

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 51 OF 2017 DATED 5TH JUNE 2017

BETWEEN

SOUTH CONSULTING AFRICA

LIMITED.....APPLICANT

AND

MINISTRY OF DEVOLUTION &

**PLANNING.....PROCURING
ENTITY**

Review against the decision of the Ministry of Devolution & Planning in the matter of Tender No. MODP/SDD/RFP/10/2016-2017 -Tender for Consultancy Services for Development of National Civic Education Framework.

BOARD MEMBERS PRESENT

- | | |
|---------------------------|----------------|
| 1. Ms. Josephine Mong'are | - In the Chair |
| 2. Eng. Weche Okubo | - Member |
| 3. Mrs. Gilda Odera | - Member |
| 4. Nelson Orgut | - Member |

IN ATTENDANCE

- | | |
|--------------------|-------------------------------|
| 1. Philemon Kiprop | - Holding Brief for Secretary |
| 2. Maureen Namadi | - Secretariat |

PRESENT BY INVITATION

Applicant – South Consulting Africa Limited

1. George Kamau - Advocate,
2. Sylvia Waiganjo - Advocate

Procuring Entity – Ministry of Devolution & Planning

1. Jackson Mwangi - State Counsel
2. Sebastian Mokuia - Head of Procurement
3. Johnson M. Ndiriga - Procurement officer

Interested Party – Stadole International Limited

1. Abidha Nicholas O.P - Advocate
2. Denis Seko - Operations Manager

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

Introduction

That, the department was granted authority to use the Open National Tendering procedure for the above tender by the Principal Secretary, State Department for Devolution, Ministry of Devolution and Planning.

Advertisement

the bids were invited through a Tender Advertisement Notice placed in the Daily Nation and the Standard Newspapers of 10th January, 2017, IFMIS Supplier Portal: <https://supplier.treasury.go.ke>, The Ministry's

Website www.devolutionplanning.go.ke, Tender portal:

<https://supplier.treasury.go.ke> and www.mygov.go.ke from the interested eligible candidates .

Closing/Opening

The tenders were closed/opened on 7thFebruary, 2017. However, an addendum was issued on 28stJanuary, 2017 which extended the opening date from 30thJanuary, 2017 to a new date on 7th February, 2017.

According to the Tender Opening Results, Fourteen (14No.) Tenders were submitted and opened on the material day

Table I: Tender Opening Register

Bid No.	Firm Name	Address And Telephone Number
1.	Simba & Simba Advocates	P. O. Box 10312-00100 Nairobi Tel. No.: 072022219330714159241 Info@Simba.Advocates.Com
2.	Gasp Management Institute Limited	P. O. Box 12903-00400 Nairobi. Tel. No.: 0453123272 0722823987
3.	Prestige Management Solution Limited	P. O. Box 1357-00618 Nairobi. Tel. No.: 254220343914/343784 Prestigemngt2003@Yahoo.Com
4	South Consulting Africa Limited	P. O. Box 25626-00603 Nairobi. Tel. No.: 0722207861 South@South.Co.Ke
5.	University Of Nairobi Enterprises And Services	P.O. Box 68241-00200 Nairobi. Unesconsultancy@Uonbi.Ac.Ke

Bid No.	Firm Name	Address And Telephone Number
6.	Adrec Limited	P. O. Box 21889-00100 Nairobi. Tel. No.: 254-724-438083 Adreclimited@Gmail.Com
7.	Gypsum East Africa Co Limited	P. O. Box 47731-00100 Nairobi. Tel. No.: 254208041100 254-735864110254721765526 Www.Gypsumeastafrica.Com Info@Gypsumeastafrica.Com
8.	Stadole International Limited	P. O. Box 2607-00200 Nairobi. Tel. No.: 0721537839 Kabuileah@Gmail.Com
9.	Digital Africa Foundation	P. O. Box 68-0020 Nairobi. Tel. No.: 020-4404098 Info@Digitalaf.Org
10.	Benson & Associates	P. O. Box 28166-00200 Nairobi. Tel. No.: 0208139108 / 0722874576 Bensoncpas@Gmail.Com
11.	Kenya School Of Government-Embu	P.O. Box 402 – 60100; Embu . Tel. No.: 068 22313364,2231824 Info.Embu@Ksg.Ac.Ke
12.	DdAfrica Communications Limited	P.O. Box 28225-00100 Nairobi . Tel. No.: 0202684785, 0723729096 Info@Africacommunications.Com
13.	Hock Kenya Consulting Limited	P. O. Box 2786 City Square Nairobi. Tel. No.: 0722871 456 Hock.Kenyaconsultinglimited@Gmail.Com

NOTE: -M/S Enolix Business Consultants, P.O. Box 12679 – 00100 Nairobi. Tel. No.: - +254727416106 / +254725384521 / +254731234223 / +254731234223 submitted through IFMIS but no hardcopy.

