

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 11/2008 OF 26th MARCH, 2008

BETWEEN

ITALBUILD IMPORTS LTD..... (APPLICANT)

AND

MINISTRY OF ROADS AND PUBLIC WORKS..... (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of The Ministry of Roads and Public Works dated the 6th day of March, 2008 in the matter of Tender No. 14/B/07/08 for Completion of Mitihani House Phase V for Kenya National Examination Council, South "C" Nairobi

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Ms. Loise Ruhiu	-	Member
Eng. C. A. Ogut	-	Member
Mr. S. K. Munguti	-	Member
Ms. J. A. Guserwa	-	Member
Amb. C. M. Amira	-	Member
Ms. Natasha Mutai	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
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PRESENT BY INVITATION FOR APPLICATION NO.11/2008

Applicant, Italbuild Imports Ltd

Mr. William Wameyo	-	Advocate, Musinga Munyithya Co. Advocates
Mr. Vittorio Venezian	-	Managing Director
Mr. Philip Ndolo	-	Director

Procuring Entity, Ministry of Roads and Public Works

Mr. Kenneth Mwangi	-	Director of Procurement
Ms. Truphosa Achar	-	Legal Officer
Mr. J. J. Okwapo	-	Quantity Surveyor
Mr. Geoffrey Mbinga	-	Chief Quantity Surveyor
Mr. Gilbert Kimaiyo	-	Procurement Officer I

Interested Candidates

Mr. J. G. Mwenda	-	Advocate, Murungi & Co Advocates
Mr. G. G. Wambugu	-	Managing Director, Ongata Works Ltd
Mr. Anthony Burugu	-	Advocate, Kamunye Gichigi & Burugu Advocates
Mr. H. S. Buttla	-	Jaswant Singh & Brothers

BOARD'S DECISION

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

BACKGROUND

The tender for the Proposed Completion of Mitihani House Phase V for Kenya National Examination Council South 'C' Nairobi was advertised in the local dailies on 7th November, 2007. The tender closed/opened on 5th December, 2007. Ten (10) firms bought the tender documents and returned their completed bids on the closing day.

THE EVALUATION

The bids were first evaluated on eligibility and responsiveness. The Procuring Entity examined the following requirements: - Bid Bond; Classification; Form of tender; Tax compliance; Business questionnaire and Past performance. Five bidders were found to be non – responsive and were eliminated.

The remaining five, including the Applicant, were then evaluated on the technical parameters. The Technical Evaluation Committee examined the following:-

1. Arithmetical check;
2. Distribution of tender amounts; and
3. Comparison of rates for major items.

After the Evaluation, the Procuring Entity found that the tenders for the Applicant, M/s Italbuild Imports Limited, and the successful bidder, Ongata Works Limited, were capable of satisfactory performance and were closest to the official estimate. The Procuring Entity noted in its observations that the Applicant had four other on-going projects while the Successful bidder had only one project. Therefore, the Procuring

Entity did not award the Applicant the tender, though its tender was the lowest evaluated. The Procuring Entity considered that awarding additional works to the Applicant may affect its performance considering that one of the Applicant's ongoing Projects was nearly 700 Km from Nairobi.

The second lowest bidder, Ongata Works Limited, was then recommended and awarded the tender at its bid of Kshs. 865,582,801.00

THE APPEAL

This Appeal was lodged on the 26th day of March, 2008 by Italbuid Imports Limited against the decision of the Tender Committee of the Ministry of Roads and Public Works communicated in a letter dated 10th March, 2008 in the matter of Tender No. 14/B/07/08 for Proposed Completion of Mitihani House Phase V for Kenya National Examination Council South 'C', Nairobi.

The Applicant was represented by Mr. William Wameyo, Advocate, Musinga Munyithya Company Advocates while the Procuring Entity was represented by Mr. Kenneth Mwangi, Director of Procurement. Interested Candidates, Ongata Works Limited and Jaswant Singh and Bros Limited were represented by Mr. Mwendwa, Advocate, and Mr. Burugu, Advocate, respectively.

The Applicant in its Request for Review has raised seven (7) grounds of appeal.

The Board deals with them as follows:-

Ground 1 – That the Applicant forwarded the tender documents as required

At the hearing, the Applicant clarified that this was a statement of fact and not a ground for appeal and withdrew this ground.

Ground 2 – That the Applicant attended the tender opening on 5th December 2007

At the hearing, the Applicant clarified that this was a statement of fact and not a ground for appeal and also withdrew this ground.

