

PUBLIC PROCUREMENT ADMINISTRATIVE BOARD

APPLICATION NO 55/2011 OF 22ND DECEMBER, 2011

BETWEEN

BLAXTON GENERAL BUILDING CONTRACTORS LTD.....APPLICANT

AND

CHEBARA BOYS SECONDARY SCHOOL.....PROCURING ENTITY

Review against the decision of the Tender Committee of Chebara Boys Secondary School dated 16th December, 2011 in the matter of Tender No. CGSS/2A for Construction of proposed offices, classrooms and dormitories.

BOARD MEMBERS PRESENT.

Ms. Judy Guserwa - Sitting in for the Chairman

Mr. Akich Okola - Member

Mr. Sospeter Kioko - Member

Ambas. Charles Amira - Member

Ms. Natasha Mutai - Member

IN ATTENDANCE

Mr. C.R Amoth - Secretary

Mrs. Maurine Kinyundo - Secretariat

Mr. L. Otieno - Secretariat

PRESENT BY INVITATION.

Applicant, Blaxton General Building Contractors Limited

- Mr. Samuel Kiprono - Advocate, Kamotho Maiyo & Co. Advocates
Mr. Kiprop Kipkoech - Director, Blaxton General Contractors Ltd

Procuring Entity, Chebara Boys Secondary School.

- Mrs. Anne Kibosie - Committee member, Chebara Boys Sec. School
Mr. James Shirusi - Youth Affairs, Chebara Boys Sec. School
Mr. Simon Komen - Maiyo & Partners
Mr. Samuel Kandie - B.O.G Chairman, Chebara Girls Sec. School.
Mr. Stephen Sirwanei - Head teacher, Kaptomut Pri. School
Mr. Ronald Kimuron - Chairman, Chebara Joint Institutions
Rev. Joel Cherono - B. O. G Member, Chebara Boys Sec. School
Mrs. Roselidah Watiti - Principal, Chebara Girls Sec. School
Mr. Thomas Kimunei - Director, Chebara Committee
Mr. Christopher Chebieg - DEO
Mr. Gideon Okonyen - Principal, Chebara Boys Sec. School
Mr. Charles Anyango - Auditor, School's Audit Unit
Mr. David Sakwa - Quantity Surveyor, M & B Associates

Interested Candidates

Mr. Harrison Munene

- Director, Harmo Engineering.

BOARD'S DECISION

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

BACKGROUND OF AWARD

Advertisement.

The tender for construction of proposed offices, classrooms and dormitories at Chebara Girls Secondary School was advertised in the Standard Newspaper on 13th October, 2011 and closed on 4th November, 2011 at 11.00 am.

Closing/Opening.

As at the time of tender opening on 4th November, 2011 the following thirteen (13) firms had returned their bids;

1. M/s Blackstone.
2. M/s Rapola General Contractors.
3. Harmo Engineering Co. Ltd.
4. Jyan Constructions.
5. M/s Saival Ent Ltd.

6. M/s Njowamu.
7. M/s Eldo Rotsa Constructions Ltd.
8. M/s Thunder Plumbing.
9. M/s Skillman Construction.
- 10.M/s Tanderi Tallents.
- 11.M/s Kishan.
- 12.M/s Tulcy Constructions Ltd.
- 13.M/s Vishua Builders.

EVALUATION.

Preliminary Evaluation.

The tenders were subjected to preliminary evaluation to ascertain compliance with the mandatory requirements as advertised based on the following criteria:-

- Category "C" registration with Ministry of Public works.
- Bid Bond of Kshs. 250 000/= from established Bank, or approved Insurance Company.
- Certified copy of valid Tax compliance.
- Litigation history of the Company.
- Adequate equipment and key personnel for the works.
- Sound financial standing and adequate access to Bank credit line.

