

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 35/2015 OF 7th JULY, 2015

BETWEEN

FRONTIER ENGINEERING LIMITED.....Applicant

AND

MARSABIT COUNTY GOVERNMENT.....Procuring Entity

The Review against the decision of Marsabit County Government in the matter of Tender No. MBI/COU/WATER/114/2014-15 for the Construction of Kolob Water Pan in Moyale.

BOARD MEMBERS PRESENT

- | | |
|-------------------------------|------------|
| 1. Mr. Paul Gicheru | - Chairman |
| 2. Mrs. Josephine W. Mong'are | - Member |
| 3. Mr. Nelson Orgut | - Member |
| 4. Mrs. Rosemary K. Gituma | - Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Stanley Miheso | - Secretariat |
| 2. Ms. Shelmith Miano | - Secretariat |

PRESENT BY INVITATION

Applicant - FRONTIER ENGINEERING LIMITED

1. Alex Masika - Advocate
2. Akelola Drammen - Advocate
3. Ismail Adan - Director Frontier Engineering Ltd

Procuring Entity - MARSABIT COUNTY GOVERNMENT

1. GodanaYatani - Advocate
2. YaltaniHalakhe - Supplies Manager,
3. Joseph Mirgichan - Director
4. HuseinAlinoor - Chief Officer, Finance
5. MoluHuqa - Chief Officer, Roads

Interested Parties

1. RobaAbkul - Operations Manager Dikus Transporters Ltd
2. JumalEdin - Director, Hilah Construction Co. Ltd
3. Ibrahim Adano - Director Salsabil Construction Ltd
4. Mohamed Said - Operation Manager, Ordofa Construction Ltd

BOARD'S DECISION

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

BACKGROUND OF AWARD

The tender that was advertised in the local dailies on 29thMay, 2015. Sixteen firms bought tender documents. The opening was held on 17thJune, 2015. Ten bidders responded. The tenders were opened in the presence of tenderers and/or their representatives.

EVALUATION

The tender was evaluated in three stages i.e.

1. Tender responsiveness
2. Technical analysis
3. Financial analysis

TENDER RESPONSIVENESS

In accordance with the requirements of the conditions of tendering under Clause 23.1, 23.3 and 23.4 only substantially responsive tenders are to be subjected to detailed evaluation.

The mandatory evaluation results are as follows:-

Bidder Name	NCA Reg	Official RCPT	Tax Compl	Bid Bond	PIN	Cert of Reg./In corp.	Site Visit	R/NR
Pioneer Engineering Construction Co. Limited	YES	YES	YES	YES	YES	YES	YES	R
Red Rock Enterprises Ltd	YES	YES	NO	YES	YES	YES	YES	NR
Surupa Investment	YES	YES	YES	YES	YES	YES	YES	R
Blue Seal Hardware Ltd	YES	YES	YES	NO	YES	YES	YES	NR
Yalamlam Investment	YES	YES	NO	NO	YES	YES	YES	NR
Ordofa Construction Company Limited	YES	YES	YES	YES	YES	YES	YES	R
Sabalkher Construction Company Ltd.	YES	YES	YES	YES	YES	YES	YES	R
Salsabil Construction	YES	YES	YES	NO	YES	YES	YES	NR
Hilah Construction Co	YES	YES	YES	YES	YES	YES	YES	R
Frontier Engineering	YES	YES	YES	YES	YES	YES	YES	R

For purposes of determining responsiveness, the technical evaluation committee set the minimum requirements for responsiveness as:-

1. Within plus or minus 15% of estimate
2. Any other two from the following:-

- a. Class of registration
- b. Official receipt
- c. Tax compliance
- d. Certificate of incorporation
- e. Bidders visit to the site

Bidder Name	Fully filled confidential business questionnaire	Fully filled bills of quantities	+/- 15% Engineers Estimate	Fully filled tender questionnaire	Fully filled forms of tender
Pioneer Engineering Construction Co. Limited	YES	YES	YES	YES	YES
Surupa Investment	YES	YES	YES	YES	YES
Ordofa Construction Company Limited	YES	YES	YES	YES	YES
Hilah Construction Co	YES	YES	YES	YES	YES
Sabalkher Construction Company Ltd.	YES	YES	YES	YES	YES
Frontier Engineering	YES	YES	NO	YES	YES

The responsive bidders were further evaluated.

