

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 11/2012 OF 12TH MARCH, 2012

BETWEEN

CELL ARC SYSTEMS.....APPLICANT

AND

DISTRICT TENDER COMMITTEE, KISUMU EAST

DISTRICT.....PROCURING ENTITY

Review against the decision of the District Tender Committee, Kisumu East District, in the matter of Tender No. KSME/PPO/NDHIWA/3A/2011-12, for construction of Block of 16 No. Type 'E' flats at Ndhiwa Police Station.

BOARD MEMBERS PRESENT

- | | | |
|-----------------------|---|--------------------------------------|
| Mr. Joshua W. Wambua | - | Member (Sitting in for the Chairman) |
| Mr. Sospeter M. Kioko | - | Member |
| Eng. Christine Ogut | - | Member |

IN ATTENDANCE

- | | | |
|--------------------|---|-------------|
| Mr. C. R. Amoth | - | Secretary |
| Mr. Nathan Soita | - | Secretariat |
| Ms. Maureen Namadi | - | Secretariat |

PRESENT BY INVITATION

Applicant, Cell Arc Systems

Mr. Gerald Kimanga - Advocate

Mr. Paul Abuor - Director

Procuring Entity, District Tender Committee, Kisumu East District

Ms. Margaret Ouma - Chairlady, District Tender Committee

Mr. Luke Midamba - Supply Chain Management Officer

Interested Candidates

Mr. Moses Agumba - Precision Engineers Ltd

Mr. James Ombogo - Gulf Fabricators Ltd

Mr. Daniel D. Oliang'a - Berlin Equipment Ltd

Mr. Houal Kotecha - B.N. Kotecha & Sons Ltd

Mr. David O. Awino - Nyokumo Plumbing & Build Cont, Ltd

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 Office of the President, Kenya Police, advertised Tender No. KSME/PPO/NDHIWA/3A/2011-2012 for the proposed construction of one block of 16No. type 'E' flats at Ndhiwa Police Station in the Standard Newspaper of 18th January, 2012.

Closing/Opening

As at the time of tender opening on 8th February, 2012 at 12:00 noon, twelve firms had returned their bids. The tenderers who returned their bids were as follows;

1. Lunao Enterprises
2. Tsotsi Gen. Construction Designers & Consultants
3. Trapezoid Constructions & Civil Engineering Ltd
4. Safety Autospares (E.A) Ltd
5. Richardson Co. Ltd
6. Gulf Fabricators Ltd
7. Cell Arc systems
8. Riana Contractors Ltd
9. Berlin Equipment Ltd
10. Precision Engineers Ltd
11. B.N Kotecha & Sons Ltd
12. Zymack Builders Ltd

EVALUATION

Evaluation of the received tenders was carried out in three stages, namely;

- Preliminary evaluation,
- Technical evaluation; and
- Financial evaluation.

Preliminary Evaluation.

Bidders were subjected to preliminary evaluation to ascertain their responsiveness with respect to the laid down minimum qualifying criteria.

These minimum requirements were as follows;

- a.) Tenderers must be registered with the Ministry of Public Works in Category "D" and above. They should also appear in the current Register of Approved Building Contractors kept by the Ministry of Public Works.
- b.) Should provide proof of having worked on works of similar magnitude and complexity undertaken in the last five years.
- c.) A bid security in form of Bank Guarantee of Ksh. 700,000/= from reputable bank
- d.) Show proof of having adequate equipment and key personnel for the specified types of works
- e.) Proof of sound financial standing and adequate access to bank credit line
- f.) To give litigation history of the company (both court and arbitration cases)
- g.) Complete confidential business questionnaire
- h.) Submit a valid tax compliance certificate.

