

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 13/2012 OF 2<sup>ND</sup> MAY, 2012**

**BETWEEN**

**RURII CONSTRUCTION (K) LTD.....APPLICANT**

**AND**

**DISTRICT TENDER COMMITTEE**

**MURANGA EAST.....PROCURING ENTITY**

Review against the decision of the Tender Committee of Murang'a District East dated 2<sup>nd</sup> May, 2012 in the matter of Tender No. MUR. EAST/MCRH/01/2011-2012 for the Construction of a dormitory block at Murang'a Children`s Home.

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Ms. Loise Ruhiu	-	Member
Eng. C. A. Ogut	-	Member
Amb. C. M. Amira	-	Member
Mr. Akich Okola	-	Member

**IN ATTENDANCE**

Mr. C. R. Amoth	-	Secretary
Ms. Judy Maina	-	Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Rurii Contractors K Ltd**

Mr. Anthony Nderitu - Advocate

Mr. Kuria Maina -Director

### **Procuring Entity, District Commissioner Murang`a East**

Mrs. Faith Singoei -District Supply Chain Officer

Mr. Austin Kamau -County Quantity Surveyor

### **Successful Bidder, Thegere Construction Company**

Mr. Joseph Kanegeni -Managing Director

## **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**

Muranga East District invited tenders for construction of a dormitory block at Muranga children's remand home on 5<sup>th</sup> March, 2012. The invitation was to by letters to seven bidders from its list of prequalified candidates and only four out of the seven invited bidders had bought the tender documents.

## **Closing/Opening**

As at the time of tender opening on 20<sup>th</sup> March, 2012 only two firms out of the four that had bought the tender documents returned their bids for Tender No. MUR.EAST/MCRH/01/2011-2012 for proposed construction of a dormitory block at Muranga children's remand home.

The two firms that had returned their bids are as follows;

1. M/S Thegere International Co.
2. M/S Rurii contractors (K) Ltd.

## **EVALUATION**

The tenders were subjected to preliminary, technical and financial evaluation stages.

The following are the parameters that were considered during evaluation in order to determine a bidder's responsiveness;

- 1) Copy of certificate of valid tax compliance
- 2) Properly filled in and signed confidential business questionnaire
- 3) Form of tender correctly filled and signed
- 4) Adequate bid bond in the required form
- 5) Proof of registration with the Ministry of works
- 6) Proof of financial ability
- 7) Proof of works of similar magnitude and complexity
- 8) Adequate equipment to be used
- 9) Qualified key personnel to be deployed
10. Performance for on going project(s) not behind schedule and without any approved extension of time
11. Whether free from litigation

12.Past performance with no default notice for ongoing project(s) or terminated contracts.

**Preliminary evaluation**

Items number 1 to 5 was used for preliminary examination of bidders. The results of preliminary evaluation are as shown in Table A below;

**TABLE A- Preliminary Evaluation**

	TENDER ER	Valid Tax compliance	Business Questionnaire Properly filled and signed	Form of tender correctly filled and signed	Adequate bid bond in the required form	Proof of registrat ion with MOW	RATIN G	RESPONSIVEN ESS
1	THEGER E INTERN ATIONA L CO. LTD.	Y	Y	Y	Y	Y	5/5	Y
2	RURII CONTR ACTORS (K) LTD	Y	Y	Y	Y	Y	5/5	Y

**Comments on Responsiveness**

- Both bidders 1 and 2 were found to be responsive at preliminary stage hence recommended for the second stage of detailed evaluation.

**Detailed/ Technical Evaluation.**

Items number 6 to 12 were used for detailed/technical evaluation of bidders who had passed the preliminary evaluation stage.

The following Table B represents the results of the detailed/technical evaluation.

**TABLE B-Detailed/Technical Evaluation**

S/NO	TENDERER	Proof of works of similar magnitude	Proof of adequate equipment to be used	Proof of adequate key personnel to be deployed	Performance for ongoing projects not behind schedule and without any approved extension of time	Free from litigation	Past performance with no default notice for ongoing project(s) or terminated a good contract	Proof of financial ability	RATING	Responsiveness
1	THEGERE INTERNATIONAL CO.L	Y	Y	Y	Y	Y	Y	Y	7/7	Y
2	RURII CONTRACTORS LTD	Y	Y	Y	Y	Y	Y	Y	7/7	Y

**Comments**

- Both bidders were found to be responsive at the detailed evaluation stage and hence recommended for the third stage of financial evaluation.