TECHNICAL ANALYSIS

The technical analysis was scored as follows:-

		Pioneer Engineering Construction Co. Limited	Surupa Investment	Ordofa Construction Company Limited	Pioneer Engineering	Sabalkher Construction Company Ltd.
Highest qualification	Certificate Diploma	4	0	0	6	0

	Graduate					
Work experience	< 5m 5-10m > 20m	6	0	0	6	6
More than 2 projects	< 5m 5-10m > 20m	6	0	0	6	0
Similar work done (single contract done) in Marsabit		0	0	0	10	10
Equipment available	Tipper 4x4 p/up Mixer Grader Loader Bowser	7	0	0	11	0
Financial Statement Audited report	2012 2013	12	0	0	7	0
TOTAL SCORE %		35%	0%	0%	46%	16%

FINANCIAL ANALYSIS

TENDERERS NAME	-/+ DEVIATION IN PERCENTAGE
Pioneer Engineering Construction Co. Limited	27
Surupa Investment	26
Ordofa Construction Company Limited	24
Hilah Construction Co	18
Sabalkher Construction Company Ltd.	28

COMBINED SCORE

The committee scored the combined technical and financial analysis as follows:-

	Bidder Name	Technical Score	Financial Score	Total/combined score
1	Pioneer Engineering Construction Co. Limited	35%	27%	62%
2	Surupa Investment	0%	26%	26%
3	Ordofa Construction Company Limited	0%	24%	24%
4	Hilah Construction Co	46%	18%	64%
5	Sabalkher Construction Company Ltd.	16%	28%	44%

THE REQUEST FOR REVIEW

When this Request for Review came up for hearing before the Board, the Applicant was represented by Mr. Alex Masika Advocate while the Procuring Entity was represented by Mr. Godana Yatani Advocate.

The Applicant sought for the following reliefs:-

- a) The annulment of the whole decision of the tender committee of the Procuring Entity.
- b) An award of the tender to the Applicant.
- c) The Procuring Entity be condemned to pay the costs of this Request for Review.

It however transpired during the hearing of this Request for Review that the Procuring Entity had not made an award of the tender to any bidder because of a dispute between the residents of where the project was to be located.

THE PARTIES ARGUMENTS

It was the Applicant's case that though the process herein was not complete, the tender document on the basis of which the Procuring Entity had invited bidders to participate in the Procurement was defective as it did not contain the criteria for technical evaluation of the bidders. He stated that the criteria for evaluation was created by the tender processing committee and was not contained in the tender document contrary to the Provisions of Section 64 of the Act as read together with Regulation 48.

Mr. Masika further argued pursuant to ground 3 of his grounds that the Procuring Entity had breached the Provisions of Section 66(4) of the Act by failing to declare and award the tender to the Applicant which was in his view the lowest evaluated bidder.

Mr. Godana in his response stated that the tender document was proper and that the criteria contained in the said document was developed by the Applicant's tender evaluation committee and was also contained in the advertisement that was carried in the newspapers and that the bidders therefore knew from the said advertisement what the criteria for evaluation was.

Mr. Godana however stated that the Applicant's contention that it was the lowest evaluated bidder did not have any basis and ought to have been disregarded since the tender in question had not been awarded to

any bidder since a dispute had arisen between members of the community who were to benefit from the said project on where it would be located.

THE DECISION OF THE BOARD

During the hearing of this Request for Review, it transpired that the Procuring Entity had evaluated but not awarded this tender because there had arisen a dispute between the residents on where the location of the project should be. This therefore left the Board with two issues for determination namely:-

1. Whether the tender document contained any criteria for evaluation as required by Section 64 of the Act and whether all the bidders were treated fairly and competitively in accordance with the Provisions of Section 66(2) of the Act
2. Whether the tender was awarded to the lowest evaluated bidder in accordance with the provisions of Section 66(4) of the Act.

The Board will now proceed to determine the said issues and pronounce its findings.

ISSUE NO. 1

1. Whether the tender document contained any criteria for evaluation as required by Section 64 of the Act and whether all the bidders were treated fairly and competitively in accordance with the Provisions of Section 66(2) of the Act.

