

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 4/2011 OF 9TH FEBRUARY, 2011

BETWEEN

JYAN CONSTRUCTION SERVICES.....APPLICANT

AND

COAST INSTITUTE OF TECHNOLOGY.....PROCURING ENTITY

Review against the decision of the Tender Committee of Coast Institute of Technology dated 31st January, 2011 in the matter of Tender No. CIT/CONST./01/2010-11 for Construction and Completion of a Tourism and Hospitality teaching facility.

BOARD MEMBERS PRESENT

Mrs. Judith Guserwa	-	Chairing
Mr. Sospeter Kioko	-	Member
Ms. Natasha Mutai	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Mr. N. M. Soita	-	Secretariat
Ms. Maureen N. Kinyundo	-	Secretariat

PRESENT BY INVITATION

Applicant, Jyan Construction Services.

Mr. David Ngala - Advocate
Ms. Anne Ndemwa - Managing Director
Mr. Teddy O. Sam - Engineer

Procuring Entity, Coast Institute of Technology.

Mr. John M. Mzera - Principal
Mr. Ronald Chenga - Procurement Officer

Interested Candidate, None

BOARD'S DECISION

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

BACKGROUND OF AWARD

Advertisement

The Procuring entity invited eleven (11) firms to participate in restricted tendering for construction and completion of the proposed Tourism and Hospitality Teaching Facility at Coast Institute of Technology, Voi Campus vide letters dated 31st December, 2010 and closed on 20th January, 2011.

Closing/Opening:

Out of Eleven (11) invited firms, Seven (7) responded by buying and returning the BQs by the time of tender closing as follows:

1. Mzedu enterprises
2. Jyan Construction Services
3. Jedy General Contractors Ltd
4. Malti Trio Agencies
5. Triospan Ltd
6. Semeha Building Contractors
7. Mngiwa General Contractors

EVALUATION

The evaluation was carried out in two stages as follows:

- (i) Preliminary/Responsiveness Evaluation
- (ii) Detailed Evaluation and Financial analysis

Preliminary Evaluation

At this stage the bids were evaluated on the mandatory requirements as listed below:

- i) Audited accounts for the past three years.
- ii) Provide a Bid bond of Kshs.20,000/= from established bank
- iii) Valid Tax Compliance certificate
- iv) Tender sum is plus or minus 10% of the official estimate

The results of the preliminary evaluation were as tabulated below:-

Item	Documents to be submitted	1	2	3	4	5	6	7
1	Audited accounts for the past 3 years	X	√	√	√	√	√	X
2	Must provide a Bid bond of Ksh.20,000 from established bank	√	√	√	√	√	√	√
3	Valid Tax Compliance certificate	√	√	√	√	√	X	X
4	Tender sum is plus or minus 10% of the official estimate	X	√	√	√	√	√	√
	REMARKS	Fail	Pass	Pass	Pass	Pass	Fail	Fail

The three bidders namely Mzedu Enterprises, Semeha Building Contractors and Mngiwa General Contractors were disqualified at this preliminary stage. Bidder No.1, (Mzedu Enterprises) was disqualified for not providing Audited accounts for the past three years and its tender sum being 10.06% below the official estimate. Bidder No. 6 (Semeha Building Contractors) provided a Tax compliance Certificate that expired on 21st November, 2010 while Bidder No.7 (Mngiwa General Contractors) did not provide Audited accounts and Tax Compliance Certificate.

Bidders No. 2,3,4 and 5 qualified to the next stage of the detailed evaluation.

Detailed Evaluation

Responsive bids were checked for arithmetic errors and comparison of their tender sums as follows:

S/No.	Tenderer	Tender sum	Corrected sum	Remarks
2	Jyan Construction Services	29,155,338.00	Same	9.77% below Estimate
3	Jedy General Contractors	29,373,800.00	29,502,101.00	9.10% below Estimate
4	Malti Trio Agencies	29,282,025.00	Same	9.38% below Estimate
5	Triospan Ltd	32,326,381.00	30,636,725.00	0.04% above Estimate

The official Estimate used in the evaluation was Kshs.32,312,624.00

No arithmetic errors were discovered for bidder No^s.2 and 4. Bidder No.3, M/s. Jedy General Contractors had an arithmetic error of Kshs. 128,301.00 which accounts for 0.45% of the total builders work, the bidder filled and signed standard forms as required except for the Bid bond which was not in the required format. Bidder No.5, M/s Triospan Ltd had an arithmetic error of Kshs. 1,689,656.00 which accounts for 5.76% of the total builders work.

RECOMMENDATION

The Evaluation Committee recommended that the tender for construction and completion of a Tourism and Hospitality Teaching Facility at Coast Institute of Technology be awarded to the lowest evaluated bidder M/s Jyan Construction Services at Kshs.29,155,338.00.

