

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 50/ 2014 OF 26TH NOVEMBER, 2014

BETWEEN

ALIKA CLEANING SERVICES LTD.....APPLICANT

AND

COUNTY GOVERNMENT OF UASIN GISHU --- PROCURING

Review against the decision of the Tender Committee of the County Government of Uasin Gishu County in the Matter of Tender No. CGU/064/2014-2015 for Prequalification of Suppliers for Management of Public Toilets - FY 2014-2015.

BOARD MEMBERS PRESENT

1. Mr. Hussein Were - Member (in the Chair)
2. Mr. Paul Ngotho - Member
3. Mr. Peter Ondieki, MBS - Member
4. Mrs. Rosemary Gituma - Member

5. Mr. Nelson Orgut - Member

IN ATTENDANCE

1. Stanley Miheso - Holding brief for Secretary

2. Shelmith Miano - Secretariat

PRESENT BY INVITATION

Applicant - M/s Alika Cleaning Systems Ltd

1. Phillip Karanja Wachira - Advocate

Procuring Entity - Uasin Gishu County Government

1. Sylvester K. Metto - Legal Officer

2. Peter Leley - County Secretary

3. Sarah Siambi - Procurement Officer

4. Kennedy Okwaro - Procurement Officer

5. Winfred Mulwa - Legal Assistant.

BOARD'S DECISION

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

BACKGROUND OF AWARD

The County Government of Uasin Gishu is one of the Fourty seven County

Governments in Kenya. It is mandated to execute service delivery in areas of health, education and projects establishments contributing to economic development in the County.

In order for the County Government to carry out its mandate, the County Government of Uasin Gishu set out to prequalify suppliers for goods, works and services for the year 2014-2015. The County Government sought to competitively identify suitable firms capable of providing the said services to be included in a shortlist of suppliers register. Among the services for which suppliers were to be pre-qualified was for the Management of Public toilets, the subject of this request for review.

INVITATION TO TENDER

The Procuring Entity, the County Government of Uasin Gishu advertised Tender No. CGU/064/2014-2015 for prequalification of suppliers for management of public toilets in the *Daily Nation* newspaper on 20th June 2014 and the tender was to be closed on 4th July 2014. The closing date was extended to 15th July 2014 through an addendum in the *Daily Nation* newspaper of 2nd July 2014. The tenders were opened in the County Hall, Eldoret on 15th July 2014 at 10.00 a.m. in the presence of bidding firms' representatives. A total of fifty four (54) firms, including the Applicant, responded and submitted bids.

EVALUATION

Evaluation Criteria

The criteria to be used at the various stages of evaluation were specified in the Tender Document. The evaluation for this tender was conducted in one

stage only because the tender was reserved under the category of youth, women and people with disability.

Preliminary Evaluation

In accordance with instructions to tenderers, bids were examined for responsiveness to the following:-

1. Tax Compliance certificate
2. Business Certificate of registration/incorporation
3. Attach copies of Identity Cards (IDS)
4. Registration certificate from the County Treasury/National Treasury
5. In addition, youth, women and PWD firms from Uasin Gishu County should provide in the questionnaire their sub-location and ward details.

Summary of Preliminary Evaluation

Completeness and Responsiveness of the Bid Results

PRELIMINARY EVALUATION					
MANAGEMENT OF PUBLIC TOILETS: CGU /P/064/2014-2015					
Bidder No.	MANDATORY REQUIREMENTS				
	Business registration certificate/certificate of incorporation	Copies of ids	Registration certificate from county /National treasury	Tax compliance	Bidder's Name
1	Y	Y	N	Y	HORSE WHEEL SELF HELP GROUP
2	Y	Y	Y	Y	SQCLEAN PROFFESIONAL SERVICES
3	N	Y	N	Y	CHEPTAIS ENTERPRISES

