

REPUBLIC OF KENYA**PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD****APPLICATION NO. 17 OF 2005****BETWEEN****ABDULHARIM AHMED BAYUSUF & SONS LTD.....APPLICANT****AND****GALOLE CONSTITUENCY DEVELOPMENT FUND.....PROCURING ENTITY**

(Appeal Against The Decision Of The Tender Committee Of Galole Constituency Development Fund (Procuring Entity) Dated 9th April, 2005, In The Matter Of Tender No. Project 022/01 To Project 022/12

PRESENT

- | | | |
|------------------------|---|-----------|
| 1. Mr Richard Mwongo | - | Chairman |
| 2. Mr John W. Wamaguru | - | Member |
| 3. Mr P. M. Gachoka | - | Member |
| 4. Prof. N. D. Nzomo | - | Member |
| 5. Mr A. S. Marjan | - | Member |
| 6. Mr Kenneth Mwangi | - | Secretary |

BOARD'S DECISION

Upon hearing the representations of the parties and upon considering the information in all the documents before it, the Board hereby decides as follows:-

BACKGROUND TO THE APPEAL

Galole Constituency Development Fund (hereinafter referred to as CDF Galole) invited tenders for construction of 12 projects scattered throughout the Constituency.

The advertisement was placed in a notice dated 14th March, 2005 placed on the public notice board of Galole Constituency

Subsequent to the tender notice, a letter was written to all the tenderers informing them of the change of deadline for submitting the bids and for opening respectively.

THE CONDITIONS FOR TENDERING

1. Must be qualified and registered contractors.
2. Successful bidder to be able to provide equipment and the machinery necessary for proper execution of the works.
3. They should be able to provide security and performance bond for the contract.
4. They will be required to have a programme of works in order to undertake the works without unnecessary delay.
5. Must be tax compliant.

COLLECTION OF TENDER DOCUMENT

Tenders were to be collected at CDF Office Hola upon payment of Kshs. 3,000.00

POINT AT WHICH TENDERS WERE TO BE SUBMITTED

To be addressed to the Chairman, Galole Constituency Development Fund or delivered to the CDF Office Hola.

PERIOD OF SUBMISSION AND RETURNING OF DOCUMENTS

The tenders were to be submitted not later than 26th March, 2005 at 12 noon, but the period of closing the submissions was extended to 31st March, at the same time while the opening was to be on the 6th April, 2005.

NOTIFICATION OF AWARD

The notification of award to the successful bidder was done vide a letter dated 15th April, 2005 and the projects were to be launched as follows:-

19 th April, 2005	-	Waldena Health Centre	-	10.00 am
19 th April, 2005	-	Wayu Boro Dispensary	-	2.00 pm
20 th April, 2005	-	Chifri Dispensary	-	9.00 am
20 th April, 2005	-	Haroresa II	-	11.00 am
20 th April, 2005	-	Lenda Primary School	-	3.00 pm
21 st April, 2005	-	Wachakone Pri. School	-	2.00 pm
21 st April, 2005	-	Chewani Dispensary	-	4.00 pm
22 nd April, 2005	-	Majengo Health Centre	-	9.00 am
22 nd April, 2005	-	Maweni Primary School	-	12.00 noon
22 nd April, 2005	-	Makere Dispensary	-	10.00 am

22nd April, 2005 - Pumwani Dispensary - 2.00 pm
23rd April, 2005 - Kumibi Primary School - 2.00 pm.

JURISDICTION OF THE BOARD

By Act No. 10 of 2003, the Constituencies Development Fund was set up. The CDF fund is established under Section 4 of the said Act and the Act has a set out procedure under which the funds will be administered. It is clear from the Act that the money that is put into the Constituencies Development Fund are public funds that are set aside from Government Ordinary Revenues in every financial year.

The Act sets out an administrative and financial framework through which the implementation of the projects is carried out by the executive arm of the Government.

Section 31 of the CDF Act, 2003 stipulates that all works and services relating to the projects under the Constituency Development Fund shall be sourced using existing Government Procurement Regulations. At the moment the Government Procurement is governed by The Exchequer and Audit (Public Procurement) Regulations, 2001 as amended in the year 2002.

Section 2 of the Act deals with interpretation and the following definitions are relevant to this Appeal.

