

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 29/2011 OF 6TH JULY, 2011

BETWEEN

GUUMBA CONTRACTORS.....APPLICANT

AND

**RAMOGI INSTITUTE OF ADVANCED
TECHNOLOGY.....PROCURING ENTITY**

Review against the decision of Ramogi Institute of Advanced Technology in the matter of Tender No. MOHEST/ESP/6/2010-2011 for construction of Standard Workshop/Laboratory complexes in various TIVET Institutions.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. Joshua Wambua	-	Member
Ms. Loise Ruhiu	-	Member
Ms. Judith Guserwa	-	Member
Ms. Natasha Mutai	-	Member

IN ATTENDANCE

Mr. N. Soita - Holding brief for Secretary
Ms. S. Miano -Secretariat

PRESENT BY INVITATION

Applicant, Guumba Contractors.

Mr. David Otieno - Advocate
Mr. Pius Oloo - Contractor

Procuring Entity, Ramogi Institute of Advanced Technology.

Mr. A.O. Aboge - Advocate
Mr. Jorim O. Guya - Principal
Mr. John O. Oduor - Head of Department, Building
Mr. George Omondi - Deputy Head of Department, Building

Interested Candidate, Chaju Builders Ltd

Mr. Seith Ojienda - Advocate
Mr. Cornel Opiyo - Advocate
Mr. J.O. Akeyo - Project Manager

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 OF AWARD

Advertisement

The tender for the proposed construction of Automotive Engineering Workshop at RIAT was advertised by the Ministry of Higher Education, Science and Technology under Tender No. MOHEST/ESP/6/2010-2011 with the closing date given as 10th March, 2011. The above tender was advertised under the Economic Stimulus implementation Programme Phase II for construction of standard workshop/Laboratory complexes in various TIVET Institutions throughout the country.

Closing/Opening:

Seventeen (17) tenderers bought the bid document but only eight (8) submitted their bids as at the time of tender closing. The firms that returned their bids were:

1. Chaju Builders Ltd
2. Cells Arc Systems
3. Go Construction Company
4. Guumba Contractors
5. Nindi Construction Ltd

6. Speedway Technical Company Ltd
7. Sunview (K) Ltd
8. Richardson Co. Ltd

EVALUATION

The received tenders were analysed by a team of three officers from the Ministry of Public Works then later evaluated by an Evaluation Committee from the Procuring Entity under the Chairmanship of Mr. George Olero. The evaluation was carried out in two stages namely;

1. Preliminary evaluation
2. Arithmetic checks

Preliminary Evaluation

The eight tenders received were subjected to preliminary evaluation based on the following criteria:

1. Proof of similar works and similar magnitude and complexity undertaken in the last five years.
2. Bid Bond in form of bank guarantee from a reputable bank.
3. Adequate equipment and key personnel for the specified type of work.
4. Proof of sound financial standing.
5. Litigation history of the company.
6. Confidential business questionnaire.
7. Tax compliance certificate.

8. Contractor registered (Class E and above) and listed in the building Contractors Registers.
9. A tenderer served with a default notice or with a project behind schedule or served with notice.

Results of the Preliminary evaluation are as summarized below:

No	Parameter	Company No.							
		1	2	3	4	5	6	7	8
1	Proof of similar works and similar magnitude and complexity undertaken in the last five years.	Y	Y	Y	Y	N	Y	Y	Y
2	Bid Bond in form of bank guarantee from a reputable bank.	Y	N	N	Y	N	N	N	N
3	Adequate equipment and key personnel for the specified type of work.	Y	Y	Y	Y	N	Y	Y	Y
4	Proof of sound financial standing.	Y	Y	Y	Y	N	Y	N	Y
5	Litigation history of the company.	Y	Y	Y	Y	Y	Y	Y	Y
6	Confidential business questionnaire.	Y	Y	Y	Y	Y	Y	Y	Y
7	Tax compliance certificate.	Y	N	Y	Y	N	Y	Y	Y
8	Contractor registered (Class E and above) and listed in the building Contractors Registers.	Y	Y	Y	Y	Y	N	Y	Y
9	A tenderer served with a default notice or with a project behind schedule or served with notice.	-	-	-	-	-	-	-	-
10	Remarks	R	N R	N R	R	N R	N R	N R	N R

Key:

R - Responsive

NR - Non Responsive

Y - Yes (Company has complied)

N - No (Company has not complied)

Six bidders were disqualified at this stage for the following reasons:

