

REPUBLIC OF KENYA

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 63/2007 OF 14TH NOVEMBER, 2007

BETWEEN

N. K. BROTHERS LIMITED.....APPLICANT

AND

NATIONAL SOCIAL SECURITY FUNDPROCURING ENTITY

Appeal against the decision of the Tender Committee of National Social Security Fund of 30th October, 2007 in the matter of Tender No. 01/2007-2008 for Proposed Completion of Social Security House Annexe-Parking Silo, Nairobi.

PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Mrs. L. G. Ruhiu	-	Member
Eng. C. A. Ogut	-	Member
Ms. J. A. Guserwa	-	Member
Mr. S. K. Munguti	-	Member

IN ATTENDANCE

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

PRESENT BY INVITATION FOR APPLICATION NO. 63/2007

Applicant, N. K. Brothers Limited

Mr. Anthony M. Lubulellah	-	Advocate, Lubulellah and Associates
Mr. W. A. Mutubwa	-	Advocate, Lubulellah and Associates
Mr. Pravin Khodo	-	Director
Mr. Rajesh D. Rathood	-	General Manager

Mr. Stephen Waweru - Technician

Procuring Entity, National Social Security Fund

Mr. Waweru Gatonye - Advocate, Waweru Gatonye and Co.
Advocates
Mrs. Anastasia Mbogo - Procurement Manager
Mr. Mr. Said Chitembwe - Corporation Secretary
Mr. Wycliffe Mutonyi - IT Manager

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 11th July, 2007. The Tender No. 01/2007-2008 was for Proposed Completion of Social Security House Annexe-Parking Silo, Nairobi.

The tender closing/opening date was 2nd August, 2007. Nine (9) firms bought the tender documents but only Seven (7) returned their duly completed bids. The tender was opened on the same date and attracted the following bidders: -

1. MCC20 Hainan International Limited;
2. N. K. Brothers Limited;
3. Capital Construction Company Limited;
4. Don-Woods Company Limited;
5. China Jiangsu International Economic Co-operation Corporation;
6. Lalji Mehji Patel & Company Limited; and
7. EpcO Builders Limited.

THE EVALUATION OF THE TENDER

The seven bidders were examined based on the following requirements: -

1. That the tender was submitted in the required format (plain outer envelope);
2. That the tender security submitted was in the required form, amount and validity period (Bank, 120 days);

3. That the tender had been signed by the person lawfully authorized to do so (form of tender);
4. That the required number of copies of the tender had been submitted (two copies);
5. That the tender was valid for the period required (90 days);
6. Valid NSSF compliance certificate;
7. Valid tax compliance certificate;
8. Details of directorship/ownership;
9. Audited accounts for the last 2 years;
10. Certificate of company/firms registration;
11. Ministry of Roads and Public Works, category A
12. Not to have been determined by the fund on any project within the last fifteen 15 years
13. Power of Attorney.

After the preliminary evaluation, bidders nos. 1, 2, 3, 4 and 6 failed to satisfy the mandatory requirements and were found to be non-responsive. Bidders Nos. 5 and 7 were responsive and proceeded to the technical evaluation.

The two firms namely namely; China Jiangsu International and Epc Builders Limited were evaluated technically based on the following parameters:-

1. Documents fully completed/compliance with pricing instructions (10 points);
2. Personnel (20 points);
3. Relevant experience (25 points);
4. Machinery & Equipment (15 points);
5. Business support (25 points);
6. At least 3 referees, with letters from the references attached (15 points);
and
7. Completion period for the works (5 points).

Based on the above, China Jiangsu International attained 45 points while Epc Builders Limited attained 93 points. The pass mark was 75 points and therefore only Epc Builders Limited qualified for the financial evaluation.

The Evaluation Committee recommended that Epc Builders Limited be awarded the contract at their bid price of Kshs. 592, 159, 369.00.

In its meeting held on 30th October, 2007, the Tender Committee adjudicated and awarded the contract to Epc Builders Limited at their tender price of Kshs. 592, 159, 369.00.

