

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 37 OF 2017 DATED 11TH APRIL, 2017

BETWEEN

TAWFIQ MOHAMED SALIM & COMPANY LIMITED.....APPLICANT

AND

COUNTY GOVERNMENT OF LAMU..... PROCURING ENTITY

Review against the decision of the County Government of Lamu in the matter of Tender No. CGL/TR/HS&E/061/2016-2017.-, In Relation to the Proposed Maternity Wing and Renovations of Existing Building at Mpeketoni Sub-County Hospital.

BOARD MEMBERS PRESENT

1. Mrs. Josephine W.Mong'are -Member (In the Chair)
2. Mr.Hussein Were - Member
3. Mr. Peter B. Ondieki, MBS - Member
4. Mr. Nelson Orgut - Member

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT - TAWFIQ MOHAMED SALIM & COMPANY LIMITED

Mr.Rogers Busena Mulomi - Advocate, Letangule & Co Advocates

PROCURING ENTITY - COUNTY GOVERNMENT OF LAMU

Mr.Jonah M. Zealot - Asst. Director Supply Chain Management

BOARD'S DECISION

Upon hearing the representations of the parties and the 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 procuring entity used the Open Tender method in identifying a contractor for construction of the above works in line with S.96 (1) of Public Procurement and Asset Disposal Act 2015. The advertisement was done on 8th March, 2017 and tenders were opened on 23rd March, 2017 at 10.00am. The Bids submitted and received as at the close of the Tender on 23rd March, 2017 included the following:-

Bidder no	Name of Firm	Total Bid sum
1	Tawfiq Mohamed Salim & company	47,278,475.73
2	Taneem General Supply	49,090,169.00

3	Seaview Suppliers Ltd	43,936,198.00
4	Jofoco Contractors Civil & Building works	65,923,994.00
5	BimSPORT Maintenance Agency	49,064,199.00
6	Al- Khaliq Enterprises Ltd	44,243,040.00

RESPONSIVENESS

In accordance with the instructions to bidders, prospective bidders had to comply with the following requirements failure to which, bidder could not qualify to stage 2, the Technical Evaluation.

1. Business Registration/Incorporation,
2. Pin/Vat
3. Valid Tax Compliance
4. Valid, Small business permit,
5. Valid NCA Certificate Category 6 & Above, and
6. Bid Bond of 2%.

Committees Remarks on the Preliminary Evaluation

Bidder 1, 2, &5, M/s Tawfiq Mohamed Salim & Company, M/s Taneem General Supply & M/S BimSPORT Maintenance Agency qualified to proceed to the next level since. Three bidders did not qualify to proceed to technical evaluation because of the following reasons;

Seaview Suppliers Ltd

- Did not attach bid bond

Jofoco Contractors Civil & Building works

- Attached expired single business permit
- Attached expired NCA

Al- Khaliq Enterprises Ltd

- Attached bid bond was 1.99% which is less than 2% of the bid sum

Only seven bidders qualified further to Technical evaluation as they both met the criteria set for preliminary evaluation. The Evaluation Committee recommended **Bidders 1,2, & 5,**

- M/s Tawfiq Mohamed Salim & Company,
- M/s Taneem General Supply Ltd.
- M/S Bimsport Maintenance Agency were subjected to further Technical evaluation since they all met the minimum criteria set out as requirements for Preliminary evaluation stage.

Technical Evaluation Criteria

The criteria used at this stage are as detailed below cumulatively carried maximum total mark of 100 points.

