

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.32/2017 OF 24TH MARCH 2017

BETWEEN

TRIPPEX CONSTRUCTION COMPANY LTD..... Applicant

AND

RONGO UNIVERSITY.....Procuring Entity

Review against the decision of Rongo University in the matter of Tender Number RU/OT/13/16-18 for the Proposed Construction of Main Campus Gate and Gate House at Rongo University

BOARD MEMBERS PRESENT

1. QS.Hussein Were - In the Chair
2. Mrs. Gilda Odera - Member
2. Eng. Weche Okubo, OGW - Member
4. Mrs. Josephine Mong'are - Member
5. Mr. Peter B. Ondieki, MBS - Member

IN ATTENDANCE

1. Philip Okumu - Holding Brief for Secretary
2. Maureen Namadi - Secretariat

PRESENT BY INVITATION

Applicant – Trippex Construction Company Limited

1. Isaac Owuor - Advocate, Owuor, Nyahanga & Ass.
2. Gilbert Kowuocha - Contractor

Procuring Entity – Rongo University

1. Mwaniki Gachuba - Advocate, Onyoni Opini Advocates
2. Fredrick Mangicho - Procurement 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

INVITATION OF BIDS

The tender for the Proposed Construction of Main Campus Gate and Gate House at Rongo University - Tender Number RU/OT/13/16-18- was advertised on 1st December, 2016 in the *Daily Nation* newspaper. The tender was closed and opened on Thursday, 5th January, and 2017 at 10.00am. Fifteen (15) tenders were opened and results recorded as shown below:

Table 1: Tender Opening Results

Bidder No.	Name of Bidder	Amount Quoted (Kshs)	Bid Bond (Kshs) 2% Of The Tender Sum
01	Carolina Construction Co. Ltd	18,320,871.20	366,417.42
02	Polish Contractors Co. Ltd	13,885,588.00	277,712.00
03	Cliffmax Kenya Enterprises Ltd	13,316,644.81	266,333.00
04	Damovin Engineering Services Ltd	14,923,597.00	300,000.00
05	Nyobu Enterprises	16,343,976.02	350,000.00
06	Goma Azul Investments	14,235,108.20	286,000.00
07	EltericseA. Ltd	14,558,794.02	290,731.00
08	Edmar Enterprises Ltd	15,136,334.80	300,000.00
09	Dapalk Consortium Co. Ltd	13,586,719.82	271,735.00
10	Sim Building Contractors	14,663,600.00	300,000.00
11	Unami Construction Co. Ltd	13,881,064.02	287,388.00
12	Stem Investments Ltd	14,572,898.00	300,000.00
13	Trippex Construction Co. Ltd	12,760,000.00	255,200.00
14	Gobol Engineering International Co. Ltd	13,155,484.00	263,110.00
15	Joro Building & General Contractors Ltd	17,627,299.10	352,546.00

TENDER EVALUATION

Rongo University's evaluation committee carried out evaluation of bids in three stages of mandatory requirements, technical evaluation and financial evaluation. The Evaluation Committee carried out the evaluation exercise from 12th to 15th January, 2017 and recommended award of tender to Edmar Enterprises Ltd being the lowest evaluated bidder. The University upheld the Tender Evaluation Committee's recommendation and awarded the tender to Messrs Edmar Enterprises Ltd at a price of Kshs. 15,136,334.80.

THE REQUEST FOR REVIEW

Bidder 13, namely Trippex Construction Co. Ltd, the Applicant herein, lodged a complaint with the Public Procurement Administrative Review Board (hereinafter "the Board") on 16th February, 2017 against the decision of Rongo University (hereinafter "the Procuring Entity") alleging that its tender document had not been fairly evaluated. The Board, in a decision rendered on Monday, 6th March, 2017 annulled the Procuring Entity's award of the tender to Edmar Enterprises Ltd and ordered the Procuring Entity to re-evaluate the Applicant's bid for technical responsiveness.

TENDER RE-EVALUATION

The Procuring Entity re-evaluated the tender on 9th March, 2017 as ordered by the Board.

Preliminary Evaluation

This was an elimination stage where each bidder's submission was checked for completeness and compliance to the stated tender submission requirements. To be deemed as responsive, tenders were checked for the following mandatory requirements:

1. Copy of certificate of incorporation/registration
2. Copy of valid Tax Compliance Certificate from KRA
3. Valid NCA Certificate Category 6 and above
4. Must submit a tender security in the amount of 2% of the tender sum valid for 150 days from the date of tender opening.