Ground 3 – That the Applicant was the lowest evaluated and responsive tenderer

The Applicant submitted that it was the lowest evaluated responsive tenderer based on paragraph 7 of its Statement accompanying the application for review. It stated that it had participated in procurement proceedings of the Procurement Entity in the past, and going by past record, it was persuaded to believe that it was likely to have been found responsive after the technical review, and amongst other tenderers it was

most likely the lowest evaluated tenderer. It argued that after having qualified through all the stages, the Procuring Entity must have considered exterior factors and/or other irrelevant considerations.

It further argued that the Procuring Entity's written response to this ground for review, which stated reasons as to why the Applicant's bid was found not to be the lowest evaluated bid, were not a correct assessment of the Applicant's estimated annual turnover for the year 2007. It stated that its list of projects for that year were presented together with its submitted tender documents and had the Procuring Entity taken into account the relevant projects, it would have found the Applicant to be compliant. The Applicant further stated that the Procuring Entity only considered the Applicant's bank credit facilities and did not consider its liquid assets to meet the tender document requirement in Clause 1.7(b). The Applicant further stated that at the time of award, it only had four ongoing projects (two as main contractor and two as sub-contractor) all of which were over 70% complete and on time.

In addition, the Applicant stated that it had complied with all the mandatory requirements as stated in the tender; that its annual cashflow was well within the tender requirements stated in Clauses 1.7(a) and (b) of the Tender Document; and that it had the necessary experience required.

In its response, the Procuring Entity submitted that the Applicant was not the lowest evaluated bidder as alleged and that the evaluation of the bid was based strictly on the evaluation criteria set out in Clause 1.7 of the Tender Document which was also in accordance with Section 31 of the Public Procurement and Disposal Act, 2005.

The Procuring Entity argued that the Applicant failed to meet the said evaluation criteria in that the Applicant's annual turnover of construction work was lower than the benchmark set in Clause 1.7 (a) of the Tender Document. It argued that the Applicant when compared with the successful bidder had a lower turnover of projects in the period under review and that the successful bidder had handled higher amounts of work. The Procuring Entity stated that the Applicant's bank line of credit was below the minimum set in Clause 1.7 (b) of the Tender Document.

The Procuring Entity further argued that the works claimed, by the Applicant, as omitted from the computation of the annual turnover were likely to be small works and were not omitted; and that the Applicant based on failing to meet the benchmark annual turnover, credit facilities and lower value of projects handled, did not qualify to be awarded the works.

The Procuring Entity further submitted that the Applicant had five (5) on going projects at the time of bidding and was therefore non-responsive based on the Tender Notice which stated that tenders from tenderers with on going projects exceeding four in number regardless of the total value of the outstanding works shall be treated as non-responsive and therefore subjected to automatic disqualification.

In addition, the Procuring Entity averred that of the Applicant's five (5) on going projects, only one (1) was 70% complete, and another was in Malindi 700 kilometres away from Nairobi, therefore, awarding the Applicant additional work may have affected its performance and ability to deliver the project as required.

The Procuring Entity concluded that it did not discriminate against the Applicant in that it used the evaluation criteria as stated in the Tender Document to evaluate its bid.

One of the Interested Candidates, Ongata Works Limited, who was the successful tenderer, supported the Procuring Entity's submissions as to why the Applicant was neither responsive nor the lowest evaluated bidder.

The other Interested Candidate, Jaswant Singh and Bros Limited, who was one of the unsuccessful tenderers, submitted that the Procuring Entity did not fully consider the unsuccessful Interested Candidate's submitted tender documents and that it considered extraneous matters not relevant to the tender in evaluation of bids.

The Board has carefully examined the documents submitted before it and submissions made by the parties and in particular the Evaluation Criteria as set out in the Tender Notice and Tender Document and notes the following:-

1) The Tender Notice (part) states that:-

Further, tenders from the following tenderers shall be treated as NON-RESPONSIVE and therefore subjected to automatic disqualification:

(iii) A tender from a tenderer with on-going projects exceeding four (4) in number, regardless of total value of outstanding works.

2) Clause 1.7 of the Tender Document states:-

To qualify for award of the Contract, tenderers shall meet the following minimum qualifying criteria;

(a) Annual volume of construction work of at least 1.5 times the estimated annual cashflow for the Contract;

(b) Experience as main contractor in the construction of at least two works of a nature and complexity equivalent to the Works over the last 10 years (to comply with the requirement, works sited should be at least 70 percent complete);

(c) Proposals for the timely acquisition (own, lease, hire, etc.) of the essential equipment listed as required for the Works;

(d) A Contract manager with at least five year's experience in works of an equivalent nature and volume, including no less than three years as Manager; and

(e) Liquid assets and/or credit facilities, net of other contractual commitments and exclusive of any advance payments which may be made under the Contract, of no less than 4 months of the estimated payment flow under this Contract.