- i. CV of at least one key person with a minimum qualification of relevant diploma.
- ii. Certified copies of audited financial reports for the last 2years
- iii. Evidence of experience in similar work attached in three different works
- iv. Method of work statement - should include but not limited to;
 - Shedule of Work
 - Equipment & materials used
- v. Health & Safety Precautions
- vi. List of equipment proposed to execute the contract, details of their operating condition, their location and proof of ownership

Pass Mark: 75%

Technical evaluation

A Summary of the evaluators' scores, aggregate and computed means of those firms which qualified for Technical Evaluation are tabulated below:

Bidder No.	Bidder's Name	Mean %
1	Tawfiq Mohamed Salim& company	21.5
2	Taneem General Supply	53.25
5.	Bimsport Maintenance Agency	82.25

Pass mark = Mean Score 75%

Committees Remarks on the Technical Evaluation

Bidders 1&2 M/S Tawfiq Mohamed Salim & company, M/S Taneem General Supply, did not qualify to further for financial evaluation since did not attain pass mark of 75% in technical evaluation because of the following reasons;

M/S Tawfiq Mohamed Salim & Company

- Did not attach any CV of a Key person
- Attached bank statement instead of audited financial reports for the last two years
- In method of work statement just indicated schedule of work but omitted Equipment & materials used and Health & Safety Precautions
- Did not attach List of equipment preferred to execute the contract

M/S Taneem General Supply

- Did not attach method of work statement
- Did not attach List of equipment preferred to execute the contract

The Committee recommended only one bidder⁵, M/s Bimспорт Maintenance Agency, further for financial analysis; they attained the pass mark aggregate of 75% as set thereon.

Recommendations of the Evaluation Committee

Based on all the foregoing technical and financial analysis together with the observations made, the committee recommended M/s Bimsport Maintenance Agency of P.O. Box 121 Mpeketoni to Proposed Maternity Wing and Renovations of the Existing Building at Mpeketoni Sub-County Hospital at Kshs. 49,064,199.00

Professional Opinion

The Head of Supply Chain Management recommended award to the work to the most responsive bidder as reflected in the Evaluation Report, M/s Bimsport Maintenance Agency of P.O. Box 121 - Mpeketoni, amounting Kshs. 49,064,199.00 (Forty Nine Million, Sixty Four Thousands, One Hundred and Ninety Nine Only) is in line with the Public Procurement and Asset Disposal Act 2015 and approval granted by the Accounting Officer.

THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s **Tawfiq Mohamed Salim & Company Limited**; the above-named Applicant, of P.O. Box 20553-00100, GPO Nairobi; against the decision of the County Government of Lamu in the matter of Tender No CGL/TR/HS&E/061/2016-2017- In relation to the Proposed Maternity Wing and Renovations of Existing Building at Mpeketoni Sub-County Hospital.

The Applicant sought for the following orders:

1. *That the Procuring Entity suspends the procurement process forthwith until the review is concluded and determined*
2. *That the Board rescinds the decision to award the tender to alleged successful tenderer*
3. *That the determined winner be awarded the contract forthwith to mitigate unnecessary delays and disruption of the project for the good of the people of Lamu County and devolution development policies*
4. *That the Applicant be declared a successful tenderer.*
5. *That the Procuring Entity to submit all the bids and records to this honourable tribunal*
6. *That the county government of Lamu shall meet the cost of the review.*

The procuring entity opposed the Request for Review and urged the Board to dismiss the same with costs.

At the hearing of the Request for Review, the Applicant was represented by Mr. Rogers Busena Mulomi Advocate while the procuring entity was represented by Mr. Jonah zealot, Assistant Director Supply Chain Management.

Counsel for the Applicant submitted that the Applicant was aggrieved by the decision of the procuring entity of having awarded the tender the subject matter of the Request for review to a bidder whose bid price was higher than that which it had offered. The applicant argued that it

submitted a responsive open tender of 47,278,475 Kenya shillings in accordance with the tender advertisement by the respondent and believed that it had offered a responsive and the lowest evaluated bid for the tender. The Counsel for the Applicant further submitted that it was shocked when on 5th April 2017 its representative visited the offices of the respondent and was informed that the tender has been awarded to one M/S Bimsport Maintenance Agency whose bid was higher than its bid. The Applicant further submitted that the letter dated 29th March, 2017 from the procuring entity provided the following reasons for its disqualification.