## FINANCIAL EVALUATION

Both bidders qualified for financial evaluation and were hence evaluated and their results tabulated as shown in Table C below;

**TABLE C-Financial Evaluation.**

	TENDERER	TENDER SUM (KSH)	ARITHMETIC ERROR (%)	BID AS % OF ESTIMATE	VARIANCE %
1	THEGERE INTERNATIONAL CO. LTD	2,809,798.40	NIL	90.05%	(-) 9.94%
2	RURII CONTRACTORS (K) LTD	2,849,656.00	0.34%	91.33%	(-) 8.67%
	OFFICIAL ESTIMATES	3,120,028.80	N/A	N/A	N/A

### Comments

From the foregoing Table C, the following can be deduced;

#### **1. M/S Thegere International Co. Ltd**

- Had a tender sum of Ksh. 2,809,798.40
- The tenderer has no arithmetic error
- The tendered sum deviation is 9.94% below the official estimates and is therefore within less or plus 10% of the official estimate.

#### **2. M/S Rurii Contractors (K) Ltd**

- Had a tender sum of Ksh 2,849,656
- The tenderer has a negligible arithmetic error.
- The tendered sum deviation is 8.67% below the official estimates is therefore within.

The 2 bids are within 10% plus or minus the official estimates and are therefore responsive at the financial analysis stage. These are bids from:

- Bid No. 1, THEGERE INTERNATIONAL CO. LTD
- Bid No. 2, RURII CONTRACTORS (K) LTD
- 

### **Board`s Comments**

Since both bids were responsive in both technical and financial evaluation, the lowest bid among the two was recommended for awarding.

### **RECOMMENDATIONS**

From the above analysis the bid from M/s Thegere International Co., P.O.Box 1324 Karatina with a tender sum of Kshs. 2,809,798.40 (Kenya shillings, Two million, Eight hundred and Nine Thousand, Seven Hundred and Ninety eight and cents Forty only) is hereby recommended for award.

### **TENDER COMMITTEE'S DECISION**

Upon consideration of the recommendations of the Evaluation Committee, the Tender Committee decided that the tender for the proposed construction of a dormitory block at Murang'a children's remand home be awarded to M/s Thegere International Co., P.O.Box 1324 Karatina at their quoted tender sum of Kshs. 2,809,798.40

### **THE REVIEW**

The Applicant Rurii Contractors (K) Ltd lodged the Request for Review on 9<sup>th</sup> March 2012 against the decision of the Tender Committee of Muranga East District in the matter of Tender No. MUR. EAST/MCRH/01/2011-2012 for construction of a dormitory block at Murang'a children's remand home.

The applicant was represented by Mr Antony Nderitu, Advocate while the Procuring Entity was represented by Ms.Faith Singoei, District Supply Chain Management Officer, Murang East. The interested candidate, was represented by Mr Joseph Kanegeni, Managing Director.

The Applicant requests the Board for the following orders;

1. The Board to Overturns the decision of the Procuring Entity
2. The Board to Award the tender to ours although the process was flawed.

The Applicant raised two grounds of review and we deal with them as hereunder;

**GROUND 1- Breach of Sections 2, 73(2) and 67 of the Act, and Regulation 54(3)**

These grounds have been combined as they touch on issues of illegality and biasness in the tender in question.

The applicant alleged that it had made an oral request to the Procuring Entity to provide it with the Procurement records pursuant to section 45(3) of the Act. It argued that failure by the Procuring Entity to provide it with the procurement this did not foster the purpose of the Act of increasing public confidence in the procurement process.

The applicant further submitted that the PE breached Regulation 54 (3 ) read together with section 73 (2) of the Act by inviting seven bidders to participate in the tender instead of ten, as provided by Regulation 54. It averred that this did not foster the aspect of fair competition in the tendering process.



