

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.1/2015 OF 5th JANUARY, 2015

BETWEEN

DOME CONSULTANTS LIMITED.....Applicant

AND

ELGEYO MARAKWET

COUNTY ASSEMBLY.....Procuring Entity

TENDER NO: EMCA/B24/2014-2015

**ITEM: PROPOSAL FOR THE PROVISION OF HUMAN
RESOURCE CONSULTANCY SERVICES FOR THE
COUNTY ASSEMBLY OF ELGEYO MARAKWET**

DATE APPEAL EXPIRES:4th FEBRUARY, 2015

BACKGROUND OF AWARD

INTRODUCTION:

The County Assembly of Elgeyo Marakwet issued an expression of interest (EOI) for provision of human resource consultancy services for the County Assembly tender no EMCA/B24/2014-201.

The tender was sent via email to 16 prequalified bidders selected from the bidders who prequalified in June, 2014 inviting them to participate as listed below:-

1. Joa and Ass Consulting Associates ltd;
2. Transform Consultants Ltd;
3. Training and Consulting Training Associates;
4. Rex East Africa Consulting;
5. Hype Information Research & Resource Centre;
6. Kenya School of Government;
7. **Dome consultants;**
8. Ecolcod Consultants Ltd;
9. Afrideg Associates;
10. ESF Apex Strategies Ltd;
11. KOSQ Consultants;
12. DGMB Financial Services;
13. Integrated Global Consultants Ltd;
14. Two EMS Associates Ltd;

15. Ethics and Integrity Institute; and

16. Airpress Communications Ltd.

The County assembly wanted a consultant to design and develop a scheme of service in respect to her vision of interrelated set of activities to achieve the mandate of County Assembly and her vision of ISO Certification.

The Human Resource consultancy service was to create a function human resource management system and HR consultancy services. The consultancy was to do the following among others:-

- i) Develop comprehensive HR policies and procedures
- ii) Design and implement a transparent staff performance management systems with incentive system that will yield the following:-
 - a) HR policies and procedures developed
 - b) Strategy and implementation plan in place
 - c) Staff management system in place

The consultancy firms wishing to be considered for the assignment were invited to submit their (EOI) expression of interest and were required to attach the below listed, among others in the tender document:-

- i) Company profile including curriculum vitae of consultancy
- ii) Should have previously undertaken at least 3 similar assignments
- iii) Valid tax compliance certificate
- iv) Valid pin certificate

- v) Valid V A T certificate
- vi) Relevant members certificates from professional bodies
- vii) Certificate of audited accounts - 3 years

The tender documents were obtained from the County Assembly-procurement office upon payment of a non-refundable fee of Ksh.1, 000 which was payable in cash or banker's cheque payment to Elgeyo Marakwet County Assembly.

Complete tender documents were to be submitted to the County Assembly in plain sealed envelopes clearly marked;

"Expression of interest for Human Resource Consultancy Services for County Assembly of Elgeyo Marakwet" Tender No. EMCA/B24/2014-2015.

AND be delivered to the address below or dropped in the Tender Box at the County Assembly premises at Iten before 17th December, 2014, at 12.00 noon and thereafter be opened in the board room in the presence of those bidders who wished to attend or their representatives.

TENDER OPENING

The tender was opened on the 17th December, 2014 at exactly 12.00pm. The tender box was opened by the tender opening committee together with the bidder's representatives, they then proceeded to the board room where the tender documents were opened.

Those who were invited to participate on the tender for provision of Human Resource consultancy services were sixteen in total and only seven bidders bought the tender documents as indicated below;

1. Institute for Capacity Development;
2. Ethics and Integrity Institute;
3. Transform Consultants Limited;
4. KOSQConsultants;
5. Airpress Communications Ltd;
6. Training and Consulting Training Associates; and
7. **Dome Consultants Ltd.**

The members found out that only one bidder returned the document as shown below;

Dome Consultancy Ltd -P. O. Box. 15452, Nairobi

The Chairman then read out the name and address of the above firm as contained in the technical envelop since the financial report cannot be opened. Also one bidder arrived late but he was advised to return the tender document since late bids are not accepted.

