

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 28/2010 OF 7TH MAY, 2010

BETWEEN

MWANGEMI GENERAL CONTRACTORSAPPLICANT

AND

MOKOWE SECONDARY SCHOOL.....PROCURING ENTITY

Review against the decision of the Tender Committee of Mokowe Secondary School dated 27th April, 2010 the matter of tender for Construction and Completion of 4- Classes, Library and Computer Class

BOARD MEMBERS

Ms. J. A. Guserwa	-	Member (In the Chair)
Amb. C. M. Amira	-	Member
Ms Natasha Mutai	-	Member
Mrs. L. G. Ruhiu	-	Member
Mr. Sospeter Kioko	-	Member

In Attendance

Mr. P. Wangai	-	Sitting in for Board Secretary
Mr. M. Obuya	-	Secretariat

PRESENT BY INVITATION

Procuring Entity, Mokowe Secondary School

Mr. H. K. Njenga - Deputy Principal

Applicant, Mwangemi General Contractors

Mr. Stephen Ndibui - Q. Surveyor

Mr. H. M Mwangemi - Director

Ms. Z. Ndirangu - Manager

Interested Candidate, Al-Rashid Filling Station

Ibrahim Mwaweru - Accountant, Al-Rashid Filling Station

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

BACKGROUND OF AWARD

Advertisement

The tender was advertised by the Office of the Deputy Prime Minister and Minister for Finance on 15th March, 2010. It was for the Construction and Completion of 4- Classes, Library and Computer Class.

Closing/Opening:

The bids closed/opened on 1st April, 2010 and eight bids were submitted.

The bidders who submitted their bids were as follows:

1. Mwagiya Agencies
2. Mwangemi General Contractors
3. Jodam East Africa Ltd
4. Equistar Ltd
5. Al- Rashid Filling Station Ltd
6. Banu Asad Contractors Company Ltd
7. Master Structures Ltd
8. Banu Stambul General Suppliers

Evaluation

Evaluation was conducted in two stages i.e.

1. Preliminary
2. Technical and Financial

The bids were evaluated for responsiveness on the following parameters:

- i. Bank Bid Security amount
- ii. Filled Form of Tender
- iii. Registration with Ministry of Public Works
- iv. Filled Business Questionnaire
- v. Tax Compliance Certificate
- vi. Proof of Experience

vii. + or - 10% estimate

Out of the eight (8) bidders, the following three (3) qualified to the technical and financial stage.

1. Mwagiya Agencies
2. Mwangemi General Contractors
3. Equistar Ltd

The successful bidder (Al- Rashid Filling Station Ltd) was disqualified at the preliminary stage. At the conclusion of the evaluation exercise, the Applicant was recommended for the award.

Tender Award

The Board of Governors of the Procuring Entity in their meeting dated 22nd April, 2010 at 2.30 pm included and subsequently awarded the tender to Al-Rashid Filling Station contrary to the recommendation of the evaluation committee to award the tender to the Applicant.

THE REVIEW

This Request for Review was lodged on 7th May, 2010 by Mwangemi General Contractors against the decision of the Evaluation Committee of Mokowe Secondary School held on 22nd April, 2010 at 2.30 p.m in the matter of Tender No. MSS/01/2009-2010 for Construction and Completion of 4- Classes, Library and Computer Class

The Applicant was represented by Stephen Ndibui, Q. Surveyor while the

Procuring Entity was represented by Mr. H. K. Njenga, Deputy Principal and the successful candidate was represented by Ibrahim Mwaweru, Accountant-Al-Rashid Filling Station.

The Applicant in its Request for Review raised three (3) grounds of review which the Board deals with as follows:-

Grounds 1, 2 and 3 - Breach of Sec. 67 & 68 of the Act

The Applicant cited 3 grounds which it argued together as they raised the same issues.

The Applicant argued that it responded to the tender as advertised by the Procuring Entity. by submitting its bid. It stated that the advert set out the tender requirements and the evaluation criteria of the bids which the Applicant complied with. It further submitted that the successful bidder did not comply with some of the tender requirements. It referred the board to the failure on the part of the successful bidder to supply the bid security, a fact that the Procuring Entity. and the successful bidder admitted to be true. The Applicant also stated that after one week of placing its bid, it was informed by the District Works Officer that its bid contained an error in the Bills of quantities which needed correction and that it agreed to the correction being effected. It argued that from that date to the date of hearing of the Request for Review, the Procuring Entity. had not notified it of the award of the tender as required by the Act.

