

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 32/2010 OF 3RD JUNE, 2010

BETWEEN

NYORO CONSTRUCTION CO. LIMITED.....APPLICANT

AND

KENYA RURAL ROADS AUTHORITY.....PROCURING ENTITY

Review against the decision of the Kenya Rural Roads Authority of Nairobi dated the 19th day of April 2010 in the matter of tender for Rehabilitation of Kibunja-Molo-Olenguruone Road (D316) of 20th April 2010.

BOARD MEMBERS PRESENT

Mr. P.M Gachoka	-	Chairman
Amb. Charles M. Amira	-	Member
Ms. Natasha Mutai	-	Member
Mr. Joshua W. Wambua	-	Member
Ms Judith A. Guserwa	-	Member

IN ATTENDANCE

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



The Tenderers who returned the Tender Documents were as listed below:

1. The Enterprises Ltd.
2. Mattan Contractors
3. Hayer Bishan Singh & Sons
4. Intex Construction Ltd.
5. A. Jiwa Shamji Ltd.
6. Kimemiah E. Construction
7. Kimilili Hauliers Ltd.
8. Victory Construction Co. Ltd
9. Limelight Creations Ltd.
10. Nyoro Construction Co. Ltd
11. Elite Earth Movers Ltd.
12. Coastal Kenya Enterprises
13. Associated Construction Company
14. H. Young Company East Africa

PRELIMINARY EVALUATION

The preliminary evaluation was conducted to establish responsiveness to the criteria set out in the invitation for Bids as follows:

1. Form of bid
2. Appendix to Form of bid
3. Bid Security
4. Copy of Certificate of Incorporation
5. Copy of Proof of Registration with Ministry of Roads (MOR)
6. Confidential Business Questionnaire

7. Form of Power of Attorney
8. Certificate of Tenderers visit to site
9. Basic rates of specified materials and bona fide quotations
10. VAT Registration
11. PIN Registration
12. Valid Tax Compliance Certificate
13. Proof of having opened a bank account in the contractor's name
14. Schedule of other supplementary information
15. Tender Notices
16. Priced Bill of Quantities

One bidder M/s Mattan Contractors was declared non responsive at this stage as its Power of attorney was not signed by the directors; and the Business confidential questionnaire was not signed by the authorized officer.

The following thirteen firms were found to be substantially responsive:

1. Associated Construction Co. (k) Ltd.
2. Tai Enterprises
3. Intex Construction Co. Ltd.
4. Kimilili Hauliers Ltd.
5. Nyoro Construction Co. Ltd.
6. Hayer Bishan Singh
7. Coastal Kenya Enterprises
8. Victory Construction Co. Ltd
9. A. Jiwa Shamji Co. Ltd.

10. kimemeah Engineering Co.
11. Elite Earthmovers
12. Limelight creations
13. Coastal Kenya Ltd.

TECHNICAL EVALUATION

The bids were examined in accordance with the post qualification criteria in the Tender Document which included:

- Schedule of key personnel
- Work methodology
- Historical Non Performance
- Audited Accounts: to submit for the last 3 financial years
- Working Capital: A minimum of Kshs 100 Million
- Current commitment: should not exceed Kshs 2 billion
- Annual Turn over: An average of Kshs 200 million for the last 3 years
- General Construction experience of 5 years.

Only two bidders were considered to have substantially met the requirements of the qualification criteria and were qualified for detailed financial evaluation. These were:

1. Kimilili Hauliers Ltd; and
2. Associated Company Ltd.

FINANCIAL EVALUATION

The Tender Sum for the bidders was compared to the Engineer's Estimate at Kshs. 893,528,541. M/s Kimilili Hauliers Ltd. was recommended to be awarded the tender at its evaluated price of Kshs. 742, 290, 293.

TENDER COMMITTEE DECISION

The Tender Committee adjudicated on the recommendation of the Evaluation Committee and awarded the tender to Kimilili Hauliers Ltd at Kshs. 742, 290,293.00. The bidders were notified vide letters dated 19th May, 2010.