The results of the preliminary evaluation show that four bidders, namely; Jyan construction/s Saival Ent. Ltd. M/s Tanderi Tallents and M/s Vishua Builders were eliminated and therefore did not proceed to the next stage of evaluation.

The following nine firms thus qualified for further evaluation;

1. M/s Blackstone
2. M/s Rapola Gen Contractors.
3. Harmo Eng. Co. Ltd.
4. M/s Njowamu.
5. M/s Eldo Rotsa Cont. Ltd
6. M/s Thunder Plumbing.
7. M/s Skillman Con.
8. M/s Kishan
9. M/s Tulcy Contr. Ltd.

TECHNICAL/FINANCIAL EVALUATION

Upon this second evaluation, the evaluation committee ranked bidders as hereunder and made a report against each evaluated bid;

Lowest Evaluated Bidder

This was received from M/s Blaxton Gen. Contractor of P.O. Box 27737 NAIROBI amounting to Kenya Shillings Seventy-five Million, Sixty Seven Thousand Five Hundred and Thirty Two only (Kshs. 75, 067,532).

- Arithmetical error +0.95% to his disadvantage
- Has attached list of similar works done.
- Rates are competitive.
- Falls 6.69% below the estimated cost.

SECOND LOWEST BIDDER

This was received from M/s Harmo Eng. Co. Limited of P.O. Box 9667-30100 Eldoret. Amounting to Kenya Shillings Seventy Five Million, Four Hundred and Ninety Four Thousand and Forty Seven (Kshs. 75, 494,047).

- Arithmetical error -0.84% to his advantage.
- Rates are competitive with current market rates.
- Has attached list and photographs of works of similar magnitude done.
- Has attached list of technical staff.
- Falls 6.169% below estimated cost.

THIRD LOWEST BIDDER

This was received from M/s Rapola Gen. Contractors of P.O. Box 6306-30100, ELDORET amounting to Kenya Shillings Seventy Seven Million, Four Hundred and Twenty one Thousand, Three Hundred and Thirty Eight (Kshs. 77,421,338).

- Arithmetical error +4.3% to his disadvantage.
- Rates competitive compared to the market rates.
- Falls 3.77% above estimated cost.
- Meets all other conditions

FOURTH LOWEST BIDDER

This was received from M/s Tulsi contractors Limited of P.O. Box 47430, NAIROBI amounting to Kenya Shillings Eighty Nine Million Four Hundred and Twenty Five, One Hundred and Ninety Three (Kshs. 89,425,193).

- Arithmetical error -0.12% to his advantage
- Rates are competitive and a few inconsistent
- Falls 11.14% below estimated cost

FIFTH LOWEST BIDDER

This was received from M/s Kishan Builders of P.O. Box 472, KAPSABET amounting to Kenya Shillings Ninety Six Million, Nineteen Thousand, One Hundred and Thirteen (Kshs. 96,019,113)

- Has arithmetical error of +2.9% to his disadvantage
- Rates are slightly higher than market rates
- Falls 19.34% above the estimated cost

SIXTH LOWEST BIDDER

This was received from M/s Thunder plumbing and construction Company Limited of P.O. Box 9711 NAIROBI amounting to Kenya

Shillings Ninety Seven Million, Nine Hundred and Seventy Three Thousand, Forty Three and Twenty Cents (Kshs. 97, 973,043.20).

- Arithmetical error -1.7% to his advantage
- Rates competitive though some are high compared to the market price
- Falls 21.77% above estimated cost.

SEVENTH LOWEST BIDDER

This was received from M/s Eldo-Rotsa construction Limited of P.O. Box 5855, Eldoret amounting to Kenya Shillings One Hundred Million Four Hundred and Thirteen Thousand, Nine Hundred and Twenty Five and Sixty Cents.