Nine bidders passed the preliminary evaluation stage and proceeded to the technical evaluation stage. These were:

1. Polish Contractors Co. Ltd – Bidder 02
2. Cliffmax Kenya Enterprises – Bidder 03
3. Nyobu Enterprises – Bidder 05
4. Goma Azul Investments – Bidder 06
5. Edmar Enterprises – Bidder 08
6. Dapalk Consortium Co. Ltd – Bidder 09
7. Unami Construction Co. – Bidder 11
8. Gobol Engineering International – Bidder 14
9. Joro Building & General Contractors Ltd – Bidder 15

Technical Evaluation

The threshold at the technical evaluation stage was 70 points. Bidders who score below 70 points will be eliminated at this stage from the evaluation process. If none of the bidders scores 70 points and above the cutoff point will be lowered to 65 points. The results of the technical evaluation were as shown in the table below.

Item	Description	Max. Points	B2	B3	B5	B6	B8	B9	B11	B13	B14	B15	
I.	Tender Questionnaire Form	10	10	10	10	5	10	10	10	10	10	10	
	Signed and stamped----- 10												
	Signed but not stamped or vice versa 5 Not signed nor stamped ----- 0												
II.	Confidential Business Questionnaire Form.	10	5	10	10	10	10	10	10	10	10	5	
	Completely filled ----- 10												
	Partially filled ----- 5 Not filled ----- 0												
III.	Key Personnel (Attach evidence)	10	20	10	5	10	10	10	5	10	10	0	5
	At least 1No. degree/diploma of key personnel in relevant engineering field												
	o With over 10 years relevant experience ----- 10	5		0	0	5	0	0	0	0	0	0	0
	o With over 5 years relevant experience ----- 5												
	o With under 5 years relevant experience ----- 1												
	At least 1No certificate holder of key personnel in relevant Engineering field	5		0	0	0	0	5	0	0	5	5	0
	o With over 10 years relevant experience ----- 5												
	o With over 5 years relevant experience ----- 3												
	o With under 5 years relevant experience ----- 1	5		0	0	0	0	5	0	0	5	5	0
	Capacity to acquire construction Materials												
o Demonstration of capacity to acquire construction materials e.g. Evidence of letter of credit agreements with suppliers ----- 5	6	0	2	6	2	6	2	0	3	3	2		
Contract completed in the last five (5) years (Max of 2 No. Projects)													
o Project of similar nature, complexity and magnitude ----- 3	6	0	2	6	2	6	2	0	3	3	2		
o Project of similar nature but of lower value than the one in													

	consideration ----- 2											
	o No completed project of similar nature ----- 0											
VI	On-going projects (Max of 1 No. Project)	3	0	0	3	0	3	1	1	0	1	1
	o Project of similar nature, complexity and magnitude ----- 3											
	o Project of similar nature but of lower value than the one in consideration ----- 1											
	o No ongoing project of similar nature ----- 0											
VII	Schedule of contractors equipment and transport (proof or evidence of ownership)	5	5	0	5	5	5	0	5	0	5	5
	o Means of transport (Vehicle) ----- 5											
	o No means of transport ----- 0											
	For each specific equipment required in the installation of the Work being tendered for(Maximum No. of equipment to be considered - 3 No.) - ----- 2	6	0	6	0	6	0	0	6	0	6	0
VIII	Financial report 10											
	Audited financial report (last three (3) years 2013, 2014, 2015)	10	0	0	2	0	10	6	6	0	4	4
	o Turn over greater or equal to 5 times the cost of the project ----- 10											
	o Turn over greater or equal to 3 times the cost of the project ----- 6											
	o Turn over greater or equal to the cost of the project ----- 4											
	o Turn over below the cost of the project ----- 2											
IX	Evidence of Financial Resources (cash in hand, lines of credit, overdraft facility etc)	10	5	5	5	0	10	0	5	0	5	5
	o Has financial resources equal or above the cost of the project----- 10											
	o Has financial resources below the cost of the project ----- 5											
	o Has not indicated sources of financial resources ----- 0											
X	Access to Liquid Finances	5	5	5	0	0	5	5	0	0	5	5
	o Evidence of access to liquid finances from a reputable bank or credit facility of upto 5 million ----- 5											
	o Not provided ----- 0											
XI	Litigation History	5	5	0	5	0	5	5	5	5	5	0
	o Filled ----- 5											
	o Not filled ----- 0											
XII	Sanctity of the tender document	10	10	10	10	10	10	10	10	10	10	10
	o Having the document intact(not tampered with in any way) ----- 10											
	o Having mutilated or modified the tender document ----- 0											
	TOTAL	100	55	53	71	48	89	54	68	53	69	52

From the table above two out of the nine bidders scored above the mandatory 70 points and hence qualified for financial evaluation. Seven bidders scored below the threshold mark and were discontinued from further evaluation. The Applicant, Messrs Trippex Construction Co. Ltd did not attain the required 70 points hence could not proceed to the Financial Evaluation Stage. Bidders 05 and 08 scored above 70 points and proceeded to financial evaluation.