THE REVIEW

The Request for Review was lodged on 3rd June 2010 by Nyoro Construction Co. Ltd. against the decision of Kenya Rural Roads Authority in the matter of Tender No. - Rehabilitation of Kibunja-Molo-Olenguruone Road (D316) of 20th April 2010. At the hearing the Applicant was represented by Mr. W. Walubengo, Advocate, while the Procuring Entity was represented by Mr. Kenneth Mwangi, Procurement Manager. The Interested Candidate, M/s Kimilili Hauliers Ltd was represented by Mr. Kigen J. Katwa, Advocate.

The Applicant seeks for the following orders from the Board:

- 1. "The Notification of Unsuccessful Bid by the Respondent herein dated 19th April 2010 to the Applicant herein be and is hereby nullified.***

2. *The decision by the Respondent herein declaring/ awarding to any bidder other than the Applicant herein as the successful bidder in the Tender of April 20th 2010 the subject of this Application be and is hereby declared the successful bidder.*
3. *The Applicant herein being the lowest bidder in the Tender opened on 20th April 2010 be and is hereby declared the successful bidder.*
4. *Award the contract to the Applicant.*
5. *Any other orders that will make the ends of justice in the matter under review to be met.*
6. *Costs of the application be borne by the Respondent”.*

The Applicant raises ten grounds of review which we deal with as follows:

Ground 1

The Applicant alleged that the Procuring Entity had pre-decided who was to be awarded the tender as evidenced by the letter of Notification to the Applicant, which it claimed was written a day before the tenders were opened. It stated that its letter of Notification was dated 19th April 2010 yet the tender opening was done on the 20th April 2010. It argued that this was an indication that the award of the tender was pre-determined prior to the evaluation of the bids.

In response, the Procuring Entity stated that it did not pre-decide who was to be the Successful bidder. It submitted that the letter of award to the Successful bidder and the regrets to the Unsuccessful bidders, were dispatched on 24th May 2010 and that the letter to the Applicant was collected by one Mr. Gitau, as evident from the Mail Dispatch Register. The Procuring Entity averred that the date of 19th April 2010 as quoted in the letter to the Applicant and the rest of the Unsuccessful bidders was a typographical error. It stated that this error was also manifested in the notification letter to another bidder namely, Hayer Bishan. It also stated that the Applicant had not been prejudiced by the said error since it was able to file this Request of Review in time in accordance with Section 67 of the Act and its Request was now being considered by the Board. In this regard, it urged the Board to find no breach on this ground.

On its part, the Interested Candidate, Kimilili Hauliers Ltd, associated itself with the submissions made by the Procuring Entity.

The Board has considered the representations of the parties and examined the documents presented before it. The Board has noted that the letter of Notification to the Applicant was indeed dated 19th April 2010, which was a day earlier to the date when the tenders were opened, namely the 20th April 2010. Upon an in-depth analysis, the Board has found that the letters of notification, although dated 19th April 2010, were dispatched on 24th May 2010. On perusal of the Procuring Entity's

Mail Dispatch Register, the Board has found that the Applicant's Notification letter was collected and signed for by one Mr. Gitau, on 24th May 2010. The Board has also taken note of the fact that the Procuring Entity has acknowledged the error in the dating of the Notification letters as a typographical error in its response to the request for review. In this regard, the Board finds no merit in the Applicant's allegation that the letters of Notification were written before the tender was opened, and that the Procuring Entity had pre-determined the successful bidder. This ground of the request of review therefore fails.

Grounds 2 and 3: Breach of Section 66(4) and Regulation 50(3).

These grounds have been consolidated since they raise similar issues.

The Applicant submitted that its bid price was the lowest, as loudly announced during the tender opening on 20th April 2010. It therefore argued that, having met all the tender requirements, it ought to have emerged the Successful bidder. It submitted that the Procuring Entity breached Section 66(4) of the Act and Regulation 50(3) of the Regulations thereof, by failing to declare its bid as the lowest evaluated bidder. It stated that the Procuring Entity's response on the Request for review, that it did not submit the signed curriculum vita of its key staff was a minor issue. It submitted that, its understanding was that it was to submit the Curricula Vitae of its key staff once awarded the tender. It therefore urged the Board to find that the Procuring Entity breached the above mentioned provisions of the Act and the Regulations.

