

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 27/2014 OF 25TH JUNE, 2014

BETWEEN

URSSA CONSRTUCCIONES METALICAS..... APPLICANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY... PROCURING ENTITY

Review against the decision of the Tender Committee of the Kenya National Highways Authority dated 15th May, 2014 in the matter of Tender No. KeNHA/R/714/2013 for Design and Construction Project for Permanent Prefabricated Modular Steel Truss or similar bridges to be installed along the Loruk - Barpelo (B4) and Homa Bay - Mbita (C19) Roads.

BOARD MEMBERS PRESENT

Mrs. Josephine W. Mong'are	-	Member (in the Chair)
Mr. Hussein Were	-	Member
Eng. Weche Okubo	-	Member
Mrs. Gilda Odera	-	Member

IN ATTENDANCE

Pauline Opiyo - Board Secretary
P. J. Okumu - Secretariat
Shelmith Miano - Secretariat

PRESENT BY INVITATION

Applicant - URSSA Construcciones Metalicas

Stephen Ligunya - Advocate
Magdaline Kabaria - Local Representative

Procuring Entity - Kenya National Highways Authority

David Kiplagat - Advocate
Caroline Yatich - Advocate
Yvonne Masinde - Senior Legal Officer
Eng. C. N. Makau - Manager Structures
Richard Kilel - Senior Procurement Officer
Abdi Yusuf - Procurement Assistant

Interested Party

Lidia Fernandez - Representative, Centunion

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

Introduction

The Government of the Republic of Kenya (GoK) received a tied loan from the Government of the Kingdom of Spain (GoS) towards the cost of Design and Construction of Permanent Prefabricated Modular Steel Truss Bridges to be installed along the Loruk – Barpelo (B4) and Homa Bay – Mbita (C19) Roads.

The Government of Kenya, through its implementing agency, the Kenya National Highways Authority (KeNHA), invited Spanish Companies, Consortia, or Joint Ventures to submit sealed bids for the project.

The bidding process was conducted in accordance with the guidelines contained in the Financial Cooperation Program between the Government of Kenya and the Government of the Kingdom of Spain signed in 2009. The bidding was restricted to Spanish companies having proven experience in the design and construction of steel truss bridges.

The method of procurement chosen was "one stage-two envelope bidding procedure". The prospective bidders were required to submit two (2) sealed envelopes, one containing the Technical Proposal (TP) and the other only the Price Proposal (PP) both submitted simultaneously in a single sealed envelope.

Advertisement

The invitation to bid was advertised in the *East African* of 8th July, 2013 and the Kenya National Highways Authority's website on 9th July, 2013.

Closing/Opening:

The bidding documents (BD) were to be returned on Wednesday, 17th September, 2013 at 10.00 a.m.

The mandatory pre-bid site visits were conducted on 25th and 26th July, 2013 as per Instructions to Bidders. All the five proposed bridge crossings on Loruk - Barpelo Road (B4) were inspected on 25th July 2013 while the Mbita Causeway Bridge on Homa Bay - Mbita Road (C19) was inspected on 26th July 2013.

Out of the six (6) prospective bidders who purchased the Bidding Documents, two (2) firms returned their bids by the stipulated closing date and time.

Table: Summary of bids received by the Purchaser

No.	Bidder name	Address	Bid Security	Bid Security Validity
1	CENTUNION Espanola de Coordinacion Tecnica y Financiera, SA	C/Marques de Villamanga, 328001-MADRID (Spain)	€ 125,000	17.4.2014
2	URSSA S. COOP	Campo De Los Palacios 18 01006 Victoria - Gasteiz Espana (Spain)	€125,000	15.4.4014

EVALUATION

Evaluation of Technical Proposals

The evaluation of the Technical Proposals was carried out as per the guidelines contained in Section III of the Bidding Document. The evaluation was done using a two-stage process. The first stage entailed examination of Technical Proposal against the requirements set out in the evaluation and qualification criteria. In the second stage, the Technical Proposals were evaluated based on the scoring system contained in section III of the Bidding Documents.