The table below shows the results of the preliminary evaluation;

TABLE A- Preliminary Evaluation

Firm	Bid Bond	Reg Cat 'D'	Statutory Obligation		Filling of Form of Tender	Filling of Business Questionnaire	Past Performance	Plant & Equipment	Adequate Staff	Litigation History	Financial Standing	Remarks
			Valid PIN cert	Tax Clearance								
Lunao Enter.	X	√	√	√	√	√	√	√	x	x	√	Non Responsive
Gulf Fabrics	√	√	√	√	√	√	√	√	x	x	√	Non Responsive
Trapezoid Const.	x	√	√	√	√	√	√	√	√	√	√	Non Responsive

Richardson Co. Ltd	√	√	√	X	√	√	√	√	√	x	√	Non Responsive
Tsotsi Gen. Company	x	√	√	X	√	√	√	x	x	x	√	Non Responsive
Zymac Builders	√	√	√	X	√	x	√	√	√	√	√	Non Responsive
Riana Const.	√	√	√	√	√	√	x	√	√	x	√	Non Responsive
Cell Arch	√	√	√	√	√	√	√	√	√	√	√	Responsive
Berlin Equipment	√	√	√	√	√	√	√	√	√	√	√	Responsive
B.N. Kotecha	√	√	√	√	√	√	√	√	√	√	√	Responsive
Safety Auto	√	√	√	x	√	√	√	√	x	√	√	Non Responsive
Precision Eng.	√	√	√	√	√	√	√	√	√	√	√	Responsive

General Overview of Non Responsive Tenders

Tsotsi Gen. Construction Co. Ltd - Ksh 87, 170, 297.00

- Tax Compliance Certificate Expired on 19th January, 2012.
- Bid bond is from an insurance company.
- Not shown proof of ownership or ability to hire of plant or equipment.
- Did not attach qualification of key personnel
- Have not indicated their litigation history

Riana Contractors- Ksh 106,841,282.20

- Maximum value of work done is an ongoing Ksh. 52 million project on construction of an administration block.
- Have not indicated their litigation history.

Zymak Builders Ltd- Ksh. 104, 846,413.40

- Did not complete the confidential business questionnaire.

- Did not attach a tax compliance certificate.

Lunao Enterprises- Ksh. 69,441,146.00

- Bid bond was from an insurance company not from a bank as per requirement.
- Has not attached copies of the qualification certificates of key personnel.
- Have not indicated their litigation history.

Gulf Fabricators Ltd- Ksh. 77,839,655.00

- Has not attached copies of the qualification certificates of key personnel.
- No proof of ownership or ability to hire plant and equipment.
- Have not indicated their litigation history.
- Has not attached any certificate of the key personnel.

Trapezoid Construction & Civil Engineering Ltd- Ksh. 83,122,048.00

- Bid bond was from an insurance company not from a bank as per requirement.
- Have not indicated their litigation history.

Richardson Company- Ksh. 84,750,125.00

- The attached Tax Compliance Certificate is not valid. Expired on 12th November, 2011.
- Have not indicated their litigation history.

Safety Auto Spares (EA)- Ksh. 126,884,987.00

- Did not attach a tax compliance certificate.
- Did not attach certificates of qualification of key personnel.

Further/ Technical Evaluation

Further, tenders from the following tenderers were to be treated as Non responsive and therefore subject to automatic disqualification.

- 1.) A tender from a tenderer whose on-going project(s) is/are behind schedule and without approved extension of time.
- 2.) A tender from a tenderer who has been served with a default notice on on-going project(s).
- 3.) A tender from a tenderer with on-going projects exceeding four (4) in number regardless of the total value of the outstanding works.
- 4.) A tender from a tenderer whose tender sum is plus or minus 10% of the official estimate.

The official Estimate for this project was **Ksh.118,738,649.95**.

The results of this phase of evaluation were as shown in the table below;

TABLE 'B'- Technical / Further Evaluation.

CONDITIONS						
ITEM		(i)	(ii)	(iii)	(iv)	
1	Lunao Enterprises	√	√	√	x	Disqualified
2	Gulf Fabricators	√	√	√	x	Disqualified
3	Trapezoid	√	√	√	x	Disqualified
4	Richardson Co. Ltd	√	√	√	x	Disqualified
5	Tsotsi Gen. Const	√	√	√	x	Disqualified
6	Zymac Builders	√	√	√	x	Disqualified
7	Riana Contractors	√	√	√	x	Disqualified
8	Cell Arch Systems	√	√	√	√	Qualified
9	Berlin Equipment	√	√	√	√	Qualified
10	B.N Kotecha	√	√	√	√	Qualified
11	Safety Auto Spares	√	√	√	√	Qualified
12	Precision Engineers	√	√	√	√	Qualified

The following bidders qualified to proceed to the next stage of evaluation as can be seen from the results of the table above.