- 1. That the applicant did not attach a CV**
- 2. That they attached bank statements instead of audited financial reports ,**
- 3. That the applicant omitted to inform the respondent the schedule of work**
- 4. The equipments he proposed to use to carry out the works and the applicant did not attach the list of equipments preferred to execute the contract.**

The Applicant further argued that the reasons given by the respondent were extraneous material outside the evaluation criteria provided for by the respondent in the tender documents and that the Applicant had complied with the bid document since the tender was very specific that tenderers must in mandatory terms attach only a copy of VAT and that those were the only documents which the tenderers were supposed to

comply with in mandatory terms. The applicant additionally that it had attached all these documents which included a CV of a member of the company and financial statements of accounts similar to those annexed to its Request for Review.

In addition the applicant submitted that the procuring entity had not notified it of the outcome of it's Tender and that there was no notification to the applicant that it's bid had been unsuccessful and had only collected the letter dated 29th March 2017 when one of the Directors of the Applicant visited the respondents offices to inquire on the progress of the tender. The Applicant further submitted that the Act provides that all notifications and communications are supposed to be in writing and any communication to the successful bidder must be done simultaneously or concurrently with communication to the unsuccessful bidders which was not done in the instant case.

The Applicant also questioned the speed at which the entire evaluation process took place and stated that the bids were closed on 23rd March 2017 while the successful bidder was awarded the tender on 29th March 2017 and that it was not therefore tenable to finalize the process in less than seven days. This it was the applicant's submission pointed to a predetermined outcome and hence the reason why the successful bidder was awarded the tender at a bid price of Kshs. 49 million despite the applicant's bid of Kshs. 47 million being lower by Kshs. 2 Million.

The applicant therefore urged the Board to allow the request for review as prayed and nullify the award made to the successful bidder with costs to the applicant.

In response to the Request for review, Mr. Jonah Zealot the Director Supply Chain management, Lamu County Government opposed the Request for Review and urged the Board to dismiss the same and allow the Procurement process to proceed. The Procuring entity submitted that indeed the tender subject matter of the Request for review was opened on 23rd March 2017 and the evaluation process completed on 29th March 2017 and an award made to the bidder who emerged successful after the evaluation. He further informed the Board that all bidders were contacted by telephone to come and collect their letters from the procuring entity's offices and hence the Applicant collected its letter on 4th April 2017. The procuring entity additionally submitted that as a result notification of the outcome of the tender was properly done and that the applicant suffered no prejudice as they were able to come before the Board and file a Request of review without undue delay.

On the reasons for disqualification, the Procuring Entity submitted that although the Applicant's bid went through the preliminary evaluation stage and was adjudged responsive at that stage, it however failed at the technical evaluation stage since it did not meet the criteria set out for evaluation in that section. He stated that the tender document, the criteria

for technical evaluation was set out clearly in the tender document which set out the marks against each technical aspect which were as follows:-

- (a) a CV of at least one key personnel with a minimum qualification or relevant diploma in related studies and a minimum of three years experience which carried **10 marks**
- (b) Certified copies of audited financial reports for two years
- (c) Experience in works of similar nature and size of each for the last three years and details of work under way, contractually committed with documentary proof and names and addresses of clients who may be contacted for further information on these contracts, attach extract copies of contracts – **30 marks**
- (d) Method of work statement should include but not be limited to schedule of works, equipment and materials used, health and safety precautions- **30 marks**
- (e) List of equipment proposed to excavate the contract, details of their operating condition, their location and proof of ownership that carried **-15 marks**

The procuring entity further stated that at the technical stage, bidders were required to score a minimum of 75% to proceed to the next stage of financial evaluation but the applicant having omitted key documents and information required at the technical evaluation stage scored only 22% and hence its bid did not proceed to the financial evaluation stage and could

therefore not be deemed the lowest evaluated bid in accordance with the law. He urged the Board to dismiss the Request for review with costs to the procuring entity and allow the process to proceed to its logical conclusion.