PRELIMINARY EVALUATION					
MANAGEMENT OF PUBLIC TOILETS: CGU /P/064/2014-2015					
Bidder No.	MANDATORY REQUIREMENTS				
	Business registration certificate/certificate of incorporation	Copies of ids	registration certificate from county /National treasury	Tax compliance	Bidder's Name
4	Y	N	Y	Y	CAPEWA GENERAL SUPPLIERS
5	N	Y	Y	N	EUNISCO PAMOJA WOMEN GROUP
6	Y	Y	N	Y	JIMCHOMI INVETSMENT CO. LTD
7	Y	N	Y	Y	ORBITAL AFRICANS LTD
8	Y	Y	Y	Y	JAITOM ENTERPRISES PO
9	Y	Y	Y	Y	DANROSE LTD
10	Y	Y	Y	Y	FAMNET LTD
11	Y	Y	N	Y	ELDORIAN VENTURE
12	N	N	N	N	ELDO BEST FRIENDS INV. CO
13	Y	Y	Y	Y	RACECOURSE YOUTH ENTERPRISE
14	Y	Y	N	N	WOPEDE WOMEN GROUP
15	Y	Y	Y	Y	SOIN CORPERATION LTD
16	Y	Y	N	Y	QUEENS WOMEN GROUP
17	Y	Y	Y	Y	INTALAN SERVICES
18	N	N	Y	N	JERUSALEM AINAPTICH DISABILITY GROUP
19	Y	Y	Y	Y	PAMKEL ENTERPRISES
20	Y	Y	N	N	NOOBLE KESSSES COMMUNITY-BASED ORG
21	Y	Y	N	N	CHARRIOT WOMEN GROUP
22	Y	Y	Y	Y	YEGUTS ENTERPRISES LTD
23	Y	Y	Y	Y	LEXICOM LOGISTICS LTD
24	Y	Y	Y	Y	DAS SERVICES
25	Y	Y	Y	Y	DABOKERS LOGISTICS LTD
26	Y	N	N	Y	PATRINA INV. CO LTD
27	Y	Y	Y	Y	ELDORET MAIN MARKET BIDII TRADERS S.H G

PRELIMINARY EVALUATION					
MANAGEMENT OF PUBLIC TOILETS: CGU /P/064/2014-2015					
Bidder No.	MANDATORY REQUIREMENTS				
	Business registration certificate/certificate of incorporation	Copies of ids	registration certificate from county /National treasury	Tax compliance	Bidder's Name
28	Y	N	Y	Y	MARALANDS AGENCIES
29	Y	Y	N	N	TAMBOIYOT MUUNGANO W.GROUP
30	Y	Y	N	Y	KAPTUMO VENTURES
31	Y	Y	Y	Y	NOVELTY GENERAL AGENCIES LTD
32	Y	Y	Y	Y	CHEMORISIT INV LTD
33	Y	Y	Y	Y	SEKEMIAT OASIS KIPCHAMO WOMEN GROUP
34	Y	N	Y	N	UASI GISHU DEAF COMMUNITY
35	Y	Y	Y	Y	POFRAC ENTERPRISES
36	Y	Y	Y	Y	SANTHWEL LTD
37	Y	Y	Y	Y	LAVENDER CLEANERS
38	Y	Y	N	Y	ALIKA CLEANING SYSTEMS
39	N	Y	Y	Y	EMONET SELF HELP GROUP
40	Y	N	Y	Y	TALIMWA INV AND CONSTRUCTION CO LTD
41	N	N	N	N	KATANIN KAPSAOS Y.G
42	N	Y	N	N	INTERCAPITAL S.H.G
43	Y	Y	N	N	CHEMTRON ENTERPRISE
44	Y	Y	N	N	ERICOS CLEANING SERVICES
45	Y	Y	Y	Y	BARUA CO. LTD
46	Y	Y	Y	Y	LANMO INV
47	Y	Y	Y	Y	ELMA CO. LTD
48	Y	Y	Y	Y	MERLU AGENCIES LTD
49	Y	Y	Y	Y	REGAL CREST AGENCIES
50	Y	Y	Y	Y	TRINLANS LTD
51	Y	N	Y	Y	MORDAN CO. LTD