X THE APPEAL

This appeal was lodged on 14th November, 2007 by N. K. Brothers Limited against the decision of the Tender Committee of National Social Security Fund in the matter of Tender No. 01/2007-2008 for Proposed Completion of Social Security House Annexe-Parking Silo, Nairobi.

The Applicant requested the Board for orders that:-

1. The said decision be set aside; and
2. The contract be awarded to the Applicant.

The Applicant was represented by Mr. Anthony M. Lubulellah, Advocate, while the Procuring Entity was represented by Mr. Waweru Gatonye, Advocate. The interested candidate was represented by Mr. Andrew Wandabwa, Advocate.

The Applicant in its Request for Review has raised 2 grounds and the Board deals with them as follows:-

Ground 1 – Breach of Section 39(1) of the Act.

Counsel for the Applicant argued that the Procuring Entity included in its tender a requirement *“Not to have been determined by the fund on any project within the last 15 years”* without any statutory authority. According to the Applicant, this amounted to limiting participation contrary to Section 39(1) of the Act.

Counsel invited the Board to note that this matter had been the subject of two previous appeals as follows:-

1. Appeal No. 5/2006 of 27th January, 2006
2. Appeal No. 20/2006 of 8th May, 2006.

Counsel further stated that there was an ongoing arbitration case with regard to the same project between the Applicant and the Procuring Entity.

Counsel argued that the determination clause was in contravention of Section 31(6) which states *“No person shall be excluded from submitting a tender, proposal or quotation in procurement proceedings except under this Section and under Section 39.”*

Counsel further argued that the preliminary evaluation of tender requirement that the candidate should not have been determined by the Fund on any

project within the last fifteen years, targeted the Applicant, was discriminatory and illegal since no such criteria was provided for, anticipated or contemplated by the Public Procurement and Disposal Act, 2005 or the Public Procurement and Disposal Regulations, 2006. Counsel concluded that the determination clause was not under the purview of Section 31(1) and that the Procuring Entity did not have discretion over the matter. Further, the question of determination was not fully concluded as it was the subject of the ongoing arbitration.

Counsel further submitted that another evaluation criterion was that the tenderers were to provide a "Valid NSSF Compliance Certificate".

Counsel argued that this was not a statutory mandatory requirement as contemplated by the Act. In any event, the inspection report of March 8th, 2007 that was submitted by the applicant with its tender confirmed that there was compliance in regard to NSSF requirements. Counsel stated that even if the inspection report was to be rejected, then this could only amount to a minor deviation which could not be used to disqualify the applicant's bid.

The Applicant also argued that it received a notification of its unsuccessful bid on 8th November, 2007 although the notification letter was dated 1st November, 2007. The Applicant argued that it had been denied the right to fourteen days within which to file their application.

Finally, the Applicant submitted that the Procuring Entity had denied it the evaluation documents and a summary of the evaluation report which they had requested by their letter of 14th November, 2007. Counsel argued that this was in breach of section 44(3) of the Act and that lack of this information prejudiced its appeal.

In response, counsel for the Procuring Entity submitted that the appeal had no merit whatsoever, was in bad faith and had an ulterior motive.

Counsel refuted the Applicant's allegation that the Procuring Entity had no statutory mandate to include the determination of tenderers as an evaluation criterion. Counsel argued that the Procuring Entity had powers under the Act to evaluate tenders and it should therefore be left free to determine the criteria for evaluation.

Counsel for the Procuring Entity referred to Section 31(1) (a) of the Act and argued that demonstration of capability and experience was a crucial provision in the section. Counsel further argued that the qualification, capability and experience of a bidder could only be established by its track record and past experience. Counsel stated that it made basic sense for the

Procuring Entity to ask whether or not a bidder had successfully completed all its past contracts. Counsel pointed out that determination was a serious matter which could not be ignored.