TENDER EVALUATION RESULTS

The following bidders were not evaluated for not submitting their bids through IFMIS portal.

TABLE II: BIDS NOT EVALUATED

Bid No.	Firm Name; Address And Telephone Number; Email Address
2.	Gasp Management Institute Limited; P.O. Box 12903–00400Nairobi. info@gaspatrica.com
5.	University Of Nairobi Enterprises And Services;P.O. Box 68241–00200Nairobi. ; unesconsultancy@uonbi.ac.ke
7.	Gypsum East Africa Co Limited; P.O. Box 47731 – 00100Nairobi. Tel.No.:254208041100,0735864110254721765526; www.gypsumeastaf rica.com ; info@gypsumeastafrica.com
9.	M/S Digital Africa Foundation,P.O. Box 68–00200Nairobi. Tel. No.: 020-4404098. Info@digitalaf.org
12.	M/S DD Africa Communications Limited;P.O. Box 28225–00100Nairobi tel 723729096: Info@africacommunications.com
13.	M/S Hock Kenya Consulting Limited;P. O. Box 2786 City Square Nairobi . Tel. No.: 0722871 456 hock.kenyaconsultingLimited@gmail.com

NOTE: -M/S Enolix Business Consultants who submitted through IFMIS but no hardcopy and was not also evaluated because of lack of compliance to the Tender requirement that the submission was to be submitted both through the IFMIS Portal and hardcopy to the Procuring Entity.

- (i) The remaining seven (7No.) Tenders were subjected to Tender Preliminary Examination, whereby all the Tenderers were examined on the **Mandatory Requirements**, and were adjudged as responsive and approved to proceed to the next stage of evaluation (technical evaluation).

Table III: Responsive Bids at Mandatory Evaluation Stage

Bid No.	Name Of Bidder
1	M/S Simba & Simba Advocates
3	M/S Prestige Management Solution Limited
4	M/S South Consulting Africa Limited
6	M/S Adrec Limited
8	M/S Stadole International Limited
10	M/S Benson & Associates
11	M/S Kenya School Of Government-Embu

- (ii) The seven (7No.) Bidders who met the mandatory requirements were subjected to detailed technical evaluation based on the criteria set out in the tender document. They were analysed separately on their responsiveness to the Technical Specifications. A matrix was developed from the technical evaluation criteria as contained in the tender documents and TOR and each bidder was scored by the evaluators. The evaluators' scores for each of the bidders were thereafter averaged to get the mean scores. The pass mark set at the technical evaluation stage was 70%. Bidders who scored less than 70% were found to be non-responsive at that stage. Those who scored 70% and above proceeded to the financial evaluation stage.
- (iii) The results of the technical evaluation for the seven (7No.) Bidders were as follows: -

Table IV: Non Responsive Firms At The Technical Evaluation Stage

Bid No.	Bidders Name	Technical Scores	Remarks
1	Simba & Simba Advocates	50.75	Non Responsive
3	Prestige Management Solution Limited	63.00	Non Responsive
6	Adrec Limited	56.50	Non Responsive
10	Benson & Associates	52.75	Non Responsive
11	Kenya School Of Government - Embu	57.50	Non Responsive

Table V: Responsive Firms at the Technical Evaluation Stage

Bid No.	Bidders Name	Technical Scores	Remarks
4	South Consulting Africa Limited	87.00	Responsive
8	Stadole International Limited	71.25	Responsive

- (iv) That, the two technically responsive bids above proceeded to the financial opening and evaluation stage. The financial opening was done on 6thApril, 2017;
- (v) The summary of the evaluation is as shown in the table below:

TABLE VI: FINANCIAL EVALUATION SUMMARY

Bid No.	Bidders Name	Financial Proposal (Ksh.)	Technical Scores (St)	Financial Scores (Sf)100 X Fm/F	Weighted Technical Score St X T%	Weighted Financial Score Sf X P%	Combined Score (S) S = Stxt% + Sf X P%	%Deviation From The Budget Amount	Ranking
4	M/S South Consulting Africa Limited	7,466,060.00	87.00	71.957	60.9	21.58	82.48	65.91%	1
8	M/S Stadole International Limited	5,372,400.00	71.25	100.00	49.475	30.00	79.475	19.38%	2

RECOMMENDATION

M/s South Consulting Africa limited of P. O. Box 25626-00603 NAIROBI being the bidder achieving the highest combined technical and financial score (82.48) was declared the most responsive bidder to the RFP and was recommended to be invited for negotiations.