PRELIMINARY EVALUATION					
MANAGEMENT OF PUBLIC TOILETS: CGU /P/064/2014-2015					
Bidder No.	MANDATORY REQUIREMENTS				
	Business registration certificate/certificate of incorporation	Copies of ids	registration certificate from county /National treasury	Tax compliance	Bidder's Name
52	Y	Y	Y	Y	USAFI HUMAN AND TOILETS MANAGEMENT
53	Y	N	Y	Y	INTERNATIONAL INSTITUTE OF MGT RESOURCE AND
54	Y	Y	Y	Y	KALYET GAA WOMEN GROUP

KEY

Y- Means Responsive

N-Means Non responsive

Bidders found to be lacking in any of the mandatory requirements were considered by the evaluation committee to be non-responsive and were therefore not prequalified.

CONCLUSION AND RECOMMENDATIONS

Out of the fifty four bidders who submitted tenders, thirty three bidders were found to be substantially responsive at the preliminary evaluation stage and therefore prequalified.

TENDER COMMITTEE'S DECISION

The Tender Committee at its meeting held on 12th September 2014 deliberated on Tender No. CGU/ 064/2014-2015 for Pre-qualification of Suppliers for Management of Public Toilets and approved the pre-

qualification of all the bidders recommended by the evaluation committee. The tender committee made the following further resolutions:

- The categories for Youths, Women and People with Disabilities be left open for continuous prequalification as they acquire AGPO certificates from County or National Treasury.
- The secretariat to develop a comprehensive list which should include all the items which will be required by the county to avoid expenses for advertisement for thresholds which do not require advertisement.
- The secretariat's advice on development of framework contracts be implemented on consumable items to reduce cost of paperwork and time wastage on operation and quotations.

THE REVIEW

The Applicant, M/s Alika Cleaning Systems Ltd lodged this Request for Review on 26th November, 2014 against the decision of the Tender Committee of the County Government of Uasin Gishu in the matter of Tender No. CGU/064/2014-2015 for Pre-qualification for Management of Public Toilets.

The Applicant requests the Board for the following orders:-

- a) *That the Tendering process for Tender No. CGU/064/2014-2015 was irregular/un-procedural and therefore a nullity ab-initio.*
- b) *That the Procuring Entity to float the Tender for Management of Public Toilets afresh*
- c) *That the Procuring Entity to strictly follow the Provisions of the Constitution and the Act*

The Applicant was represented by Mr. Phillip Karanja Wachira, Advocate from the firm of Karanja Otunga & Associates while the Procuring Entity was represented by its legal officer, Mr. Sylvester K. Metto.

The Applicant raised two grounds of review as follows:

- 1. That the Procuring Entity failed to open the Tenders publicly on 4th July 2014 as provided in its Tender Document and the Public Procurement and Disposal Act and the Regulations.*
- 2. That the Procuring Entity failed to inform the Applicant whether it won or lost the Tender as provided by law.*

THE APPLICANT'S CASE

The Applicant submitted in its first ground of review that the Procuring Entity floated tenders for management of public toilets in which the Applicant participated. It submitted that the Tender Document provided that the tenders would be opened publicly on 4th July, 2014 at 10.00 a.m. and that on that date, the Procuring Entity's Tender Committee Chairman, Mr. Moses Olum, informed all those who had attended that there was an error in the description of the services tendered for and advised the tenderers to go to the County website and download the amended tender document and re-submit the same for opening on 15th July, 2014.

The Applicant averred that it re-submitted its amended tender on 15th July, 2014 but the Procuring Entity did not open the tenders and instead advised all those who had attended that they should report back on the following day, the 16th July, 2014. The Applicant stated that on 16th July, 2014 the Procuring Entity informed all those who had attended that the tenders would be opened on the 17th July, 2014 but again this did not happen and

instead the Procuring Entity informed all those who had attended that it would communicate with each bidder individually. The Applicant finally submitted that the Procuring Entity did not communicate nor had it informed the Applicant whether the Applicant won the tender or not as provided by the Public Procurement and Disposal Act and the rules made there under.