The Technical Proposals submitted by the two bidders met the minimum requirements for responsiveness outlined in the Bidding Documents and therefore qualified to continue with evaluation by application of the scoring system established in the second stage of evaluation.

The scoring system applicable to items 1.3: Experience in similar projects and 1.4: Technical documents were then used in evaluating the Technical Proposals.

Stage 3: Examination of Price Proposal (PP)

Upon completion of the examination and evaluation of the Technical Proposals (TP), the results were communicated to the State Secretariat of Commerce of the Spanish Ministry of Economy and Competitiveness. A no-objection to proceed with the opening of the Price Proposals (PP) was received by the Procuring Entity on 18th November, 2013. The Tenderers whose bids were found to be technically responsive were invited to the Price Proposals (PP) opening on 21st November, 2013 at 10.00am. The exercise was presided over by the Tender Evaluation Committee appointed by the

Purchaser in the presence of a representative of the Spanish Economic and Commercial Office in Nairobi, Kenya and bidders or their representatives.

Table: Summary of Information Read Out at the Price Proposals Opening

Serial no.	Name of the Bidder	Bid Price (Euros)	Original Tender Document	Copies	Soft Copy (CD ROM)
1	CENTUNION	6,950,000.00	1	1	1
2	URSSA S. COOP	6,758,601.00	1	1	1

Further the Committee confirmed that all the bidders provided the following information:

- a) Price Proposal Submission Form in accordance with ITB Clause 13.1;
- b) Price Schedules, in accordance with ITB Clauses 13.2, 14, and 15.

There were no arithmetic errors found on the two bids and therefore the bid prices remained unchanged.

Stage 4: Evaluation of Price Proposal (PP)

The scoring criteria outlined in section III of the Bidding Documents was used in evaluating the Price Proposals (PP). The formula used is shown below:

$$PP = 10.21 + \left[\frac{1.5}{(PPE-7.25)} \right]$$

Where: - PP is the Price Proposal

- PPE is the Price Proposal under evaluation x 10⁻⁶

The results for evaluation of price proposal are provided in the table below:

Table: Results for Evaluation of Price Proposal

Bidder No.	Bidder name	$PP = 10.21 + \left[\frac{1.5}{(PPE - 7.25)} \right]$
1	CENTUNION,	5.21
2	URSSA S. COOP	7.16

Stage 5:

The evaluated final Bid Score was obtained through the following formulae:

$$\text{Evaluated Bid Score} = \text{ETP} + \text{EPP}$$

Where: **ETP** is the Evaluation of Technical Proposal (Maximum score of 90 points)

EPP is the Evaluation of Price Proposal (Maximum score of 10 points)

The result for the combined evaluation of Technical Proposal and Price Proposal is as provided in the Table below:

Table- Scores for the combined technical and price proposal

Bidder No.	Bidder Name	Evaluation of Technical Proposal	Evaluation of Price Proposal	Evaluated Score	Rank
1.	CENTUNION, Espanola de Coordinacion Tecnica y Financiera, SA	87	5.21	92.21	1
2.	URSSA S. COOP	62	7.16	69.16	2

Recommendation

As per the tender evaluation criteria and guidelines in Section III of the Bidding Documents, the contract was to be awarded to the bidder whose Bid was complete and responsive, and had obtained the Highest Evaluated Bid Score. The Evaluation Committee therefore recommended that the Tender for Design and Construction Project for Permanent Prefabricated Modular Steel Truss or Similar Bridges to be Installed Along the Loruk - Barpelo (B4) and Homa Bay - Mbita (C19) Roads be awarded to **M/s Centunion, Espanola de Coordinacion Tecnica y Financiera, SA of C/Marques de Villamanga, 328001-MADRID (Spain)**, for the sum of Euro6,950,000.00 (Six Million,Nine Hundred Fifty Thousand Euros).