1. Cell Arch systems.
2. Berlin Equipment.
3. B.N Kotecha.
4. Safety Auto spares.
5. Precision Engineers.

However, Safety Auto spares did not qualify for further evaluation as they were non responsive in accordance to the minimum requirements as shown in Table 'A.'

Analysis of Responsive Bidders.

Cell Arch Systems- Ksh 107,082,999.80

Its tender had no arithmetic errors

It is a registered contractor in category "D" with the Ministry of Public Works.

It had the following on-going projects.

- Proposed construction to completion of science complex at Kisumu Polytechnic- Ksh 75, 599,770.
- Wang Chieng pipeline extension- Ksh 11, 305, 764.

It had completed the following:-

- Proposed Training Restaurant & Student Center at Kisumu Polytechnic- Kshs 59,443,450/=

Its tender was 9.82% below the official estimate.

Berlin Equipment Limited-Ksh.110,045,512.06

Its tender had a negligible arithmetic error with error correction factor of +0.108% to his advantage.

It is a registered contractor in category "D" with the Ministry of Public Works.
It had the following on-going projects;

- Erection and completion of Tiwi Beach Resort Luxury Villas at - Ksh 167.8 Million
- Proposed one block of 12 No. Type "E" Flats at Sigomere Police Post- Ksh 59,311,795.

It had completed the following;

- Construction of roads, buildings and factory annexures for Kwale International Sugar Company Limited, valued at 167.8 Million
- Its tender was 7.32% below the official estimate.

B.N Kotecha & Sons- Ksh 118,120,215.08

Its tender had a negligible arithmetic error correction factor of +0.507% to his advantage.

It is a registered contractor in category "B" with the Ministry of Public Works.
It had the following on-going projects;

- Proposed model health centre at Bura Constituency at Ksh 16,099,437/=
- Proposed one block of 12 No. Type "E" flats at Ugunja Police Post- Ksh 62,639,762.

Its tender was 0.52% below the official estimate.

Precision Engineers Limited

Its tender had a negligible arithmetic error with an error correction of -0.560% to his disadvantage.

It is a registered contractor in category "D" with the Ministry of Public Works.

It had the following on-going projects;

- Proposed School of excellence at Kibos at Ksh 30,000,000/=
- Proposed Kuajork Banking Premises in Sudan at Ksh. 78.1 Million

It had completed the following;

- Proposed Akado Youth Empowerment Centre at Ksh 9,000,000/=

Financial Evaluation

The four (4) qualifying tenders were subjected to further scrutiny to determine the consistency of the tendered rates and their competitiveness.

The table below shows the comparison of rates for major items.

TABLE "C" - Comparison of Rates for major Items.

	Cell Arch	M/s Berlin	B.N Kotecha	Precision	Estimate
Concrete 1:2:4	13,000	13,000	14,300.00	15,000.00	15,598.00
200 mm walling	1,600	2,300	2,530.00	3,400.00	2,650.00
Concrete tiles	1,800.00	3,000.00	3,300.00	3,500.00	1,700.00
150* 50 timber	395	450	495	700.00	520.00

The following criteria were employed in evaluating the four bidders who qualified to be evaluated at the financial stage of evaluation.

1. Tenderer whose project had delayed unnecessarily without approved extension of time.
2. A contractor who has more than 4No. ongoing projects of whatever value.
3. Tenderer whose tender sum is outside $\pm 10\%$ of the Engineer's Estimate.
4. Tender who had been served with Default notice.

The following table shows the results of the financial evaluation;

TABLE "D"- Financial Evaluation

No.	Tenderer	Tender Sum	Variance
1	Cell Arc Systems P.O.Box1172-40300 Kisumu	107,081,999.00	-9.82%
2	Berlin Equipment Ltd P.O.Box 2522,Kisumu	110,045,512.06	-7.32%
3	B.N Kotecha & Sons Ltd P.O.Box 18-40100,Kisumu	118,120,215.05	-0.52%
4	Precision Engineers Limited P.O.Box 3367, Kisumu	128,336,019.20	+8.08%

The following issues arose out of the financial evaluation;

THAT;

1. M/s Cell Arc Systems was once awarded a tender at Kisumu Polytechnic for Construction of science Complex where even the column one time collapsed because of poor workmanship due to lack of professional personnel and unwillingness to take or follow instructions as per Principal's letter.
2. Both Berlin Equipment Ltd and B.N Kotecha & Sons Ltd have got more than 4 ongoing projects each hence their capacity are stretched despite being some of the best contractors in the District.
3. Only M/s Precision Engineers Ltd should be considered for an award amongst the 4 proposed.