The Applicant submitted in its second ground of the request for review that the Procuring Entity failed to inform it whether it won or lost the tender contrary to the Provisions of Section 67 of the Act, Regulation 66 of the Public Procurement and Disposal Regulations, 2006 (hereafter referred to as the "Principal Regulations") and Regulation 19 of the Public Procurement (Amended) Regulations, 2013.

In an affidavit signed by one Mr. Tom Makale, the Managing Director of the Applicant, the Applicant stated that the Procuring Entity had by March 2014 not informed it of the outcome of the tender. It decided to write to the Procuring Entity enquiring on the same after some people started interfering with its on-going management of public toilet business claiming that they were the ones who had won the tender. The Applicant stated that the Procuring Entity did not respond to its letter but instead floated a fresh tender on 20th June 2014 in which the Applicant participated by putting in its bid.

It was the Applicant's case that since 17th July 2014, the Procuring Entity had neither communicated to it nor had the Applicant been informed whether it won the tender or not contrary to the provisions of the Public Procurement and Disposal Act, 2005 and the rules made thereunder. The Applicant stated

that, by a letter dated 19th November, 2014 but delivered to the Applicant on 24th November, 2014, the Procuring Entity demanded that the Applicant vacates the toilet premises at the Main Bus Park and the Sosian Bus Park which it was operating in by 30th November 2014.

The Applicant stated that it had all along been waiting for communication of the outcome/award of the tender it participated in and only came to learn of the breach of the tendering process on 19th November 2014 when the Procuring Entity wrote to it demanding that it vacates the toilets it had been operating for more than ten years.

THE PROCURING ENTITY'S RESPONSE

The Procuring Entity, in its response in an affidavit signed by Mr. Peter K. Leley, the County Secretary of the Procuring Entity, stated that it invited a specific group of suppliers to enable it undertake the management of public toilets on its behalf and upon the said invitation several persons and body corporate responded by submitting their prequalification bids. It added the advertisement of the tender for management of public toilets was restricted to enterprises owned by women, people with disability and youth groups in accordance with the initiative to create opportunities for the aforesaid group of persons to access the government procurement, herein after referred as "YAGPO".

The Procuring Entity averred that the Applicant's directors are not from the group targeted and was a non-starter *ab-initio* and that the request for review should be struck out as such. The Procuring Entity averred further that in so responding the Applicant submitted itself to the process, criteria, evaluation

and conditions in the prequalification document together with the advertised invite.

The Procuring Entity stated that it indicated to all the bidders of the change of opening date from 4th July, 2014 to 15th July, 2014 and that from 15th July 2014 it started opening the bids which process went on for 5 days from the official opening date because of the large number of tenders that were received. The Procuring Entity averred that it undertook the tender opening process for a period of about five days as the same involved over 4,000 tenders in respect of all the County Government pre-qualifications for the year 2014/2015. The Procuring Entity also stated that the Applicant had confirmed that it attended the tender opening session and was aware of the outcome of the prequalification process.

The Procuring Entity submitted that the Applicant was notified of the prequalification process by print media and written communication as they did send their representative to the tender opening. The Procuring Entity further submitted that it subsequently evaluated the tenders and the Applicant was not successful. It also submitted that the Applicant should have applied to be prequalified in the categories that were open to all tenderers.

The Procuring Entity finally submitted that the relevant prequalification to this case is that of the year 2014/2015 and reference by the Applicant to any matter before July 2014 is irrelevant and intended to mislead the Board.

APPLICANT'S REPLY

In response the Applicant through it's advocate submitted that the Procuring Entity did not receive the letter of notification dated 25th September, 2014 from the Procuring Entity. It further stated that the issue of public interest overriding private interest does not arise since all those who were prequalified were private entities.