The Applicant also submitted that four tenderers bought the tender documents but only two of them returned the tender documents. It stated that the minimum number of tender documents to be subjected to the process of procuring by the procuring entity may vary from three to five documents depending on the magnitude and scope of the contract.

The Applicant stated that during the opening of the tender, it submitted a bid of Ksh 2,849, 656.00 whereas the successful bidder submitted a bid of Ksh 2,809,798. 40. It further stated that the Engineer's estimate of Ksh 3,120,028.80, which was read during the opening. It alleged that the successful bidders offer was exactly 10% below the tendering estimate which raised suspicion, as to how these figures were exactly 10% below the Engineer's estimates. It stated that its bid was 8.7% below the Engineers estimate.

The applicant submitted that investigations it had undertaken revealed that the initial engineer's estimate of the bid was Ksh 5,342,380 but this was downsized to Ksh 3,159,782 by omission of some items in the Bill of Quantities, such as, windows, doors, finishes, contingencies, sanitary works, plumbing works project management and electrical works. Based on the above facts it argued that the tendering process was flawed and did not meet the criteria set out in the Act.

The applicant further submitted that the Procuring Entity awarded the tender to the Successful Bidder, Thegere who hails from Kirinyaga County, while it hails from Murang'a County which was the County in which the procurement was being carried out. It argued that because of this fact it was supposed to have been given preference.

The applicant further stated that the Evaluation Committee comprised of members of the tender committee contrary to regulation 16 (4). It further submitted that the Procuring Entity breached herein Section 52(3)(b) of the public procurement and disposal Act 2005, herein after referred to as the Act by failing to provide drawings, which is a mandatory requirement.

In conclusion the applicant alleges that the Procuring Entity breached Section 67 of the Act by failing to notify the Applicant at the same time. It stated that it only became aware that the award had been made when it visited the site and observed that the Successful Bidder had moved to the site and was in the process of demolishing the structure which was thereon.

In response the Procuring Entity averred that the Tendering Process was correctly followed as per the Public Procurement and Disposal Regulations, 2006. It stated that it was unable to provide the applicant with the procurement records since no request for the same had been done by the applicant in writing.

The Procuring Entity stated that it invited seven bidders from a register of prequalified bidders based on their capability, past experience and work load. It further stated that out of the seven bidders only four bidders bought the bid documents and only two bidders, namely, the Applicant and the Successful Bidder, returned the bid documents. It submitted that both bids were subjected to financial and technical evaluation and the award recommended to the lowest evaluated bidder.

With regard to the Engineer's estimates, the Procuring Entity submitted that this was used as a guide based on prevailing market prices. It further submitted that the Engineer's estimate was confidential and was opened together with the other bids during the tender opening/closing session. It stated that the initial Engineer's Estimate of Ksh 5,342,380.00 was sent to the client Ministry to source for funding. It submitted that the client Ministry informed it that it had a budget of Ksh 2.8 Million. Accordingly, the estimate was reduced to Ksh. 3,159,782.00. It argued that the Engineer's Estimate was used as a guide so that it did not award tenders that were too high or too low. The Procuring Entity also averred that the tender was awarded to the lowest responsive bidder M/S Thegere International Co. Ltd, and that although the Applicant's bid was also responsive, it was higher than that of the Successful Bidder by Ksh. 39,858

Regarding the issue of notification the Procuring Entity further submitted that all the tenderers who participated in the above tender were notified of the results of the process using post as per Section 67 of the Public Procurement and Disposal Act. It further stated that no contract has been signed with the Successful Bidder, and further that, contrary to the claim by the Applicant, site handing over has not been done.

As to the composition of the Evaluation and Tender Committees, while admitting that one of the members was in both committees, the Procuring Entity stated that this was as a result of insufficient staff at the district level following the creation of many district.

Regarding the alleged failure by it to attach the drawing, the Procuring Entity submitted that this was done to avoid different interpretation of the same by bidders. It submitted that the bills of quantities were sufficient to describe all the works with the required details.

In conclusion the Procuring Entity stated that it did not give preference to the Applicant because the funds for the project came from the client Ministry and not from the CDF or LATIFF funds.