RECOMMENDATIONS.

After the conclusion of the evaluation exercise, the Evaluation Committee recommended that Tender No. KSME/PPO/NDHIWA/3A/2011-12 for the Construction of Block of 16 No. Type 'E' flats at Ndhiwa Police Station be awarded to M/s Precision Engineers being the lowest evaluated bidder.

TENDER COMMITTEE'S DECISION

Upon deliberation on the recommendation of the Evaluation Committee, the Tender Committee in its meeting of 29th February, 2012 adopted the Financial Evaluation Committee's recommendation and approved award of the tender for Construction of Block of 16 No. Type E flats at Ndhiwa Police Station, Tender No. KSME/PPO/NDHIWA/3A/2011-12 to M/s Precision Engineers Ltd at a tender sum of Ksh.128,336,019.20.

THE REVIEW

The Request for Review was lodged by Cell Arc Systems on the 12th March, 2012 against the decision of the District Tender Committee, Kisumu East District. The Applicant was represented by Mr. Gerald Kimanga, Advocate while the Procuring Entity was represented by Mr. Luke Midamba, the District Supply Chain Management Officer.

The Applicant raised nine grounds of Review and requested the Board for the following orders:-

- (a) The Procuring Entity's decision to award the tender to Precision Engineers Limited which was not the lowest evaluated tenderer be and is hereby annulled;*
- (b) The Procuring Entity be and is hereby ordered to award the tender to the Applicant who was the lowest evaluated tenderer as ranked in the recommendation of its Tender Evaluation Committee;*

(c) Costs of the review be paid to the Applicant;

(d) Such or further relief(s) as this Board shall deem just and expedient to grant.

Preliminary Issue.

At the hearing, the Applicant sought leave to rely on a certified copy of the Evaluation Report it had obtained from the County Works Officer. It submitted that, having failed to get a report from the Procuring Entity, it resulted in obtaining the same from the County Works Officer for the purposes of filing this Request for Review.

In response, the Procuring Entity objected to the admissibility of the said copy of the Evaluation Report for reasons that the document was obtained illegally without following the due process of the law.

The Board, having considered the source of the document and the provisions of Section 44 of the Act ruled that the said document could not be admitted for the purposes of the hearing but assured the parties that, since all the original documents on the tender in question had been submitted to the Board, then the Board would peruse all the documents prior to reaching its decision.

The Board therefore expunged the document for the purposes of the hearing and proceeded to hear the matter.

GROUND 1,2,3,4,5,6,7 & 8: Breach of Section 66(4) of the Act and Regulation 51(2).

These grounds have been combined since they raise the same issues on the evaluation and award of the tender.

The Applicant submitted that the Procuring Entity breached Section 66(4) of the Public Procurement and Disposal Act (hereinafter referred to as '*the Act*') by failing to award the tender to the lowest evaluated bidder. It submitted that the Procuring Entity had by and large followed the law in the evaluation process but erred in arriving at the lowest evaluated bidder.

The Applicant stated that the Procuring Entity seemed to have complied with the requirements of Section 66(5) of the Act in that it had prepared a summary of the evaluation report but failed to reach at the correct decision on lowest evaluated bidder, and instead awarded the tender to a bidder whose price was not the lowest.

The Applicant further submitted that the Procuring Entity breached the express provisions of Regulation 51(2) by failing to consider the Evaluation Report in awarding the tender. It stated that the Evaluation Committee properly and procedurally evaluated the bids in accordance with the Act and alleged that it had emerged the best overall. It therefore argued that the Tender Committee erred by awarding the tender to Precision Engineers Ltd, contrary to the provisions of the Act, the Regulations and principals of natural justice.