The senior procurement officer then informed members present including the bidders and their representatives present that the above process will be re- done a fresh since only one bidder does not meet the minimum required thresholds of three bidders for the process to go to the next stage of technical evaluation.

The Clerk of the County assembly via letter Ref:EMBA/ADM/A.14/144 dated 19th December, 2014, terminated the tender.

RE-TENDER

The County Assembly of Elgeyo Marakwet then re-tendered for an expression of interest (EOI) for provision of human resource consultancy

services tender no EMCA/B24/2014-201. The County assembly again invited via email the 16 prequalified bidders selected from the bidders who prequalified in June, 2014. The tender was opened on 6th January, 2014 at the County Assembly Board Room No.16 at 12.00 noon.

There were no representative of the bidders at the site and the chairman sought clarification and was advised by the secretary on adherence to the PPOA regulations. The committee then proceeded to open the tender box after which the members moved to the board room for the opening of the sealed envelopes. There were 5 technical proposals found in the tender box with four financial proposals.

The secretary informed that 16 bidders were invited from the assembly's prequalified bidders after the first bidders could not meet the minimum threshold. The chair guided that the financial proposals are not to be opened and that the members present to proceed with opening of the technical proposals.

The five submissions were as below:

No	Name of Bidder	Contacts
1	Airpress Communications	Email: koin@airpresscomm.com Phone: 0722 382 705
2	Integrated Global Consultants Ltd	Email: Integratedglobal.consultants@yahoo.com Phone: 0722 666 667
3	KOSQ Consultants	Email: kosqconsultants@yahoo.com Phone: 0720926555
4	Trasform Consultants	Email: transformconsultants@gmail.com Phone: 0724 174713
5	Dome Consultants Ltd	Email: akimebur@domegrouppltd.co.ke

During the opening process, one member of public came in at 12.15pm with his documents but he was advised it could not be received as it was past the set time.

Note: During scrutiny of the details, it was found out that document for Dome Consultancy Ltd had a Notification of Appeal letter dated 5th January 2015.

REQUEST FOR REVIEW NO. 1/2015

The Request for Review was lodged by M/s Dome Consultants Limited on 5th January, 2015 in the matter of the proposal for the provision of Human Resource Consultancy Services for the County Assembly of Elgeyo Marakwet. At the hearing of the Request for Appeal the Applicant appeared through its Managing Director Mr. Kimebur while the Procuring Entity was represented by Mr. David Bargetuny, Head of Procurement at the County.

The Applicant seeks for the following orders:

- 1. Directing and/or compelling the Respondent to evaluate the Applicant's Proposal as per the criteria set out in the tender document.*
- 2. Awarding costs of the review to the Applicant.*
- 3. Granting any other relief that the Review Board deems fit to grant under the circumstances.*

The Applicant raised seven grounds of review in support of the Application for Review as follows:

Grounds 1, 2, 3, 4, 5, 6 and 7:- These grounds have been consolidated as they relate to breach of Sections 2, 27, 36, 81 and 82 of the Public Procurement and Disposal Act, 2005 (hereafter referred to as "the Act").

The Applicant submitted that the Procuring Entity declined to evaluate its proposal on the ground that it was the only proposal that was submitted in response to the tender contrary to Sections 81 and 82 of the Act. Instead the Applicant stated that on 19th December, 2014, it received a telephone call from the Procuring Entity informing it that its proposal could not be evaluated as it was the only one in response to the tender. The Applicant stated that it expected the Procuring Entity to evaluate its proposal in accordance with the criteria set out in the tender document and Section 81 (2) (e) of the Act and that failure to evaluate its proposal denied the procurement process competitiveness, integrity, fairness, transparency and accountability. It was the Applicant's submission that would lead diminished public confidence in the Procuring Entity's procurement procedures and that failure to evaluate its proposal was denying it the opportunity to derive an economic gain from the Tender award and hence it risked suffering loss and damage.

