

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 20/2016 OF 21<sup>ST</sup> MARCH, 2016**

**BETWEEN**

**TECHNOLOGY BENCHMARK LIMITED.....APPLICANT**

**AND**

**GOVERNMENT OF MAKUENI COUNTY.....PROCURING ENTITY**

Review against the decision of Government of Makueni County in the matter of Tender No. GMC/E/T/003/2015/2016 Makueni County Asset Management System.

**BOARD MEMBERS PRESENT**

- |                              |            |
|------------------------------|------------|
| 1. Mr. Paul Gicheru          | - Chairman |
| 2. Mr. Paul Ngotho           | - Member   |
| 3. Mr. Peter B. Ondieki, MBS | - Member   |
| 4. Mr. Hussein Were          | - Member   |

**IN ATTENDANCE**

- |                        |                               |
|------------------------|-------------------------------|
| 1. Mr. Philemon Kiprop | - Holding Brief for Secretary |
| 2. Ms. Shelmith Miano  | - Secretariat                 |

## **PRESENT BY INVITATION**

### **Applicant – Technology Benchmark Limited**

1. S. Owino - Advocate
2. Mutisya Mathelu - CEO

### **Procuring Entity– Government of Makueni County**

1. Antony Mulekyo - Advocate
2. Winfred Muka - Procurement Officer
3. JumaBabu - Legal Officer

## **BOARD'S DECISION**

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

## **BACKGROUND OF AWARD**

The Government of Makueni County sent out an invitation through open tender through an advertisement in The Standard Newspaper dated 24<sup>th</sup> December, 2015, which invited the interested firms to submit their applications for consideration for the Installation of an Asset Management System.

### **Tender opening**

The bids were closed/opened on 8<sup>th</sup> January, 2016 .Only one bid from M/s Technology Benchmark Ltd of Po Box 288897-00100 Nairobi.

## Tender Processing

Committees of five (5) members carried out tender evaluation and were chaired by Mr. Philip Ngila.

The submitted bids were examined to ascertain if all the required documentation had been submitted.

## Preliminary Evaluation

The results of preliminary evaluation are summarized below:-

S/No	Requirement	Response
01	Copy of certificate of incorporation/registration	R
02	Copy of a valid single business permit	R
03	Copy of tax compliance certificate	R
04	Copy of VAT/PIN certificate	R
05	Number of copies(2hard copy documents and 1 Cd including the soft copy of the submitted tender documents (technical and financial)	R
06	Validity of tenders specified	R
07	Bid security of 2%	R
08	Audited and signed financial statement/Accounts for the past 2 financial years	R
09	Dully filled form of tender	R
10	Dully filled confidential business questionnaire	R

11	Copies/evidence of past clients on related work(s)/Asset(s)	R
12	Engage in provision of services in areas of work relating to software development and financial services	R
13	Must have internationally recognized quality process certifications and proof of that has been supported/submitted	R
14	In case of joint venture/consortium, the bidding team can collectively/individual the below eligibility criteria. However in case of a prime and subcontractor arrangement prime member should solely fulfill individual criteria	R
15	Technical and financial bids MUST be submitted in separated	R

The results of preliminary evaluation declared the Applicant as responsive and therefore proceeded for the technical evaluation.

**Technical Evaluation:**

No.	Requirement	%Score	Attained Score
1	Company profile	5	5
2	Company's technical capacity/Accomplished Assets/past	5	3

	clients		
3	Company's Engineers technical capacity	10	8
4	Specific experience of the bidder related to similar assignments	15	10
5	Proposed detailed solution-based on the features	45	40
6	Project methodology	5	5
7	Project timeline/schedule	5	4
8	training	10	10
	<b>Total</b>	<b>100</b>	<b>85</b>

### Remarks

One (1) bidder was responsive in the technical evaluation and therefore proceeded for financial evaluation.

### Financial Evaluation

#### Technology Benchmark Ltd

NO	NAME OF BIDDER	Engineers Estimate	Quoted Amount(inclusive of VAT)	Variance
1	Technology Benchmark Ltd	2,500,000	2,800,000	12%

## **Final Recommendation**

The Tender Processing Committee therefore recommends the award of tender to Technology Benchmark Limited subject to negotiations being lowest evaluated responsive bidder.