On its part, the Interested Party, M/s Thegere, stated that it had been notified by a letter on 3<sup>rd</sup> April, 2012 that its bid had been successful. It further stated that, contrary to the claim by the Applicant that the site had been handed over to it, no such handing over had taken place. It further pointed out that no works had commenced since it had not signed any contract agreement.

The board has carefully listened to the submissions by the parties and examined the documents presented before it .

The issues to be determined by the Board are,

- Were bidders notified pursuant to Section 67 of the Act?
- Did the Procuring Entity breach Regulation 54 (3)
- Was the Bid awarded to the lowest evaluated Bidder
- Was Preferential treatment applicable to this tender
- Did the Composition of the Evaluation and Tender Committee prejudice the applicants bid.
- Whether the works Drawings should have been made available to the Applicant.

The Board notes that the tender in question was adjudicated by the Tender Committee of the Procuring Entity on 30<sup>th</sup> March, 2012. According to the

minutes of the said tender committee the Successful Bidder emerged the winner. According to the evidenced tendered by the Procuring Entity during the hearing of the Application, it thereafter notified both parties of the outcome of the process. The Board notes from the documents submitted to the Board and specifically from the Procuring Entity's bundle of documents that there are copies of notification to both the applicant and the successful bidder dated 30<sup>th</sup> March, 2012.

The Board further notes that according to the evidence tendered by the Applicant, it never received notification of the outcome of the process, and only became aware that the award had been made when it observed that the Successful Bidder had taken possession of the site.

Although there was conflict in the evidence of parties on this issue, the Board is of the view that the Applicant has not been prejudiced in any way as it was able to file this Request for Review.

Accordingly, the Board finds that the claim by the Applicant that it did not have notification of the award is without merit.

Concerning breach of Regulation 54(3) the Board notes from the documents submitted to it that the Procuring Entity sent letters of invitation to tender to seven bidders. The said letters are all dated 5<sup>th</sup> March, 2012, and all the tenderers who were invited to tender were obtained from the list of prequalified bidders.

Section 73(2)(b) sets out when restricted tendering may be used and reads as follows;

***“A Procuring Entity may use restricted tendering if the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, works or services to be procured.....”***

The Board further notes the provisions of Regulation 54(3) which, is read together with the above cited Section 73(2)(b), provides for the procedure to be adopted when using restricted tendering and states as follows;

***“Where restricted tendering is used pursuant to section 73(2)(b) of the Act, the procuring entity shall invite tenders from at least ten persons selected from the list maintained under Regulation 8(3)(a).”***

On the other hand, Regulation 8(3)(a) on the functions of procuring entities which is referred to above states as follows;

***“The functions of the procuring entities shall be to maintain and update annually standing lists of registered tenderers required by the procuring entity and liaise with the authority in respect of the Authority’s register of suppliers and procuring agents.”***

The Board further notes that the Procuring Entity invited only seven bidders to tender for the tender under dispute. Four bidders later bought the tender documents but only two of them managed to return their tender documents (i.e M/s Thegere International Co. Ltd and Rurii Contractors). It is only these two that were later subjected to the evaluation process upon which Thegere International Co. Ltd was awarded the tender.

The Board is alive to the provisions of Regulation 54(3) which requires that a procuring entity should invite at least ten bidders where it chooses to use restricted tendering method. However, there are practical difficulties which may be encountered by a procuring entity in applying this provision in those remote parts of the country where it is impossible to compile a list of

prequalified bidders to meet this requirement. Such a situation may also be encountered where, due to the creation of many new districts, it is difficult, if not impossible to create such a list. In such a situation, common sense must prevail in order to avoid a situation where strict compliance with the provisions of Regulation 54(3) may lead to no procurement being undertaken. It is in the context of this scenario that the Board accepts the explanation by the Procuring Entity to invite only seven bidders to participate in this procurement taking into account factors such as available experience, the number of contracts being undertaken by available contractors, among other things. This finding by the Board should not be taken as sanctioning deviation by procuring entities from application of this regulation. Each case must be considered on its merit in order to justify deviation from the provisions of this regulation.

Taking the above into account, the Board finds that the Procuring Entity did not breach Regulation 54(3).