Secondly and more importantly the Applicant stated that it requested for the return of its proposal unopened but the Procuring Entity's indicated that the same had been opened and was now the property of the Procuring Entity. The procuring entity, it was submitted by the Applicant,

has now called for fresh submission of the tenders and has purportedly cancelled/terminated the previous tender accordingly. The Applicant submitted therefore that that the Procuring Entity having opened its proposal contrary to section 36 (4) of the Act it thus compromised its competitiveness in there-advertised tender. The Applicant further stated that the Procuring Entity's failure to evaluate its proposal was contrary to Section 2 of the Act which requires it to, inter alia, promote competition and ensure that competitors are treated fairly, promote integrity and fairness of procurement procedures, increase transparency and accountability in the procurement procedures and increase public confidence in the procurement procedures.

It was the Applicant submission that the purported re-advertisement of the tender by the Procuring Entity was in breach of section 36 of the Act and its actions were null and void as the initial tender had not been terminated as provided for by section 36 of the Act. He urged the Board to allow the Appeal and order the Board to allow the Appeal and direct the Procuring Entity to evaluate its tender accordingly.

In response the Procuring Entity submitted that upon advertisement of the tender subject matter of the Review, seven bidders bought the bid document. However, when it closed the tender and on opening the tender box only one bidder i.e. the Applicant, had submitted its bid. The Procuring entity submitted that it felt the bid was not responsive since it could not evaluate only one tender and proceeded to cancel the same and invited fresh bids for the said tender. The Procurement however confirmed that it did not return the Applicant's technical bid since it had already opened the same but the financial bid was unopened and

available for collection. The Procuring Entity submitted that it was guided by Section 53(1) & (2) of the Act and sought for bidders afresh.

Upon hearing the submission by both the Applicant and the Procuring and has perused all the documents filed by the parties therein. The Board has identified only one issue for determination to wit;

"Whether the procuring entity was justified in failing to evaluate the Applicants tender and whether in purporting to terminate the Procuring Entity acted within the law."

The Board notes that the Applicant was invited by the Procuring Entity together with other entities to participate in the tender herein and did so by returning its technical and financial bid in compliance with the tender document therein. It is not disputed that the Applicant was the only bidder that put in its bid for the tender and that at the opening only its bid was available for evaluation. It is also not disputed that to date the Procuring Entity has never returned to the Applicant its technical and financial bids.

The board also in the notes that the P.E also opened the technical proposals of the applicant and has to date despite mounting a fresh tenders, not returned at the technical proposals or the financial ones to the applicant. This, the Board notes, is in contravention of section .82 of Public Procurement and Disposal Act, 2005 which requires that where tenders are not evaluated then they should be returned to the bidders unopened. The Board has looked at the provisions of section 73(1), 2 (a) (b) and regulation 53 (1) and (2) and the first schedule on the thresholds for allowing procuring entities to use restricted tendering methods as

opposed to open tenders and notes that in compliance with the law, the Tender Document contained an evaluation criterion against which the tenders were to be evaluated. This criterion is to be found in clause 2.7.1 of the P.E tender document. The board has also noted that in the first schedule in the Act the only threshold to be found in is one that sets the sum of expenditure at Kshs. 20 Million for restricted tenders. The board has not come across any other threshold therein set by law and is at a loss as to where the Procuring Entity came across the requirement of three bids to warrant an evaluation. The board notes that all tenders are evaluated against the set criteria in the tender document and not against each other. This argument by the Procuring Entity is a misdirection on the law and therefore wrong.

The board also notes that the procedure for termination of tenders is set out under section 36 (4) the act provides procedures for termination of tenders to be followed by Procuring Entity which involves notifying the Public Procuring Oversight Authority, all the bidders where a tender is terminated and also providing reasons thereon. The board further notes that where a tender is terminated all bid documents are to be returned to the bidders unopened. This was never done in this particular tender. Section 36:- *Termination of procurement proceedings.*

"36.(1) A procuring entity may, at any time, terminate procurement proceedings without entering into a contract.