1. "Procurement - Means the purchasing, hiring or obtaining by any other contractual means of goods, construction and services".
2. "Public Procurement- Means procurement by procuring entities using public funds".
3. "Procuring Entity - Means a public entity undertaking a procurement".

It is clear from the above definitions that the Constituencies Development Committee set up Under Section 23(1) of the CDF Act is a public entity that has been set up to oversee the expenditure of the public funds that are released by the Government to the Constituency Account that is to be opened and maintained pursuant to Section 45 of the CDF Act.

In view of the foregoing it is not in doubt that the Board has the jurisdiction to determine this appeal.

FOUNDATIONS OF APPEAL

The Applicant M/s Abdulharim Ahmed Bayusuf & Sons Ltd has raised four Grounds of Appeal. The same were argued by Mr Sah Raseme on behalf of the said Applicant. On its part the Galole Constituency Development Fund was represented at the hearing by Mr Mailanyi Advocate. We will deal with the said Grounds of Appeal as follows:-

GROUND NO. 1

The Applicant alleges that it was not notified of the place and time for tender opening contrary to Regulation 23(e) of the Exchequer and Audit (Public Procurement) Regulations 2001 (hereinafter referred to as The Regulations). It is argued by the Applicant that although it was one of the bidders it was not notified of the place and the time of opening. On its part the Procuring Entity referred the Board to two notices both dated 14th March, 2005. The First notice is headed Tender Notice and it does not state the place and time of opening. The second notice of the same day is headed "closing and opening of tenders" and it is stated to be written further to the notice we have referred to. That notice extended the closing date of the tender to 31st March, 2005 and stated that the opening will be done on 6th April, 2005 at 10.00 am. We have perused the two notices and we agree with the Applicant that the place for the opening of tenders is not stated in either of the notices.

Regulation 23(1) (e) is framed in mandatory terms and states that the place and time of opening must be stated. The Procuring Entity failed to do this and we hold that there is a breach of Regulation 23(1) and this ground of appeal therefore succeeds.

GROUND NO. 2

The Applicant states in this ground that Tenders were not placed in a Tender Box contrary to Regulation 28 2(a) and (b) and that this allowed manipulation promoting the interest of individual committee members. The Applicant stated that the tenders were being submitted to the officers at the offices of Galole Constituency Fund. On its part the Procuring Entity stated that it had a Tender Box. According to the Procuring Entity it had placed a closed carton box at the offices where the Tenders were to be dropped. The successful tenderer, M/s Rakman Services Ltd confirmed to the Board that there was no Tender Box and that they gave their tender documents to the officers in the Constituency Development Fund Offices.

Regulation 28 2(a) makes it mandatory to have a box which should be clearly labeled "Tender Box" and which must be constructed in such a manner that it must be capable of having two locks whose keys shall be kept by two different offices.

Having heard the parties we agree with the Applicant that there was no Tender Box. This was also confirmed by the successful tenderer. Even if we accept the argument of the Procuring Entity that there was a carton or a box made of "hard paper", the Procuring Entity would still be in breach of Regulation 28 2(a).

Accordingly this ground of appeal also succeeds.

GROUND 3

The Applicant states that the Procuring Entity did not advertise the tender as per Regulation 22(1) and the time given to the tenderers was 13 days instead of 28 days as required by the Regulations.

Regulation 22 when read together with Schedule Two on thresholds makes it mandatory that tenders of Kshs. 5,000,000 and above be effected by open tender. Such tender must be advertised in at least three daily newspapers of nationwide circulation. The time allowed for such tenders is 28 days.

The Procuring Entity did not advertise the tenders and the time given was less than 28 days. Accordingly this ground of appeal also succeeds.

GROUND NO. 4

The Applicant states that the Respondent breached Regulation 17(b) in that it awarded a contract far in excess of the amount available in the CDF Account which is Kshs. 27,000,000.

Regulation 17(b) requires the Procuring Entity to ensure that sufficient funds are set aside in its budget to pay any amount due under the resulting contract for a tender that it floats.

The Procuring Entity stated that it only awarded tenders of Kshs. 27,000,000 and that is available under the Constituency Fund. The said sum is made up of a sum of Kshs. 6,000,000 which is already in the account and a further sum of Kshs 21,000,000 which is about to be disbursed to the Account and they have a written confirmation from the National Assembly that the said sum will be released soon.