THE TENDER COMMITTEE DECISION

The Procuring Entity's Tender Committee, at its 130th meeting held on 15th May, 2014, considered and awarded the tender for Design and Construction Project for Permanent Prefabricated Modular Steel Truss or similar bridges to be installed along the Loruk - Barpelo (B4) and Homa Bay - Mbita (C19) Roads to **M/s Centunion, Espanola de Coordinacion Tecnica y Financiera, SA of C/Marques de Villamanga, 328001-MADRID (Spain)**, for the Sum of Euro 6,950,000.00 (Six million, nine hundred fifty thousand Euros).

REQUEST FOR REVIEW

The Request for Review was lodged by M/s URSSA CONSTRUCCIONES METALICAS of physical address: Vitoria-Gasteiz, Spain, against the decision of the Kenya National Highways Authority (the Procuring Entity), dated 15th May, 2014, in the matter of Tender for Design and Construction Project for Permanent Prefabricated Modular Steel Truss or Similar Bridges to be Installed Along The Loruk - Barpelo (B4) and Homa Bay - Mbita (C19) Roads

The Applicant was represented by Mr. Stephen Ligunya, Advocate while the Procuring Entity was represented by Mr. David Kiplagat, Advocate. The interested party Centunion Espanola Coordinacion Teenia Financiera , SA who was the successful bidder was represented by Ms. Lidia Fernandez.

The Applicant requested the Board for the following orders: -

- i) THAT the Board annuls the decision of the Procuring Entity to award the tender to CENTUNION in respect to the subject tender;*
- ii) THAT in the alternative, the Board orders the Procuring Entity to re-evaluate the tenders and award the tender in accordance with the Act and the Tender Document;*
- iii) THAT the Board directs the Procuring Entity to award the subject tender to the Applicant, being the lowest evaluated bidder;*
- iv) THAT the costs of this Request for Review be awarded to the Applicant.*

The Board has looked at the grounds for the request which fall into the following Seven grounds:- The determination of the following grounds will however be subject to the Board's finding on the issue of jurisdiction.

Grounds 1 and 2: Allegations of breach of Sections 2(a) and 2(c) of the Public Procurement & Disposal Act, 2005 (hereinafter referred to as "the Act")

These two grounds were consolidated as they relate to similar provisions of the Act. The Applicant alleged that the Procuring Entity breached the above Provisions of the Act by awarding the tender to a bidder whose evaluated price was higher, thus defeating the objective of economy in the procurement process, and in the process treating the Applicant unfairly by failing to award it the tender when its bid was the lowest in terms of the financial proposal.

In its Supporting Statement, sworn by one Anthony Njoroge Wanjiru, the Applicant averred that according to the figures read out by the Procuring Entity at the opening of the Financial Bids, the Financial Proposal by the Applicant was 6,758,601 Euros and the Financial Proposal for the Successful Bidder was 6,950,000 Euros. This aspect was further reinforced by the Applicant during the hearing. Counsel for the Applicant submitted that it ought to have been awarded the Tender as it offered a bid that was 191,399 Euros less than that of the Successful Bidder. It argued that the purport of Section 2(a) & (b) of the Act is to promote Economy which should be realised by a Procuring Entity awarding a tender to the lowest bidder. It therefore stated that this was not done in this particular Tender.

In its Memorandum of Response, the Procuring Entity stated that Clause 37 of the Instructions to Bidders in the Tender Document provided that the

Purchaser (Procuring Entity) would award the contract to the bidder whose bid obtained the highest evaluated bid score and was complete and substantially responsive to the Bid Document. The said clause further required that the bidder had to have remained qualified to perform the contract satisfactorily. The Procuring Entity further stated that it considered both the technical and financial proposals of the bidders in determining the evaluated bid score and in order to achieve efficiency as required under the Act. The Procuring Entity stated that whereas the Applicant offered the lowest price on the financial proposal, it was not the highest evaluated bidder when both the technical and financial scores were combined in that it scored 69.1% against a score of 92.21% by the Successful bidder. The Procuring Entity reiterated that it was not looking at the price alone in evaluating the bids but was also guided by the need to maximise economy and efficiency, capability, experience and all other technical aspects provided for in the tender document in the Instructions to Bidders (ITB) Clause 31, 32, 33, 34 and 35. On the Applicant's claim that the Procuring Entity violated Section 2(c) on integrity, on the fairness of the process, it reiterated that the process was fair, was done with integrity and there was no favouritism to any party and the procedure was nowhere out of what was expected in the Tender document.

