

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
REVIEW NO. 20/2012 OF 18TH MAY, 2012

BETWEEN

**MT. KENYA CONSTRUCTION
COMPANY LIMITED.....APPLICANT**

AND

**DISTRICT COMMISSIONER
MATHIOYA DISTRICT.....PROCURING ENTITY**

Review against the decision of Tender Committee of Mathioya District in the matter of Tender No. CDF/MATH/05/2012 for Construction of Proposed Divisional Headquarters for Mathioya District -at Kamacharia Division.

BOARD MEMBERS PRESENT:

Mr.P.M. Gachoka	-	Chairman
Ms.Judith Guserwa	-	Member
Amb. Charles M. Amira	-	Member
Mr.Akich Okola	-	Member
Eng Christine Ogut	-	Member

IN ATTENDANCE:

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

PRESENT BY INVITATION:

Applicant –Mt.Kenya Construction Company Ltd.

Norman Otieno - Advocate
Peter Wachira - Director
Peter Kariuki - Director
Joshua Muriu - Director

Procuring Entity - District Commissioner, Mathioya

Austin Maina - Quantity Surveyor
Jackson Irungu - Legal Officer

Successful Bidder-Josamu Ventures

John Mbuthia - Director
Rahab Githigia - Representative
Esther Wanyika - Representative

BOARD'S DECISION

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

BACKGROUND OF AWARD

Advertisement

The Ministry of Planning, National Development and Vision 2030 advertised the tender for construction works for DO's Office at Kamacharia Divisional Headquarters in Mathioya District among other tenders in the Daily Nation newspapers of 2nd April, 2012.

Closing/Opening:

The tender closed and opened on 19th April, 2012 with the following Seven (7) bidders responding:

Table 1: Bidders that responded to the tender advert and their tender sum

No.	Tenderer	Tender Sum (Ksh)
1	Buldel Enterprises Ltd	9,434,780
2	Jozamu Ventures Ltd	8,010,000
3	Kiunga Building and Construction Company Ltd	7,822,590
4	Jonya Building Contractors Ltd	8,831,450
5	Kikama Trading Ltd	10,261,790

6	Howard Construction Company Ltd	9,028,268
7	Mt. Kenya Construction Company Ltd	7,746,100
Engineer's Estimates		9,103,670

EVALUATION

The bids were evaluated in three stages namely; Preliminary Evaluation, Detailed Evaluation and Financial Evaluation.

Preliminary Evaluation

Bidders were evaluated for responsiveness against the following five requirements;

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 format
5. Proof of registration with the Ministry of Works category G and above

Table 2 below provides a summary of the results of the Preliminary Evaluation.

Table 2: Results of Preliminary Evaluation

	Tenderer	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 registration with MOW category G and above	Rating	Responsiveness
1	Buldel Enterprises Ltd	X	Y	Y	Y	Y	4/5	N
2	Jozamu Ventures Ltd	Y	Y	Y	Y	Y	5/5	Y
3	Kiunga Building and Construction Company Ltd	Y	Y	Y	Y	Y	5/5	Y
4	Jonya Building Contractors Ltd	Y	Y	Y	X	Y	4/5	N
5	Kikama Trading Ltd	Y	Y	Y	Y	Y	5/5	Y
6	Howard Construction Company Ltd	Y	Y	Y	Y	Y	5/5	Y
7	Mt. Kenya Construction Company Ltd	Y	Y	Y	Y	Y	5/5	Y

Key: Y - Responsive, N - Non responsive

From the findings presented in Table 2 above, two bidders namely; Buldel Enterprises Ltd and Jonya Building Contractors Ltd were disqualified at this stage for failure to meet all the mandatory requirements. Buldel Enterprises Ltd failed to attach a Valid Tax Compliance certificate while Jonya Building Contractors Ltd attached a bid bond from Benkways Insurance Agency which is not a PPOA approved insurance company. The following five bidders qualified to proceed to Detailed Evaluation stage:

1. Jozamu Ventures Ltd
2. Kiunga Building and Construction Company Ltd
3. Kikama Trading Ltd
4. Howard Construction Company Ltd
5. Mt. Kenya Construction Company Ltd

Detailed Evaluation

The five bidders were subjected to the following seven (7) parameters on a Yes/No basis:

1. Proof of works of similar magnitude
2. Proof of adequate equipment to be used
3. Proof of adequate key personnel to be deployed
4. Performance for ongoing projects not behind schedule and without any approved extension of time.
5. Free from litigation
6. Past performance with no default notice for ongoing project(s) or terminated a good contract.
7. Proof of Financial Ability

Table 3 below provides a summary of detailed evaluation.

