

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.15/2008 OF 9TH APRIL, 2008

BETWEEN

SORRENTO LTD.....APPLICANT

AND

CITY COUNCIL OF NAIROBI.....PROCURING ENTITY

Appeal against the decision of the City Council of Nairobi, the
Procuring Entity dated 26th March, 2008 in the matter of tender
No.CCN/CT/003/07-08 for Rehabilitation and Lease of Uhuru Park
Restaurant.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	-	Chairman
Amb. C.M Amira	-	Member
Mr. Akich Okola	-	Member
Ms. Natasha Mutai	-	Member
Ms. Judith Guserwa	-	Member

IN ATTENDANCE

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

PRESENT BY INVITATION FOR APPLICATION NO.15/2008

Applicant, Sorrento Ltd

Mr. Benson O. Ochieng	-	Advocate, Ochieng Ochieng & Co. Advocates
Mr. Phillippe Musewe	-	Director
Mr. Eric Oduk	-	Staff Member
Mr. John Nyaka	-	Staff Member

Procuring Entity, City Council of Nairobi

- | | | |
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| Mr. E. N. Omotti | - | Advocate, E. N. Omotti & Co.
Advocates |
| Mr. O. A. Kenyatta | - | Advocate, E. N. Omotti & Co.
Advocates |
| Mr. G. K. Njamura | - | Director of Procurement |
| Mr. A. Musa | - | Deputy Director of Procurement |

INTERESTED CANDIDATES

- | | | |
|------------------|---|----------------------------------|
| Ms. C. Kimei | - | Advocate, Trans Millenia Ltd |
| Mr. Silas Irungu | - | Director, Good Times Investments |

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 OF AWARD

This tender was advertised by the Procuring Entity on 22nd October, 2007. The tender closed/opened on 13th November, 2007 in the presence of the bidders' representatives. Seven bidders returned their bids before the closing of the tender.

The prices and the bid bonds were read out as follows:

S/No.	Tenderer	ATTACHMENT				COMPLETION PERIOD	RENT OFFER (Kshs 000)	COST RENOVATION (Kshs.)	OF RENOVATION	BID BOND (Kshs)
1.	Little Joe Restaurant	No	No	No	No	3 Months	120	5,599,401.20		200,000.00
2.	Sorento Ltd	Yes	Yes	Yes	Yes	2 Months	250	6,684,442		200,000.00
3.	Good Times	No	No	No	No	5 weeks	150	4,510,871		200,000.00
4.	Buffe Park					2 months	160			200,000.00
5.	Kimson Commercial Agencies	Yes	Yes	Yes	Yes	3 months	170	5,896,088.60		200,000.00
6.	Metro Fil & Restaurant	No	No	No	Yes	-	175	5,393,217.40		200,000.00
7.	Trans Millenia Ltd	No	No	No	Yes	4 weeks	250	3,877,276.60		250,000.00

Technical Evaluation

This was carried out by a committee chaired by Mr. D. K. Gatimu, City Planning and was based on the following criteria:

S/No.	Requirements	Points (%)
1.	Duration to rehabilitate restaurant	10
2.	Experience of contractor	10
3.	Experience in operating restaurant	20
4.	Financial standing of the bidder	20
5.	Program for procurement, Installation and Commissioning of equipments for restaurant	10
6.	Rent repayment program	30
7.	TOTAL	100

A summary of the technical evaluation was as follows:

Table 1

S/No.	Item	Little Joe	Sorrento Ltd	Good Times	Buffet Park	Kimson Commercial Agencies	Trans Millenia
1.	Duration	5	7	4	7	5	4
2.	Contractor's experience in rehabilitation	0	10	8	6	0	10
3.	Experience in operating restaurant	0	14	0	18	0	0
4.	Financial standing	0	20	0	15	0	20
5.	Program for procurement, installation & Commissioning	10	10	0	0	0	0
6.	Rent repayment program	0	28	0	0	0	0
7.	TOTAL	15	89	12	46	5	29

Arising from the above information, only Sorrento Ltd qualified for financial evaluation after attaining the cut-off mark of 70%. All the other bidders were disqualified at this stage of evaluation.