THE TENDER COMMITTEE DECISION

The Tender Committee in its meeting held on 28th January, 2011 deliberated on the recommendation of the Evaluation Committee and awarded the tender for Construction and Completion of a Tourism and Hospitality Teaching Facility at Coast Institute of Technology to M/s Jyan Construction Services at kshs.29,155,338.00. This decision was later reviewed by the Tender Committee in its meeting held on 31st January, 2011 following the Board of Governor's decision in a meeting held on 29th January, 2011 and awarded the tender to M/s Mzedu Enterprises for being the lowest bidder pricewise among those invited to bid.

THE REVIEW

The Request for Review was lodged by M/s Jyan Construction Services on 9th February 2011 in the matter of Tender No. CIT/CONST./01/2010-11 for Construction and Completion of a Tourism and Hospitality teaching facility. The Applicant was represented by Mr. David Ngala, Advocate while the Procuring Entity was represented by Mr. John M. Mzera, Principal.

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

- 1. To nullify the award to the current contractor as there was a clear breach of the Procurement Act.*
- 2. The flawed process be reconsidered because if the status quo remains the same, the Applicant may suffer loss and damage in the following regard:*
 - a) Financial facilities obtained for the commencement of the project would attract huge interest if not utilized and repaid within the stipulated time frame.*
 - b) Funds already spent on consultancy and other professional service may never be recovered.*
 - c) Personnel already hired from the local community would be laid off causing them & their families unnecessary anguish, diminishing their hopes these trying moments.*

The Board deals with the grounds of Review as follows:-

Grounds 1,2,3,4,5 and 6 - Breach of Sections 65 & 66 of the Act and Reg. 48

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

The Applicant submitted that its bid was the most responsive and yet it was not awarded the tender following the decision of the Procuring Entity's Board of Governors. It stated that it was unfairly denied the award of the tender after being informed that it had actually won the tender. It further

stated that although it was informed by the Procuring Entity's procurement officer that its award had been cancelled, no reasons were given to it for the cancellation. It added that it was informed by the Procuring Entity that another bidder by the name of Mzedu Enterprises Ltd had been awarded the tender. The Applicant claimed that Mzedu's bid was not within the Engineer's estimate and that the contractor is registered with the Ministry of Public Works in category "G" against the prerequisite requirement of category "E" and above.

It argued that this action on the part of the Procuring Entity was in breach of Sections 65 and 66 of the Public Procurement and Disposal Act of 2005 (hereinafter "the Act"). It submitted that the contractor who was awarded the contract was not responsive since the contractor had not submitted Audited accounts for three years and its bid being 10.06% below the Engineer's estimate, therefore could not qualify for the Award as envisaged by Reg. 48. It therefore prayed to the Board to nullify the award of the tender to Mzedu Enterprises Ltd. The Applicant also submitted that it had been denied its letter of notification of the award despite having been informed on phone that it had won the tender.

In response, the Procuring Entity stated that it had engaged in selective tendering method due to the urgency in the construction of the project at hand. It further stated that it had instructed the Ministry of Public Works to carry out the tendering process on its behalf. It added that on 20th January, 2011, the tenders were opened and a total of 7 Contractors had returned their bids which were evaluated by the Evaluation Committee. It conceded that both the evaluation Committee and the Tender Committee agreed on the

award of the tender being made to the Applicant but the decision was overruled by the Board of Governors. It stated that the Board of Governors met on the 29th January, 2011 and considered the list of the registered and qualified contractors, as capable of undertaking the project given that the list had been submitted by the Ministry of Public Works. It therefore decided to direct the Tender Committee to award the tender to Mzedu Enterprises who had submitted the lowest bid price.

It submitted that the Award was made to Mzedu Enterprises on the 2nd of February, 2011. It argued that the Tender Committee rightly awarded the tender to the lowest evaluated bidder after the recommendation of the Board of Governors based on the list of qualified and registered contractors provided by the Public Works officer Ministry of Public Works – Voi. It further stated that the Applicant had engaged in unsolicited influence on evaluations to secure favours from one of the evaluation committee members and therefore breached Section 38 of the Act. It added that although the Applicant had not been provided with the tender opening minutes; tender evaluation minutes and report, it had annexed copies to its application confirming the fact that the same were obtained in a clandestine manner. It submitted that whereas it was true that some of the bidders were not qualified and registered under class “G” as alleged by the Applicant, it reserved the right to choose a contractor whom it had faith in. It added that it used estimates which had been supplied to it by the Ministry of Public Works.

The Board has considered the arguments by both parties and has also examined the documents before it.