THE BOARD'S FINDINGS

The Board has carefully considered the oral and written submissions of the parties and examined all the documents that were submitted to it and has identified the following issues for determination in this Request for Review: -

- (i) Whether the Procuring Entity failed to comply with the Provisions of Section 60 (2) and (3) of the Public Procurement and Disposal Act with regard to the opening of tenders.
- (ii) Whether the Procuring Entity failed to carry out the tender evaluation process in accordance with the evaluation criteria set out in the tender document contrary to the Provisions of Section 66 (2) of the Act.
- (iii) Whether the Procuring Entity failed to comply with Section 67 (2) of the Act with regard to the notification of award

1. As to whether the Procuring Entity failed to comply with Section 60 (2) and (3) of the Act on opening of tenders:

Section 60 of the Act on opening of tenders provides as follows:-

"60.....

(2) *Immediately after the deadline for submitting tenders, the tender opening committee shall open all tenders received before that deadline.*

(3) *Those submitting tenders or their representatives may attend the opening of tenders.*

....."

The Board has perused copies of the Evaluation Report and the original Tender Documents and notes the following:

- a) The Tenders was advertised in the *Daily Nation* of Friday, 20th June, 2014.
- b) The Tender Notice indicated that the prequalification item No. CGU/P/064/2014/2015 was for the target groups - youth, women and people with disabilities firms.
- c) The Tender Notice indicated that enterprises of people with disability, youth and women from within Uasin Gishu County only were encouraged to apply and were to have the following mandatory requirements:-
 - (i) A copy of Tax compliance certificate (where applicable)
 - (ii) A copy of business registration certificate/ certificate of incorporation
 - (iii) Copies of identity card (ID)
 - (iv) Registration certificate given by the county treasury of Uasin Gishu or the National Treasury
- d) The Tender Notice of 20th June, 2014 indicated that the tenders were to be opened on 4th July, 2014 which is 14 days from the advert.

- e) On 2nd July, 2014 the period of submission was extended to 15th July, 2014 vide an advert in the *Daily Nation newspaper*.
- f) The tenders register indicates that the tender was opened on 15th July, 2014 at 10.00 am.
- g) Tender opening minutes were signed by the members on 25th July, 2014.
- h) The Preliminary evaluation requirements were set out in the Tender Notice and in the Tender Document (Requirements – Mandatory, Page 18)
- i) **The Applicant's bid was not successful on evaluation as its tender document did not provide evidence of it being registered under people with disability or youth or women enterprises from within Uasin Gishu County and did not have a copy of Registration certificate given by County Treasury of Uasin Gishu or the National Treasury and copies of IDs of the directors.**
- j) The Evaluation report was signed by the evaluators and is dated 18th August, 2014.

From the foregoing, the Board observes that the submitted tenders were opened on 15th July, 2014. The Board further observes that the Procuring Entity had a tender opening register and opening minutes signed by the members of the opening committee as required by Sections 60(4), (7)-(9) of the Act on the procedure applicable to tender opening.

The Board finds that in terms of Section 60 (2) and (3) of the Act, the Procuring Entity complied with the law because it indeed opened and read out the tenders publicly on 15th July, 2014. However tender opening went on for 5 days owing to the large number of tenders received. This ground of Request for Review therefore fails.

2. As to whether the Procuring Entity failed to carry out tender evaluation in accordance with the evaluation criteria set out in the tender document contrary to section 66 (2) of the Act:

The Board notes that the Tender Document provided evaluation criteria to be used by the Procuring Entity to determine the successful tenderer.

The Board observes that the tender for management of public toilets as specified in the Tender Notice of 20th June, 2014 was reserved for enterprises owned by people with disability, youth and women. The mandatory evaluation criteria used were also specified in the Tender Document. The original bid documents of the Applicant did not have copies of the Registration Certificate given by County Treasury of Uasin Gishu or the National Treasury and Copies of Identity Cards of the directors as required. This was a mandatory requirement and Section 64(1) of the Act requires a tender to conform to all the mandatory requirements for it to be responsive.