Regarding the question of the claim by the Applicant that it was entitled to preferential treatment in view of the fact that the procurement in question was in Muranga East District where it is located, whereas the Successful Bidder is located outside the said district, the Board notes that Section 39 of the Act gives permission for a Procuring Entity to apply preferences and reservation. Section 39(4) provides that such preferences and reservations shall apply to *works, services and goods, or any combination therefore*. In this regard, the Board further notes that Regulation 9 of the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011 read together with Regulations 10 and 11 of the same law provide as follows;

Regulation 9;

*“For purposes of Section 39(4)(c) of the Act the regions preference and reservation schemes is applied shall be-*

- a.) Constituencies*
- b.) Counties; and*
- c.) Local authorities*

**Regulation 10;**

*“Local preference and reservation shall be applicable in the constituencies, local authorities and counties where citizen contractors are based and operate.”*

Further, we note that Regulation 11 of the same law provides as follows;

*“Local contractors who are based and operate in the regions specified in Regulation 10 shall be given exclusive preference when participating in procurements using funds from the Constituency Development Fund and Local Authority Transfer Fund, except where it is established that local capacity is not available.”*

The Board further notes that the procurement in question was being funded by the client Ministry and not by funds from CDF or LATFF. In light of this, the Board finds that the preferential scheme set out in Regulation 9 of the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011 is not applicable to this procurement.

Regarding the question as to whether there was breach of Regulation 16(4), the Board notes that the provision states that

*“No person shall be appointed under paragraph 3 if such person is a member of the tender committee of the procuring entity”*



The effect of this provision is that one cannot be a member of a tender committee and a member of an evaluation committee of a procuring entity. In this particular case, the Board notes that Mr. M.M Kibugi was a member of the evaluation committee, according to the minutes of the evaluation committee dated 20<sup>th</sup> March, 2012, and also a member of the Tender Committee, according to the minutes of the said committee dated 30<sup>th</sup> March 2012. Similarly, the Board further notes that Mr. Patrick P. Lekenit, was also in the two meetings as member.

The Board finds that this arrangement was irregular and therefore in breach of Regulation 16(4) cited above. Accordingly, this ground succeeds. However, this notwithstanding, the Board is not persuaded that this irregularity justifies annulment of the decision of the Procuring Entity, especially taking into account the fact that on the whole, the evaluation of the tenders was correctly done.

On the issue of whether or not the Procuring Entity breached Section 52(3)(b) of the Act by failing to provide drawings to the Applicant, as claimed by the Applicant, the Board notes that the Applicant participated in the entire process and never at any time raised the issue. Indeed, if it was material to the Applicant, it should have sought clarification from the Procuring Entity. In the view of the Board, this ground is an afterthought by the Applicant.

Accordingly this ground of request for review fails.

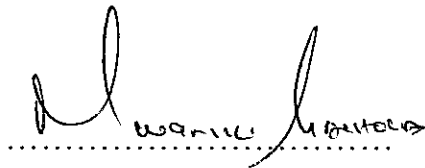
With regard to the submission on issues of biasness, unfairness and favouritism on the part of the procuring entity, the Board observes that the facts as stated by the applicant are both speculative and unsubstantiated and

as such do not disclose breach of any provision (s) of the Act nor of the Regulation. The Board is therefore unable to comment on them.

With regard to costs, as the Board has held on several occasions in the past tendering is a business risk and therefore the costs associated with it should be borne by the bidders. Accordingly, there are no orders as to costs.

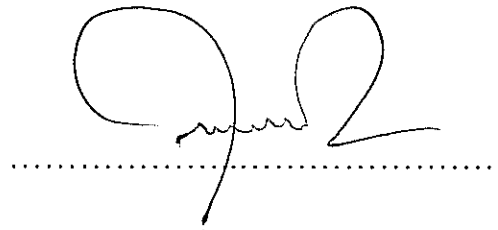
Taking into consideration all the above matters, the Request for Review fails and is hereby dismissed. The Board orders, pursuant to Section 98 of the Act that the procuring process may proceed.

**Dated at Murang'a East on this 2<sup>nd</sup> day of May, 2012.**



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

**CHAIRMAN  
PPARB**



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

**SECRETARY  
PPARB**