

REPUBLIC OF KENYA

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD**

APPLICATION NO.36/2007 OF 18TH JUNE, 2007

BETWEEN

OTTAWA CANADA GARDEN CONSULTANCY.....APPLICANT

AND

**KENYA COLLEGE OF COMMUNICATION AND
TECHNOLOGY.....PROCURING ENTITY**

Appeal against the decision of the Tender Committee of Kenya College of Communications and Technology in the matter of Tender No. PQ/LS/2007/2008 for Ground Improvement and Landscaping Services.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Ms Phyllis N. Nganga	-	Member
Eng. D. W. Njora	-	Member
Mr. P. M. Gachoka	-	Member
Mr. J. W. Wambua	-	Member
Mr. John W. Wamaguru	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Holding Brief for Secretary
Mr. I. K. Kigen	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO.36/2007

Applicant, Ottawa Canada Garden Consultancy

Mr. Dickens M. Ouma	-	Advocate for the Applicant
Mr. Ottawa Canada	-	Landscaper
Mr. Zakayo Okwaro	-	Landscaper
Ms. Seve Ottawa	-	Landscaper
Ms. Priscillah Wanjiku	-	Designer

Procuring Entity, Kenya College of Communication and Technology.

Mr. N. B. Muriuki	-	Deputy Director
Mr. John Kanyoni	-	Estates Officer
Mr. Richard Kilel	-	Procurement Officer

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

This was an open tender advertised in the local dailies on 27th April, 2007. The tender was for Ground Improvement and Landscaping Services.

The tender closing/opening date was 18th May, 2007. Twenty nine (29) firms bought the tender documents and returned their completed bids.

The tenders were in the process of being evaluated at the time the appeal was filed.

THE APPEAL

This appeal was lodged on 18th June, 2007 by Ottawa Canada Garden Consultancy against the decision of the Tender Committee of Kenya College of Communication and Technology in the matter of Tender No. PQ/LS/2007/2008 for Ground Improvement and Landscaping Services.

The Applicant requested the Board to annul the tender award and any other relief that the Board may deem fit to grant.

The Applicant was represented by Dickens M. Ouma, Advocate while the Procuring Entity was represented by Richard Kilel and N. B. Muriuki.

The Applicant in its Request for Review has raised eleven (11) grounds of appeal. The Board hereby deals with the grounds as follows:-

The Applicant's complaint concerns tender No.PQ/CS/2006-07 for which the Applicant was a candidate as it submitted his tender.

Grounds 1-2

These are statements which do not allege the breach of any provisions of the law and therefore need no comment.

Ground 3

At the hearing the Applicant stated that the provisions of Section 60(2) of the Public Procurement and Disposal Act, 2005 which provided that tenders must be opened immediately after the deadline for submitting tenders was breached by the Procuring Entity.

The Procuring Entity stated that the annual tenders were opened in accordance with the provisions of the Public Procurement and Disposal Act, 2005 and to the Public Procurement and Disposal Regulations, 2006 and therefore no breach was committed by the Procuring Entity.

The Board observed that the complaint regarded Breach of Section 60(2) that the pre-qualification tenders were not opened on the tender opening date. The Board has further seen the register of tender opening, which contains the Applicant's signature dated 18th May 2007.

Accordingly, this ground of appeal fails.

Ground 4

During the hearing the Applicant argued that the Procuring Entity Breached Section 52(3) (a) read together with Section 34(1) of the Public Procurement

and Disposal Act 2005 and that the tender documents provided for in Tender No. TC/CS/MB/2007/2008 also contained specifications as detailed in pre-qualification document No.PQ/LS/2007/2008 for Ground Improvement and Landscaping services. This amounted to confusion and ambiguity in the tender specifications.

At the hearing the Procuring Entity responded that there were no tender specifications in the Pre-qualification document, PQ/LS/2007-2008 as alleged. The tender number for cleaning services was; TC/CS/MB/2007-8 and the above tender number, PQ/LS/2007-2008 was not similar.

The Board noted the complaint regarded breach of Section 52(3) read together with Section 34(1). That the tenders specifications for Pre-qualification Tender PQ/LS/2007-2008 and TC/CS/MB/2007-8 for cleaning had the same specifications. The Board noted that Applicant participated in the pre-qualification tender, which is not required by law to have any tender specifications. On the other hand the Applicant did not bid for tender TC/CS/MB/2007-8 for cleaning services and this was not subject of the complaint. In addition, the tender documents for pre-qualification and for cleaning services were perused by the Board and the two did not have similar specifications.

There was therefore no breach of the Act, the Regulations or Tender Documents.

Accordingly, this ground of appeal also fails.

Ground 5 & 6

At the hearing, the Applicant argued that unknown to it, and without the benefit of prior information from the Procuring Entity, its existing duties being Ground Improvement and Landscaping Services were lumped together with the provision of cleaning services (Mbagathi Campus).

The Applicant further argued that at the time of advertising the tenders, Pre-qualification and Request for Proposals, it was on site, and its contract was running. If at all the terms of its contract and the requirement for undertaking Ground Improvement and Landscaping Services were going to be varied; the Applicant should have been given prior information on such

variance before the advertisement or at the point of purchasing and taking the Pre-qualification documents.