3) *Clause 5.5 of the Tender Document states as follows:-*

“Prior to the detailed valuation, the Employer will determine whether each tender
(a) meets the eligibility criteria defined in Clause 1.7 (b) has been properly signed
(b).....
(d)”

In regard to the Procuring Entity's Tender Evaluation Report as contained in the Minutes for the Thirty Fourth Ministerial Tender Committee Meeting (MTC: 34/2007-2008), of 6th March, 2008, the Board noted that the Procuring Entity carried out an evaluation as to the eligibility and responsiveness of the tenders submitted prior to detailed evaluation of only the tenders that substantially met the minimum set criteria. The Board observes that in evaluating eligibility and responsiveness, the Procuring Entity considered amongst other set criteria, Past Performance of the bidders, and parameters considered under this were projects, plant and equipment, staff and financial. It noted that the Procuring Entity proceeded to determine five (5) out of the ten (10) bidders as non-responsive, and reasons given included lack of proof or inadequate credit facilities or liquid assets to service the cashflow required for the project; low annual turnover; and no indication of previous experience.

The Board observes that the Procuring Entity proceeded to evaluate the eligible and responsive bidders on price including arithmetic check and reasonableness of pricing of items of work. In addition to evaluation on price, the Procuring Entity also made comments on the eligible and responsive bidders' current work load, past experience and bankers for the bid bond. The Board notes that the Applicant's tender was reported as the 1st lowest responsive tender. The Board also observes that the Applicant and successful tenderer were stated as having offered tenders which are capable of satisfactory performance and that they both had the pre-requisite experience and resources.

The Board notes that the evaluation report, under General Observations, continued to state that the Applicant had four (4) on going projects, most of them far from completion, whereas, the successful candidate only had one (1) under the Procuring Entity's supervision, and that in addition the Applicant had a project in Malindi, 700 kilometres from Nairobi therefore, awarding it additional work may affect its performance. The Board observes that on the basis of the analysis and observations, the report concluded that the tender submitted by the successful bidder be recommended for acceptance. The report notes the Secretariat's Comments which incorporate observations made by the Ministerial Tender Committee in its meeting No. 33/2007-2008 of 28th February, 2008, deferring the application for adjudication

and requiring the relevant department in the Procuring Entity to attend to the issues raised before re-submitting the application.

The Board further notes that the department was recorded as having re-submitted the application and attended to the issues raised. The department also confirmed that the Applicant had four (4) on going projects under the Procuring Entity's supervision. The Board also notes that the omission of the Applicant from the list of responsive tenderers was an error as stated by the Procuring Entity. It notes that the Applicant only had one project which was 70% complete while the value of works handled by the successful bidder was relatively higher than that of the Applicant's. The Board further notes that on the basis of the analysis and observations, the department concluded that the tender submitted by the successful bidder be recommended for acceptance. The Board notes that the Procuring Entity's Ministerial Tender Committee in its Meeting No. 34/2007-2008 (Minute No. 11) held on 6th March, 2008 discussed the re-submission for application and noted the department's recommendations, secretariat's comments and awarded the contract to the successful bidder and immediate communication on this was allowed.

The Board also noted Section 31 of the Act, and in particular subsections (3) and (4) provides as follows:-

(3) 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.

(4) 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).

After carefully examining the documents submitted before it and the parties' submissions, The Board finds that the Procuring Entity's Tender Report as contained in the Minutes for the Thirty Fourth Ministerial Tender Committee Meeting (MTC: 34/2007-2008), of 6th March, 2008, is the Procuring Entity's official and final Tender Evaluation Report on this tender and no other evaluation reports, observations and/or analysis, by the Procuring Entity, outside this Tender Report were valid. Further, in this Tender Report, the Applicant was evaluated by the Procuring Entity to be eligible and responsive and therefore deemed to have complied with both the requirements in the Tender Notice and Clause 1.7 of the Tender Document. Finally, the Board finds that in evaluating the Applicant on percentage completed of its on going projects, the relative value of its turnover compared to the successful bidder's, and the effect that the distance of the Malindi project may have on the Applicant's performance, the Procuring Entity applied an evaluation criteria which was not in the Tender Document and which was also contrary to Section 31 of the Act, on which the

Procuring Entity has relied on in its response to this ground of appeal, and in particular subsections (3) and (4).

Accordingly, this ground of appeal succeeds.

Ground 4 – That the Applicant had all the necessary documents as per the tender document

The Board finds that this is a statement of fact and not a ground for appeal.

Ground 5 – Breach of Regulation 51 (1)(d) of the Public Procurement and Disposal Regulations, 2006

The Applicant alleged that the Procuring Entity did not give the Applicant reasons as to why its tender was rejected and that this was contrary to the said Regulation.