- Arithmetical error -3.8% to his advantage
- Rates slightly high compared to market rates
- Falls 24.81% above estimated cost

EIGHTH LOWEST BIDDER

This was received from M/s Njowamu Construction Company of P.O. Box 7736-00300 NAIROBI amounting to Kenya Shillings One Hundred Million, Seven Hundred and Nineteen Thousand, Two Hundred and Forty Five (Kshs. 100, 719,245.56)

- Arithmetical error +2.3 to his disadvantage
- Rates high compared to market prices
- Falls 25.19% above estimated cost

NINTH LOWEST BIDDER

This was received from M/s Skillman construction Limited of P.O. Box 1481, NAIROBI amounting to Kenya Shillings

- Arithmetical error -1.2% to his advantage
- Rates high compared to market prices
- Has attached list of similar works done
- Falls 41.47% above the estimated cost

CONCLUSION AND RECOMMENDATION

After considering the a foregoing evaluation and analysis the evaluation committee recommended the lowest analyzed bid from M/s Blaxton of P.O. Box 27737, Nairobi, amounting to Seventy Five Million Sixty Seven Thousand, Five Hundred and Thirty Two Thousand (Kshs. 75, 067,532) for award after adjudication by the Tender Committee.

RECOMMENDATION

The Tender Committee, namely, Chebara Joint Institution Tender Committee, at its meeting held on 16th December, 2011 decided that although M/s Blaxton General Building Contractors, quoted the lowest price in the tender opening, it should not be awarded the contract based on the findings of a team constituted to carry out a market survey, whose report indicated that the bidder did not have capacity and competence to implement the project. Accordingly, M/s Blaxton was considered not to be the lowest evaluated bidder. In light of the team's finding, M/s Harmo Eng. & Building Co. Ltd., whose operations impressed the team during a site visit, was recommended for award.

TENDER COMMITTEE'S DECISION

The Tender Committee upon adjudication in its meeting of 16th December, 2011 awarded the tender for construction of proposed offices, classrooms and dormitories to, M/s Harmo Engineering Company Ltd of P.O. Box 9667, Eldoret at the tender sum of Kshs. 75, 494, 047 (Seventy Five Million Four Hundred and Ninety Four Thousand and Forty Seven).

The Applicant Blaxton General Building Contractors Ltd lodged the Request for Review against the decision of the Tender Committee of Chabara Boys Secondary School in the matter of Tender No. CGSS/2A for construction of proposed offices, classrooms and dormitories.

The Applicant requests the Board for the orders that;

1. *To annul, cancel or set-aside the award of tender to the Tenderer irregularly adjudicated successful and award Tender No. CGSS/2A of 2011 to the Applicant. Direct the Procuring Entity to enter into contract with Applicant.*
2. *In the alternative , and without prejudice to prayer number 1 above the procurement proceedings be annulled in their entirety.*
3. *That cost of this Review be awarded to the Applicant.*

The Board has carefully listened to the submissions by the parties and considered the documents before it and makes the following findings and decisions.

The Applicant raises five (5) grounds of review which we deal with as follows:-

GROUND 1 , 2 AND 5 Breach of Section 66(2) and Section 66(4) of the Act.

The Applicant submitted that during the tender opening of the tender in question its tender was recorded as the lowest at Kshs. Seventy Five Million and Sixty Seven Thousand Five Hundred and Thirty Two only (Kshs. 75,067,532.00) and that the Procuring Entity in utter breach and

disregard of section 66(2) of the Public Procurement and Disposal Act failed and/or refused to award the tender to it as the lowest evaluated Tenderer.

It argued that the PE introduced a new requirement for a site visit after evaluation had been completed. This amounted to a new evaluation criterion, contrary to the provisions of Section 66(2) of the Act.

It pointed out that, according to the evaluation done by the Evaluation Committee, it emerged as the lowest evaluated bidder and should therefore have been awarded the contract. In support of this contention, it cited the report of the evaluation committee dated 7th December 2011 which ranked it as the lowest evaluated bidder and recommended it for award of the contract.

