

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 17/2008 OF 9TH JUNE, 2008

BETWEEN

RAY ENGINEERING CONSTRUCTION COMPANY LIMITED
(APPLICANT)

AND

LOCAL AUTHORITIES PROVIDENT FUND
(PROCURING ENTITY)

Appeal against the decision of the Tender Committee of the Local Authorities Provident Fund in the matter of Tender No. LAPF/4/PD/2007-2008 for Construction of Modern Serviced Apartments on Plot No. LR 209/13773 along Mucai Drive, off Ngong Road, Nairobi.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
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
Mr. I. K. Kigen	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO. 17/2008

Applicant, Ray Engineering Construction Company Limited

Mr. Hassan N. Lakicha	-	Advocate, Hassan, Bulle & Company Advocates
Mr. Kuingu Mwakodi	-	Director
Mr. D. M. Maungu	-	Quantity Surveyor

Procuring Entity, Local Authorities Provident Fund

Mr. George Kithi	-	Advocate, Madzayo Mrima & Company Advocates
Ms. Lucy Kimathi	-	Employee
Ms. Joyce Lisanja	-	Employee
Ms. Veronicah Leseya	-	Employee
Mr. Paul Obado	-	Consultant

Interested Candidate, Capital Construction Company Limited

Joseph. M. Mwawuda	-	Deputy Managing Director
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BOARD'S DECISION

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

BACKGROUND

The Tender was advertised in the local dailies on 26th March, 2008 for the Construction of Modern Serviced Apartments on Plot L.R. No. 209/13773 Along Mucai Drive, Off Ngong Road, Nairobi. It closed/ opened on 21st April, 2008. Seven (7) firms bought the tender documents and duly returned their bids.

THE EVALUATION

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

1. One (1) original and six (6) copies of each document- Main Contractor and Sub-contractors where applicable;
2. Business Registration Certificate;
3. Current Business Permit;
4. PIN Registration Certificate;
5. VAT Registration Certificate;
6. Current Tax Compliant Certificate;
7. Bid Security equivalent of 1% of the tender sum;
8. Registration Certificates from MORPW, Class B and above.
9. Audited Financial Statements for the last three years; and
10. Proof of access of line of credit of not less than Kshs. 20 Million

Three bidders namely, Centurion Engineers & Builders Limited, Ray Engineering Construction Limited and EPCO Builders Limited did not meet the above requirements and were disqualified from further evaluation.

The other four firms namely, Twiga Construction Company, Ongata Works Limited, FUBECO China Fushun and Capital Construction Limited qualified and proceeded to technical evaluation.

In the Technical Evaluation, the four (4) firms were examined based on the following requirements:-

- | | |
|-------------------------------------|-----------|
| 1. Experience of the contractor | 3 points |
| 2. Past experience of similar works | 15 points |
| 3. Financial Stability | 15 points |
| 4. Key Professional Staff | 10 points |
| 5. Plant/Equipment/Machinery | 12 points |
| 6. Bidders Approach & Methodology | 15 points |
| 7. Work Plan | 15 points |
| 8. Stakeholders | 15 points |

The Minimum qualifying technical score was 70%.

Two firms namely, Ongata Works Limited and FUBECO China Fushun were disqualified for failure to meet the minimum technical score. The other two firms namely, Twiga Construction Company and Capital Construction Limited qualified and proceeded to the financial evaluation.

Upon application of the financial evaluation formula as set out in Clause 5.5 of the Tender Document, Capital Construction Limited emerged the first evaluated bidder.

The evaluation committee recommended the award be made to Capital Construction Limited at Kshs. 459, 000, 000.00. The Procuring Entity's Tender Committee approved the award of the contract to Capital Construction Limited at their tender sum of Kshs. 459, 000,000.00.