Table 3: Results of Detailed Evaluation

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
2	Jozamu Ventures Ltd	Y	Y	Y	Y	Y	Y	Y	7/7	Y
3	Kiunga Building and Construction Company Ltd	Y	Y	Y	Y	Y	Y	Y	7/7	Y
5	Kikama Trading Ltd	X	X	X	Y	Y	Y	Y	4/7	N
6	Howard Construction Company Ltd	Y	Y	Y	Y	Y	Y	Y	7/7	Y
7	Mt. Kenya Construction Company Ltd	Y	Y	Y	Y	Y	Y	Y	7/7	Y

Bidder No.5, M/s Kikama Trading Ltd was disqualified at this stage for failing to attach Proof of works of similar magnitude, Proof of adequate equipment to be used and Proof of adequate key personnel to be deployed. The remaining four bidders namely; Jozamu Ventures Ltd, Kiunga Building and Construction Company Ltd, Howard Construction Company Ltd and Mt. Kenya Construction Company Ltd qualified to proceed to Financial Evaluation.

Financial Evaluation

At this stage, bidders were subjected to detailed analysis comprising Error correction and deviation from the official estimates. Only tenders within 15% plus or minus the official Estimates were considered responsive. Table 4 below provides a summary of Financial Evaluation results.

Table 4: Results of Financial Evaluation

No	Tenderer	Tender Sum (Ksh)	Arithmetic Error	Bid as % of Estimate	Variance %
2	Jozamu Ventures Ltd	8,010,000	Nil	88%	(-) 12%
3	Kiunga Building and Construction Company Ltd	7,822,590	0.20%	85.93%	(-) 14.07%
6	Howard Construction Company Ltd	9,028,268	Nil	99.17%	(-) 0.83%
7	Mt. Kenya Construction Company Ltd	7,746,100	Nil	86%	(-) 14%
Official Estimates		9,103,670			

All the four bids were within 15% plus or minus the official estimates and thus responsive.

RECOMMENDATIONS

The Tender Evaluation Committee recommended award of the contract to the lowest among the four responsive bidders M/s Mt. Kenya Construction Company Ltd at their tender sum of Ksh.7,746,100.

TENDER COMMITTEE DECISION

The Constituency Development Fund Tender Committee at its meeting held on 2nd May, 2012 awarded the contract for construction of Kamacharia Divisional Headquarters to M/s Jozamu Ventures Ltd at a tender sum of Ksh.8,010,000.

THE REVIEW

The Applicant Mt. Kenya Construction Company Limited lodged this Request for Review on 18th May, 2012 against the decision of the Tender Committee of Mathioya District in the matter of Tender No. CDF/MATH/05/2012 for construction of DO's office at Kamacharia Divisional Headquarters in Mathioya District.

The Applicant was represented by Mr. Norman Otieno, Advocate while the Procuring Entity was represented by Mr. Austin Maina, Quantity Surveyor and Mr. Jackson Irungu, Legal Advisor.

The Applicant requests the Board for the following orders;

1. The Procuring Entity's decision to award the Tender CDF/MATH/05/2012 for the construction of DO's office at Kamacharia to the successful bidder be and is hereby nullified.
2. That the Board do review the entire records of the procurement, and do substitute the decision of the Review Board for the decision of the Procuring Entity and award the tender CDF/MATH/05/2012 for the construction of DO's office at Kamacharia to the Applicant as had been recommended by the Evaluation Committee
3. The Procuring Entity be and is hereby ordered to pay the costs of this appeal.
4. Such other or further orders as the Board shall deem just and expedient.

The Applicant raised 21 grounds of review and the Board deals with them follows;

GROUND 1,2,3,4,5,6,7,8,9- General Statements.

These grounds have been combined as they are all general statements which do not disclose any breach of the Act nor the Regulations. As such, the Board cannot comment on them.

GROUND 10,11,12,13,15 AND 16- Breach of Sections 2(b), 66(4), 67(1)(2) of the Act and Regulations 10(2)(b), 11(1)(b) and 11(4).

The Applicant alleged 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 it the tender having been the lowest evaluated bidder. It also alleged that despite having quoted the lowest price among all those who had tendered in this particular tender, and was recommended for award by the Evaluation Committee, the Tender Committee failed to approve the Evaluation Committee’s recommendations, and erroneously and in suspicious circumstances awarded the tender to the third lowest evaluated bidder contrary to the principal of fair competition as envisioned under Section 2(b) of the Act. The Applicant also alleged that the Tender Committee breached Regulation 10(2)(b) for failing to approve the Evaluation Committee’s recommendation to award it the tender.