The Applicant further submitted that it complied with all the tender requirements in its bid including payment of the tender fee of Kshs. 5,000.00 and that it incurred other costs in the preparation of the Tender including obtaining the Bid Bond. It added that the award of the tender to any other bidder is prejudicial to the Applicant as it will stand to suffer irreparable loss for being denied the right, in accordance with the Act and Tender Rules, to be awarded the tender as the lowest evaluated Bidder in the said tender.

In response, the Procuring Entity stated that during the opening of the tender on 4th November 2011 the tender of the Applicant was recorded as

the lowest at **Kshs. 75,065 532.00**. It submitted that this notwithstanding, when the Applicant's tender was subjected to further technical evaluation, where other factors are considered, it was found not to be the lowest evaluated bidder and therefore there was no breach of section 66(2) of the Act. In support of this contention, it pointed out that to be able to determine the lowest evaluated bid, it was necessary for it to make arithmetical corrections on the tender sums quoted by the bidders, and when this was done, the figure quoted by the Applicant, which was Kshs. 75,067,532 increased to Ksh. 75,732,815.60, whereas that of the Successful Bidder, which was Kshs. 75,494,047 came down to Ksh. 74,897,730.44.

Regarding the report of the Evaluation Committee dated 7th December 2011 which recommended the Applicant for award of the contract, the Procuring Entity averred that that report did not accurately reflect the decision of the Committee as there was another report which contradicted it.

It argued that the decision by the Tender Committee to subject the bidders to further verification as to their existence and standard of work was a prudent measure aimed at avoiding awarding the contract to briefcase contractors. It further argued that contrary to the claim by the Applicant that the verification exercise constituted a new criterion, this was not the case as the basis for such an exercise is founded on condition number two of the advertisement which required bidders to have ***"adequate equipment and key personnel for the specified type of works."***

It further argued that, in any case, the Procuring Entity was not bound to accept the lowest quoted bid as indicated in its advertisement. In this regard, it referred the Board to a paragraph in the tender notice which states that the *"Chebara Management committee reserves the right to accept or reject any tender application without giving reasons for its rejection and does not bind itself to the lowest tender."*

As regards the Applicant's claim that it had paid for the tender documents and the bid bond, the Procuring Entity argued that such expenses are normal expenses incurred by all bidders in this tender.

The Board has carefully considered the submissions by the parties and examined the documents before it and makes the following findings;

The Board notes that according to the minutes of the tender opening committee, which are dated 4th November 2011, the Applicant's price of Ksh. 75,067,532.00 was the lowest among the thirteen bidders who responded to the tender notice by submitting their bids.

The Board further notes that according to the tender notice bidders were required to satisfy the following criteria:-

1. Certificate indicating the category Registered in from the relevant ministry.
2. Adequate equipment and key personnel for the specified types of works;

3. Sound financial standing and adequate access to bank credit line.
4. Certified copy of valid Tax Compliance Certificate.
5. Litigation history of the company (both court and arbitration cases).
6. Confidential business Questionnaire.

The Board also notes that although the tender notice specified the above evaluation criteria, Clause 1.5 of the Tender Document listed other evaluation criteria to include;

- a.
- b. Total monetary value of construction work performed for each of the last five years
- c. Experience in works of a similar nature and size for each of the last five years, and details of work under way or contractually committed; and names and addresses of clients who may be contacted for further information on these contracts;
- d.

The Board further notes that according to the evaluation report by the Evaluation Committee of the Procuring Entity dated 7th December 2011, the Committee evaluated the bids using these criteria, which resulted in the elimination of four out of fifteen bidders who had submitted bids. As a result of this exercise, the Applicant emerged the winner and was recommended by the Evaluation Committee for award of the contract. The

Board also notes that the report was presented to a body called "the Chebara Joint Institutions Tender Committee" on an unspecified date sometime after 7th December, 2011, for its consideration and decision.

The Board further notes that this was the only evaluation report that was made available to it and no other report as alluded by the Procuring Entity in its submissions.