It submitted that the successful bidder had also failed to submit a tax compliance certificate (which fact was not disputed by the successful bidder and the Procuring Entity) and therefore should not have been awarded the tender. It prayed for annulment of the award of tender to the successful bidder and re-award of the same to the Applicant.

In response, the Procuring Entity stated that it had notified the Applicant together with the other bidders of the award of tender save that it did not have proof of delivery of the notification letters. It alleged that the District Works Officer had declined to supply it with the Evaluation report although it had requested for the report. It conceded that although the successful bidder did not have a bid security at the time of the tender opening, the Procuring Entity had considered the outstanding money Mokowe Secondary School owed to the bidder which was considered to be an appropriate security for the tender.

It added that although the successful bidder had been disqualified at the preliminary evaluation stage, the Procuring Entity's Board of Governors recommended that Al-Rashid Filling Station be included in the process and subsequently awarded the tender.

It finally argued that the school had already signed a contract with the successful bidder who had been paid an advance payment of Kshs. 3 million and had delivered some material on the site. It prayed to the Board

to uphold the decision of the Procuring Entity to award the tender to the successful bidder even though it conceded that it may not have followed the requirements of the tender and the Act strictly due to ignorance on its part.

The successful bidder informed the Board that it had no comments on the matter

The Board has carefully considered the submission of the parties and examined the documents presented to it.

The Board has noted that the successful bidder and the Procuring Entity have conceded that the bid for the successful bidder did not have the bid security nor a valid tax certificate at the time of tender closing/opening. This was contrary to the requirements of Items 2 and 7 of the Tender Advertisement notice. The Board further notes that the successful bidder having been disqualified at the preliminary stage should not have been reinstated into the process by the Procuring Entity. This is contrary to Regulation 47(2).

This limb of the request for review therefore succeeds.

On the issue of notification of the award, the Board finds that the Procuring Entity had not placed before the board any evidence to support notification of the award to the Applicant or any of the other unsuccessful bidders as

required by the provision of Section 67(2) of the Act. The Board has also noted that the letter of notification to the successful bidder was dated 27th February, 2010 and altered to read 27th April, 2010 yet no copy of the letter to the Applicant bearing the date 27th February, 2010 was placed before it. This is contrary to Section 67(2) of the Act that requires simultaneous communication to all the bidders.

The Board further finds that the Procuring Entity's signing of a contract with the successful bidder was not done in accordance with the provisions of Section 68(2) of the Act and as such the contract was not valid.

Consequently, this limb of appeal also succeeds.

Finally the Board has noted that this request for review was filed on 7th of May, 2010. The Procuring Entity was notified on 14th May, 2010. The letter notifying the Procuring Entity of the review clearly stated that the Procurement process was to be suspended until the hearing and determination of the Request for Review. It is therefore rather surprising for the Procuring Entity to state that it has already signed a contract and paid the successful bidder a sum of Kshs. 3 Million.

The Board further notes that the successful bidder had not even executed the performance bond to warrant the release of such an advance payment. It is inconceivable how the successful candidate would have carried out

mobilization, delivered materials and commenced work within a period of 15 days to be entitled to any payment of such a magnitude.

In the above premises, the Applicant has satisfied the board that it complied with all the requirements of the tender and was recommended by the evaluation committee. The decision by Procuring Entity's Board of Governors to ignore the recommendation of the evaluation report was without a basis and therefore flawed

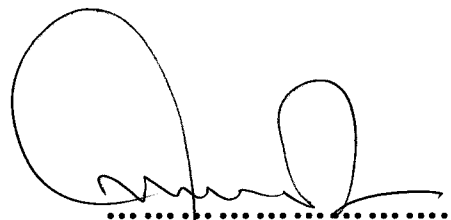
Taking all the above into consideration, the appeal succeeds as the Board finds that the tender award to the successful candidate was irregular.

The award of the tender to the successful candidate is hereby annulled. The Board in exercise of its powers under Sec. 98 of the Act orders the Procuring Entity to award the tender in accordance with the recommendation of the evaluation report. Further, the Board orders the Procuring Entity to notify both the successful and unsuccessful bidders of the award in accordance with Section 67(2) of the Act.

Dated at Nairobi on this 7th day of June, 2010



Signed Chairman, PPARB



Signed Secretary, PPARB