Accordingly, the Evaluation Committee recommended the award of the tender to Sorrento Ltd at a monthly rent of Kshs.250, 000/= and rehabilitation cost of Kshs.6, 684,442/=.

In its meeting No.15/2007-2008 held on 8th February 2008, the Tender Committee made the following observations.

1. Members of the Tender Committee noted that this was an open tender that appeared in the print media.
2. That this was a proposal to rehabilitate, operate and transfer the restaurant to the City Council.
3. The tender attracted seven bidders who were subjected to both financial and technical evaluation.
4. The criteria for evaluation was set in the tender document.
5. That whereas the tender documents for the recommended bidder were purchased in the name of M/s Sorrento Lounge Limited, the firm that had been evaluated was M/s. Salongo S. I. Tour Operator Ltd/M/s Salongo Lounge/M/s Salongo Club which appear to be sister companies but were separate legal entities.
6. There was no proof that M/s Sorrento Ltd was in the hotel and catering line of business.
7. That the distribution of the scores to the various elements of the criteria was wanting since some elements had been given more weight than they deserved by the evaluation panel.
8. The bidder offering the shortest period of rehabilitation earned lesser scores than those taking longer to rehabilitate.
9. The period for recouping the costs of reconstruction had only been reflected to only one bidder and for the other six firms

was reflected as one. Members concurred that from the formulae it was possible to calculate the period every bidder would take to recoup the rehabilitation costs.

10. The future streams of income to the City Council were not clearly reflected to enable the members arrive at an informed decision.
11. The lease period had been given as 5 years.

The Tender Committee consequently deferred the award of the tender and referred the matter to the evaluation committee for re-evaluation based on the aforesaid matters. Upon re-evaluation the evaluation committee prepared its second report as set out in table 2 below:-

Table 2

S/No.	Item	Little Joe	Sorrento Ltd	Good Times	Buffet Park	Kimson Commercial Agencies	Trans Millenia
1.	Duration to rehabilitate restaurant	5	7	4	7	5	4
2.	Contractor's experience in rehabilitation	0	10	8	6	0	10
3.	Experience in operating restaurant	0	14	0	18	0	0
4.	Financial standing	0	20	0	15	0	20
5.	Program for procurement, installation & Commissioning	10	10	0	0	0	0
6.	Rent repayment program	8	30	14	13	15	0
7.	TOTAL	23	91	26	59	20	34

Based on the re-evaluation reports the Evaluation Committee recommended the award of the tender to the applicant yet again and it forwarded its recommendations to the Tender Committee.

The Tender Committee held its tender meeting No.16/2007-2008 on 21st February, 2008. The Tender Committee rejected the recommendation of the evaluation committee and embarked on an exercise of 'review and distributions' of the scores amongst the bidders. The Tender Committee prepared a new score report as indicated in table 3 below.

Table 3

The evaluation matrix by the tender committee after review and re-distribution of scores

S/No.	Item	Little Joe	Sorrento Ltd		Good Times	Buffet Park		Kimson Commercial Agencies	Trans Millenia
			E. C	T.C*		Eva.	T.C*		
1.	Duration to rehabilitate restaurant	5	7	10	4	7	10	5	4
2.	Contractor's experience in rehabilitation	0	10	10	8	6	10	0	10
3.	Experience in operating restaurant	0	14	14	0	18	18	0	0
4.	Financial standing	0	20		0	15	15	0	20
5.	Program for procurement, installation & Commissioning	10	10	20	0	0	0	0	0
6.	Rent repayment program	8	30	28	14	13	30	15	0
7.	TOTAL	23	91	94	26	59	80	20	34

Note: TC *...scores of the Applicant and the successful bidder after review and redistribution of scores by the tender committee

Based on its report the Tender Committee awarded the tender to Buffet Park Ltd at a monthly rent of Kshs.160, 000/= and rehabilitation cost of Kshs.5, 518,563/=.

A letter dated 14th March, 2008 was sent to successful candidate on 14th March, 2008. However, it was later withdrawn when the Applicant complained to the Procuring Entity on 22nd March, 2008 that it was not notified of the award of the tender.

Accordingly, fresh letters of notification of the award to the successful and unsuccessful bidders dated 26th March, 2008 were issued.

