REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.70/2007 OF 17TH DECEMBER 2007

BETWEEN

OTIENO ODONGO & PARTNERS.....APPLICANT

AND

MIMISTRY OF WATER & IRRIGATION....PROCURING ENTITY

Appeal against the decision of the Tender Committee of the Ministry of Water & Irrigation in the matter for Consulting Services for the Engineering Design and Construction Supervision of Intake Wells for Garissa Water.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	-	Chairman
Mr. Joshua W. Wambua	-	Member
Amb. C.M Amira	-	Member
Mrs. L. G. Ruhiu	-	Member
Mr. Akich Okola	-	Member
Ms. Natasha Mutai	-	Member
Ms. Judith Guserwa	-	Member
Eng. C. A. Ogut	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Board Secretary
Mr. P. M. Wangai	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO.70/2007

Applicant, Otieno Odongo & Partners

Mr. Alex S. Masika	-	Advocate, Masika & Koross Advocates
Mr. Oduor A. Awuor	-	Lawyer, Masika & Koross Advocates

Procuring Entity, Ministry of Water & Irrigation

Mr. Ondara Ouma	-	Chief Procurement Officer
Mr. I. G. Kimani	-	Geologist
Mr. S. M. Theuri	-	Engineer

Interested Candidate

Eng. A. A. Mohamed Bhai	-	Director, Howard Humphreys (EA) Ltd
Mr. Bernard Ochieng'	-	Manager, Water and Sanitation

BOARD DECISION

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

BACKGROUND

The Request for Proposals for Consulting Services for the Engineering, Design and Construction supervision of Intake Wells for Garissa Water supply was given out to five firms on 16th October, 2007 namely:-

1. H.P Gauff KG Consulting Engineers
2. CAS Consultants Led
3. Wanjohi Consulting Engineers
4. Otieno-Odongo & Partners
5. Howard Humphreys E.A. Ltd

The technical proposals were opened on 9th November, 2007 for the four firms who had responded excluding H.P. Gauff KG Consulting Engineers who had declined.

These were subjected to a technical evaluation. Bidder No.4 (the Applicant) failed to attain the pass mark of at least 70% and was therefore disqualified.

The Procuring Entity returned un-opened, the financial bid of the Applicant vide a letter dated 3rd December, 2007.

The financial bids for the remaining three (3) bidders were opened on 5th December, 2007. The request for appeal was lodged on 17th December, 2007. The tender process has not bee completed.

THE REVIEW

This Application for request for review was lodged on 17th December,2007, by Otieno Odongo & Partners against the decision of the Technical Evaluation Committee of the Ministry of Water and Irrigation, Procuring Entity of 28th November,2007 disqualifying them for being technically non-responsiveness in the matter of Request for Proposals (RFP) for Consulting Services for the Engineering Design and Construction supervision of the intake Wells for Garissa Water Supply and requesting them to collect their unopened financial bid.

The Applicant was represented by Mr. Alex S. Masika Advocate, and the Procuring Entity was represented by Mr.Ouma Ondara. The interested candidate was represented by Eng. Mohammed.

The Applicant requested the Board to make the following orders:

a. Annul in whole the decision of the Technical Evaluation Committee of the Procuring Entity
b. Give directions to the Procuring Entity to adopt the procedures and criteria set out in the RFP document and there be a re-evaluation.
c. The Procuring Entity be condemned to pay costs of Appeal for the Applicant.

In its request for review the Applicant raised three grounds of appeal which the Board deals with as follows:

Grounds 3, 4 and 5: Breach of Sections 81(2)(e)1(iii), 82 (1) and 82 (2)

The three grounds have been consolidated since they raised similar complaints.

The Applicant submitted that the Technical Committee of the Procuring Entity had wrongfully declared its bid technically non responsive. It further submitted that whereas the qualifying mark was 70%, the Applicant attained 69%.The Applicant argued that the Procuring Entity acted in breach of Section 81(2) (e) iii of the Public Procurement & Disposal Act, 2005 by introducing additional requirements and changing the criteria for evaluation not provided for in the Request for Proposals (RFP) document. It further argued that the Procuring Entity acted in breach of Regulation 16(5) (a) by failing to adhere to the criteria set in the RFP document.

The Applicant further submitted that the Procuring Entity acted in breach of Section 82(1) of the Public Procurement & Disposal Act, 2005 by not examining the bids in accordance with the criteria and procedures set out in the RFP document. It further submitted that the Procuring Entity had powers to change the RFP document through an addendum to all bidders which was not done. It stated that the financial proposals for three bidders had already been opened. In conclusion, the Applicant urged the Board to annul the tender.

In response, the Procuring Entity submitted that it did not breach of Sections 81(2) (e) iii and 82(1) of the Public Procurement & Disposal Act, and Regulation 16(5) (a). It admitted that it changed and introduced new criteria. It stated that the change which was done with emphasis on the Ground water was to enable the Technical Evaluation Committee undertake a more comprehensive evaluation. It stated that the change and introduction of the new criteria was done in good faith and applied equally across board. However, it admitted that it did not inform the bidder of the changes of evaluation criteria. The Procuring Entity further stated that it was familiar with the requirements of the Act regarding notification of changes before the deadline for submitting the RFP documents. In conclusion, it agreed to abide with the decision of the Board.

The Interested candidate, Howard Humphreys represented by Mr. A. A. Mohamed Bhai submitted that they were unable to comment on the subject matter since they did not have the summary of the evaluation report.

The Board has carefully considered the submissions of the parties and documents submitted before it.

The Board has noted that this was a RFP whose evaluation was to be conducted in two stages. The technical Evaluation was to be done first and the bidders who attained a 70% minimum score were to proceed to the financial evaluation. The Applicant failed to attain the minimum technical score and accordingly its bid was rejected. It is clear by its letter dated 3rd December, 2007 that the Procuring Entity notified the Applicant that its bid was technically non-responsive.

The Board has carefully examined both the RFP documents and evaluation report of the Technical evaluation committee and observed that the criteria for evaluation were provided for at clause 18 the RFP document. Further, it has observed that Procuring Entity changed the Evaluation criteria in the process of the Evaluation and introduced additional parameters which varied the marks as follows:-

Item	Description	Max Score
1	Evidence of experience gained in the last 10 years	
1.1	Water Supply and Sanitation	
a	Feasibility Study	4
b	Preliminary Design	3
c	Detailed Design Study	3
d	Tendering	2
1.2	Groundwater Development And Exploitation	
a	Feasibility Study	4
b	Preliminary Design	2
c	Detailed Design Study	2
d	Construction Supervision	3
e	Operation, Maintenance of similar projects	1
f	Preparation of EIA	6
	Sub-total	30

The Board has also observed that the following items which were in the initial evaluation criteria were omitted.

Item	Description	Max Score
1	Design Manual preparation/scientific or Technical Studies	8
2	Operation, Maintenance and Capacity Building	4

The Board has noted that the Procuring Entity in its response to the Request for Review admitted that it changed the evaluation criteria. The change of criteria is contrary to Sections 81(2) (e) 1(iii), 82 (1) and 82 (2) of the Public Procurement and Disposal Act. The Procuring Entity should have cancelled the bid at the point it realized that it had omitted a major criteria in the RFP document.

Accordingly, these grounds of Appeal succeed.

Taking into account all the foregoing matters the Appeal succeeds and the Tender is hereby annulled.

Accordingly the Procuring Entity may re-tender.

Dated at Nairobi on this 14th day of January, 2008.

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CHAIRMAN
PPARB

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SECRETARY
PPARB