In response, the Procuring Entity stated that, it did not breach Section 66(4) and Regulation 50(3) as alleged by the Applicant. It submitted that the Applicant was indeed the lowest priced bidder as loudly announced during the Tender Opening on 20th April 2010. It further submitted that after the tender opening, all the bids were evaluated and ranked in accordance with section 66(1), (2), (3) and (4) of the Act and Regulation 50(3). It averred that during the Evaluation process, the Applicant's bid was found non-responsive under two evaluation criteria, namely;

- i) Historical non performance; and
- ii) Failing to provide the schedule of its key personnel and the signed Curricula Vitae of its key staff.

In conclusion, the Procuring Entity requested the Board to find that it did not breach Section 66 and Regulation 50 as alleged by the Applicant.

The Interested Candidate Kimilili Hauliers Ltd, in support of the Procuring Entity submitted that its bid was the lowest evaluated and urged the Board to find no omission on the part of the Procuring Entity.

The Board has considered the representations of the parties and perused the tender documents presented before it. The Board has observed that the Applicant was the lowest priced bidder at the Tender Opening with a price of Kshs. 724,906,738.90. The Board is alive to the requirements of Section 66 of the Act, that an Evaluation of the bids is supposed to be done by the Procuring Entity after the opening of the tenders to determine the lowest evaluated bidder. The Board takes cognizance of

the fact that the lowest priced bidder does not of necessity turn out to be the lowest evaluated bidder as envisaged under Section 66 of the Act and Regulation 50. In this particular case, the Board notes that the Applicant's bid was evaluated and at the Post-qualification stage, was disqualified on two accounts, namely:

- i) Historical non performance; and
- ii) Failing to provide schedule of key personnel and signed Curricula Vitae of its key staff.

Upon perusal of the Evaluation report, the Board finds that, the Applicant's bid was disqualified due to historical non performance, as revealed by the Procuring Entity's letter of 23rd April 2007 to the effect that the Applicant's Contract on a previous project namely, Nakuru-Marigat Road (B4) was wound up. On the matter of Key personnel, the Board has taken note that the Applicant had provided a list of its Management team. However, the Applicant did not provide a schedule of its Key Personnel and Curricula Vitae as required by the tender document in a note under the schedule of Key Personnel which stated:

Note: *The Bidder shall list in this schedule the key personnel he will employ from the Contractors headquarters and from the Contractor's site office to direct and execute the work together with their qualifications, experience, position held and nationality in accordance with Clause 15.2 and 16.3 of the Conditions of Contract Part II (where required, use separate sheets to add extra data for column 4). Bidders shall attach signed and certified CVs of all key staff.*

The Board has noted that, only two bidders, namely Kimilili Hauliers Limited and Associated Construction, proceeded to the Financial Evaluation, and upon evaluation Kimilili Hauliers Limited emerged the lowest evaluated bidder. In this regard, the Board makes the finding that the Applicant could not have emerged as the lowest evaluated bidder since it did not pass all the stages of evaluation.

From the foregoing, these grounds of the request of review also fail.

Ground 4

In this ground, the Applicant stated that the letter of notification did not set out the grounds/reasons for which the Procuring Entity declared the Applicant as unsuccessful bidder.

In response, the Procuring Entity stated that indeed the letter of notification did not set out the grounds/reasons for which the Procuring Entity declared the Applicant as unsuccessful. It submitted that this was not a requirement under the Act which only requires a Procuring Entity to notify the successful and unsuccessful bidders simultaneously. It averred that Section 67 of the Act does not require the Procuring Entity to give the reasons for failure to succeed in a tender. It further stated that the notification letters sent to both the successful and unsuccessful bidders met the requirements of the Act and the Regulations and therefore this ground had no merit.

The Board has considered the representations of the parties and examined the documents presented before it. The Board has taken note that the Applicant was furnished with a letter of notification dated 19th April 2010. The Board also takes note of the provision of Section 67 of the Act which provides that all persons whose tenders were not successful shall be notified at the same time with the person whose tender was successful. The Board observes that this Section does not require that the notification shall contain reasons for which the unsuccessful bidders' tenders failed. The Board notes that the unsuccessful bidders can request for the reasons for disqualification of their bids under Regulation 66 (2). The Board therefore finds no merit in the Applicant's allegations.