## **TENDER COMMITTEE**

The tender committee in its meeting held on 27<sup>th</sup> January, 2016, deliberated and noted that only one firm quoted for the work. After going through the documents members recommended that the tender be re-floated because the bidder did not meet the technical requirements.

## **REQUEST FOR REVIEW**

The Request for Review was lodged by M/s Technology Benchmark Limited on 21<sup>st</sup> March, 2016 in the matter of the tender No. GMC/E/T/003/2015/2016 for Installation of the Makueni County Asset Management System.

The Applicant in the Request for Review was represented by Mr. Owino S. of O. Owino & Associates Advocates while the Procuring Entity was represented by Mr. Antony Mulekyo from the firm of M/s Anthony M.Mulekyo Company Advocates.

**The Applicant sought for the following order:**

- 1. The Request for Review filed herein by the Applicant against the respondent be allowed*
- 2. The respondent does evaluate the Applicant's tender in its entirety in accordance with the tender documents and the Act.*

*3. The respondent do cancel the second tender being tender reference No.GMC/ICT/T/116/2015/2016 inviting fresh tender for the provision of the same services.*

*4. Costs be awarded the Applicant.*

**The Applicant's case**

The Applicant submitted that sometime in December 2015, the Respondent invited members of the public to submit tenders to the procuring entity for the installation of asset management system and that pursuant to the said advertisement; the Applicant submitted it's tender to the procuring entity.

It was the Applicant's case that it's representative was present at the County Headquarters at Wote, Makueni during tender opening when it transpired that the Applicant's tender was the only tender that had been submitted in response to the invitation to tender and that the tender opening committee confirmed at the tender opening in the presence of a representative of the Applicant that the Applicant's tender had met all the mandatory requirements.

Mr. Owino stated that upon the submission of the tender, the Applicant waited to be informed of the outcome of it's tender but while it was waiting for the notification, it came across a newspaper advertisement on 12<sup>th</sup> February, 2016 re-advertising the same tender while the first procurement process had not been completed.

Counsel for the Applicant submitted that the procuring entity's action was contrary to the Provisions of Section 65 of the Act since the procuring entity

did not notify the Applicant that its tender had been declared non responsive.

Counsel for the Applicant further submitted that the procuring entity contravened the Provisions of Section 67 of the Act since it had failed to notify the Applicant of the outcome of its tender.

On the issue of the re-advertisement of the tender, Counsel for the Applicant submitted that the procuring entity contravened the Provisions of Section 36 of the Public Procurement and Disposal Act 2005 since the Applicant purported to invite new bids without terminating the first procurement proceedings as advertised in December, 2015. It was the Applicant's case that its tender had been evaluated leading to a recommendation signed by the tender evaluation committee members recommending the award of the tender to it.

Counsel for the Applicant further stated that the procuring entity's conduct amounted to impunity and a breach of the Provisions of the Act and the Regulations and urged the Board to award the tender directly to the Applicant since its tender had undergone both the preliminary and technical evaluation where it had attained 85 marks after which it proceeded to financial evaluation and all that remained was an award of the tender being made to the Applicant at its tendered sum of Kshs. 2,800,000.00.

Counsel for the Applicant relied on the decision of the Board in the case of **Dome Consultant Ltd -vs- Elgeyo Marakwet Assembly PPARB no. 1 of 2015** and stated that in the case now before the Board, the Applicant had not



even purported to terminate the earlier tender and had not taken any step under the Provisions of Section 36 of the Act towards that direction.

Counsel for the Applicant urged the Board to find that the failure by the procuring entity to complete the first procurement was illegal and urged the Board to direct that it be completed and to annul/cancel the purported termination and fresh re-advertisement and to direct the Applicant to award it the tender.

The Applicant therefore prayed that the Request for Review be allowed with costs.