PROFESSIONAL OPINION

The head of Procurement opined that tender process was undertaken in adherence to Sections 46, 58, 74, 80 and 115 to 132 of the Act and section 36 & 51 of the Public Procurement and Disposal Regulations (2006). The tendering process also was in compliance with Public Finance Management Act, 2012, in accordance to provisions of Section 132 (b) of Act, 2015; Candidates who have achieved the highest combined score (both Technical and Financial) may be invited for competitive negotiations. The amount set aside for the assignment is Ksh.4, 500,000 and all the responsive Candidates' bids are far above this budget, hence in accordance with Section 131 (c), Section 132(2) (a) and (b) and Section 132 (3) Bidder No. 8 **M/s Stadole International Limited**, having a tender sum of Ksh. 5,372,400 at 19.38% above the Budget Amount may be invited for negotiations. Whereas Bidder No.4. **M/S South Consulting Africa Limited** with a tender sum of Kshs 7,466,060.00 is above the Budget Amount by 65.91%, thus far above the threshold of 25% of the Budget Amount and to that effect he does not qualify for contract negotiations and award.

REQUEST FOR REVIEW

The Request for Review was lodged South Consulting Africa Limited on 5th May, 2017 in the matter of Tender No: MODP/SDD/RFP/10/2016-2017 - Tender for Consultancy Services for Development of National Civic Education Framework.

The Applicant in this request for review was represented by Mr. George Kamau , Advocate while Procuring Entity was represented by Mr. Jackson Mwangi, State Counsel.

The Applicant requests the Board for the following orders:

- a. *The decision of the Respondent as communicated by the letter dated 15th May, 2017 under Tender No. MODP/SDD/RFP/10/2016-2017- Tender for Consultancy Services for Development of National Civic Education Framework to the unnamed consultant be nullified;*
- b. *The Board substitutes its decision for that of the Accounting Officer of the Procuring Entity communicated by the letter dated 15th May, 2017 under Tender No. MODP/SDD/RFP/10/2016-2017- Tender for Consultancy Services for Development of National Civic Education Framework to the unnamed consultant with an award of the same to the Applicant;*
- c. *The Respondent be compelled to pay the costs to the Applicant arising from/and incidental to this Application; and*

d. The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in

THE APPLICANT'S SUBMISSIONS

The Applicant stated that its request for review was filed on time and had been brought under Section 167 of the PPDA, given that it had received its notification award letter on 29th May 2017 though the letter was dated 15th May 2017 and it referred the Board to the attached annexes of copies of the receipt from Postal Corporation of Kenya as well as the stamped envelope of the notification letter.

In its arguments, the Applicant submitted that as indicated in its statement in the Request for Review, on page 1, clause no.4, the Procuring Entity had written to inform the Applicant that although it had attained the highest mark of 82.48%, the financial bid was above the available budget by 55.91% and this rendered its bid unsuccessful. The Applicant argued that the tender was a Request for Proposal and Section 86(b) the Act and the tender document's clause 2.8.4 state that a successful bidder is determined by the highest combined score. The Applicant further argued that there was no indication by the Procuring Entity that there was a tie between the two final bidders to necessitate negotiations thus the Procuring Entity had no justification to disqualify the Applicant as being above budget. The Applicant submitted that it was never invited for any negotiations despite it attaining the highest combined score and argued that Section 132 of the PPDA cannot be read in isolation of

Section 131 which gives the basis of competitive negotiations. The Applicant stated that Section 124 (5) of the PPDA required that the Procuring Entity in a RFP should provide an estimated budget or estimated time of key experts yet the PE failed to provide either, leaving no guidance on how bidders were to quote for the tender. It argued that the Procuring Entity wanted to illegally use the procedure of competitive negotiations to knock them out. The Applicant requested the Board to order the PE to invite them for negotiations given that they scored the highest marks.