Financial Evaluation

The lowest evaluated responsive bid amongst bidders with a score of 70 points will be recommended for award. The result of the financial evaluation was as shown in the table below.

Bidder No.	Name of Bidder	Amount Quoted (Kshs)	Bid Bond	Ranking
05	Nyobu Enterprises	16,343,976.02	350,000.00	2
08	Edmar Enterprises Ltd	15,136,334.80	300,000.00	1

Bidder 08(Edmar Enterprises Ltd),being the lowest evaluated responsive bidder, was recommended for award of the tender at a cost of Kshs 15,136,334.80.

PROFESSIONAL OPINION

The acting Procurement Officer of the University issued a professional opinion on 10th March, 2017 in which he advised as follow:

1. That the difference of Kshs. 4,449.81 from the approved budget is quite minimal. Rongo University Management to raise the budgetary allocation to cover the cost of the works rather than cancelling the tender on the basis of inadequate budgetary allocation.
2. That in the event that the allocation is increased, Messrs Edmar Enterprises Ltd, being the lowest evaluated responsive bidder, be awarded the tender for Construction of Main Gate and Gate House at Rongo University at a cost of Kshs. 15,136,334.80.

The Accounting Officer of the Procuring Entity, the Vice-Chancellor, approved the recommendation of award to Messrs Edmar Enterprises Ltd at a cost of Kshs. 15,136,334.80 on 13th March, 2017. Letters of notification and regret were done on 13th March, 2017.

REVIEW

This Request for Review was lodged by M/S Trippex Construction Company Limited, (the Applicant) of Post Office Box 37839-00100, Nairobi on 24th March 2017 against the decision of Rongo University (the Procuring Entity) in the matter of Tender Number RU/OT/13/16-18 for the Proposed Construction of Main Campus Gate and Gate House at Rongo University. The Applicant requested the Board for the following orders:

1. **That the decision of the Procuring Entity declaring the Applicant's bid as unsuccessful is illegal and the same be annulled in whole.**
2. **That the Board be pleased to order the Procuring Entity to award the tender to the Applicant as it is the lowest evaluated bidder.**
3. **That the Procuring Entity be condemned to pay costs of this Request for Review to the Applicant.**

The Procuring Entity, in its response, averred that the Request for Review lacked merit and ought to be dismissed with costs.

The Applicant was represented by Mr. Isaac Owuor of Owuor Nyahanga and Associates Advocates while the Procuring Entity was represented by Mr. Mwaniki Gachuba of Onyoni Opini Advocates. The Applicant raised three grounds which it argued as follows:

THE APPLICANT'S CASE

The Applicant stated that Section 80 (2) of the Public Procurement and Disposal Act, 2015 (hereinafter "the Act") as well as Clause 5.8 of the tender document required the Procuring Entity to evaluate the tender using

the criteria set out in the tender document and further that Regulation 49 (1) required the evaluation committee to undertake the technical evaluation in accordance with the tender document. The Applicant further stated that Clause 5.6 of the tender document provided that the Procuring Entity will evaluate and compare only the tenders determined to be substantially responsive in accordance with Clause 5.5 of the tender document. The Applicant also referred to the technical evaluation criteria in the tender document, specifically the part which provided as follows:

“Only bidders who score 70 points and above will be subjected to financial evaluation. Those bidders who score below 70 points will be eliminated at this stage from the entire evaluation process and will not be considered further”.

The Applicant submitted that the scoring by the Procuring Entity of its tender was not in accordance with the Act, the Regulations and the tender document and that the evaluation was flawed to the extent that it resulted in the Applicant being wrongly awarded 44 marks. The Applicant further stated that the Procuring Entity sent a notification letter dated 13th March, 2017 to the Applicant informing it that its bid was unsuccessful for the following reasons:

1. No personnel who is a certificate holder in the relevant engineering field (5 marks).
2. No ongoing project of similar nature (3 marks).

3. Providing an expired lease agreement for provision of construction equipment and transportation (11 marks).
4. Inconsistencies in the financial statements (10 marks).
5. Providing an expired credit facility (5 marks).
6. No evidence of current valid bank statements (10 marks).

To support its case, the Applicant referred to the technical score sheet found in the tender document and argued as follows:

Item iii) At least one certificate holder of key personnel in relevant engineering field:

- *With over 10 years relevant experience -5 marks*
- *With over 5 years relevant experience - 3 marks*
- *With under 5 years relevant experience - 1 mark*

On this item(s), the Applicant argued that it satisfied the requirement since it provided relevant documentation for six staff as follows:

- a) Orondo George Ochieng- Bachelors Degree of Built Environment in Quantity Surveying from Technical University of Kenya awarded in 2015 and Higher Diploma in Construction Engineering (Structural Engineering Option) in 2009.
- b) Gilbert Odhiambo Kowuocha- Bachelors degree of Quantity Surveying from Technical University of Kenya awarded in 2014 and a certificate of Diploma in Quantity Surveying from Mombasa Polytechnic awarded in 2015.