#### **The procuring entity's case**

Counsel for the procuring entity opposed the Applicant's Request for Review. He relied on the replying affidavit sworn by Joshua Willy Wambua on 4<sup>th</sup> April, 2016 together with the annexures thereto and first submitted on the preliminary objection dated 4<sup>th</sup> April, 2016. He stated that the Request for Review had been filed out of time because the Applicant had learnt of the fact that its tender had been rejected on 12<sup>th</sup> February, 2016 and had confirmed that position on 17<sup>th</sup> February, 2016 when the tender was re-advertised. He however submitted that the Applicant did not file its Request for Review until 21<sup>st</sup> March, 2016 which was outside the period of 14 days provided for under Regulation 73 of the Regulations. Counsel for the procuring entity stated that it was mandatory under the Provisions of Regulation 73 of the Public Procurement and Disposal Regulations 2006 for an applicant to lodge a Request for Review within 14 days upon becoming aware of the Breach.

On the issue of the case of **Dome =vs the County Government of Marakwet (PPARB) no. 1 of 2015**, Counsel for the procuring entity submitted that the said decision was distinguishable from the present case since it involved several bidders unlike the present case where there was only one bidder.

Counsel for the procuring entity submitted that it was necessary to cancel and re-invite bids in this tender in order to promote the spirit of competition because it was only one bidder who had submitted it's bid when the tender was first advertised and that this was aimed at promoting the objectives of the Constitution and the Act that required the promotion of fair competition.

He stated that the Board had wide powers to issue such orders as it would deem fit in order to promote competition especially considering that there was only one bidder in the earlier process, which would have inhibited competition.

Counsel for the procuring entity submitted that the Applicant would not suffer any prejudice if the re-advertisement was allowed to go on since it would still participate in the re-advertised tender. Counsel for the Applicant however conceded that no notice of termination was issued to the Applicant under the provisions of Section 36 of the Public Procurement and Disposal Act 2005 but nonetheless urged the Board to dismiss the Applicant's Request for Review with costs.

### **The Applicant's response to the procuring entity's submissions**

In a short response to the submissions made by Counsel for the procuring entity, Mr. Owino opposed the procuring entity's contention that the Request

for Review had been filed out of time and submitted that under the Provisions of Regulation 73(2) (c) of the Public Procurement and Disposal Regulations 2006, time could only start running from the date of the occurrence of the breach complained of or from the date of the bidders notification of the outcome of a bidder's tender. Counsel for the Applicant stated that the Applicant had neither been notified of the outcome of its tender under Sections 67 or 82 of the Act or that the Procurement process had been terminated under Section 36 of the Act.

He therefore submitted that the Applicant could not rely on the Provisions of Regulation 73(2)(c) in asserting that the Applicant's Request for Review had been filed out of time and urged the Board to allow the Request for Review with costs.

### **THE BOARD'S DECISION**

The Board has considered the Request for Review, the Preliminary Objection filed by the procuring entity, the Replying Affidavit sworn by Joshua Willy Wambua together with the annexures thereto. The Board has also considered the submissions made by the parties.

The Board will first consider the Preliminary Objection filed by the procuring entity since it raises an issue of jurisdiction which must be considered and be determined first.

It was the procuring entity's contention in the preliminary objection that the Applicant's Request for Review had been filed out of time.

This submission was based on the Applicant's admission at paragraphs 5 and 6 of the Request for Review that it had learnt that this tender had been re-

advertised on 12<sup>th</sup> February, 2016 and that on 17<sup>th</sup> February, 2016 a representative of the Applicant visited the procuring entity's offices with a view to finding out the outcome of the tender. It was therefore the procuring entity's submissions that the Applicant ought to have filed its Request for Review within Fourteen (14) days from 12<sup>th</sup> February, 2016 or at least from 17<sup>th</sup> February, 2016.

Counsel for the Applicant however opposed this submission and stated that the procuring entity was under an obligation to serve notices under Sections 65, 67 and 36 of the Act and that the Applicant could not therefore be expected to file a Request for Review when it had not received a notification.

The Board has considered the rival submissions made on this issue and finds on the basis of the procuring entity's own admission that the Applicant was not served with any notification that its tender was unsuccessful.

In the absence of service of a notification therefore, the Applicant could not be expected to file a Request for Review to challenge any of the procuring entity's actions under the Provisions of Sections 65, 67 or 36 of the Act. It is the obligation of every procuring entity to ensure that it serves a notification on every bidder either informing him or her that his or her tender has been successful or unsuccessful. Where the tender is unsuccessful, the notice must state the reasons why it was unsuccessful. It is only on the basis of such reasons that a bidder can challenge or refrain from challenging a procuring entity's decision.