THE APPEAL

This appeal was lodged on 9th April, 2008 against the decision of the Tender Committee of City Council of Nairobi the Procuring Entity in the matter of Tender No.CCN/CE/T/003/07-08 the proposed Rehabilitation of Uhuru Park Restaurant at Uhuru Park Nairobi.

The applicant raised 6 grounds of appeal and urged the Board to nullify the decision of the Procuring Entity and re-award the tender to it.

The Applicant raised six grounds of appeal and the Board deals with them as follows:-

Ground 1 - Breach of Section 2 of the Act

The Applicant argued that the Procuring Entity breached Section 2 of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as the Act) by rejecting its tender. The Applicant submitted that it had offered the highest rent of Kshs. 250,000.00 per month compared to the rent of Kshs. 160,000.00 offered by the successful bidder. Further, the evaluation committee had declared it as the most

responsive bidder but the decision was changed by the Tender Committee.

It argued that the tender by the Applicant was the most responsive. Therefore, the Procuring Entity failed to comply with the purpose and spirit of Section 2 of the Act.

In response, the Procuring Entity denied that it breached section 2 of the Act and argued that it was guided by the objectives of the Act in all respects.

The Board has considered the submissions by the parties and notes that Section 2 of the Act cannot be breached in isolation without considering breaches of other Sections of the Act. In this respect a finding cannot be made on a breach of this section at this stage until the merits of the other grounds have been considered in their totality.

The Board has noted that Section 2 sets out the objectives of the Act. Therefore, it is not a section that can be breached in isolation. An Applicant has to demonstrate breach of other sections of the Act and Regulations to show that the objectives of the Act were not achieved. In this respect, a finding cannot be made on a breach of this section at this stage until the merits of the other grounds have been considered in their totality.

Accordingly, this ground can not succeed on its own and the Board will consider the other grounds as argued by the Applicant.

Grounds No. 2 and 3

The Applicant argued that the Procuring Entity breached Sections 66(2), (4), 67(2) and 82(5) of the Act read together with clause 18.1 of the Instruction to Bidders. The Applicant further argued that its bid was substantially responsive as it had offered the highest rent of Kshs.250, 000/= per month.

was substantially responsive as it had offered the highest rent of Kshs.250, 000/= per month.

It further stated that it had the technical and financial capacity to provide the services required by the Procuring Entity according to the findings of the evaluation committee. Accordingly, the Procuring Entity should have awarded it the tender in accordance with clause 18.1 of the Instructions to Bidders, which required it to award the tender to the best responsive bidder. It maintained that it was the best evaluated bidder and therefore should have been given the tender which the Procuring Entity failed to do and as such breached section 66(4) of the Act.

In response, the Procuring Entity submitted that it fully complied with the provisions of Section 66(2), (4) and 82(5) of the Act. It further argued that the Applicant was not awarded the tender as it had failed to follow instructions to bidders on the legal capacity of the tenderers. It argued that although the Applicant had purchased the bid documents under the name of M/s Sorrento Ltd whose certificate was annexed to the documents, it had attached documents relating to other companies by the names of Salongo Group of companies, Salongo Club and Salongo S.I. Tour Operators Ltd. It alleged that these documents made the Procuring Entity to evaluate a different bidder from the one that had tendered.

Further the Procuring Entity argued that the Applicant failed to fully comply with Clause 18.1 of the Instructions Bidders by failing to demonstrate that it had the capacity and resources to carry out the works effectively, expertise to run a restaurant, financial ability and the relevant licenses and permits to enable it to run a restaurant business.

As a result, the Applicant could not be awarded the tender despite offering the highest monthly rent of Kshs. 250, 000/=.

The Board has perused the documents submitted by the parties and considered the submissions made by the parties and has noted the following:-

1. The Applicant purchased the bid documents in the name of Sorrento Ltd
2. The Applicant submitted its bid documents for evaluation as Sorrento Ltd.
3. The Procuring Entity evaluated the Applicant's bid at all stages as Sorrento Ltd.
4. The Procuring Entity's tender committee un-procedurally reviewed and redistributed the scores of the bidders including those of Sorrento Ltd which they found to be most responsive but awarded the tender to Buffet Park Ltd.