According to the minute number 3, (which dealt with "Matters Arising"), of a meeting of the Tender Committee dated 13th December, 2011, the Tender Committee raised the issue of when the market survey team would visit the targeted bidders and states "

it was noted that the group will go out on 14th and 15th December and the main objective is to visit on-going and recently completed projects of the targeted bidders with the aim of establishing;

i. Their existence

ii. Their organizational structure and operations management,

iii. Quality of their work.

It was noted that the report on the same will be read on 16th December 2011 for the tender committee to make informed adjudication and tender awards."

The Board further notes that this was the first time that the issue of site visits/market survey is mentioned. As already noted in the submissions by the parties, such site visit did take place on 14th December 2011, in case of the Applicant, in circumstances which have given rise to this dispute as to its propriety and legality.

The Board further notes that as agreed at the meeting of the Tender Committee which took place on 13th December 2011, the Committee met on 16th December 2011 and considered, among other things, the report of the market survey. After deliberating on the matter, the Committee made the following observations:

"In Chebera girls secondary school M/s Blaxton general building contractors Ltd. and M/S HARMO Eng and building Co. were targeted.

a) Blaxton management took the team to one completed project at Moi Education Centre. The management seemed not to be conversant with the project since it was the school administration which took the team around and answered questions where appropriate.

- The workmanship of the project was good.
- When the committee requested the Director of Blaxton to take the team to another ongoing project, he declined insisting that they needed three days to prepare for such visits.

b) M/S Harmo Engineering and building company management team took members to their projects in Eldoret Polytechnic (ongoing and completed one at K-NIT senior residential flats at Kapsoya (completed).

- The management structure and operations management was very good.
- The management was willing to take the team around.
- the quality of works was desired and impressive.
- they have done work of similar magnitude.

The Board further notes that based on the foregoing, the Tender Committee decided that although Blaxton General building Contractors quoted the lowest price in the tender opening after considering the findings of the team during their visits it was found not to be lowest evaluated bidder. Accordingly, the tender was awarded to M/s Harmo Engineering & Building Co. Ltd. It is this decision which the Applicant is agrieved with, and hence the request for review.

The question for determination by the Board on this limb of the application is whether the site visits was a new criterion, as claimed by the Applicant, or was merely an act of implementation of condition 2 in the tender notice, as claimed by the Procuring Entity. In the view of the Board, the answer to this question needs to be examined from the perspective of the substantive provisions of Section 66(2) of the Act, on which the Applicant relies. The above Section sets out in mandatory terms that;

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used."

The rationale for this provision is to guard against the temptation on the part of Procuring Entities to manipulate the procurement process during evaluation by using undisclosed procedures and criteria which will have the effect of defeating the spirit of openness and fairness as required under Section 2 of the Act. As already stated, the Procuring Entity set out the procedures and the criteria in the tender notice and Tender Document which it intended to use in evaluating the bids. Indeed, in carrying out the evaluation of the bids, the Evaluation Committee relied solely on the pre disclosed procedures and criteria set out in tender notice and tender document, and came to a determination that the Applicant's bid was the lowest. Accordingly, it recommended to the Tender Committee in its report dated 7th December, 2011 that the tender be awarded to the Applicant.

The Board finds that in the view of the decision by the Tender Committee to introduce site visits as an additional method of assessing the suitability of bidders amounted to introducing a new procedure and criterion of evaluation.

The Board therefore finds that this decision breached Section 66(2) of the Act. Accordingly, this ground of Request for Review succeeds.

Regarding the claim by the Procuring Entity that following arithmetical corrections, the Applicant's quoted tender sum turned out to be higher than that of the Successful Bidder, the Board notes that the tender document at page 55, state that correction of errors and I T B Clause 5.7(f) provides for arithmetical errors to be effected and that the tender prices were to be adjusted. Further, the Board notes that while Section 63(1) of the Act permits a Procuring Entity to correct arithmetic errors in a tender, Section 63(2) is very clear that in such events, the procuring entity must give prompt notice of the correction to the person who submitted the tender. According to Section 63(3), if the person who submitted the tender rejects the correction, then its tender shall be rejected.