Where a procuring entity decides to declare bids non-responsive or terminates the procurement process altogether it must also act likewise.

In the absence of any service of notification therefore and for the other reasons set out above, the procuring entity's preliminary objection is dismissed and the Board will now consider the Applicant's Request for Review on its merits.

As the Board has already adverted to in this decision while considering the arguments by the parties, the procuring entity advertised this tender in December, 2015 and through no fault of its own, the Applicant turned out to be the only bidder which submitted its tender. The minutes marked as annexure "JWW2" annexed to the Supporting Affidavit of Joshua Willy Wambua show that the tender was evaluated on 14<sup>th</sup> January, 2016 where the Applicant scored 85 marks in the technical evaluation and was thereafter subjected to financial evaluation where its price was evaluated at the sum of Kshs. 2,800,000.00.

Based on the above results, the tender evaluation committee recommended that the tender be awarded to the Applicant but in its meeting held on 27<sup>th</sup> January, 2016 and particularly at minute 293, the tender committee members rejected the proposal of award and decided to re-advertise the tender because in their view, the Applicant did not meet the technical requirements.

The Board however finds based on the procuring entity's own admission that the procuring entity did not take any of the steps set out under the provisions of Section 36 of the Act before terminating the tender and no notice was issued to the Applicant.

The Board further finds that the tender was not rejected as being non-responsive.

The only reason which Counsel for the procuring entity gave during the hearing of the Request for Review was that the procuring entity decided to re-advertise the tender because only one bidder had submitted its bid and the tender was not therefore competitive.

The Board however wishes to observe that there is no law that prevents only one bidder from submitting a tender to the exclusion of any other bidder where bids are publicly invited and if any other bidder or bidders fail to submit their bids, the bidder who did so cannot be punished for having been the only one who submitted a bid.

On the issue of termination, the Board held in the case of **Dome Consultants Limited –vs- Elgeyo Marakwet County Assembly (PPARB) no. 1 of 2015** that where a procuring entity decides to terminate a procurement process, the procuring entity has to notify the Public Procurement Oversight Authority and the bidders or bidder of the termination and the reasons thereof. The Board further held that the procuring entity which decides to terminate procurement proceedings must return all bid documents to the bidders.

In addition to the above case, the Board also held in the case of **Tricon Works Kenya Limited –vs- Kenya Forestry Research Institute (PPARB No. 51 of 2013)** that the power conferred upon the procuring entity by law under Section 36 of the Act is 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.

The Board was informed by the Applicant and this was not disputed by Counsel for the procuring entity that the procuring entity is still holding the Applicant's tender document contrary to the Board's holding in the case of **Dome Consultants Ltd -vs- Elgeyo Marakwet County Assembly (PPARB No. 1 of 2015)**.

Based on the above findings, the Applicant's Request for Review dated 18<sup>th</sup> March, 2016 succeeds and is hereby allowed in terms of the following orders:-

### **FINAL ORDERS**

In view of all the foregoing findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement Asset Disposal Act 2015, the Board makes the following orders on this Request for Review:-

- a) **The Applicant's Request for Review dated 18<sup>th</sup> March, 2016 is hereby allowed.**
  
- b) **The purported termination and re-advertisement of the subject tender in the newspaper edition of 12<sup>th</sup> February, 2016 under Tender Ref No. *GMC/ICT/T/116/2015/2016* for the supply, installation and commissioning of an asset management system is hereby annulled and set aside.**
  
- c) **Since the earlier tender advertised in December, 2015 had undergone through all the stages of evaluation, the Board directs that the same**

be placed before the tender committee within a period of Fourteen (14) days from today's date for award to the Applicant.

d) In default of the procuring entity complying with order (c) above within the stated period of Fourteen (14) days from the date hereof, the Applicant shall be deemed to have been awarded the tender and the procuring entity shall be bound to issue a letter of award to it at the expiry of the said period.

e) Each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 7<sup>th</sup> day of April, 2016.



CHAIRMAN  
PPARB



SECRETARY  
PPARB