In its response, the Procuring Entity argued that pursuant to the Act and Regulations, bidders should seek for clarifications on any item of information if they so wished as long as this was done before the closing of the tender. The Applicant herein did not seek for such information prior to the purchase nor before the closure of the annual tenders.

The Board has observed that these grounds were mere statements which did not allege the breach of any legal provisions on the tender document for which he participated. Further Procuring Entity was under no obligation in law to give prior information to the Applicant concerning where its existing contractual duties were to be placed in future tenders.

Therefore these statements had no basis of support and hence these grounds also fail.

Ground 7

The Applicant argued that the Procuring Entity vide its advertisement and opening of tenders, misrepresented directly or by implication that Ground Improvement and Landscaping services would be undertaken separately from cleaning services.

The Procuring Entity responded that Tender No.TC/CS/MB/2007/8 for Cleaning Services at Mbagathi Campus and Pre-qualification No. PQ/LS/2007/8 was a different item as set out in the tender advertisement notice.

The Board noted that this was a statement not alleging any breach of the law or tender document for which the Applicant participated. Further, the Applicant did not provide evidence of misrepresentation that the landscaping services it offered would be separated into cleaning services tender. The Procuring Entity was under no obligation to give bidders prior notice concerning how ongoing contracts they are performing will be treated in future.

This ground of appeal also fails

Ground 8

During the hearing the Applicant alleged that the Procuring Entity by its advertisement and subsequent opening of tenders on the 18th May 2007 misrepresented to the Applicant that it had no competitors in the Ground Improvement and Landscaping services, a fact they knew was not true.

The Procuring Entity responded that it did not Pre-determine who the bidders were in an open tender process.

The Board also noted that this was a statement that did not allege breach of any legal duty imposed on Procuring Entity. It amounted to an admission by the Applicant that it was aware of opening of tenders on 18th May, 2007.

This ground of appeal also fails.

Ground 9

The Applicant argued that, by failing to alert it on the need to apply for cleaning services of Tender No. TC/CS/MB/2007/2008 so as to competitively bid for the same with others, the Procuring Entity suppressed material facts from the Applicant to disentitle it from putting its bid for the services.

In its response, the Procuring Entity stated that adequate tender information was availed to all bidders, both in the tender advertisement notice and the contents of the tender documents sold to all bidders who participated in the tender process.

The Board observed that this was a statement that did not specify breach of the legal duty imposed on the Procuring Entity. The Applicant did not show what legal duty was imposed on Procuring Entity to alert the Applicant to apply for cleaning services. The Procuring Entity's duty was to advertise tenders, which it did on 27th April, 2007 pursuant to Section 54.

This ground of appeal also fails.

Grounds 10 & 11

At the hearing the Applicant argued that by including Ground Improvement and Landscaping Services under Tender No.TC/CS/MB/2007/2008, and purporting to invite pre-qualification for Ground Improvement and Landscaping Services, the Procuring Entity knowingly misled the Applicant into submitting a pre-qualification document that was not going to secure its services especially given that it was an existing service provider. The Applicant was denied an opportunity to exercise its right to a competitive bidding for delivery of services with the result that come the 1st day of July 2007, its services would no longer be required due to an unprocedural procurement process.

The Procuring Entity responded and stated that Tender No. TS/CS/MB/2007/8 was a different tender from PQ/LS/2007/8. The Procuring Entity further argued that the open tender procurement process was procedural, transparent and in complete compliance to the requirements of the Public Procurement and Disposal Act, 2005 and the Public Procurement and Disposal Regulations, 2006.

The Board noted that these grounds were statements that do not allege the legal duty breached by the Procuring Entity. There was no legal or other duty imposed on the Procuring Entity to ensure that the Applicant's services as an existing service provider were secured in future. No evidence was adduced to show that the Procuring Entity denied the Applicant the right to competitive bidding. Since the tenders were advertised it was for the Applicant to take advantage of the competitive procurement by tendering for them.

These grounds also fail.

Observations

The Applicant tendered for Pre-qualification of Ground Improvement and Landscaping Services. The Procuring Entity has not completed evaluating the tender which only the Applicant applied.

That tender was for services "as and when required" as per Section 1 Clause 5.5 of the tender. These would be requested by way of quotation. None of those services may be requested until the tender is awarded.

The Applicant's complaint was therefore premature, as no award had been made.

Applicant's Prayers

Prayer 1 This could not be granted as Applicant was not a candidate thereof and therefore raise complaints in respect thereof.

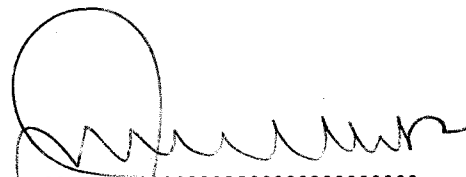
Prayer 2 This could not be granted as no impropriety was demonstrated in the tender for which the Applicant tendered.

Prayer 3 This could not be granted as the Board's jurisdiction did not extend to existing contracts. Board's remedies under Section 98 dealt only with procurement proceedings and not with ongoing contracts.

Taking into account all the above matters, the Appeal is hereby dismissed and the Procurement Proceedings are allowed to proceed.

Date at Nairobi this 10th day of July, 2007


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CHAIRMAN
PPARB


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SECRETARY
PPARB