The Board notes that the correction of errors was done and yet notification to the affected bidders was not done as required by Section 63(2) of the Act which states;

“The Procuring Entity shall give prompt notice of the correction of an error to the person who submitted the tender.”

The Board therefore finds that the Procuring Entity was in breach of that provision of the Act, and the argument that it corrected the errors for the Applicant cannot be sustained. This ground of Appeal succeeds.

GROUND 3 AND 4- Breach of Sections 37 and 38 of the Act

The Applicant argued that the Procuring Entity in breach of the Act, Regulations and the Tender Rules, summoned it by Mobile Telephone on

December 15th, 2011 without any written notice and information of the Agenda of the meeting. It stated that following the opening of tenders, it did not receive any communication from the Procuring Entity until 15th December 2011, when it received a telephone call from the Procuring Entity at 11 am summoning it to meet the Board of Governors of Chebara Boys School at the Railways Club in Nairobi at 3pm.

It further stated that in response to the call, it attended on the representatives of the Procuring Entity as requested, in the company of its lawyers and was informed that the purpose for the meeting was to enable the Procuring Entity to carry out a site visit at the Moi Education Centre in Nairobi, which was one of the projects which the Applicant claimed in its tender documents to have been completed by it.

The Applicant further stated that upon being so informed, it protested that the notice was too short for it to arrange the site visit with the owners of the project, to whom it had already been handed over, and further inquired from the Procuring Entity as to the law under which it was required to arrange for the site visit. It averred that at this juncture, the representatives of the Procuring Entity stated that they could visit the project without the Applicant as it was not necessary for them to obtain its permission. The Applicant submitted that, notwithstanding its protestation, it took the representatives of the Procuring Entity to the site, and further offered to take them to another site in Ongata Rongai, but this was rejected by the

Procuring Entity on the ground that it wanted to visit M/s Quickhard Steam & Equipment Ltd, one of the bidders, in Kasarani, whose representatives were also present at the Railways Club.

The Applicant argued that the decision by the Procuring Entity to contact it before the award of the tender and without any written notice for a meeting was clearly in breach of the express provisions of Sections 37 and 38 of the Act, Regulations and Tender Rules that prohibit any contact with the Tenderer before the award of the tender and without any written notice.

It further argued that the Procuring Entity breached regulation 11 in that the Tender Committee did not state the reasons for rejecting the recommendation of the Evaluation Committee.

In conclusion the Applicant urged the Board to annul the tender and to exercise its powers under Section 98(c) by awarding the tender to it. In support of this prayer, it cited the case of *M/S Wamo Construction Co v. District Tender Committee, Ijara District*, [Application No 18/2010].

In response, the Procuring Entity averred that its tender committee felt that before they adjudicated the tender for Chebara Girls, it was prudent that they verify the existence of these contractors and check the standard of their works including equipment and key personnel for specified types of works with the aim of avoiding briefcase contractors and that such visits do not require any written or prior communication.

The Procuring Entity further averred that the exercise carried out applied uniformly to the first two lowest bidders without any bias and that the Applicant's Director was informed by its consultant about the visit and mission by the Chebara Joint Institution tender committee.

The Procuring Entity further argued that it did not breach section 37 of the Act as alleged by the Applicant as communication by telephone was communication by electronic means, which is permitted by section 37(3) of the Act.

In conclusion the Procuring Entity urged the Board to dismiss the Application, notwithstanding any procedural flaws, and to order the procurement process to continue.

The Board notes the provisions of Section 37 (1) of the Act which stipulate that;

Section 37(1);

"If the procurement procedure used is open or restricted tendering or a request for proposals, communications between the procuring entity and a person seeking a contract for the procurement shall be in writing."