Bidder No.	Bidder's Name	Reasons for disqualification
2	Cells Arc Systems	1. Bid bond from Amaco Insurance and without seal or watermark from bank 2. Not tax compliant
3	Go Construction Company	Bid bond from Amaco Insurance
5	Nindi Construction Ltd	1. No proof of works done of similar magnitude 2. No Bid bond 3. No proof of personnel and equipment owned 4. No audited accounts and bank statements 5. Not tax compliant

6	Speedway Technical Company Ltd	<ol style="list-style-type: none"> 1. Has a Bid bond from Amaco Insurance Company. 2. Registered with the Ministry of Public Works in Class F
7	Sunview (K) Ltd	<ol style="list-style-type: none"> 1. Bid Bond from Amaco Insurance Company 2. Not adequate bank statement
8	Richardson Co. Ltd	Bid bond from Amaco Insurance Company

Only two bidders namely: Chaju Builders and Guumba Contractors met the responsiveness requirements and proceeded to Arithmetic checks stage.

Arithmetic Checks

Of the two bidders that were subjected to Arithmetic checks, the bid for M/s Guumba Contractors had an arithmetic error of Ksh.7,390,883 which translated to 16.3%. The Engineer's estimate for this contract is Ksh.42,001,930.00.

RECOMMENDATIONS

The Evaluation Committee recommended that the contract be awarded to M/s Chaju Builders at their tender sum of Kshs. 41,993,572.00.

THE TENDER COMMITTEE DECISION

The Tender Committee at its meeting held on 13th April 2011 approved award of the contract for the proposed construction of Automotive Engineering Workshop at RIAT to M/s Chaju Builders at their tender sum of Kshs. 41,993,572.00.

THE REVIEW

The Request for Review was lodged by M/s Guumba Contractors on 6th July 2011 against the decision of the Tender Committee of Ramogi Institute of Advanced Technology in the matter of Tender No. MOHEST/ESP/6/2010-2011 for the construction of Standard Workshop/Laboratory complexes in various TIVET Institutions. The Applicant was represented by Mr. David Otieno, Advocate while the Procuring Entity was represented by Mr. A.O. Aboge, Advocate.

The Applicant raised four grounds of review and urged the Board to make the following orders:-

- 1. The award of the tender the subject of this review to the Successful bidder be annulled and the Procuring Entity be ordered to award the tender to the Applicant at the agreed sum of Ksh.38,484,016.74.*
- 2. Such further or other directions be given as the justice of the case requires.*
- 3. The Applicant's costs of these proceedings be paid by the Procuring Entity and the Successful bidder.*

The Board deals with the grounds of Review as follows:

PRELIMINARY ISSUE RAISED BY THE SUCCESSFUL BIDDER

At the commencement of the hearing the Successful bidder raised Preliminary Objection on the following grounds:

1. *That this Board has no jurisdiction to hear this matter pursuant to section 93 (2)(c) of the Public Procurement and Disposal Act, 2005 as a contract has already been duly entered into between the Procuring Entity and the Successful bidder in accordance with section 68 of the said Act.*
2. *This Request for Review is frivolous as per section 93(2)(d) of the Public Procurement and Disposal Act, 2005.*

The Successful Bidder argued that the Board did not have Jurisdiction to entertain the Request for Review. In support of its contention, the Successful Bidder cited Section 93(2) which sets out matters which are not subject to review by the Board. It submitted that Section 93(2) of the Act provides that:

“(2) The following matters shall not be subject to the review under subsection (1)-

(a).....

(b).....

(c) Where a contract is signed in accordance to section 68:”

It further argued that the notification of the Tender Award was made on the 24th of June, 2011 and that the fourteen (14) days appeal window lapsed on the 8th of July, 2011 when the contract was signed.

The Successful Bidder also stated that it had already moved to the site on 9th July, 2011 and had carried out extensive works. At this juncture, the Board sought to know when the Procuring Entity received the stay directions from the Secretariat, which the Procuring Entity confirmed were received on the 8th of July, 2011, although it stated that the same were received after the contract had been signed. The Board also sought to know from the Interested Party and the Procuring Entity when the fourteen (14) days Appeal window had lapsed and they confirmed that the 14th day fell on 8th July, 2011. The Interested Party admitted that the earliest date that the Procuring Entity could sign the contract was 9th July, 2011 and therefore the agreement that it had signed on 8th July, 2011 was not signed in accordance with section 68 of the Act.