In the circumstances, this ground of review also fails.

Grounds 5 and 6: Breach of Section 2 of the Act.

These grounds have been consolidated since they raise similar issues.

The Applicant stated that the Procuring Entity's decision of not awarding it the tender, despite its bid having been the lowest in price, was contrary to the rules of natural justice and flew in the face of the objects and purpose outlined in Section 2 of the Act and the Tender Document. It further alleged that the Procuring Entity's decision was not transparent, did not promote accountability and was unfair to the Applicant.

In response, the Procuring Entity stated that its decision was not contrary to the rules of natural justice and was not in contravention of the Act as alleged by the Applicant. It stated that the tender was advertised and bidders responded by submitting their respective bids, following which the tenders were opened publicly and thereafter an evaluation conducted and award made in accordance with the Act. It submitted that its decision was in accordance with section 2 of the Act. In conclusion, it requested the Board to find no merit in this ground.

The Board has perused the documents presented before it and observed that:

- (i) The Procuring Entity advertised the subject tender on 15th March, 2010 following which 14 bidders returned their bids.
- (ii) The bids were opened publicly on 20th April, 2010.
- (iii) An Evaluation was conducted by the Evaluation committee and an Evaluation Report prepared in accordance with the tender documents.
- (iv) The award was then made by the Tender Committee to the recommended lowest evaluated bidder.

In this regard, the Board does not find any evidence to show that the Procuring Entity breached the rules of natural justice in the way it handled the tender process. Accordingly, the Board finds that the

Procuring Entity did not breach Section 2 of the Act as alleged by the Applicant.

To the above end, these grounds of the Request of Review also fail.

Grounds 7, 8 and 10

These grounds are mere statements supported by no alleged breaches of the Law and therefore the Board need not make any findings on them.

Ground 9

The Applicant submitted that in awarding the contract to the Successful bidder Kimilili Hauliers Ltd, the Procuring Entity breached the letter and spirit of the Act, Regulations and the express provisions in the Tender Document. It stated that Kimilili Hauliers Ltd had never done works of similar nature and magnitude as contemplated by the Tender. It submitted that Kimilili Hauliers had only been known to have done gravelling work while the substantial works in the contemplated Tender was largely bituminous in nature. It concluded that it hence doubted the Successful bidder's technical expertise and capacity to undertake the project as envisaged in the Tender.

In response the Procuring Entity stated that the Successful bidder, Kimilili Hauliers Ltd, was the lowest evaluated bidder who satisfied all the requirements in the bid documents which included:-

- i) Registration of Roads construction under Class B, to carry out works of between Kshs 500 million and Kshs 1 billion, by the Ministry of Roads;
- ii) Having the necessary general and specific construction experience stated in the tender documents.

On its part the Successful bidder submitted that it met all the tender requirements and satisfied the Procuring Entity that it was capable of carrying out the works.

The Board has considered the representations of the parties and examined the documents presented before it. From the Evaluation Report, the Board finds that the successful bidder, Kimilili Hauliers Limited satisfied all the requirements in the bid documents which included:-

- i) Registration of Roads construction under Class B to carry out works of between Kshs. 500 million and Kshs 1 billion, by the Ministry of Roads.
- ii) Having the necessary general and specific construction experience.

The Board therefore finds no reason to prove that the successful bidder lacks the capacity to carry out the works.

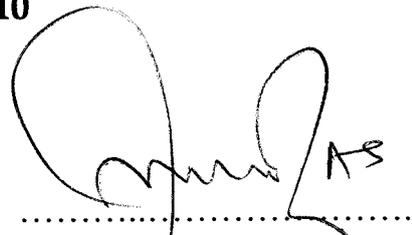
Accordingly this ground also fails.

Taking into consideration all the above, the Request of Review hereby fails, and the Board orders that the Procuring Entity may proceed with the tender process.

Dated at Nairobi on this 28th day of June, 2010

Handwritten signature of the Chairman, appearing to be 'Wanjau Mwanja', written over a dotted line.

**CHAIRMAN
PPARB**

Handwritten signature of the Secretary, appearing to be 'James M. Njoroge', written over a dotted line.

**SECRETARY
PPARB**