The Board further notes that the above provision is couched in mandatory terms, thereby leaving no discretion to the parties as to the form of communication, save and except as the Director-General of the Public Procurement Oversight Authority may issue directions permitting

electronic communication, in accordance with Section 37(3) of the Act. The Board has not been shown any evidence of such directions being issued.

In light of the above, the Board finds that the Procuring Entity's communication to the Applicant by telephone was in breach of Section 37(1) of the Act. The Procuring Entity ought to have reduced their telephone communication to the candidates into writing as envisaged by Section 37(2) of the Act which states that;

"If the procurement procedure used is direct procurement or a request for quotations, communications between the procuring entity and a person seeking a contract for the procurement shall either be-

- a. in writing; or***
- b. referred to and confirmed in writing."***

As regards the claim by the Applicant that the decision by the team mandated by the Tender Committee to contact the Applicant for purposes of carrying out site visits was in breach of Section 38 of the Act, the Board notes the provisions of this section, which state as follows:

Section 38 (1)(b);

"(1)After the deadline for the submission of tenders, proposals or quotations-

- a)***

b) no person who is not officially involved in the evaluation and comparison of tenders, proposals or quotations shall attempt, in any way, to influence that evaluation and comparison."

The Board notes that the procurement system of Kenya creates for Procuring Entities internal organizational structures and assigns such structures specific roles for the management of the procurement process. In this respect, Section 26(1) of the Act provides that:

"For the purposes of ensuring that its decisions are made in a systematic and structured way, a public entity shall establish procedures to provide for the making of decisions, on behalf of the public entity, relating to procurement."

Section 26(6) establishes such internal structures by providing as follows:

"A public entity shall establish a tender committee, procurement unit and such other bodies as are required under the regulations for the purpose of making such decisions on behalf of the public entity as specified in this Act and the regulations."

The functions of both the evaluation committee and the tender committee are set out in the regulations. Regulation 16(1) specifies the functions of the evaluation committee as follows:

"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 tenders or proposals."

It is clear from the above-cited provision that the function of carrying out evaluations is the prerogative of the evaluation committee. In the discharge of this function it must act independently and free from any influence in order for the result of its work to be credible.

However, the Board notes that the Tender Committee upon receiving the Evaluation Committee's report, sought to engage both the Applicant and the successful bidder on a site visit with a view to evaluating them on that basis.

Further, the Board notes in view of the above introduction of site visit by the Tender Committee as another ground upon which it was to evaluate both the Applicant and the successful bidders, that Section 38(1)(b) of the Act prohibits any person who is not involved in the evaluation of tenders to influence that evaluation in any way. The above provision states that;

Section 38(1)(b);

"After the deadline for the submission of tenders, proposals or quotations-

a.

b. No person who is not officially involved in the evaluation and comparison of tenders, proposals or quotations shall attempt, in any way, to influence that evaluation and comparison."

The Board therefore finds that in asking both the Applicant and the successful bidder to take them to a site visit for purposes of evaluating them on that basis, the Tender Committee breached the above cited provision of the Act.

Regarding the role of the tender committee, regulations 10 (2) (b) and (c) of the Regulations provide, inter alia, that;

"The functions of the Tender Committee shall be to-

- e. Approve the selection of the successful tender or proposal*
- f. Award procurement contracts in accordance with the thresholds prescribed in the First Schedule;*
- g.*

Regulation 11(1) sets out the role of a tender committee in respect to approvals or rejection of submissions emanating from the recommendations of an evaluation committee as follows:

"In considering submissions made by the procurement unit or evaluation committees, the tender committee may-

(a) approve a submission; or

(b) reject a submission with reasons; or

(c) approve a submission, subject to minor clarifications

by the procurement unit or evaluation

committee."