- c) Aoko Willis Omondo- Higher Diploma in Construction (Building Economics option) awarded in 2015.
- d) Kariuki, T. Michael- Higher Diploma in Construction (Building and Civil Engineering) awarded in 1997.
- e) Jeckoniah Opudo- Higher Diploma in Civil Engineering
- f) Dickson Owuocha- Higher Diploma in Civil Engineering from Kenya Polytechnic.

The Applicant argued that based on the technical evaluation, at least two of its personnel held a relevant degree, diploma and certificate thus providing an even higher qualification than what the Procuring Entity had requested for while the rest had the required certificates and therefore it should have been awarded the full 15 marks and not 10 marks as presumed.

Item vii) Schedule of contractor's equipment and transport (proof or evidence of ownership):

- *Means of transport - 5 marks*
- *No means of transport - 0 marks*

On rental lease agreement, the Applicant admitted that its lease expired on January 4th 2017 but argued that the lease was renewable. It however submitted that the scoring was for provision of construction equipment and transportation. The Applicant argued that it had provided invoices to show payment for two concrete mixers, 4 dumpers and scaffolding and that

it had one Dumpy level C410 and four Atlas Copco pokers. It submitted that dumpers do not have registration numbers since they are equipment and not motor vehicles with log books adding that the documents produced were sufficient proof and that, if in doubt, the Procuring Entity should have conducted due diligence.

Item viii) Financial Report: Audited financial report (last three years 2013, 2014, 2015):

- *The turnover greater or equal to 5 times the cost of the project - 10 marks*
- *Turnover greater or equal to 3 times the cost of the project - 6 marks*
- *The turnover greater or equal to the cost of the project - 4 marks*
- *The turnover below the cost of the project - 2 marks*

On this item the Applicant submitted that it provided two full year financial statements appearing at pages 154 to 191 of the Request for Review one being for the period between 1st July to 30th June 2015 and the other being for the period between 1st July to 30th June 2016. It stated that the Applicant was incorporated as a company on 4th of March 2014 and consequently could not produce annual statements for the period prior to the date of incorporation. The Applicant further submitted that the financial statement for the year 2014 which the Procuring Entity termed inconsistent was not an annual statement but a working document owing to the fact that the Applicant had not completed the statutory 12 months to have an annual financial statement for that year. It was the Applicant's further case that the financial statements it provided were for the years ending 30th June 2015 and 30th June 2016 and which indicated turnover of

Kshs 220,145,821 and Kshs 249,421,825 respectively, more than five times the cost of the project hence eligible to be awarded the full 10 marks.

Item ix) Evidence of Financial Resources (cash in hand, lines of credit, overdraft facility, etc):

- *Has financial resources equal or above the cost of the project* - 10 marks
- *Has financial resources below the cost of the project* - 5 marks
- *Has not indicated the source of financial resources* - 0 marks

On this item the Applicant stated that its financial statements for the year ending 30th June 2016, showed cash at bank of Kshs 2,610,274, and hence qualified for award of 5 marks. It argued that there was no requirement for bank statements specifically stated in the technical score sheet of the tender document.

Item x) Access to Liquid Finances:

- *Evidence of access to liquid finances from reputable bank or credit facility of up to Kshs 5 million* - 5 marks
- *Not provided* - 0 marks

On this item the Applicant admitted to providing an expired document but stated that it had also availed a letter from the African Development Bank to show that it had a business account with the bank therefore asserting that it ought to have been awarded the full 5 marks as a result.

The Applicant concluded by contending that it had surpassed the 70 mark score required to qualify for financial evaluation.

On costs, the Applicant submitted that the Procuring Entity's unfair decision to declare its tender unsuccessful had denied it earnings and profit it would have made from the tender and had also exposed it to risks. It claimed that it had spent considerable amount of money in the tender considering that it had appeared before the Board in an appeal regarding the same tender barely a month earlier. The Applicant further claimed that the Procuring Entity's actions as aforesaid would make the public suffer loss and damage as the Applicant's bid was economical and the loss of the benefit of the Applicant's vast experience.

The Applicant urged the Board to allow the Request for Review, grant the prayers sought and condemn the Procuring Entity to pay the costs of the Request for Review.