Consequently, the Successful Bidder abandoned the Preliminary objection and the Board directed that the Request for Review be heard on merit.

Grounds 1,2 and 3 - Breach of Section 31,39,40,41 and 42 of the Act.

These three grounds have been consolidated as they are related to the evaluation process of the tender.

The Applicant stated that the Procuring Entity erred in law and in fact by awarding the tender to the Successful Bidder yet the bidder failed to meet the requirement on bid security. It stated that the Successful Bidder submitted a bid security that was valid for ninety (90) days only instead of the one hundred and twenty (120) days as stipulated in the tender documents. It argued that the acceptance of the bid security that didn't meet the mandatory requirements was discriminatory and in breach of Sections 31 and 39 of the Act.

The Applicant further argued that the Successful bidder's tender sum of Kshs. 41,993,520/= was so close to the Engineer's estimates of Kshs. 42,001,930/= which would lead to a reasonable inference that the Successful Bidder had colluded with the Procuring Entity and therefore it had engaged in corrupt and fraudulent practices contrary to Sections 40 and 41 of the Act.

The Applicant finally submitted that the Procuring Entity re-evaluated its bid and corrected the bid sum from Ksh.45,874,900.00 to Kshs. 38,484,016.94 which it accepted. It argued that although it accepted the corrected bid sum the Procuring Entity proceeded to award the tender to the Successful Bidder which move reflected collusion on the part of the Procuring Entity contrary to Section 42 of the Act.

In response, the Procuring Entity submitted that the Successful Bidder qualified to participate in the tender and stated that the Successful

Bidder's bid bond was valid in accordance with Clauses 3.6 and 3.8 of the Standard Tender documents of works issued by Public Procurement Oversight Authority (hereinafter "PPOA") in January, 2007 which were used in the tender.

The Procuring Entity submitted that Engineer's estimates were prepared by the Ministry of Works based on the accepted principles for preparation of Bills of Quantities. It argued that the closeness between the Engineers estimates and that of the Successful Bidder's tender sum in its view suggested that the Successful Bidder's tender had a more realistic estimate of the cost of the intended project. It also stated that the inference of collusion on its part was baseless and unreasonable. It further stated that the Procuring Entity had not engaged in fraudulent and corrupt practices.

The Procuring Entity further stated that in the course of the financial evaluation of the bids the Technical Committee noted an arithmetic error in the Applicant's tender amounting to Kshs. 7,390,883.00. It argued that although the Applicant accepted that it could carry out the project at the grossly lower sum of Kshs. 38,484,016.94, it had erroneously construed the correction of the error to mean that its bid was the successful one.

Finally, the Procuring Entity stated that the Tender Committee adopted and approved the recommendations of the evaluation committee and that the tender was awarded to the lowest evaluated bidder.

On its part, the Successful Bidder stated that it duly submitted a fully responsive, qualified and competent tender within the required time and with a tender security valid for one hundred and twenty (120) days. It also submitted that its bid complied with all the Instructions to Bidders (I.T.B.) and its tender sum of Kshs.41,993,520.00 was based on the prevailing market prices and that the prices were accurate. The Successful Bidder denied allegations of collusion or corrupt practices as alluded to by the Applicant.

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

The Board has noted that the tender was evaluated by two different committees namely committee comprising of the Regional works officers Central Nyanza, the County Works officer - Kisumu County and a Mr. Odongo S.O. (I.B.MOPW - Kisumu) all from the Ministry of Public Works while the second committee comprised of four officers under the chairmanship of Mr. George Olero. Both committees evaluated the bids in stages of preliminary evaluation and Arithmetic checks with the Ministry of Public Works Committee submitting its report to the Procuring Entity on 24th March, 2011 while the Procuring Entity's evaluation committee evaluated the tenders in three meetings held on 25th, 28th, and 29th, March, 2011.

The Board further notes that the evaluation criteria used in the evaluation of the tender was that set out in the Newspaper advertisement and the tender documents used were the Standard Tender documents issued by the PPOA.

The Board also notes that the Applicant was disqualified at the Preliminary evaluation stage for there being a significant variance between its corrected sum of Kshs. 38,484,016.74, and the Engineers estimate of Kshs. 42,001,930. The Procuring Entity proceeded to award the tender to the Successful Bidder as approved by the Tender Committee in its meeting of 13th April, 2011.