Regulation 11(2) is very categorical in terms of what the tender committee may not do. It states that:-

" The tender committee shall not-

(a) modify any submission with respect to the

recommendations for a contract award or in any other respect:

(b) reject any submission without justifiable and objective

reasons."

In this particular case the Board notes that the Tender Committee, upon receipt of the submission of the Evaluation Committee recommending award to the Applicant, decided to reject the recommendation without giving any reasons and embarked on conducting evaluation on its own thereby arrogating itself the role of Evaluation Committee contrary to the provisions of Regulation 11(2) cited above. Further, it decided to subject the tenders to a new evaluation criterion, and then proceeded to award the contract to another bidder, contrary to the recommendation of the

Evaluation Committee. In the view of the Board this action amounted to breach of regulation 11(1) of the Regulations already cited above.

Accordingly, the Board finds that the Procuring Entity breached Sections 37 and 38 of the Act, and Regulation 11(1) of the Regulations. Therefore, these grounds of request for review also succeed.

OBSERVATIONS BY THE BOARD

The Board observes that in the tender under review, there was a major confusion as to the correct Procuring Entity. The confusion is apparent from the fact that although the pleadings, and hence the proceedings, tender notice were in the name of Chebara Boys Secondary the letters of notification were all in the name of Chebara Girls Secondary School. Section 3 of the Act defines a Procuring Entity to mean "*a public entity making a procurement to which this Act applies.*" In this particular case, the funds were allocated to Chebara boys, it advertised the tenders and therefore was supposed to evaluate and award the tenders and notify the parties accordingly. This error will need to be corrected.

The Board also observes that the manner in which the Tender Committee in question was composed was against the provision of Section 7 of the Second Schedule to the Regulations on composition of Tender Committees. The above provision enlists the membership structure of schools' Tender Committees to include;

- *The Deputy Principal or Deputy Headmaster appointed in writing by the Principal/Headmaster,*
- *The officer in charge of finance or equivalent appointed by the Principal/Headmaster,*
- *At least six heads of departments or members of the teaching staff including the matron or officer-in-charge of the boarding facilities where applicable appointed by the Principal or Headmaster,*
- *The officer heading the procurement unit.*

The above position notwithstanding, the Board finds that the Tender Committee in question as established overreached its mandate by:-

1. Unprocedurally carrying out evaluations of the tenders using a new criterion, when evaluations had already been done by the Evaluation Committee, which is the legally authorized body to carry out evaluations.
2. Influencing the evaluation by carrying out the site visits and using the results of such visits to award the tender to a person who was not the lowest evaluated bidder as recommended by the Evaluation Committee.

Taking all the above matters into consideration, this Request for Review succeeds. The award of the tender to the Successful Bidder, Harmo Eng & Building Co. Ltd. is hereby annulled pursuant to Section 98(a) of the Act.

As regards the Applicant's prayer that the Board exercises its powers under Section 98(c) and award the contract to it, the Board declines to give such an order, taking into account the Board's findings that the evaluation was not done in accordance with the Tender Document.

The Board is alive to the fact that this tender is for the construction of offices, classrooms and dormitories in a girls' school in Marakwet West District, Elgeyo Marakwet County, where such a facility is badly needed. Accordingly, the Board invokes its powers under Section 98(b) of the Act and orders the Procuring Entity to carry out re-evaluation of the tenders using the criteria set out in the tender documents. The re-evaluation should be done, and award of tender made within thirty days of this order.

Dated at Nairobi this 23rd day of January, 2012.

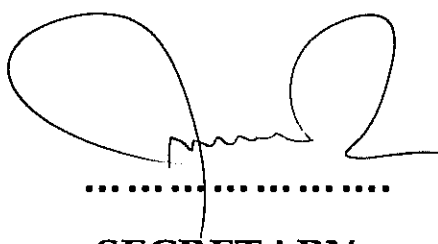
SIGNED



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CHAIRMAN

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SECRETARY

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