The Applicant submitted that its bid was the most responsive, lowest in cost and devoid of any arithmetical error. Finally, it submitted that it had previously undertaken and completed a tender of a bigger magnitude and complexity than the Successful Bidder and therefore ought to have been awarded the tender. It urged the Board to also take into cognisance the importance of the project and the urgency involved when deciding on the matter, by invoking its powers to order for a substitution of the award in its favour in order to allow for an expeditious completion of the project in public

interest. In support of its argument, it cited the Board's decision in Application No. 18/2010 Wamo construction Co. vs District Tender Committee, Ijara District, where the Board invoked its powers under Section 98 of the Act and substituted the decision of the Tender Committee and further ordered that the Procuring Entity enter into contract with the Applicant.

In response, the Procuring Entity denied breaching any Section of the Act and or the Regulations in evaluating the subject tender. It submitted that it conducted its evaluation as per the relevant provisions of the Act and the Regulations by carrying out the evaluation in three (3) stages namely;

- Preliminary Evaluation
- Technical Evaluation and
- Financial Evaluation.

The Procuring Entity submitted that it adhered to the criteria set out in the tender advertisement and arrived at the lowest evaluated bidder.

In Particular, the Procuring Entity averred that it did not breach Section 66(4) of the Act since the evaluation process involved detailed evaluation criteria which led to the award of the tender to M/s Precision Engineers Ltd. It submitted that the outcome of the Technical Evaluation recommended that a further evaluation on the four (4) bidders be carried out during the Financial Evaluation. It stated that its decision on the award was not based on the lowest tenderer as alleged by the Applicant but rather on the lowest evaluated tenderer after an evaluation conducted based on the criteria as set out in the Tender Notice of 18th January, 2012 and tender document thereof.

With regard to breach of Regulation 51(2), the Procuring Entity submitted that the Tender Committee made the award based on the Financial Evaluation Report and the recommendations thereof.

In conclusion, the Procuring Entity submitted that the subject tender was of utmost public interest and importance, considering that the project was for the construction of Police flats at Ndhiwa Police Station, which would help in enhancing Security in the District, more so considering the forthcoming National General Elections. It therefore urged the Board to find no merit in the Application and allow the procurement process to proceed.

On its part, an Interested Party M/S Precision Engineers Ltd, associated itself with the submissions of the Procuring Entity. It stated that, following the advertisement of the tender by the Procuring Entity, it had submitted a competitive bid and was therefore rightly awarded the tender. It stated that it had the capacity to deliver the project, having done projects of higher magnitude both within the Country and at International level.

Another Interested Candidate, M/S B.N. Kotecha & Sons Ltd, stated that it submitted its bid and only received a letter of regret without details of the reasons for the disqualification of its bid.

On its part, M/S Gulf Fabricators Ltd, another Interested Candidate, stated that it had submitted the second lowest priced bid and that given a second chance it would tender for the same amount.

The Board has considered the representations of the parties and the documents presented before it.

The issue for the Board to determine is whether or not; the tender was evaluated and awarded in accordance with the criteria set out in the tender

document and pursuant to the relevant provisions of the Act and the Regulations.

To determine the above, the Board takes note of the following:-

1. That the Procuring Entity advertised the tender on 18th January 2012 in both the Nation and the Standard Newspapers.
2. The minimum requirements Criteria of Evaluation was set out in the said tender advertisement as follows:-
 - a.) *"Tenderers must be registered with the Ministry of Public Works in Category "D" and above. They should also appear in the current Register of Approved Building Contractors kept by the Ministry of Public Works.*
 - b.) *Should provide proof of having worked on works of similar magnitude and complexity undertaken in the last five years.*
 - c.) *A bid security in form of Bank Guarantee of Ksh. 700,000/= from reputable bank.*
 - d.) *Show proof of having adequate equipment and key personnel for the specified types of works.*
 - e.) *Proof of sound financial standing and adequate access to bank credit line.*
 - f.) *To give litigation history of the company (both court and arbitration cases).*
 - g.) *Complete confidential business questionnaire.*
 - h.) *Submit a valid tax compliance certificate".*
3. The following further qualification criteria were also set out in the advertisement and were applied in evaluating the four bidders who qualified to be evaluated at the Financial stage of evaluation.
 - a) *"Tenderer whose project had delayed unnecessarily without approved extension of time.*

- b) *Contractor who has more than 4.No. ongoing projects of whatever value.*
c) *Tenderer whose tender sum is outside ± 10% of the Engineer's Estimate.*
d) *Tenderer who had been served with Default notice."*

The Board takes note of the provisions of Section 66(4) of the Act which provides as follows:-

"The successful tender shall be the tender with the lowest evaluated price."