On Grounds 3 and 4 : Allegations of breach of Sections 66(2) and 66(6) of the Act on evaluation of the bids.

The two grounds were consolidated as they relate to the evaluation of bids by the Procuring Entity.

The Applicant alleged that the Procuring Entity breached Section 66(2) of the Act by evaluating the tenders using criteria which were not set out in the

Tender Document. The Applicant submitted that during the pre-bid meeting, a clarification was sought about a requirement in the tender document on provision of the basic design and that the Procuring Entity, in response to the query, amended the Tender Document by clarifying that basic design was not a requirement anymore as per the original Tender Document.

The Applicant argued that in blatant violation of that clause as amended, the Procuring Entity went ahead to evaluate it and awarded the Successful Bidder 8 marks allocated for the item and gave the Applicant a mere 2 marks. The Applicant submitted that this act by the Procuring Entity was in violation of the evaluation criteria set out in the Tender Document as this particular condition had been removed.

The Applicant further alleged that the Procuring Entity breached Section 66(6) of the Act as read together with Regulation 46, as amended by paragraph 16(4) of Legal Notice No. 106 of 2013, by carrying out the evaluation of the tenders after the expiry of the statutory period of fifteen (15) days prescribed in the said Legal Notice.

In its response, the Procuring Entity averred that it did not amend the Tender Document to exclude the requirement of Basic Design as alleged by the Applicant, but rather the Procuring Entity clarified that Basic Design entailed submission of design calculations and capacity to design foundations and steelworks by way of documentary evidence of such previous works done by the Bidder. Further, the Procuring Entity averred that the Addendum did not exclude Basic Design as alleged but the same still formed part of the List of Works and Schedule of Requirements.

The Procuring Entity further stated that the Applicant submitted only truss configurations but failed to submit any documentary evidence as to its capacity to design foundations and steel works or documentary evidence of steel bridges that it had previously designed and constructed, hence the Applicant's score of 2 marks out of the maximum of 8 marks allocated under the Basic Design item.

Further, the Procuring Entity averred that it did not breach Section 66(2) of the Act as the Applicant's Bid was not complete and substantially responsive to the tender requirements.

As to the issue of carrying out the evaluation of the tenders after the expiry of the statutory period of fifteen (15) days, the Procuring Entity stated in response that this tender required the participation of the Spanish Ministry of Economy and Competitiveness whose role was, inter alia, to oversee the tender process and to grant approval for the evaluation to proceed to Financial Proposal Evaluation stage once the Evaluation of Technical Proposals was finalised.

The Procuring Entity further stated that considering the circumstances of this tender, the entire evaluation process could not be finalised in fifteen days unlike in tenders in respect of Government of Kenya funded projects.

~~On Ground 5: Allegations of Breach of the Procurement Law by failing to read out loud the results of the technical evaluation during the opening of the financial proposals~~

The Applicant alleged that the Procuring Entity contravened the Procurement Law by failing to read out the technical scores during the opening of the Financial Proposals. The Applicant submitted that on 21st November, 2013, it attended the opening of the Financial Proposals and that at the said opening it requested the Procuring Entity to read out a loud the Technical Scores of the bidders before the opening of the Financial Proposals and was informed by the Procuring Entity that those scores would be disclosed only after the evaluation of the Financial Proposals.

In highlighting this ground, the Applicant relied on the case of **Geodev(K) Limited Vs. The Ministry of Education Review No. 37 of 2008** where the Board held that *"before the opening of the financial proposal of the tender the Technical scores of the evaluated bids must be read out and minutes prepared in accordance with Section 60(8) of the Act and therefore failure to do so has fatal to the tender in question. This, the Applicant stated, was a mandatory requirement in the procurement Laws of Kenya.*

Further, in its Supporting Statement, the Applicant submitted that following receipt of the letter inviting them to the opening of the Financial Proposals, it requested the Procuring Entity, by a letter dated 15th November, 2013, to provide it with a summary of the Technical Evaluation report, which request the Procuring Entity allegedly failed to comply with.