It further submitted that the Tender Committee breached Regulation 11(1)(b) by failing to give reasons for rejecting the Evaluation Committee’s recommendation to award the tender to it. It argued that if the Tender Committee had any reason for that rejection of the Evaluation Committee’s recommendation, it ought to have given such reasons to either the head of the Procuring Entity or the accounting officer and to resubmit to the Evaluation Committee for it to provide explanation and a justification for the decision made. The Applicant alleged that none of the above happened and as such the Procuring Entity was in breach of Regulation 11(4).

Finally, the Applicant reiterated that despite it not being awarded the tender, as per the recommendation of the Evaluation Committee for being the lowest evaluated bidder, the Procuring Entity erroneously and in

suspicious circumstances awarded the tender to the third lowest evaluated bidder.

The Applicant stated that this was contrary to Section 2(b) of the Act.

In response, the Procuring Entity stated that the Applicant met the minimum criteria and was recommended for award by the Evaluation Committee that sat on 24th April, 2012 at the District Boardroom. It stated that the Tender Committee declined to award the tender to the Applicant and decided to deliberate itself and awarded the tender to the third lowest evaluated bidder.

The Procuring Entity submitted that the breach of Section 66(4) of the Act was done by the Award Committee and not the Procuring Entity. It submitted that the award committee and not itself failed for not approving the Evaluation Committee's recommendation as is required of it under Regulation 10(b). The Procuring Entity further submitted that it had categorically stated in the tender advertisement that it reserved the right to reject any tender in part or in whole without giving reasons and does not bind itself to accept the lowest or any other tender.

Finally, the Procuring Entity submitted that the reason why the Tender Committee did not award the tender to the Applicant is because the Applicant had another on-going project at the site.

On its part, the interested party M/s Jozamu Ventures Ltd stated that it participated in the tender and complied fully with all the conditions in the advertisement, and that its company is resident within Mathioya District contrary to the allegations by the Applicant.

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

The Board notes that the Ministry of Planning, National Development and Vision 2030 advertised five tenders in the Daily Nation of 2nd April, 2012 for various Construction Works within Mathioya District. The Construction Works for Kamacharia Divisional Headquarters vide Tender No. CDF/MATH/05/2012 was one of them. Seven (7) bidders responded as shown below;

1. Buldel Enterprises Ltd
2. Jozamu Ventures Ltd
3. Kiunga Building and Construction Company Ltd
4. Jonya Building Contractors Ltd
5. Kikama Trading Ltd
6. Howard Construction Company Ltd
7. Mt. Kenya Construction Ltd

The Board also notes that the bids were evaluated through three stages namely Preliminary Evaluation; Detailed/Technical Evaluation and

Financial Evaluation, and four bidders including the Applicant Mt. Kenya Construction Company Limited(the Applicant); Jozamu Ventures Ltd; Kiunga Building and Construction Company Ltd; and Howard Construction Company Ltd qualified through all evaluation stages.

The Board further notes that the Financial Evaluation of the four qualified bidders indicates as below;

- Mt. Kenya Construction Company Ltd Ksh. 7, 746, 100;
- Kiunga Building and Construction Company Ltd Ksh. 7, 822, 590;
- Jozamu Ventures Ltd Ksh. 8, 010, 000
- Howard Construction Company Ltd Ksh. 9, 028, 268

The issues for the Board to determine arising from these proceedings are;

- i. Did the Procuring Entity breach Section 66(4) of the Act?
- ii. Did the Procuring Entity breach Regulations 10(2)(b); 11(1)(b) and 11(4)?
- iii. Did the Procuring Entity breach Section 67(1) and (2) of the Act?

In addressing itself to the issue of breach of Section 66(4) of the Act, the Board takes note of the provision of Section 66(4) of the Act which states as follows;

Section 66(4);

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

The Board also notes from the Procuring Entity's Evaluation Report submitted to it that the Applicant emerged as the lowest evaluated bidder having submitted the lowest tender sum of Ksh. 7, 746, 100 and was therefore recommended for award by the Evaluation Committee.

In view of the foregoing, the Board finds that this limb of the grounds has merit and therefore succeeds.

Turning to the issue on whether the Procuring Entity breached Regulation 10(2)(b), 11(1)(b) and 11(4) by rejecting the recommendation of the Evaluation Committee, the Board is alive to the provisions of the said Regulations which state as follows;

Regulation 10(2)(b);

The functions of the tender committee shall be to-

- a.***
- b. Approve the selection of the successful tender or proposal.***

Regulation 11 (1) (b);

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

- a.***
- b. Reject a submission with reasons;***

Regulation 11(4);

Any submission rejected by the tender committee may be resubmitted and the tender committee shall provide an explanation and a justification for its decision thereof.