The Board has carefully looked at clause 27 (Award Criteria) of the tender document and specifically at clause 27.1 where it provides as follows: *"Subject to Sub-clause 27.2, the Employer will award the Contract to the tenderer whose tender is determined to be substantially*

responsive to the tender documents and who has offered the lowest evaluated tender price subject to possessing the capability and resources to effectively carry out the Contract Works as required in Sub-clause 2.1 and 2.2 hereinabove”.

Sub-clause 2.1 (Eligibility requirements) page 6 of the tender document provides as follows: *“This invitation to tender is open to all tenderers who are qualified as stated in the appendix (page 22 of the tender document).*

The tender document at Page 17 of the tender document - clause 23 (Determination of Responsiveness) sets out how the determination of the most responsive tender was to be carried out. Instead of using the tender document to evaluate the tenders, the tender evaluation committee came up with a separate evaluation report of their own titled **“County Government of Marsabit – Evaluation Report”** with clauses 1-5 purporting to set out the parameters for evaluation committee went a head to use the evaluation criteria they themselves had set up in determining the issue of technical responsiveness but which was not contained in the tender document. They went ahead to use this to determine the winning Bidder and submitted the results to the Chairman of the tender committee for award. All this was outside what is contained in the tender document and was in direct violation of Section 66(2) which provides:

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

It is obvious that the tender evaluation committee created its own evaluation criteria not contained in the tender document.

This Board has severally held that a Procuring Entity can only evaluate ~~tenders based on the evaluation criteria set out in the tender document~~ and no other criteria should be used.

In the case of **Richardson Company Ltd -vs- The Registrar of the High Court of Kenya (2008 - 2010 PPRB at page 232** the Board stated as follows:-

“The Board has examined the tender documents and noted that the financial evaluation parameters were not set out in the Tender Documents. At the hearing, the Procuring Entity stated that those parameters are set out in the International Financial Reporting Standards (IFRS). However the tender documents did not provide that those parameters or the IFRS would apply. As the Board held severally, a Procuring Entity can only use the criteria set out in the Tender Document for Evaluation. This is clearly stated in Section 66(2) which states as follows”.

The Court has further held **JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Price Enterprises -vs- the Public Procurement Administrative Review Board (Judicial Review No. 137 of 2015)** that where the Board finds that there was a problem in the tender document, it ought to direct the Procuring Entity to retender.

As the Board has observed, the tender document in this tender did not contain a criteria for the technical evaluation of bidders setting out how

the marks for each item would be awarded. The tender processing committee instead opted to come up with it's own criteria which was not contained in the tender document.

In view of the above glaring shortcomings the Board has no option but to allow this ground of the Applicant's Request for Review.

ISSUE NO. 2

Whether the tender was awarded to the lowest evaluated bidder in accordance with the provisions of Section 66(4) of the Act.

On this last issue framed for determination, the Board finds that no award has been made in respect of this tender. The Board however finds that just like in case No's 33 and 34, the Procuring Entity used the same tender document which did not set out an evaluation criteria and was therefore defective. This tender must therefore inevitably suffer the same consequences as the tenders in cases No's 33 and 34.

The Board further wishes to observe that once a procuring Entity has embarked on a Procurement process, the tender evaluation must be done within fifteen (15) days from the date of tender opening and an award made within Thirty (30) days from the date of tender opening. The allegation that the award of the tender in this particular instance was stopped by dispute between the residents is not a reason in the Board's view to have stopped the procurement process.

THE FINAL ORDERS OF THE BOARD

In view of all the above findings and in exercise of the powers conferred upon the Board by the Provisions of Section 98 of the Act, the Board makes the following orders:

1. The Request for Review filed by the Applicant on 7th July 2015 in ~~respect of Tender No. MBT/COU/WATER/114/2014-15 is hereby~~ allowed to the extent that the Procurement process in respect of this Request for Review is hereby annulled as it was based on a defective tender document.
2. The Procuring Entity is directed to retender afresh for the subject tender on the basis of a tender document that clearly sets out the evaluation criteria and how the said criteria is to be evaluated.
3. THAT the Procuring Entity shall retender and complete the entire process within a period of 30 days from the date hereof.
4. In view of the orders made above each party shall bear it's costs of this Request for Review.

Dated at Nairobi on this 28th day of July, 2015

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CHAIRMAN
PPARB

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SECRETARY
PPARB