In its response, the Procuring Entity averred that it was not at liberty to read out a loud the results of the technical evaluation during the opening of the Financial Proposals until the entire evaluation had been concluded and the Contract Award published. It submitted that this was a fact that was

communicated to the bidders during the opening of the Financial Proposals and was also part of the conditions contained in the Tender Document, which clearly provided that *'information relating to examination, evaluation, comparison and post qualifications of bids and the recommendation of Contract awards shall not be exposed to bidders or any other person not officially concerned with such process until the publication of the Contract'*. It averred that this clause was clearly stipulated in the tender document and all bidders were aware of it at the outset.

The Procuring Entity therefore averred that the Instruction to Bidders - General, in the Tender Document, provided that the bidders could only be notified of the outcome of the evaluation exercise after the signing of the contract between the Procuring Entity and the Successful Bidder.

On Grounds 6 and 7 - Allegations of Breach of Section 67(2) of the Public Procurement & Disposal Act, 2005 (hereinafter referred to as "the Act") as read together with Regulation 66 of the Public Procurement & Disposal Regulations, 2006 (hereinafter referred to as "the Regulations").

The two grounds were consolidated as they related to an alleged breach of the same requirement of the Act.

The Applicant alleged that the Procuring Entity breached Section 67(2) of the Act as read together with Regulation 66 of the Regulations (as amended by paragraph 19 of Legal Notice No. 106 of 2013, by failing to notify the Applicant in writing that its tender was not successful at the same time that it notified the Successful Bidder. The Applicant further alleged that the Procuring Entity failed to give it reasons as to why its tender was not successful.

In its Supporting Statement, the Applicant averred that by a letter dated 15th April, 2014 the Procuring Entity wrote to the Applicant requesting the Applicant to extend its bid validity period for ninety days, and that pursuant to the request, the Applicant wrote to the Procuring Entity on 22nd April, 2014 indicating its agreement to extend the bid validity period.

The Applicant submitted that in its tender document, it had provided its mailing address including its email and contact person and that the Procuring Entity had used the said address when it sought an extension of the bid validity, yet when it came to fulfilling its legal obligations under Section 67 of the Act, the Procuring Entity sought to deliver its letter through the Diplomatic bag at the Ministry of Foreign Affairs. The Applicant alleged that it never received the said letter until it became concerned about the delay in concluding the tender and wrote to the Procuring Entity on 14th May, 2014 to inquire about the fate of its tender. Further, the Applicant stated that having not heard from the Procuring Entity, it then wrote to the Spanish Economic Counsellor based in Nairobi to inquire about the outcome of the tender process and that by an email dated 18th June, 2014, the Economic Counsellor informed the Applicant that the Procuring Entity had awarded the tender to the Successful Bidder.

The Applicant stated that contrary to Section 67(2) of the Act, the Procuring Entity had deliberately failed to notify it of the outcome of the tender process thus violating the provisions of Section 67 of the Act.

The Applicant sought to rely on two decisions to buttress this point on the relevance of Kenyan Procurement Laws to the tender the subject matter of this

Request for Review. The Applicant referred to the case of **Globaltec Desarrollos E Ingeniera S.A Vs. The Ministry of Fisheries Review case No. 21 of 2013** where the Board exercised jurisdiction despite the tender being financed by the foreign Government of the Kingdom of Spain. Similarly the Applicant relied on the decision of the High Court in the matter between **Areven T & D and Visca Corporation as AREVA TD-VISCAS consortium Vs. The Public Procurement Complaints, Review and Appeals Board, The Kenya Power and Lighting Company Limited & ABB Power Technologies, AB Sweden Review No 193 of 2007** where the Court held that donor conditions and the element of conflict between those conditions and the provisions of the Act were not always to be presumed to oust the Jurisdiction of the Board.