Finally, Counsel further pointed out that the Applicant was not barred from participating in the tender, but was allowed to participate like any other bidder. It therefore denied that there was discrimination as alleged by the Applicant.

With regard to the issue of NSSF compliance certificate, counsel argued that this was not part of the initial grounds that the Applicant had raised and could therefore not be part of the appeal. Nevertheless, Counsel pointed out that this was another criteria which had led to the applicant's bid been unsuccessful. Counsel argued that the letter of inspection dated 8th March, 2007 that was included in the Applicant's tender documents could not qualify as a Compliance Certificate. Counsel submitted that this criteria was important as it helped establish bona-fide identity of the bidders in view of the many so called briefcase/cowboy contractors. It submitted that the Compliance Certificate was meant to establish whether tenderers were up to date with their statutory contributions. Counsel concluded that the issue of NSSF Certificate was part of the mandatory requirements and it could not be treated as a minor deviation.

The Procuring Entity argued that the Applicant's allegation that it sent a notification letter on 1st November, 2007 was false as all notification letters were physically delivered to all bidders on 7th November, 2007. The fourteen days appeal window started running from 7th November, 2007 and not otherwise as alleged.

In conclusion, the Procuring Entity argued that it received the letter requesting for the summary of evaluation on 14th November, 2007 but before it could respond it was served with notice of the appeal on 15th November, 2007.

On its part, the interested party, concurred with the arguments of the Procuring Entity. It emphasized that the Procuring Entity had statutory authority under Section 31 to use any evaluation criteria so long as the criteria was pre-set and included in the Tender Documents.

The Board has carefully examined the alleged breach and noted that Section 39 (1) provides as follows:-

“Candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the Regulations.”

The Board notes that one of the criteria included in the tender notice and Tender Documents states as follows:-

“Not to have been determined by the Fund on any project within the last fifteen years”.

Clearly, this criterion targeted all the previous contractors whose contracts had been previously terminated within the past fifteen years. This was a mandatory requirement that applied to all bidders and not just the Applicant. Therefore, the allegation that this was discriminatory to the Applicant is not correct. The fact that the Applicant's previous tender in respect of this particular project had been determined did not make the clause discriminatory.

Section 31(1) (a) of the Act provides as follows:-

“A person is qualified to be awarded a contract for procurement only if the person has necessary qualifications, capability, experience, resources, equipments and facilities to provide what is being procured”.

The Procuring Entity may use a criterion of past performance to confirm whether or not a bidder has the necessary capability to be awarded a contract for a procurement.

Further, Section 31(3) and (4) provides as follows respectively:-

“The criteria under subsection (1) and any requirements under subsection (2) shall be set out in the tender documents or the request for proposals or quotations or, if a procedure is used to pre-qualify persons, in the documents used in that procedure.”

“The Procuring Entity shall determine whether a person is qualified and that determination shall be done using the criteria and requirements set out in the documents or requests described in subsection (3).”

It is clear that the Procuring Entity has been given the discretion to determine whether a bidder is qualified as long as the criteria is set out in the tender document.

As the Board has already noted, the Procuring Entity did not use any criteria that was not set out in the tender documents.

Finally, the Board notes that the determination period of fifteen years is rather punitive.

On the issue of the NSSF Compliance Certificate, the Board has noted that as part of the preliminary evaluation, the tender document required bidders to submit an NSSF Compliance Certificate. Again this requirement equally applied to all the bidders. It was established that the Applicant did not attach a Certificate of Compliance to its bid. Rather, the Applicant attached an inspection report dated 8th March, 2007 which stated in part as follows:-

*“Refer to inspection visit made to your place of work and evaluation of records carried out. The following was noted:-
.....All contributing workers were found to be registered. You were advised to collect their statements to facilitate updating of their accounts. You were noted to have some newly recruited staff who had not commenced contributions. Ensure they are registered and effect their contributions at the end of the month.”*

The Board has noted that this tender was advertised on 11th July, 2007 and the tender closed/opened on 2nd August, 2007. There is no explanation by the Applicant why it failed to submit an NSSF Compliance Certificate. The Board has further noted that the successful bidder had provided the Compliance Certificate. Therefore, the Procuring Entity rightly disqualified the Applicant at the preliminary evaluation stage.