The Board has noted that the Procuring Entity engaged the services of the Ministry of Public Works to process the subject tender from the identification of qualified contractors, evaluation of the bids to the recommendation of award. The Board notes that the Applicant was one of the bidders amongst 7 whose bid was submitted; evaluated and found to be the most responsive in comparison with the others as set out below:-

S/No.	Tenderer	Tender sum	Corrected sum	Remarks
2	Jyan Construction Services	29,155,338.00	Same	9.77% below Estimate
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From the above table, the Board notes that the Successful bidder, Mzedu Enterprises, was disqualified at the Preliminary stage for failure to provide 3years Audited accounts which were mandatory.

The Board also notes that from the successful bidder's bid document the contractor is registered by the Ministry of Public Works in category "E" as per the Ministry's letter of 20th December, 2010 and not category "G" as alleged by the Applicant.

The Board further notes that the Evaluation Committee was duly constituted, carried out the evaluation exercise and recommended award to the Applicant. The Board also notes that the evaluation report was forwarded to the Tender Committee which concurred with the recommendation of the Evaluation Committee but the matter was then referred by the Procuring Entity to the Board of Governors for ratification. It is also noted that it is at this point that the Board of Governors ordered the Tender Committee to award to the lowest priced bid without paying due consideration to the evaluation report and subsequent recommendation of the Report.

In this regard, the Board notes that Regulations 10 and 16 of the Public Procurement and Disposal Regulations 2006 (hereinafter “the Regulations”) provide for the establishment of the Tender and Evaluation Committees respectively whose mandates are specifically set out as hereunder:-

Regulation 10 reads “(1) *A procuring entity shall establish a tender committee in the manner set out in the Second Schedule.*

(2) The functions of the tender committee shall be to :

- a) review, verify and ascertain that all procurement and disposal has been undertaken in accordance with the Act, these Regulations and the terms set out in the tender documents.*
- b) approve the selection of the successful tender or proposal*
- c) award procurement contracts in accordance with thresholds prescribed in First Schedule.”*

Regulation 16 reads: “ (1) *For each procurement within the threshold of the tender committee, the procuring entity shall establish an evaluation*

committee for the purposes of carrying out the technical and financial evaluation of the tender or proposals.

(2) An evaluation committee established under paragraph (1) may comprise:

a) a separate financial evaluation committee and a separate technical evaluation committee; or

b) a combined financial and technical evaluation committee.

(5) A technical evaluation committee established in accordance with paragraph (2)(a) shall be responsible for:

a) the technical evaluation of the tenders or proposals received in strict adherence to the compliance and evaluation criteria set out in the tender documents

b) performing the evaluation with all due diligence and within a period of thirty days after the opening of tenders.

(8) Under no circumstances may any member of an evaluation committee enter into direct communication with any of the tenderers participating in a tender or proposal that such evaluation committee is considering.

(9) An evaluation committee shall prepare a report on the analysis of the tenders received, and final ratings assigned to each tender and submit the report to the tender committee."


From the above requirements, the Procuring Entity's Board of Governors has no role to play in the evaluation and/or award of any tender once the statutory bodies have been constituted and carried out their work. The Board therefore holds that the Procuring Entity's Board of Governors had no mandate to re-evaluate the bids nor re-award the tender contrary to what the two aforementioned bodies had effected.

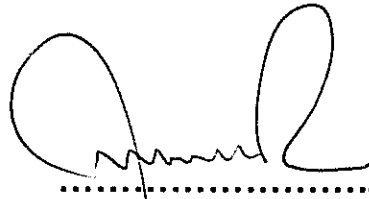
The Board therefore finds that the Procuring Entity breached Regulation 10(2)(c) and 16(9) of the Regulations by awarding the tender based on a recommendation by a body (BOG) that did not have such powers.

With regard to the Applicant's allegation that it was the most responsive bidder and therefore qualified for award, the Board notes that the Procuring Entity did not produce any material before it to show that indeed the Applicant was not the most responsive. Infact, the Procuring Entity conceded that the Evaluation Committee and the Tender Committee played their role and recommended the award to the Applicant because it was found to be the most responsive bidder. The Board therefore does not find any basis to deviate from the recommendation of the two committees who declared the Applicant the most responsive:

1. Consequently, all the grounds of request succeed.
2. Award to Successful bidder, M/s Mzedu Enterprises Ltd is hereby nullified
3. The Procuring Entity is hereby directed to Award Tender No. CIT/CONST./01/2010 - 11 to the Applicant.
4. There is no order as to costs.

DATED at Nairobi this 8th day of March, 2011.


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CHAIRMAN
PPARB


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SECRETARY
PPARB

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