The Applicant urged the Board to find that this tender was subject to the Kenyan law and therefore should proceed to make a finding that the Procuring Entity breached the provisions of the Act in evaluating the tender in the manner that it did and in proceeding to sign the contract of Award with the successful bidder without complying with Section 67 of the Act.

In its response, the Procuring Entity stated that on 19th May, 2014 it notified the Successful Bidder of the award and subsequently on 6th June, 2014 it notified the Applicant of the outcome of the evaluation and gave the Applicant the reasons why its tender was not successful. Under the terms and conditions of the Tender Document the Notification of the outcome of the Tender could only be done after the Contract had been signed.

The Procuring Entity further submitted that according to Section 7 of the Act where there is a conflict between this Act and Regulations and the conditions imposed by the donor fund, the condition of the donor shall prevail and no other. It stated that Section 7 (1) of the Act comes to the aid of the Procuring Entity because the issue of 15 days, the notification and the period did not apply to this process being that in this contract the funds were donated by the Spanish Government and they gave their instructions and conditions and where there was a conflict then the donor conditions supersede the Act. This contract was therefore procured in accordance with the express conditions contained in the tender document that all parties in submitting their bids agreed to be bound by.

ON THE ISSUE OF JURISDICTION

Upon the consideration of all the above arguments the Board shall first consider whether it has the jurisdiction to determine the substantive arguments raised in this matter.

The Parties raised the issue of the existence of a contract signed by the parties at the hearing of this matter and the Board must determine whether it has the jurisdiction to determine any other matter after that. On the issue of the applicability of Kenyan Laws relating to the public procurement processes, the Board finds that this tender being financed by a tied loan and not a grant, then the Laws of Kenya are applicable to the procurement process. The Board is therefore bound by the provisions of the Public Procurement and Disposal Act, 2005 and the Regulations made thereunder in determining whether or not it has the requisite Jurisdiction to hear and determine this matter on merit. The

Board is alive to the provisions of Section 93 (2)(c) and Section 68(1) of the Act which provides as follows:-

Section 93(2):-

"The following matters shall not be subject to the Review under subsection (1)

- a).....*
- b).....*
- c) Where a contract is signed in accordance with section 68."*

Section 68(1):-

"The person submitting the successful tender and the Procuring Entity shall enter into a written contract based on the tender documents, the successful tender....."

The Board takes the issue of Jurisdiction very seriously. Jurisdiction is everything and is key to the proceedings before any Court of Law or Tribunal. The Public Procurement and Disposal Act, 2005 has made it very clear that the Board may not adjudicate on any matter where a signed Contract has been entered into. The Board finds the fact that a contract was to be signed between the successful tenderer and the Procuring Entity was clearly articulated in the Tender Document and there was adequate notice to parties participating in this tender and no party can claim not to have been aware of the said conditions in advance.

The Board also finds that no bidder raised the issue at the pre-bid meeting and as such all parties were expected to be aware of these conditions of the tender well in advance. The Board finds that the contract between the Procuring

Entity and the successful bidder was signed on 29th May 2014. While this Board has powers conferred on it by Section 98 of the Act, to this end the Board finds that the contract signed was entered into in accordance with the provisions of the tender document and with proper notice to the Applicant and the successful bidder. The Board is therefore persuaded that a valid contract exists and the same was properly entered into in accordance with the conditions set out in the tender document.

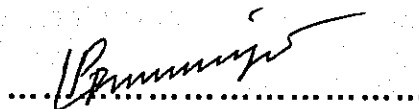
Accordingly and pursuant to the provisions of Section 93 (2) (c) of the Act, the Board holds that it has no jurisdiction to hear this matter.

Guided by the finding on the issue of Jurisdiction, the Board will therefore not proceed and determine the issues raised by the Applicant in its grounds of the Request for Review as filed. Subsequently the Request for Review is struck out. The Board makes no orders as to costs.

Dated at Nairobi this 22nd day of July 2014



CHAIRMAN, PPARB



SECRETARY, PPARB