The Board has looked at the evaluation report provided by the Procuring Entity. The said report shows that the contract was awarded to Rakman Services Ltd at a tender price of Kshs. 62,276,420. This was to cover various projects that are to be financed through the Constituency Fund. The notice of the tender did not compel the candidates to buy all the tenders to enable them to be awarded the tenders wholesomely. However, the Board notes from the letter of notification that all the projects were consolidated and awarded to

Rakman Services Ltd and that all the projects were to be launched for implementation between 19th April, 2005 and 23rd April, 2005.

The Procuring Entity has admitted that only Kshs. 6,000,000 is in the CDF Account and was expecting a further Kshs. 21,000,000. Therefore the evaluation report provided by the Procuring Entity shows that the contract was awarded to Rakman Services at a Tender price of Kshs. 62,276,420 and this was to cater for all projects. This award is clearly in breach of the regulation 17(6), and accordingly, this ground of appeal succeeds.

In view of the foregoing the Applicant has succeeded in all the four grounds of appeal. The only issue that is remaining for the Board to consider is what remedy the Board will grant under Regulation 42 (5).

The Procuring Entity stated at the hearing that although no contract has been signed, Rakman Services Ltd the successful tenderer has already moved on to various sites after the launching and has started various works. The said works are on the sum of Kshs. 6,000,000 that is already in the account. The successful Tenderer Rakman Services Ltd stated that it has commenced work and has already sent the invoice for the work done for an amount in excess of Shillings 5 million.

Since work has already commenced on the sum of Kshs. 6,000,000 already in the account it would be inappropriate for the Board to annul this part of tender, as it will amount to closing the stable after the horse has bolted. Accordingly we hold that Rakman Services Ltd may complete the work on the various sites as per the allocation of the said sum of Kshs. 6,000,000. The Tender was awarded irregularly but since the work is at an advanced stage and the contractor would in any event be entitled to claim for works done quantum meruit we hold that it will do more harm to public interest if we annul this part of the tender. However, we wish to bring to the attention of the Procuring Entity the provisions of Regulation 33(1) which states that, after the notification of the award, the Procuring Entity must wait for a period of Twenty One (21) Days that is the appeal window allowed to the unsuccessful tenderers to petition the Board. As such the commencement of the work before the expiry of Twenty One (21) Days was highly irregular and in breach of the regulations.

The second part of the Tender involve a sum of Kshs. 21,000,000 which is expected into the account as the necessary authorization for remittance has allegedly been given. As we have already observed, Rakman Services Ltd were awarded a tender for a sum of Kshs. 62,276,420. This means that the Procuring Entity is committing funds that have not yet been allocated to it. This award, as we have observed was made irregularly and there was a breach of many Regulations. Accordingly we annul this part of the award. The Procuring Entity must tender afresh tendering upon receipt of the said

sum of Kshs. 21,000,000. Such tender can only cover the money available as per Regulation 17(6). We wish to add that Planning is an integral process in procurement and it is used by the procuring entities as a tool outlining the broad phases and procurement processes involved for a particular project. The procurement plan covers the entire period of the project. The project period may cover one financial year or several financial years. However, the work plan should be based on the approved project proposals to which funds are allocated and disbursed. Any tender done must be on the basis of the funds so allocated and disbursed.

Finally, the Board wishes to make the following observations:-

1. Regulation 23(1) sets out the composition of the Constituency Development Committee. The same is to be headed by the Member of Parliament. As Regulation 31(1) requires all tenders and quotations to be done under the relevant Government Procurement Regulations it is imperative that the relevant tender committees be established to do the evaluation and make proposals of award. We say this because we have noted that there is a lot of mix up in this case between the Galole CDF Tendering Committee and Galole CDF Committee. The Board has perused a circular dated 18.11.2004 Ref. No. PPD 2/20/29A/10 written by the Permanent Secretary Ministry of Finance to the Chairmen of Constituency Development Committees, among others advising them that the Constituency Development Committee and District Projects Committees shall be recognized as Public Entities as provided in the Regulations and that Tender Committees must be set up in accordance with the First Schedule Paragraph 1.9 of the Regulations.
2. Constituency Development Fund involves public money and all the tendering procedures as set out in the Regulations must be strictly adhered to.
3. The bills of quantities used in these tenders were defective.

Delivered at NAIROBI this 23rd day of May 2005

A. S. Mwanja
.....
for CHAIRMAN
PPCRAB

[Signature]
.....
SECRETARY
PPCRAB