The Board has carefully perused the documents submitted to it and notes that the Evaluation Committee in its report dated 24th April, 2012 recommended that the Applicant be awarded the contract for being the lowest evaluated bidder. However, the Tender Committee in its meeting of 2nd May, 2012 declined to adopt, without reasons as is required by the law, the recommendations of the Evaluation Committee. Instead, the Tender Committee decided to award the tender to the third lowest evaluated bidder.

) The Board notes that although at the hearing the Procuring Entity stated that the reason why the Applicant was not awarded the contract was because it had another on-going project. The Board also notes that this was not set out in the Tender Document as one of the evaluation criterion.

The Board therefore finds that the Tender Committee's rejection of the Evaluation Committee's recommendation was unjustified. Accordingly, the Board finds that this limb of the grounds also has merit and therefore succeeds.

GROUND 14-Breach of Section 67(1) of the Act.

) The Applicant alleged that the Procuring Entity breached the provision of Section 67 (1) and (2) of the Act by failing to dispatch notification letters simultaneously. It further alleged that Section 67(1) and (2) of the Act mandates the Procuring Entity to issue letters of notification to both the successful and unsuccessful bidders at the same time.

In response, the Procuring Entity denied breaching Section 67 (1) and (2) of the Act. It submitted that it released the letters of notification to both the successful and unsuccessful bidders on the same day as indicated in the letters. The Procuring Entity also submitted that the letters were written and handed over to the CDF Funds manager for onward transmission to the tenderers. Although the said letters did not reach the bidders at the intended time, copies thereof were dispatched and they reached the bidders in good time.

The interested candidate M/s Jozamu Ventures Ltd stated in its written response that it was informed by the Tender Committee that proper notification was sent to all the parties by registered post.

The Board has carefully examined the documents presented before it and the parties' submissions.

The issue for the Board to determine on this ground is whether the Procuring Entity breached Section 67(1) and (2) of the Act, and whether the Applicant was prejudiced in any way by the letter of notification as issued.

In addressing this issue, the Board makes reference to the provisions of Section 67(1) and (2) of the Act which provide as follows;

Section 67(1) and (2);

(1). Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted.

(2). At the same time as the person submitting the successful tender is notified, the procuring entity shall notify all other persons submitting tenders that their tenders were not successful.

The Board notes from the documents presented before it that the Procuring Entity notified both the successful and unsuccessful bidders of the outcome of the tender vide letters dated 4th May, 2012. The Board also notes that although the Procuring Entity admits that there was a delay in releasing the letters of notification to tenderers, that delay did not prejudice the Applicant in any way as the Applicant lodged its Request for Review on 18th May, 2012 which was still within the fourteen days period during which the law allows it to lodge its appeal.

In view of the foregoing, the Board finds that the Procuring Entity did not breach Section 67(1) and (2) of the Act as alleged by the Applicant.

GROUND 17-Breach of Section 68(2) of the Act.

The Applicant alleged that the Procuring Entity has already taken the successful bidder on a site visit and it suspects that a contract has already been signed between the Procuring Entity and the successful bidder before the fourteen day window period had elapsed.

In response, the Procuring Entity denied having signed the contract with the successful bidder. It submitted that as it had indicated in the letters of notification, such could only happen after the contractor has provided a work schedule and an acceptable Performance Bond to the Project Manager.

The successful bidder on its part stated in its written response that upon receipt of the letter of award dated 4th May, 2012, it was shown the site by the engineer and it proceeded to expend substantial amounts of money in mobilizing equipment and manpower to the site. It also stated that it later removed the equipment and manpower from the site upon directions of the District Supply Chain Management Officer in a letter dated 28th May, 2012.

The Board has carefully examined the documents presented before it and the parties' submissions.

The issue for the Board to determine on this ground is whether the Procuring Entity has signed a contract with the successful bidder contrary to Section 68(2) of the Act.

In addressing this issue, the Board is alive to the provisions of Section 68(2) of the Act which state;

Section 68(2);

“The written contract shall be entered into within the period specified in the notification under section 67(1) but not until at least fourteen days have elapsed following the giving of that notification.”

It is clear from the above provision that a contract can be entered into only after fourteen days have lapsed following the date of notification.