In determining this issue, the Board is guided by the following provisions of the Act and the Regulations:

Section 66 (2) of the Act which states as follows:-

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

And Regulation 32 of the Preference and Reservations (Amendment) Regulations, 2013 which states as follows:-

"32. Qualification for preference and reservations schemes - For the purpose of benefiting from preference and reservations schemes, an enterprise owned by youth, women or persons with disabilities shall be a legal entity that -

a) Is registered with relevant government body; and

b)

The Board finds that by its own admission, the Applicant stated that it did not possess a registration certificate issued by the County Treasury of Uasin Gishu or the National Treasury for purposes of being entitled to benefit from the preference and reservations schemes under Regulation 32. The Applicant does not therefore qualify for pre-qualification under the scheme.

The Board therefore finds that the Procuring Entity applied the evaluation criteria set out in the Tender Documents and hence complied with the provisions of Section 66 (2) of the Act. This ground of Request for Review therefore fails.

3. As to whether the Procuring Entity failed to comply with Section 67 (2) of the Act on notification of award:

Sections 67(2) of the Act and the Regulations govern the question of notification of award. The two provide as follows:-

Section 67 (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"

Regulation 66(2):-

"A procuring Entity shall immediately after tender award notify an unsuccessful tenderer in writing and shall in the same letter provide reasons as to why the tender, proposal or application to be prequalified was unsuccessful"

From the documents presented before it the Board notes as follows:-.

- 1). The Procuring Entity wrote a letter of regret to the Applicant Ref. CGU/P/064/2014/15/38 dated 25th September, 2014.
- 2). The letters were dated the same date as the notification letters to the Successful Bidders.
- 3). The procuring entity did not provide evidence of service or receipt of the letters of notification.

The Board finds that the Procuring Entity wrote notifications of award to the Successful Bidders and notifications to unsuccessful bidders. All the letters were dated 25th September, 2014. The Board has however not seen any evidence to show that the letter of notification to the Applicant was delivered either by personal delivery or registered post. In the circumstances, the Board is inclined to accept the Applicant's evidence that it first became aware that it's tender was not successful when it received the Procuring Entity's letter dated 19th November, 2014 requiring the Applicant to vacate from the toilets at the Main Bus Park and at the Sosian Bus Park.

The Board finds that in terms of Section 67 (2) of the Act, the Procuring Entity failed to comply with the Law by failing to notify the Applicant that its tender was unsuccessful. The Board has weighed the consequences of this breach against the intended action of the Applicant, had the Applicant been duly notified. From the submission of the Applicant it intended to challenge the decision of the Procuring Entity to reject its tender which is what it has exactly done.

The Board finds that the Applicant indeed attained this objective and filed this application which was entertained and heard by the Board. The Applicant therefore did not suffer any prejudice arising from the failure of the Procuring Entity to notify it as required by Section 67 (2) of the Act. The Board, being cognizant of its finding in issue No. 2 and without appearing to excuse the failure by the Procuring Entity, therefore finds that though not served, the Applicant did not suffer prejudice since it was able to lodge its request for Review on time.

DECISION OF THE BOARD

Accordingly and for all the above reasons and in exercise of the powers conferred upon it by the Provisions of Section 98 of the Act, the Board makes the following orders: -

- 1. The Applicant's Request for Review filed on 26th November 2014 fails and is hereby dismissed. The Procuring Entity is at liberty to proceed with the procurement process.**

2. This Request for Review having failed but for the reason that Procuring Entity failed to serve the Applicant with a notification that it's tender was unsuccessful, the Board makes no order as to costs as against any of the parties to this request.

Dated at Nairobi this 18th day of December, 2014.

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CHAIRMAN, PPARB

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SECRETARY, PPARB