PROCURING ENTITY'S RESPONSE

In its response to the Request for Review, the Procuring Entity (hereinafter referred to as the PE) stated that it relied on its written submissions and submitted that Section 124(5) of the PPADA, 2015 requires a PE to provide bidders with either a budget estimate or an estimate of time the project would likely undertake. The PE referred the Board to page 23 of the tender document where it had stated that the project would take an estimated 90 days and argued that it had fulfilled the requirements of Section 124(5). The PE further submitted that Section 132 (2b) states that if a bidder's financial bid is more than 25% above the available budget, the bidder cannot be considered for negotiations, hence the reason they did not invite the Applicant for negotiations despite it having the highest combined score as it would be a breach of the law. The PE stated it must have the financial capacity to award a tender and it could therefore not just award the

tender to the Applicant for having met the technical qualifications as this would be a futile exercise. In response to the Applicant's request to the Board to order the PE to provide the budget and invite it for negotiations, the PE stated that it had provided its budget in page 6 of its Response to the Request for Review and that the Applicant was now fully aware that it was above budget by 65.91%, making it unlawful to invite them for any negotiations as per Section 124 (2b). It argued that there was therefore no need to hold further discussions with the Applicant and stated that it associated with the Interested Party's Reply to the Request for Review. The PE confirmed that it had not entered into any contract with the Interested Party but was at the stage of inviting them for negotiations and they would have disclosed the budget to them prior to that.

The PE requested the Board to dismiss the request for review with costs as it had no merit.

INTERESTED PARTY'S SUBMISSIONS

In its reply to the Request for Review, the Interested Party associated itself with the Procuring Entity's submissions. It submitted that both the Applicant and the Interested Party attained the minimum 70% threshold required in the technical evaluation and were therefore technically qualified to undertake the job. The Interested Party further stated that the determining factor on selecting the successful bidder after being shortlisted by the PE was the financial aspect and that the Applicant was found to be way above the PE's budget. In its

arguments, the Interested Party submitted that the Applicant was limiting itself to Section 132 (a) and (b) whereas 132 (c) clearly states that a bidder exceeding the budget by over 25% should not be invited for negotiations. The Interested Party submitted that the Applicant's request to be invited for negotiations by the PE was not part of their prayers sought in the Request for Review and hence the Board should not pay heed to the request to negotiate. It further submitted that although the Applicant argued that it had not been aware of the budget prior, the same was the case for the Interested Party who bid without knowledge of the budget and that their financial bid was within the required maximum limit of 25% above budget given that it was 19%. The Interested Party noted that the Applicant confirmed that indeed it had quoted over ksh. 7,000,000/= yet the budget was much less.

The Interested Party requested that the Request for Review be dismissed with costs.

APPLICANT'S RIGHT OF REPLY

In its reply to the PE's submissions, the Applicant argued that the requirement in Section 124 is clearly structured in the context of the standard document for procurement of consultancy and that the PE ought to have provided information on the requirements for key personnel and budgets. The Applicant further argued that there was no tie in the financial bids and that the tender was an RFP thus Section 86 (b) which provides for competitive negotiations does not

apply. The PE submitted that it had not sought for orders outside its prayers and that the Board had the powers under Section 173 to substitute the PE's decision.

BOARD'S FINDINGS

The Board, having considered the submissions made by parties and examined all the documents that were submitted to it, has identified the following issues for determination in this Request for Review:

- 1. Whether the Procuring Entity breached Section 86 1 (b) of the PPDA by not inviting the Applicant for negotiations on their financial bid.*
- 2. Whether the Procuring Entity duly followed the procurement procedures in Section 84 and 85 of the PPADA in the evaluation process for an RFP tender.*

The Board observes that Tender No. MODP/SDD/RFP/10/2016-2017 for Consultancy Services for Development of National Civic Education Framework was on 7th February 2017. The tender attracted a total of fourteen (14) bidders. Of these, seven (7) bidders were not evaluated for failure to submit their bids through IFMIS portal while the remaining seven were subjected to Tender Preliminary Examination on the Mandatory Requirements and were approved to proceed to the next stage of technical evaluation. The pass mark set at the technical evaluation stage was 70% and only two firms qualified to go to the next stage of financial evaluation. They were M/S South

Consulting Africa Limited (87%) and M/S Stadole International Limited (71.25%).

M/s South Consulting Africa Limited had a financial bid of ksh. 7, 466, 060/= while M/S Stadole International Limited bid ksh. 5, 372, 400/=. On a combined score formula, M/S South Consulting Africa Limited scored 82.48% while M/S Stadole International Limited scored 79.475%. M/S South Consulting Africa Limited was declared the most responsive bid and recommended by the evaluation committee to be invited for negotiations given that its financial bid was above budget.

According to the Procuring Entity, the amount set aside for the tender was ksh. 4, 5000, 000/= making the bid of M/S South Consulting Africa Limited 65.91% above budget while M/S Stadole International Limited's bid 19.38% above budget.