In response to the submissions made by the procuring entity, the applicant stated that if indeed the original tender did not have the documents as alleged, then it was possible that the same was interfered with during evaluation.

THE BOARD'S DECISION

The Board having heard the submissions made by all the parties before it and having perused all the documents submitted to it in support and in opposition to the application the Board has identified one issue for determination, to wit;

"Whether the procuring entity was justified in rejecting the Applicant's bid at the technical evaluation stage".

The Board has noted the contents of the letter dated 29th March, 2017 from the procuring entity which stated that the applicant was disqualified at the technical evaluation stage for failure to include the following items in its tender document;

1. That the applicant did not attach a CV
2. That they attached bank statements instead of audited financial reports.
3. That the applicant omitted to inform the respondent about the schedule of work.

4. The Applicant did not indicate the equipment it proposed to use to carry out the work and that the Applicant did not attach the list of equipment preferred to execute the contract.

The Board has perused the original tender document and notes that the above listed documents were missing from the Applicant's bid and that the Applicant did not therefore attain the marks attached to the said items at the technical evaluation stage. The board is alive to the provisions of Section 80(2) of the Act which provides as follows;

"Section 80(2)The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."

The Board notes that the tender document contained the criteria for evaluation as follows;

- a) A CV of at least one key personnel with a minimum qualification on relevant diploma in related studies and a minimum of three years experience which carried 10 marks
- b) A certified copies of audited financial reports for two years.

- c) Experience in works of similar nature and size of each for the last three years and details of work under way, contractually committed with documentary proof and names and addresses of clients who may be contacted for further information on these contracts, attach extracts copies of contracts – **30 marks**
- d) Method of work statement should include but not limited to schedule of works, equipment and materials used, health and safety precautions- **30 marks**
- e) List of equipment proposed to excavate the contract, details of their operating condition, their location and proof of ownership that carried -**15 marks**

As the Board has already stated above, it has perused the Applicant's original tender document and has established that the said documents were missing from the tender document submitted by the Applicant. The Board is also not persuaded by the argument that the Applicant's tender document was interfered with since the procuring entity would not have any interest or motivation for doing so. Consequently the Board finds that the Applicant was properly disqualified at the technical evaluation stage for having failed to meet the mandatory passmark.

On the issue of notification, the Board finds that the applicant was properly notified of the outcome of it's tender and suffered no prejudice because it was able to file this the Request for Review within time. The Board also

notes that the allegations that the evaluation was conducted within a very short period has no bearing on the outcome of the evaluation as the law allows a procuring entity a period of not more than Thirty (30) day to carry out an evaluation and nothing therefore prohibits a procuring entity from concluding the exercise within a shorter period. Overallly therefore the Board finds that the Applicant's Request for Review is without merit.

COSTS

On the issue of costs, the general principle is that costs follow the event. The board notes that the applicant has been unsuccessful in its request for review. However although the procuring entity is entitled to costs, the Board notes that the procuring entity did not appear before the Board when served in the first instance thus occasioning an adjournment of the matter and will therefore not award the procuring entity any costs in the matter

FINAL ORDERS

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

1. That the Request for Review filed by M/s Tawfiq Mohamed Salim & Company against the decision of the County Government of Lamu in the matter of Tender No. CGL/TR/HS&E/061/2016-2017.- In Relation to the Proposed Maternity Wing and Renovations of

Existing Building at Mpeketoni Sub-County Hospital be and is hereby dismissed.

2. The procuring entity is directed to proceed with the procurement process in respect of Tender No. CGL/TR/HS&E/061/2016-2017.- In Relation to the Proposed Maternity Wing and Renovations of Existing Building at Mpeketoni Sub-County Hospital to its logical conclusion.
3. The Board makes no orders as to costs and directs that each party shall bear its own costs in this Request for Review.

Dated at Nairobi on this 2nd day of May, 2017.



CHAIRMAN
PPARB



SECRETARY
PPARB