THE PROCURING ENTITY'S RESPONSE

In response to the Request for Review, the Procuring Entity raised a preliminary issue citing regulation 73(2) (b) of the Public Procurement and Disposal Regulations 2006, which requires that the Request for Review be accompanied by necessary statement. It cited the **Court of Appeal case of Speaker of the National Assembly and Njenga Karume in (1992) eKLR**, where the court held that *where a procedure is provided that procedure must be*

followed strictly, and argued that in the absence of the statement by the Applicant accompanying the Request for Review, the Board should declare the Request for Review as incompetent.

The Procuring Entity averred that it evaluated the Applicant's tender in strict compliance with the criteria set out in the tender document and that, resulting from that the evaluation, the Applicant scored a total of 44 marks and therefore failed to meet the threshold of 70 marks.

On the issue of qualification of the key personnel, the Procuring Entity submitted that the Applicant only provided evidence of holders of degrees and diplomas of its key personnel but failed to provide any evidence of certificates for at least one artisan which was a specific requirement and it therefore rightly scored no mark for the artisan. It submitted further that the Applicant's claim that it ought to have been awarded 15 marks was invalid since in the first category the maximum mark was 10 and in the second category for certificate holders the mark was 5 and the marks for the two categories could not therefore be combined.

Regarding evidence of similar ongoing projects, the Procuring Entity averred that the Applicant did not provide any evidence that the Proposed Sanctuary for Friends Church at Madaraka project was of a similar nature, complexity and magnitude as the tender the subject of the request for review arguing that the said project was not on-going as it

commenced on 14th March, 2016 and was completed on 28th November, 2016.

The Procuring Entity averred that the Applicant did not provide any evidence of ownership of equipment adding that the Applicant had admitted that it provided an expired lease of equipment and an expired credit facility letter. It averred further that the Registration Books of Motor Vehicles supplied by the Applicant showed ownership by third parties who were unrelated to the Applicant; the Certificate of Origin and the Delivery Note were not documents of title nor did they prove that the purported equipment was shipped to Kenya and was available for use at site. It also averred that the invoices and receipts provided by the Applicant did not provide evidence that the Applicant owned the equipment.

It was the Procuring Entity's contention that the dumper was a truck which had to have a registration number arguing that in Kenya evidence of ownership of equipment is found in section 80 of the Traffic Act where it is required that one must have a log book to prove ownership and that in the absence of a log book then ownership had to be demonstrated and that in this case, there was nothing from the Applicant that showed that it indeed owned the dumper equipment it had listed. The Procuring Entity relied on the case of **Ramesh V. Hiranvs Justus Murianki& another 2017 eKLR** which amplifies section 8 of the Traffic Act and also on Section 108 of the

Evidence Act which places the burden to prove ownership on the Applicant.

On the issue of the credit facility, the Procuring Entity submitted that the letter by ABC bank Ltd merely stated that the Applicant was the bank's customer but that the letter neither stated that the Applicant had any credit facility with the bank nor was it proof of access to credit. As regards the Audited Financial statements, the Procuring Entity submitted that the tender document was categorical that the tenderers were to submit audited accounts for the year 2013, 2014 and 2015. It submitted further that the Applicant's reason for not being able to submit some financial statements on account of not trading in the years 2013, 2014 was inexcusable as the Applicant did not seek any amendment or variation to the tender document, as provided under Section 75(1) and (2) of the Act and had proceeded to enter into the tendering process fully aware of the technical requirements in the tender documents. The Procuring Entity, to fortify its argument, cited the High Court case **Republic v Public Procurement Administrative Review Board & Another ex-parte Gibb Africa Ltd & Another** 2012 eKLR where the Court stated that *once an Applicant has submitted a bid with full knowledge of any flaws in the tender document and raises no complaint thereof such an Applicant would be precluded from raising an application thereafter and especially after losing the tender*. It sought to fortify its argument further in the case of **PPARB Application No.57 of 2014- Riley Services Limited vs the Judiciary** which is a decision of the Board touching on the submission of audited accounts and contended that the

Applicant could not now be heard to say that it was unfairly disqualified by the Procuring Entity.

It was the Procuring Entity's position that the Applicant's audited accounts for 2015 had irregularities and inconsistencies. It argued that the statements for the financial year 2014 ended on 31st December 2014 yet the subsequent financial periods end on 30th June. It argued further that the Statement of Changes in Equity Title reads 30th June 2015 for the year 2014 and the Property Plant and Equipment reads 30th June 2015 for the period 2014. The Procuring Entity went further to submit, regarding the dispute by the Applicant that no bank statements were required, that there was a requirement under clause 1.5h of the tender document which states: "*authority to seek reference from the tenderer's bankers'* and emphasized that the Applicant failed to meet the requirements when it failed to submit bank statements or a letter of authority. It also submitted that it had discredited the Applicant audited accounts and therefore could not consider that the Kshs2.5 million claimed to be available by the Applicant as reliable information. The Procuring Entity avers that the Applicant did not provide any evidence of bank statements and it was therefore impossible for the Procuring Entity to establish cash in hand, lines of credit and overdraft facilities.