The Board wishes to note that a professional opinion addressed to the Principle Secretary Ministry of Devolution and Planning, State Department of Devolution, was done on 15th May 2017, by the Procuring Entity's Head of Supply Chain Management Unit, Mr. S. J. Mokuu, indicating that due to both bids having exceeded the available budgets, Section 131 (c) and Section 132 (2) (a) and (b) permits them to be invited for negotiations. Mr. Mokuu however stated in his opinion that M/S South Consulting Africa limited was above budget by 65.91% far exceeding the threshold of 25% of the available budget and thus did not qualify for contract negotiations

and award. The Board notes that on the same date of 15th May 2017, the Principal Secretary, Mr. Micah Pkopus Powon, wrote a letter to the Director M/S Stadole International Limited informing them that their bid had been accepted for negotiation and that the contract would be awarded subject to the outcome of the negotiations pursuant to Section 128 and 132 of the PPDA 2015.

The Board wishes to observe that the Procuring Entity did not at any time indicate the available budget to any bidder during the tender process. The Board further observes that the tender was a Request for Proposal which takes into account a combined score to determine the most responsive bidder.

The Board notes that although the Procuring Entity found that the Applicant was the most responsive bidder, the Procuring Entity's failed to invite the Applicant to negotiate its financial bid but instead invited the second most responsive bidder M/s Stadole International Limited for negotiations. The Board observes that the Tender Processing Committee had however recommended M/S South Consulting Africa Limited for award and negotiations in line with Section 86 (1) of the Act. The Board has noted that the Head of Procurement having received the evaluation report carried out a further re-evaluation where in page 5 of 6 of its opinion in the table of Financial Evaluation summary introduced the issue of budget of ksh. 4, 500, 000/= and further computed percentage deviation from the budget of the two bidders who were deemed responsive at the

technical evaluation stage. As a result, the Applicant was not recommended and the second ranked bidder was recommended for negotiation and award. The Board wishes to bring to the Procuring Entity Section 84 of the Act which states:

84 (2) the professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting

In this case, the Board notes that there was no dissenting opinion in the evaluation report. The Board however wishes to state that a professional opinion should not introduce any new method of evaluation. In this case, having realized that the bids were above budget, the Head of Procurement ought to have returned the same to the Tender Processing Committee with the comment on the budget and that at no time should a professional opinion become a re-evaluation.

Having said so, although M/S South Consulting Africa Limited was the most responsive bidder with the highest score, the Board notes that its budget was 65.91% higher than the available budget as claimed by the Procuring Entity. The Board also notes that at no time did the Procuring Entity provide a budget estimate for the bidders to work with, so neither parties were aware of a budget. Given that the threshold for the technical evaluation was 70% and that both parties exceeded the same, the Board finds that no party was prejudiced in this aspect. The introduction of a budget line in the procurement

process the Board notes was an extrinsic criteria to the tender document and not provided for by the law in any event.

The Board however notes that Section 127 of the Act states as follows:

The successful proposal shall be the responsive proposal with the highest score determined by an accounting officer in accordance with procedure and criteria set out under section 86 of the Act.

The Board notes that the Tender Processing Committee recognized that M/S South Consulting Africa Limited was the most responsive bidder and recommended negotiations. The Board wishes to refer to Sections 132 (a) and (b) which state as follows:

132 (2) In case of tenderers that quoted above the available budget, an accounting officer of a procuring entity shall:

(a) reveal its available budget to tenderers; and

(b) Limit its invitation to tenderers whose evaluated prices are not more than twenty five percent above the available budget.

Having not disclosed its budget to the bidders in the first instance the Board notes that the Procuring Entity is estopped by law from using the budget line to disqualify a party whose combined score was the highest and whose bid was recommended for award by the evaluation committee and faults the professional opinion provided by the Procurement professional which went contrary to the law in

an evaluation for request for Proposals. In view of the above findings the Board finds the request for Review merited and will allow it.

COSTS

Costs follow the event. The Board notes that the Applicant is successful in this matter and therefore entitled to costs. However having ordered a return to the procurement process of the applicant's bid the Board notes that this is a good case where each party should bear their own costs.

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 and Disposal Act, 2015 the Board makes the following orders on this Request for Review:-

- 1. The Request for Review filed by the Applicant on 5th June 2017 in respect of Tender Number MODP/SDD/REP/10/2016-2017 for Consultancy Services for Development of National Civic Education Framework is hereby allowed.**
- 2. The letter by the Procuring Entity inviting the successful bidder M/S Stapole International for negotiations in respect of Tender Number MODP/SDD/REP/10/2016-2017 for Consultancy Services**

for Development of National Civic Education Framework is vacated and set aside.

3. The Board directs and orders the procuring entity to complete the Procurement process in accordance with the Tender Document and in compliance with the law.

4. In view of the orders all parties shall bear their own costs.

Dated at Nairobi on this 23rd day of June, 2017.



CHAIRMAN

PPARB



SECRETARY

PPARB