The Board notes from the documents submitted to it by the Procuring Entity that what the Procuring Entity did in this particular case was to take the Successful bidder for a site visit. The Board also notes that there is no provision that prohibits the Procuring Entity from taking the successful bidder on such a site visit before signing of the contract.

The Board has also carefully examined the documents presented before it by both parties and has not found any evidence to show that a contract has already been signed between the Procuring Entity and the Successful bidder.

In view of the foregoing therefore, the Board finds that this limb of the grounds lacks merit and therefore fails.

GROUND 18 AND 19- Breach of Section 44(3) of the Act and Regulation 66(2).

The Applicant alleged that it requested the Procuring Entity for reasons as to why its tender was not successful vide a letter dated 7th May, 2012. It

submitted that as at the date of filing the Request for Review, the Procuring Entity had not responded to that letter.

The Applicant also alleged that the Procuring Entity breached Section 44(3) of the Act by failing to provide a summary of the proceedings of the evaluation even upon the Applicant making a written request in the aforesaid letter.

In response, the Procuring Entity submitted that it did not provide the summary as requested by the Applicant as the Applicant was not categorical on why it wanted the summary of the evaluation.

The Board has carefully examined the documents presented before it and the parties' submissions.

The issue for the Board to determine is whether the Procuring Entity owed a duty to the Applicant of providing it with reasons as to why its bid was unsuccessful and also of providing it with a summary of the evaluation.

In addressing this issue, the Board makes reference to the provisions of Regulation 66(2) and Section 44(3) of the Act which state as follows;

Regulation 66(2);

"Where so requested by an unsuccessful tenderer, a procuring entity shall, within fourteen days after a request, provide written reasons as to why the tender, proposal or application to be pre-qualified was unsuccessful."

Section 44(3)

“Notwithstanding the provisions of subsection (2) the disclosure to an applicant seeking a review under Part VII shall constitute only the summary referred to in section 45(2) (e)”

And for clarity of Section 45(2)(e) of the Act states as follows;

“a summary of the evaluation and comparison of tenders, proposals or quotations including the evaluation criteria used.”

The Board has perused the documents submitted before it and established that the Applicant indeed wrote to the Procuring Entity on 7th May, 2012 requesting for a written explanation as to why its tender was unsuccessful.

The Board notes that the said letter from the Applicant stated in part as follows;

“Further, we request for a written explanation as to why our bid was unsuccessful pursuant to clause 66(2) of the Public Procurement and Disposal Regulations, 2006. This should contain but not limited to information on summary of the evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used (As per requirements of contents of clause 44(3) of the Public Procurement and Disposal Act, 2005).”

It is clear from the above provisions of the law that a duty is imposed on the Procuring Entity to provide a summary of the Evaluation Report and the reasons why the bid is unsuccessful the moment the Applicant requests for the same.

The Board notes that as at the time of the hearing of the Applicant's Request for Review, the Procuring Entity had not responded to the Applicant's request in its letter of 7th May, 2012. The Board also notes that there is no provision of the law that requires the Applicant to give reasons why it wanted a summary of the evaluation.

The Board therefore finds that in view of the failure by the Procuring Entity to provide the Applicant with a summary of the evaluation and the reasons why its tender was unsuccessful upon request, the Procuring Entity breached Section 44(3) of the Act and Regulation 66(2).

Accordingly, the Board finds that this ground has merit and therefore succeeds.

GROUND 20- Breach of Regulations 10 and 11 of the Preference and Reservation Regulations.


On the issue of the Procuring Entity's breach of Regulations 10 and 11 of the Preference and Reservations Regulations, 2011, the Applicant indicated to the Board at the hearing that it had abandoned this ground. The Board therefore makes no finding on it.

Taking all the above into consideration, the Board finds that the tender process was flawed and therefore the Request for Review succeeds and the Board pursuant to the provisions of Section 98 of the Act directs as follows:-

1. The award to the successful bidder is hereby annulled;

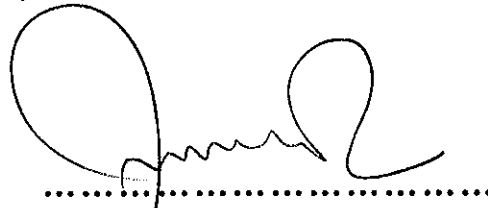
2. Pursuant to Section 98 (b) of the Act, the Board directs that the Evaluation Report be resubmitted to the Tender Committee for purposes of award as per the recommendations of the Evaluation Committee;
3. The Board gives no orders as to costs.

Dated at Nairobi on this 14th Day of June, 2012.



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CHAIRMAN
PPARB



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SECRETARY
PPARB