On the issue of loss of money from preparing the tender, the Procuring Entity referred the Board to clause 1.10 of the tender documents which stated that bidders would bear their own cost associated with the preparation and admission of the tender and therefore the issue of loss

claimed by the Applicant for preparing the tender should not arise. It concluded its submissions by requesting the Board to dismiss the Request for Review and to order the Applicant to pay its costs.

THE 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:

- (i) *Did the Applicant go against the provisions of Regulation 73 (2) (b) of the Regulations by filing the Request for Review without an accompanying statement, thereby rendering the application incompetent?*
- (ii) *Did the Procuring Entity fail to evaluate the Applicant's tender in accordance with the evaluation criteria set out in the tender document thereby breaching the provisions of Section 80(2) of the Act?*

The Board now proceeds to determine the issues framed for determination as follows:

1. **As to whether the Applicant went against the provisions of Regulation 73 (2) (b) of the Regulations by filing the Request for Review without an accompanying statement, thereby rendering the application incompetent**

The Board observes that Tender Number RU/OT/13/16-18 for the Proposed Construction of Main Campus Gate and Gate House at Rongo University attracted fifteen bids which were opened on 5th January 2017. The opened tenders were evaluated through three stages namely preliminary evaluation, technical evaluation and financial evaluation. The Board further observes that six bidders were disqualified at the preliminary evaluation stage and the remaining nine were evaluated at the subsequent stage of technical evaluation where seven bidders, including the Applicant, were disqualified for failing to meet the 70 marks required to proceed to the net stage. Only two proceeded to the financial stage where it is also observed that Messrs Edmar Enterprises Ltd emerged the winner and was awarded the tender at a sum of Kshs15,136,334.80 which award has been challenged by the Applicant. The Board further observes that by a letter dated 13th March, 2017, the Procuring Entity notified the Applicant that its tender was not successful having failed at the technical evaluation stage due to several reasons it provided in the letter of notification.

The Applicant herein lodged this Request for Review on 24th March 2017 seeking, among others, the annulment of the decision of the Procuring Entity to award the tender to the successful bidder. The Procuring Entity in its memorandum of response filed on 29th March 2017 challenged the application on the ground that it was incompetent by dint of failure of the Applicant to comply with the procedure prescribed by Regulation 73 (2) (b) of the Public Procurement and Disposal Regulations, 2006.

In resolving the preliminary issue, the Board is guided by the provisions of Regulation 73 (2) (b) of the Public Procurement and Asset Disposal Regulations 2006 which states as follows:

“The request referred to in paragraph (1) shall –

(a).....

(b) be accompanied by such statements as the applicant considers necessary in support of its request”

The Board notes that the Applicant lodged this Request for Review on 24th March, 2017 and that the same was signed and filed by its Advocate Mr. Isaac Owuor from the firm of Owuor, Nyahanga & Associates. The Request for Review was not signed by the Applicant nor was it accompanied by a statement of the Applicant. The Board however notes that the Request for Review largely challenged the evaluation of the tender and the marks awarded to the Applicant which are matters that would ordinarily be contained in the evaluation report supplied to the Board. In view of the fact that these are matters which can be ascertained from the evaluation report which is in the custody of the Board, the Board therefore finds and holds that the absence of a statutory statement is not fatal to the Applicant’s case and the objection by the procuring entity is therefore disallowed.

2. As to whether the Procuring Entity failed to evaluate the Applicant's tender in accordance with the evaluation criteria set out in the tender document thereby breaching the provisions of Section 80(2) of the Act

As noted elsewhere in this decision, the Applicant was among the nine bidders who passed the preliminary evaluation stage and proceeded to the technical evaluation stage where it was disqualified for the reasons stated in the notification letter of 13th March 2017 which were given as follows:-

"...., we are unable to award you the contract and therefore you should consider your application submitted on 5th January, 2017 UNSUCCESSFUL. This is due to the following reasons:

- 1. There is no personnel who is a certificate holder in relevant engineering field.*
- 2. There is no ongoing project of similar nature*
- 3. You provided an expired lease agreement for the provision of construction equipment and transportation.*
- 4. inconsistencies in the financial statements: -*
 - (a) We required financial statements for the years 2013, 2014 and 2015. You provided financial statements for the years 2014, 2015 and 2016.*
 - (b) Financial statements for the year 2014 are not authentic based on the following reasons.*
 - Financial period is ending on 31st December, 2014 yet subsequent financial periods are ending on 30th June.*

- *Financial statements for financial year 2014 on pages 2/88(5), 2/89(7) and 2/90(8, 9) have inconsistent period that financial statements relate to.*
- *Pages 2/88(5) and 2/89(7) Profit and Loss Account and Statement of changes in Equity title reads 30th June, 2015 while the statements are for 2014.*
- *Page 2/90(9) Property, Plant and Equipment is as at 30th June, 2015 while these financial statements are for 2014.*

Edwin Associates who audited 2014 financial statements did not include their practicing license number, unlike Omato & Co. who audited subsequent financial statements. Therefore authenticity of financial statements for year 2014 could not be established.