(2) The procuring entity shall give prompt notice of a termination to each person who submitted a tender, proposal or quotation or, if direct procurement was being used, to each person with whom the procuring entity was negotiating.

- (3) *On the request of a person described in subsection (2), the procuring entity shall give its reasons for terminating the procurement proceedings within fourteen days of the request.*
- (4) *If the procurement proceedings involved tenders and the proceedings are terminated before the tenders are opened, the procuring entity shall return the tenders unopened.*
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- (5) *The procuring entity shall not be liable to any person for a termination under this section.*
- (6) *A termination under this section shall not be reviewed by the Review Board.*
- (7) *A public entity that terminates procurement proceedings shall give the Authority a written report on the termination.*
- (8) *A report under subsection (7) shall include the reasons for the termination and shall be made in accordance with any directions of the Authority with respect to the contents of the report and when it is due."*

The board notes that in this particular instance the Procuring Entity went ahead to invite new bids before it could put in motion termination procedures of the existing tenders and also continued to hold on to the Applicant's tender documents in violation of the law and the regulations made therein.

This issue has been determined by the Board in several matters dealing with the proper procedures on termination of tenders. The board made a finding in **Tricon Works Kenya Limited Vs Kenya Forestry Research Institute (Application No.51 of 2013)** in which the Board held that the powers conferred upon the Procuring Entity by law are not absolute and

that the provisions of Section 36 (6) of the Act can only aid a party who has terminated a tender or a tender process in compliance with the provisions of Section 36 (6) of the Act. Where a complaint of non-compliance with the provisions Section 36 of the Act are raised, the Board is bound to inquire into the question of whether the termination was lawful or not.

In the case of **Tudor Services Ltd VS National Oil Corporation (Application No. 21 of 2009)** the Board held that the powers conferred upon the Procuring Entity under section 36 of the Act must be exercised in good faith and in full compliance with the requirements set out under the Act. The Board proceeded to nullify the termination of an award by the Procuring Entity for failure to comply with the provisions of Section 36 of the Act.

In case of **Horsebridge Network systems (EA) Ltd Vs The CentSal Bank of Kenya Limited (Application No. 65 of 2012)** the Board nullified the termination of an award of a tender inter-alia on the ground that the Procurement Entity had not filed a report of the termination with the Director General of the Procurement Oversight Authority (PPOA) as required by the provisions of Section 36 (7) of the Act.

In the case of **Muema Associates Vs Turkana County Council (Application NO. 35 of 2008).**

The Board held that while exercising the power to terminate an award of a tender under the provisions of Section 36 of the Act, the Procuring Entity must inter-alia:-

- (i) Give sufficient notice to all bidders of the decision to terminate the Procurements Proceedings.

- (ii) The Procuring Entity must give reasons for it's decision.
- (iii) The Procuring Entity must give a report to the Authority regarding it's decision to terminate Procurement Proceedings as per Section 36(7) of the Act.

~~From the foregoing and in view of the evidence availed to it the board is~~
satisfied that this request has merit and will proceed to allow it. The Board therefore makes the following orders and directs as follows:

1. That the Request for Review filed by the Applicant M/S Dome Consultants Limited on 5th January 2015 in respect of Tender No. EMCA/B24 /2014 -2015 against the Elgeyo Markwet County Assembly is hereby allowed .
2. The Board in exercise of its powers conferred by section 98 of the Public Procurement and Disposal Act, 2005 orders and directs Procuring Entity to evaluate the applicant's Tender proposal in its entirety in accordance with the evaluation criteria contained in the Tender Document and in compliance with the Public Procurement and Disposal Act, 2005 and ensure that the tender validity is extended accordingly .
3. The Board orders and directs the Procuring Entity to cancel the second tender inviting fresh request for proposals for provisions of the same services and which was opened on 6th January 2015 .

4 The board makes no order as to cost.

Dated at Nairobi on this 26th January, 2015



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CHAIRMAN

PPARB



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SECRETARY

PPARB

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