The Board notes that the tender in question attracted twelve (12) bidders and only four of them, namely; Cell Arc Systems, Berlin Equipment Ltd, B.N. Kotecha & Sons Ltd and Precision Engineers Ltd, were found to be responsive. The Four bidders were subjected to a further evaluation as set out in item 3 above.

Upon perusal of the Technical Evaluation Report by the Ministry of Public Works and the Financial Evaluation Report thereof, the Board notes that the Financial evaluation heavily relied on a report submitted by the District Development Officer, who was also charged with the responsibility of monitoring and evaluating all the projects in the Province. The Board finds that the Applicant was evaluated and disqualified for reasons that it had once been awarded a tender at Kisumu Polytechnic, where after carrying out the construction works, a column collapsed due to poor workmanship. This information was obtained by the Procuring Entity from the principal of Kisumu Polytechnic. The Board notes that under Section 62 of the Act, a Procuring Entity is given the discretion to seek clarification/information to assist it in the evaluation and comparison of tenders. In this regard the Board finds that the Applicant was properly disqualified.

The Board further notes from the Evaluation Report that both Berlin Equipment Ltd and B.N Kotecha & Sons Ltd, were disqualified for the reasons that each had more than four (4) ongoing projects and hence their capacities were stretched. This was in line with the criteria set out in the Tender Notice of January 18th 2012. Accordingly the Board finds that the two (2) bidders were also properly disqualified.

In this regard, the Board finds that the three (3) bidders, having been properly disqualified, none of them could have been the lowest evaluated bidder as envisaged under Section 66(4) of the Act.

With regard to the allegation that the Procuring Entity breached the provision of Regulation 51(2); the Board notes the provision of Regulation 51(2) which provides as follows:-

"The Evaluation report prepared under paragraph (1) shall be considered by the tender committee, prior to awarding the contract or taking any other action in relation to the procurement as may be necessary."

The Board notes that the Tender Committee in its meeting No. 18, held on 29th February, 2012 adopted the recommendations of the Financial Evaluation Report in arriving at its decision to award the tender to M/s Precision Engineers Ltd. Further, the Board also notes that there is nowhere in the Evaluation Report where the Evaluation Committee made a recommendation for the tender to be awarded to the Applicant.

The Board therefore finds no evidence to support the claim that the Tender Committee altered the recommendations of the Evaluation Committee. Accordingly, this limb of the appeal fails.

GROUND 9:- Loss

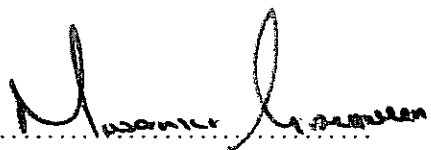
The Applicant alleged that it stood to suffer loss and damage and was likely to suffer immensely as a result of the investment it had made in the tender documents, bid bond and profit earnings from the Tender.

In response, the Procuring Entity argued that the Applicant should be aware that upon participating in a tender, the costs incurred are normal business loss which happened to all the parties who participated, as only one person amongst them could be successful.

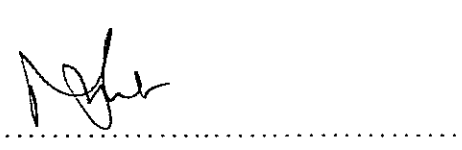
On the prayers by the Applicant to be awarded costs, the Board has previously ruled that the tendering process is a business risk borne by the parties to a tender. Further, in open competitive tendering, there is no guarantee that a particular tender will be accepted and just like any other bidder, the Applicant took a commercial risk when it entered into the tendering process. In view of the foregoing, the Applicant cannot claim the loss associated with the tendering process.

Taking into consideration all the above matters, this Request for Review fails and is hereby dismissed. The Board orders, pursuant to Section 98 of the Act, that the procurement process may proceed. There are no orders as to costs.

Dated at Kisumu this 30th day of March, 2012



**CHAIRMAN
PPARB**



**SECRETARY
PPARB**