The Board finds that the bid bond submitted by the Successful Bidder from Kenya Commercial Bank (KCB) was valid for ninety (90) days upto 6th June, 2011 while that of the Applicant was for One hundred and twenty (120) days as required in the tender advertisement notice. The Board also finds that the tender validity period of the subject tender was sixty (60) days as per Clause 3.6 of the Instructions to Tenderers in the Tender Document with effect from 10th March, 2011 to 9th May, 2011 and therefore the notification of award of the tender on the 24th of June, 2011 was done outside the tender validity period contrary to Section 67(1).

On the issue of the bid price, the Board notes that the Engineer's estimate sum was Kshs. 42,001,930/= while that of the Successful bidder was Kshs. 41,993,572/=. As per the tender requirements a bid was considered

responsive if it was within a 10% range from the Engineer's estimate in accordance with the tender advertisement. The requirement in the advertisement read "~~Tenders from the following tenderers shall be considered non responsive:~~

(i)

(ii).....

(iii)

(iv) *"A tender from a tenderer whose tender sum is plus or minus 10% of the official estimate."*

The Board finds that during the financial evaluation, the Applicant's tender sum was corrected from Kshs. 45,874,900.00 to Kshs. 38,484,016/74 which correction the Applicant acknowledged as being correct vide its letter of 11th April, 2011. Although this correction reflected a big variance between the Engineer's estimates and the Applicant's bid price, it was within the 10% margin of the Engineer's estimate. The Board holds that the Procuring Entity in this regard was not justified in rejecting the Applicant's bid.

However, the Board finds that there has been no proof of collusion, corruption and fraudulent practices.

Therefore these grounds of Review succeed.

Ground 4- Breach of Regulation 11

The Applicant argued that the Procuring Entity had no power to reject or modify the recommendation of its Evaluation committee on the Applicant's and the Successful Bidder's tenders without a justifiable cause as is provided under Rule 11 of the Regulations.

In response the Procuring Entity argued that the Tender Committee did not reject the recommendation of the Evaluation Committee but adopted them.

The Board has noted that the Tender Committee in awarding the tender to the Successful Bidder adopted the Procuring Entity's Evaluation Committee's recommendation to the following effect;

"The Committee , therefore concluded that the lowest evaluated bidder was Chaju - Builders Ltd. Consequently, the Committee recommended Chaju Builders Ltd for consideration of award of this tender."

As already noted, the tender was evaluated by two Evaluation Committees. The Procuring Entity did not give reasons for accepting the recommendations of one Committee and the reasons for rejecting the other. The Tender Committee should have given the reasons for accepting one recommendation what it failed to do.

Accordingly, these grounds also succeed.

Finally, the Board makes the following observations:-

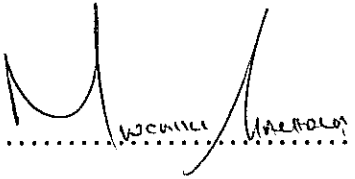
1. The Board finds that notification of award of the tender to the Successful Bidder by the Procuring Entity was done on the 24th June, 2011. The tender validity period was 60 days which expired on 9th May 2011. Therefore, the notification of the award was made outside the tender validity period in contravention of Section 67(1) of the Act.
2. The Procuring Entity signed the contract on the 8th of July, 2011 after receiving the notification of the reviewing of the Review. The signing was in breach of Section 94 of the Act. In any event, the signing of the Contract on 8th July 2011 was premature, as the fourteen days appeal window was lapsing on that day and the earliest day the Procuring Entity could sign the Contract was 9th July 2011. Therefore, the Contract was not signed in accordance with Section 68 of the Act.

In view of the foregoing, the Request for Review succeeds and the Award of the tender to the Successful Bidder is hereby nullified.

The Board hereby directs the Procuring Entity to proceed to re-tender by way of restricted tendering under the Provisions of Section 73 of the Act. This will only be addressed to those bidders who participated in the subject tender.

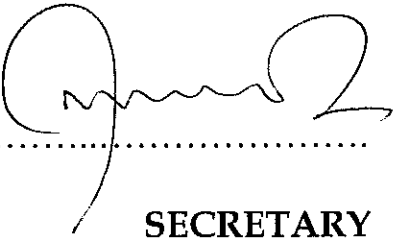
There will be no orders as to costs.

Dated at Nairobi on this 28th day of July, 2011



A handwritten signature in black ink, appearing to be 'M. M. M. M.', written over a horizontal dotted line.

**CHAIRMAN
PPARB**



A handwritten signature in black ink, appearing to be 'J. M. M.', written over a horizontal dotted line.

**SECRETARY
PPARB**