With regard to the issue of notification, the Board observes that the Applicant was notified on 7th November, 2007 and was able to file the appeal within time and therefore no prejudice was suffered.

Finally, on the request by the Applicant for evaluation documents and a summary of the evaluation the Board has noted that the letter for request was dated 14th November, 2007 the same day the Applicant filed its appeal. Section 44(3) provides that a bidder is entitled to a summary of the evaluation report. Though no period is given for provision of the summary evaluation report, this should be within a reasonable period. However, the Applicant made its request on 14th November, 2007 and filed its Appeal on the same day. Accordingly, it can not be said that the Procuring Entity breached Section 44(3) as argued by the Applicant.

Considering the above matters the Board finds that the Procuring Entity did not breach Sections 31, 39(1) and 44(3) of the Act.

Taking all the above in consideration, all the limbs of that ground fail.

Ground 2 – Breach of Section 66 (2), (3) and (4) of the Act.

The Applicant submitted that the Procuring Entity adopted an evaluation criterion which was discriminatory, subjective and unquantifiable. Further, it argued that the Procuring Entity accepted a tender which was not the lowest tender in breach of section 66(2), (3) and (4) of the Public Procurement and Disposal Act, 2005 to the detriment of the Applicant.

In response, the Procuring Entity stated that it had duly complied with the criteria set for evaluation. In addition, the evaluation criteria were set for all interested bidders. No evidence of discrimination had been put forward, demonstrated nor proved.

The Procuring Entity further argued that, the requirement in regard to determination, was part of the advertisement as well as being part of the tender evaluation criteria set out in the tender documents. The same was applicable to all bidders and was not in any way targeting the applicant. The Procuring Entity further submitted that the criteria on Determination had been used by the Procuring Entity on other tenders in respect to other projects. The Procuring Entity stated that it had in the past determined other contractors in regard to the Nyayo Housing Project in Embakasi.

On its part, the Interested Party argued that the allegation of discrimination could not be valid since the applicant had not stated which category of people was being targeted.

On Section 66(4) of the Act, Counsel argued that there was no breach since the Section provides for “the lowest evaluated price” and not “the lowest tender” as alleged by the applicant. The successful bidder was therefore, rightfully awarded the tender since it had the lowest evaluated price.

The Board has scrutinized the documents and noted the alleged breaches in regard to the evaluation of tenders. Arising from the foregoing, three issues emerge:-

- a) Whether the evaluation criteria was set out in the tender document,
- b) How the Procuring Entity applied the aforesaid criteria in the evaluation process and

- c) The distinction between “the lowest bidder” and “the lowest evaluated bidder”.

The Board notes that the evaluation criteria were clearly set out in Appendix D of the tender document.

The Board further notes that the Procuring Entity evaluated all bidders based on the criteria set out in the tender document, and that out of the seven bidders, only two were found to be responsive. The Applicant was one of the five who were found to be non-responsive as it did not meet the preset evaluation criteria. As a result, the Applicant did not proceed to the technical evaluation. The Board has further noted that the Applicant did not raise an issue on the evaluation criteria set out in the tender document prior to bid submission.

The Board further notes that the Applicant had alleged that the tender was not awarded to the lowest bidder. Section 66 (4) states that “*the successful tender shall be the tender with the lowest evaluated price.*” In this case, the Applicant was not evaluated technically as it was found to be non responsive at the preliminary stage. The Applicant’s Tender price does not therefore qualify as the lowest evaluated tender price.

Accordingly, this ground of appeal fails.

Taking into account all the foregoing matters, the appeal fails and is hereby dismissed.

Accordingly, the procurement process may proceed.

Dated at Nairobi on this 11th day of December, 2007


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CHAIRMAN
PPARB


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SECRETARY
PPARB