Accordingly, the Board finds that the argument by the Procuring Entity that the Evaluation Committee evaluated a different bidder from the one who bought the bid document is not tenable.

The Board further notes that Clause 18.1 of the Instruction to Bidders provided as follows:-

"...the employer will award the contract to the bidder whose bid has been determined to be substantially responsive and has offered the highest evaluated bid provided further that the bidder has capability and resources to carry out the works effectively and efficiently".

It is also noted that the duties of the tender committee are set out at Regulation 11(1) and (2) as follows:-

- 11(1) (a) *Approve a submission; or*
(b) *Reject a submissions with reasons; or*
(c) *Reject a submission, subject to minor clarifications by the procurement unit or evaluation committee.*

11(2) the tender committee shall not -

(b) Reject any submission without justifiable and objective reasons.

The Board has further perused the evaluation reports prepared by the Evaluation and the Tender committees' together with the documents that supported the bids. It is noted that the evaluation committee rightly and procedurally evaluated the bids and the Tender Committee had no legal basis to "review and redistribute" the scores thereby carrying out another evaluation exercise. The Tender Committee could only exercise the functions conferred on it under Regulation 11(2).

In view of the above, the Tender Committee exceeded its mandate in "reviewing and redistributing" the scores of the bidders. In any event, the scores as set by the Tender Committee as reflected in table 3 clearly show the Applicant as the highest scorer and therefore the substantially responsive tenderer with 94 marks compared to the score of 80 marks of the successful tenderer.

The Board finds that the Applicant was evaluated and found to be substantially responsive and that it also offered the highest evaluated bid with the highest monthly rent. The bidder had also provided evidence of resources capability to carry out the works efficiently and earned maximum score in financial standing.

In regard to the breach of Section 67(2) the parties are in agreement that the notification of award was done twice. The first notification to some bidders was done through letters dated 14th March, 2008. This was followed by another notification to all bidders through letters dated 26th March, 2008. The letter of 26th March, 2008 also cancelled the notification letters of 14th March, 2008. The Applicant having been notified on 26th March, 2008 and having been able to file the Request for Review in time was not prejudiced by this manner of notification. Nevertheless, the Procuring Entity breached the aforesaid Section 67(2) of the Act by failing to notify all candidates, both successful and unsuccessful, at the same time.

With regard to Breach of Section 82(5), the Board has noted that the method used for procurement which is the subject of the review was Open Tender and not Request for Proposal. Therefore, Section 82(5) which deals with evaluation of Request for Proposals was not applicable and could not have been breached.

In the circumstances, save for the allegation of breach of Section 82(5), these ground of appeal succeed.

Grounds 4, 5 and 6

In these grounds the Applicant reiterated that its bid was the most advantageous bid with the highest rent offer. The Applicant submitted that it had the technical and financial competence to offer the services required and should have been awarded the tender.

In response, the Procuring Entity submitted that the Applicant was not awarded the tender because of the observations made by the Tender Committee touching on its real identity as a bidder. It urged the Board to dismiss the Request for Review.

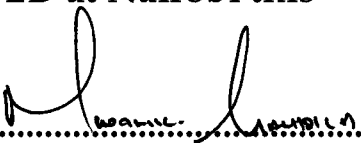
The Board has noted that these grounds of appeal are general statements that are not supported by any breach of the Act or Regulations. These statements do not comply with Regulation 73(2)

(a) which requires the Applicant to state the alleged breaches of the Act or Regulations in addition to stating reasons for its complaints.

Therefore, these grounds of appeal fail.

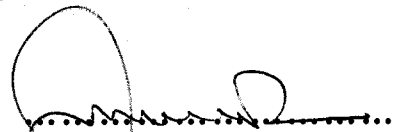
Taking into account all the above matters, the award of the tender to Buffet Park Ltd is hereby nullified and the Board orders the Procuring Entity to direct the Tender Committee to award the tender in accordance with the recommendations of the evaluation committee.

DATED at Nairobi this 8th day of May, 2008



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**CHAIRMAN
PPARB**



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**SECRETARY
PPARB**