In its response, the Procuring Entity stated that this Regulation gives the requirements of an evaluation report prepared by the Procuring Entity under Section 66(5) of the Act and that the Regulation did not require the Procuring Entity to give reasons for the rejection of a tender.

The Procuring Entity further stated that the Applicant did not seek from it reasons as to why the Applicant's tender was not successful and therefore, could not have expected any information on this.

The Board has carefully examined the documents submitted before it and the parties' submissions and finds that the Applicant did not request from the Procuring Entity reasons as to why its tender was not successful. In addition, the Applicant could therefore not expect to have received such information from the Procuring Entity. The Board also observes that Regulation 51(1) (d) of the Regulations gives the requirements of an evaluation report prepared under Section 66(5) of the Act. Therefore, Regulation 51(1) (d) of the Regulations does not require the Procuring Entity to give the Applicant reasons for rejection of its tender.

Accordingly, this ground of appeal fails.

Ground 6 – Breach of Regulation 52(2) of the Public Procurement and Disposal Regulations, 2006

In this ground, the Applicant alleged that the Procuring Entity breached Section 52(2) of the Regulations by not accepting the Applicant's tender after the Applicant had met all the conditions under the Act and the tender documents having been the lowest responsive tenderer. The Applicant alleges that the Procuring Entity had no option

but to accept the Applicant's tender and in not doing so exercised a discretion that it did not have and in the process breached the said Regulation.

In its response, the Procuring Entity stated that the Regulation deals with post qualification of tender and that there was no provision in the tender document for this and neither was there an application of post tender qualification approach in this bid.

The Board notes that Regulation 52 provides:-

52 (1) Where so indicated in the tender documents, a procuring entity may prior to the award of the tender confirm the qualifications of the tenderers who submitted the lowest evaluated responsive tender in order to determine whether the tenderer is qualified to be awarded the contract in accordance with Section 31(1) of the Act.

(2) Where so indicated in the tender documents, if the lowest evaluated tenderer is determined under paragraph (1) not to be qualified in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer who submitted the next lowest responsive bid.

The Board further notes that this Regulation provides the Procuring Entity an opportunity to confirm, prior to award, the qualifications of the lowest evaluated responsive tenderer, and should the lowest evaluated tenderer be found not qualified, paragraph (2) allows the Procuring Entity to reject the unqualified tenderer and proceed with confirmation of qualifications of the next lowest responsive bid. However, such a provision for confirmation of qualification should be stated in the Tender Documents.

The Board has carefully examined the documents submitted before it and the parties' submissions and finds that the Tender Documents did not have a provision for the Procuring Entity to confirm qualifications of bidders prior to award of tender and that the Procuring Entity did apply post tender qualification.

Accordingly, this ground of appeal fails

Ground 7 – The Procuring Entity considered exterior matters contrary to the Tender Document, Custom and Law

The Applicant alleged that the Procuring Entity considered exterior matters contrary to the Tender Document, custom and Law.

In its response, the Procuring Entity stated that this ground was covered by its response to ground 3 of the Applicant's application for review.

The Board has carefully examined the documents submitted before it and the parties' submissions and finds that as argued under Ground 3 of this Appeal, the Procuring Entity applied evaluation criteria that was not stated in the Tender Document and did

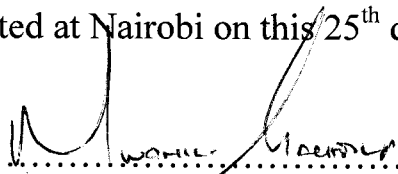
not evaluate the bid in accordance with Section 31 of the Act, as it had claimed, and in particular in accordance with subsections (3) and (4).

Accordingly, this ground of appeal succeeds.

Taking into account all the foregoing matters, the appeal succeeds and the Board pursuant to Section 98 of the Act orders that:-

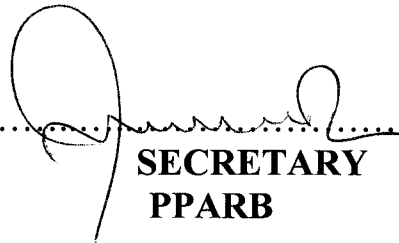
- i) The award to the successful tenderer, Ongata Works Limited be nullified.
- ii) The Procuring Entity is ordered to re-evaluate the tender afresh. Further, the Procuring Entity should ensure that the tender re-evaluation process is carried out in accordance with the criteria stated in the Tender Documents.
- iii) The Procuring Entity shall extend the tender validity period and instruct tenderers to extend their bid bonds to cover the period of re-evaluation and award.

Dated at Nairobi on this 25th day of April, 2008



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**CHAIRMAN
PPARB**



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**SECRETARY
PPARB**