5. You provided an expired credit facility.

6. No evidence of current valid bank statements

This tender was awarded to M/s Edmar Enterprises Ltd at a cost of Kshs.15, 136,334.80 being the lowest evaluated responsive bidder...."

The Board has heard the Applicant's arguments in support of the Request for Review on the issue of technical evaluation of the tender and the procuring entity's opposition to the said issue.

To determine this issue, the Board has looked at the technical evaluation criteria found in the tender document and the scoring of the Applicant thereto which as follows:-

Item	Description	Max. Points		B13
I.	Tender Questionnaire Form	10		10
	Signed and stamped----- 10			
	Signed but not stamped or vice versa..... 5			
II.	Confidential Business Questionnaire Form.	10		10
	Completely filled ----- 10			
	Partially filled ----- 5			
III.	Key Personnel (Attach evidence)	10	20	10
	At least 1No. degree/diploma of key personnel in relevant engineering field			
	o With over 10 years relevant experience ----- 10			
	o With over 5 years relevant experience ----- 5			
	o With under 5 years relevant experience ----- 1	5		0
	At least 1No certificate holder of key personnel in relevant Engineering field			
	o With over 10 years relevant experience ----- 5			
	o With over 5 years relevant experience ----- 3	5		5
	o With under 5 years relevant experience -----1			
	Capacity to acquire construction Materials	5		5
o Demonstration of capacity to acquire construction materials e.g. Evidence of letter of credit agreements with suppliers ----- 5				
V	Contract completed in the last five (5) years (Max of 2 No. Projects)	6		3
	o Project of similar nature, complexity and magnitude -- -----3			
	o Project of similar nature but of lower value than the one in consideration ----- 2			
	o No completed project of similar nature ----- 0			
VI	On-going projects (Max of 1 No. Project)	3		0
	o Project of similar nature, complexity and magnitude -- ----- 3			
	o Project of similar nature but of lower value than the one in consideration ----- 1			
	o No ongoing project of similar nature - -----0			
VII	Schedule of contractors equipment and transport (proof or evidence of ownership)	5	11	0
	o Means of transport (Vehicle) ----- 5			
	o No means of transport ----- 0			

	For each specific equipment required in the installation of the Work being tendered for(Maximum No. of equipment to be considered – 3 No.) ----- 2	6		0
VIII	Financial report 10	10		0
	Audited financial report (last three (3) years 2013, 2014, 2015			
	o Turn over greater or equal to 5 times the cost of the project ----- 10			
	o Turn over greater or equal to 3 times the cost of the project ----- 6			
	o Turn over greater or equal to the cost of the project --- ----- 4			
o Turn over below the cost of the project -----2				
IX	Evidence of Financial Resources (cash in hand, lines of credit, overdraft facility etc)	10		0
	o Has financial resources equal or above the cost of the project----- 10			
	o Has financial resources below the cost of the project - -----5			
	o Has not indicated sources of financial resources ----0			
X	Access to Liquid Finances	5		0
	o Evidence of access to liquid finances from a reputable bank or credit facility of upto5million----- 5			
	o Not provided ----- 0			
XI	Litigation History	5		5
	o Filled -----5			
	o Not filled -----0			
XII	Sanctity of the tender document	10		10
	o Having the document intact(not tampered with in any way) -----10			
	o Having mutilated or modified the tender document---0			
	TOTAL	100		53

A further statement at the end of the technical evaluation criteria found in the tender document provides as follows:

“Only bidders who score 70 points and above will be subjected to financial evaluation. Those bidders who score below 70 points will be eliminated at this stage from the entire evaluation process and

will not be considered further. The lowest evaluated responsive bid amongst the bidders with a score of 70 points will be recommended for award based on competitiveness of each individual firm..."

From the score sheet of the technical evaluation, the Board observes that the Applicant was awarded a total of 53 marks, which was below the 70 marks required to proceed to the financial evaluation stage.

The Board takes cognizance of the applicable law on evaluation which is found at 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 further notes that Regulation 49(1) which is relevant to the issue of technical evaluation provides as follows:-

Regulation 49(1) *"Upon completion of the preliminary evaluation under Regulation 47, the evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the description of goods, works or services in the tender document."*

The Board observes the following regarding the scoring of the parameters in contention:

Item iii) At least one certificate holder of key personnel in relevant engineering field:

The Applicant was awarded 0 out of 5 marks in this parameter.

