive and these proceeded to financial evaluation;
 - iv) The Evaluation Committee had determined the successful bidder as non-responsive for failure to provide a valid bid bond among other reasons;
 - v) The Evaluation Committee after carrying out the Financial Evaluation determined the Applicant to be the lowest evaluated bidder and had recommended that the tender be awarded to it. It had noted that the Applicant had not put prices against the Mechanical and Electrical works which had been issued as an addendum to the main works; but that the prime cost sums for these works had been included in the final tender figure;
 - vi) The Evaluation Committee had brought to the Applicant's attention that it had not put a price against the Mechanical and Electrical works vide a letter Ref EBU/PQS/GLN/71, and that the Applicant confirmed that it had included the cost of these works in the other rates and provisional sums as per the requirements of Clause 3.3 in the Instructions to Bidders and Clause 23.5 of the Conditions of Contract;
 - vii) The Tender Committee met to award the tender and on deliberating on the evaluation committee's tender report, noted three irregularities:-that the bid from the Applicant which the Tender Opening Committee had rejected, had been subjected to evaluation by the evaluation committee; that after the tender opening, there was communication between the evaluation team and the Applicant pertaining to the tender sum; that four bidders said not to have bid bonds actually had valid bid bonds;
 - viii) The Tender Committee corrected these irregularities at the meeting and declared eight out of the eleven bids received as responsive, with the result that the Applicant was declared non

responsive and the successful bidder was found to be responsive;

- ix) The Tender Committee then subjected the eight bidders to financial evaluation and determined the successful bidder as the lowest evaluated bidder and awarded the tender to it.

The issue before the Board under these grounds of appeal is the jurisdiction of the Tender Opening committee, the Evaluation Committee and the Tender Committee in evaluation and award of tenders.

To answer this, the Board notes the relevant Sections of the Act and its Regulations as follows:-

- i) Section 60 of the Act sets out the Tender Opening committee's role in opening of the tenders which revolves around opening of bids received, recording the procedure followed in opening of the bids and recording particulars of bidders who attend the tender opening;
- ii) Regulation 47 sets out how tenders are to be deemed responsive or non responsive, and who rejects non responsive tenders. The Regulations stipulate this as the role of the Evaluation Committee;
- iii) Regulation 11 sets out what actions in respect of approving tender recommendations, the Tender Committee may and shall not do. The Regulations allow the Tender Committee to approve a submission, or reject a submission with reasons, or approve a submission subject to minor clarifications by the Evaluation Committee. The Regulations stipulate that the Tender Committee shall not among other actions, modify any submission with respect to the recommendations for a contract award or in any other respect.

The Board therefore finds that the Tender Opening Committee in disqualifying the Applicant at the tender opening, and making arithmetic corrections to tenders submitted, acted beyond the powers granted it in the Act and Regulations.

The Board further finds that the Tender Committee in making corrections to the Evaluation Committee's tender report and recommendations, and subsequently conducting its own tender evaluation and substituting the Evaluation Committee's recommendations with its own, also acted beyond the powers granted it in the Act and Regulations.

On the issue as to whether the Applicant should have been disqualified by the Evaluation Committee for not putting prices against the Mechanical and Electrical Bills, the Board notes Clause 3.3 of the Instructions to Tenderers which states that *items for which no rate or price is entered by the tenderer, will not be paid for when executed and shall be deemed covered by the other rates and prices in the Bill of Quantities.*

The Board therefore finds that the Applicant's bid should not have been rejected on the ground that it had not put prices against the Mechanical and Electrical Bills, and that the Evaluation Committee's decision to evaluate the Applicant's bid was correct.

On the issue as to whether the successful bidder's tender should have been accepted or rejected on the basis of the bid bond, the Board notes that Clause 3.9 of the Instructions to Tenderers states that *any tender that is not accompanied by an acceptable Tender Security shall be rejected.* The Board has examined the bid bond submitted by the successful bidder and notes that it is not on headed paper of the issuing bank (National Bank of Kenya) but had a rubber stamp of National Bank of Kenya, Embu Branch and has two signatures

against it. The Board finds that this is not a valid bid bond and accordingly, the Evaluation Committee was right in rejecting it.

From the foregoing, these grounds of appeal succeed.

Ground 4 - Breach of Section 45(3) of the Act

The Applicant claimed that the Procuring Entity failed to provide it with the procurement records within a reasonable time contrary to Section 45(3) of the Act.

In its response, the Procuring Entity stated that the tender advertisement clearly stated that it reserved the right to reject any or all tenders without giving reasons for such rejection and it was not bound to accept the lowest or any tender. It further stated that the Applicant proceeded to lodge a request for review before obtaining copies of the tender opening and award minutes which would have provided it with information about the proceedings.

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

The Board has examined the Applicant's letter to the Procuring Entity dated 22nd March, 2010 and notes that the Applicant had requested for six documents, namely, the Tender Advertisement notice, the Technical Report, the Financial Report, Minutes of the Tender Opening Committee, Minutes of the Tender Award Committee and the letter of notification.

The Board notes Section 44(3) of the Act which states that *the disclosure to an applicant seeking a review shall constitute only the summary of the evaluation and comparison of tenders, including the evaluation criteria used*. These are the procurement records alluded to in Section 45(3) of the Act.

The Board therefore finds that the Applicant was not entitled to receive the technical report, the financial report, minutes of the

tender opening committee, minutes of the tender award committee as it had requested.

Accordingly this ground of appeal fails.

At the hearing, it came to the Board's attention that the Applicant had been in possession of the Evaluation Committee's Tender Report prior to notification of award. The Board observed that this was irregular and that the Procuring Entity ought not to have released such confidential information to a bidder.

Ground 6 - Breach of Section 59(3) of the Act

The Applicant alleged that the Procuring Entity awarded works which were substantially different from the advertised works contrary to Section 59(3) of the Act.

In its response, the Procuring Entity stated that it had awarded a contract for the construction of a general ward as advertised in the tender notice.

The Board has carefully examined the documents submitted before it and the parties' submissions and finds no evidence presented by the Applicant to substantiate this allegation.

Accordingly this ground of appeal fails.

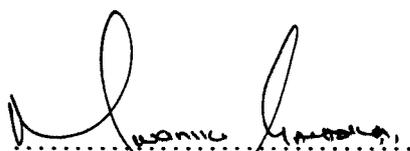
As the Board has already noted in grounds 3 & 5, the Procuring Entity's Tender Opening Committee and Tender Committee acted beyond powers granted them by the Act and Regulations by, respectively, disqualifying the Applicant and proceeding to modify the Evaluation Committee's tender report and carrying out its own evaluation of the bids.

Therefore, taking into account all the foregoing matters, it is clear to the Board that the Applicant was wrongly disqualified by the Tender

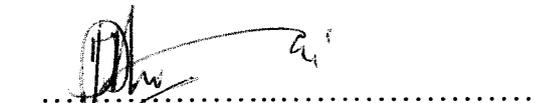
Committee and the Board therefore orders, pursuant to Section 98 of the Act, that:-

- i) The decision to award the tender to the successful tenderer is nullified; and
- ii) The Procuring Entity follows the recommendation of the Evaluation Committee to award the tender to the Applicant.

Dated at Nairobi on this 29th day of April, 2010



**Signed Chairman
PPARB**



**Signed Secretary
PPARB**