Board observation

There was one certificate holder in quantity surveying who ought to have been awarded marks. The Board finds that the Procuring Entity's phrase, *relevant engineering field*, is ambiguous and appears calculated to be used to lock out key personnel of the Applicant and who are otherwise qualified for the task the procurement was intended to undertake. The Board is further persuaded that the term *Certificate holder* is not synonymous with *artisan* as argued by Counsel for the Procuring Entity during the hearing and the score ascribed to one is not transferable to the other. The Board also finds that, in any case, degrees and diplomas are also certificates and the Procuring Entity did not distinguish between degree certificate/diploma certificate holders from *Certificate holders* in the tender document.

Item vi) On-going projects:

The Applicant was awarded 0 out of 5 marks in this parameter.

Board observation

The Applicant submitted a letter dated 13th February 2016 confirming a contract award for Friends Church Makadara sanctuary and another one dated 16th December 2016 to the effect that the Applicant had undertaken the construction satisfactorily. The Board is satisfied that, at the time of submission of tender, this was an on-going project since even construction was completed, the project was still in the first month of the defects period which is an industry standard of six months. The Applicant therefore ought to have been awarded marks for this parameter.

Item vii) Schedule of contractor's equipment and transport (proof or evidence of ownership):

The Applicant was awarded 0 out of 11 marks in the second part of this parameter.

Board observation

The Applicant provided receipts and invoices of equipment it purchased. Receipts denote proof of payment and the Procuring Entity was at liberty to conduct due diligence at the Applicant's premises to confirm the existence of the equipment. Marks ought to have been awarded for the equipment and for means of transport.

Item viii) Financial Report: Audited financial report (last three years 2013, 2014, 2015):

The Applicant was awarded 0 out of 10 marks in this parameter.

Board observation

The Applicant submitted two audited financial reports, one for the period 1st July to 30th June 2015 and the other for the period 1st July to 30th June 2016 but not for three years 2013, 2014, 2015 as required. The Applicant could not have been awarded the marks for failure to comply with the requirement of the tender document.

Item ix) Evidence of Financial Resources (cash in hand, lines of credit, overdraft facility, etc):

The Applicant was awarded 0 out of 10 marks in this parameter.

Board observation

The Applicant's audited financial statements showed a cash balance but no form of evidence to confirm cash in hand was submitted as required. The Applicant could not have been awarded marks for failure to comply with the requirement of the tender document.

Item x) Access to Liquid Finances:

The Applicant was awarded 0 out of 5 marks in this parameter.

Board observation

The Applicant did not provide evidence of access to liquid finances from a reputable bank or credit facility of up to 5 million and therefore was not awarded marks.

Taking into consideration the foregoing the Board finds that the Applicant was not correctly scored at the technical evaluation stage. Examples of parameters of technical evaluation that the Board noted not to have been correctly evaluated were as follows:

1. *Item iii) - At least one certificate holder of key personnel in relevant engineering field*
2. *Item vi) - On-going projects*
3. *Item vii) - Schedule of contractor's equipment and transport*

The Board is convinced that the Applicant was not correctly awarded marks and that some of its marks were not given to it resulting in a score well below the 70 mark threshold. The Board observes that it is not possible for it to ascertain exactly how many marks in total the Applicant would have received had the Procuring Entity correctly evaluated the Applicant's bid at technical evaluation stage. The Board is not in a position to ascertain whether or not the Applicant would have passed the 70 mark threshold to enable its bid progress to the financial evaluation stage. The Board believes that the responsibility to so determine lies in the province of the Procuring Entity's evaluation committee.

In view of the foregoing, the Board finds and holds that the Procuring Entity breached the provisions of Section 80 (2) of the Act. This ground of review therefore succeeds and is allowed.

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

1. The Request for Review filed by the Applicant on 24th March 2017 in respect of Tender Number RU/OT/13/16-18 for the Proposed Construction of Main Campus Gate and Gate House at Rongo University be and is hereby allowed.
2. The award of the Tender subject of this request for Review to the successful bidder be and is hereby annulled.
3. The Procuring Entity is directed to re-instate the Applicant's tender into the evaluation process and re-evaluate its tender from the technical evaluation stage and award the tender to the lowest evaluated bidder upon complying with the evaluation criteria in the tender document and in compliance with the provisions of Section 86 of the Act within fourteen (14) days from the date of this decision.
4. In view of the orders of the Board all parties shall bear their own costs.

Dated at Nairobi on this 13th day of April, 2017.


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CHAIRMAN
PPARB


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SECRETARY
PPARB