THE APPEAL

This Appeal was lodged on the 9th day of June, 2008 by Ray Engineering Construction Company Limited against the decision of the Tender Committee of the Local Authorities Provident Fund in the matter of Tender No. LAPF/4/PD/2007-2008 for Construction of Modern Serviced Apartments on Plot No. LR 209/13773 along Mucai Drive, off Ngong Road, Nairobi.

The Applicant was represented by Mr. Hassan N. Lakicha, of Hassan, Bulle & Company Advocates while the Procuring Entity was represented Mr. George Kithi, Advocate, Madzayo Mrima & Company Advocates. The Successful Bidder was represented by Mr. Joseph M. Mwawuda.

The Applicant in its Request for Review has raised seventeen (17) grounds of appeal.

The Board deals with them as follows:-

Grounds 1, 2, 3, 5, 8, 9 and 13

The Board finds that these are not grounds of appeal but mere statements not backed by any allegation of breach of the Act or the Regulations.

Ground 4 – Breach of Section 64(2) and Regulation 47 (1) (d) and (2)

The Applicant submitted that it was the lowest evaluated responsive tenderer. It stated that to the best of its recollection it had submitted the required number of tender documents (original plus six copies) and that if by some human error, the Procuring Entity misplaced some copies, the missing copies could have been made from the original as provided for under Section 64(2) (a) and (b) of the Act at the Applicant's cost.

The Applicant further submitted that the Procuring Entity's decision that the Applicant's tender was non responsive on the grounds that it failed to submit the required number of copies was oppressive, unfair and against natural justice to deny it the tender on such ground. Further, it argued that even if it did not provide sufficient copies through human error, the same could have been remedied if the Applicant was requested to meet the cost of producing additional copies from the Original.

In response, the Procuring Entity submitted that the Applicant was not the lowest evaluated bidder as alleged because its tender was not responsive as it did not conform to all mandatory requirements in the tender documents. It stated that the Applicant did not comply with the mandatory provisions of Regulation 47 (1) (d) in that the Applicant did not submit the required number of copies of the tender, that is one Original and six copies. Therefore, the evaluation committee rejected the Applicant's tender as non responsive at the preliminary evaluation stage.

The Procuring Entity further argued that the Applicant failed to meet the mandatory criteria as stated in the Clause 1.4 of the Tender Documents. It stated that the Applicant failed to submit the following mandatory requirements:-

- 1) A current single business permit issued by the relevant local authority.
- 2) Latest audited financial statements for the last 3 years. Indeed the Applicant could not meet this requirement as it had only been in existence for 26 months having been incorporated on 17th February, 2006; and
- 3) Proof of access to line of credit of not less than Kshs 20 Million from a reputable bank/financial institution and not an insurance company.

The Procuring Entity referred to the Board's past decisions in Application Nos. 63/2007 between N. K. Brothers, the Applicant and National Social Security Fund, the Procuring Entity and 67/2007 between Alliance Media (K) Limited, the Applicant and The University of Nairobi, the Procuring Entity on the issue of mandatory requirements.

The Board has carefully examined the documents submitted before it and in regard to the Mandatory Minimum Qualifying Criteria as set out in the Tender Notice and Tender Document notes the following:-

- 1) The Tender Notice (part) states that:-
Bidders MUST submit, under a separate sealed envelope, the following mandatory and statutory Qualification Documents in form of ONE (1) Original and SIX (6) Copies
- 2) Clause 1.4 of the Tender Document states:-
To qualify for tender evaluation, tenderers shall meet the following mandatory minimum qualifying criteria.
 - (a) *Business Registration Certificate from the Attorney General's Chambers;*
 - (b) *Current Single Business Permit issued by the relevant local authority;*
 - (c) *PIN registration certificate from KRA;*
 - (d) *VAT registration certificate from KRA;*
 - (e) *Current tax compliance certificate from KRA;*
 - (f) *Bid security from a reputable bank/financial institution (not insurance company) equivalent to 1% of the bid/tender price;*
 - (g) *Registration certificate from Ministry of Roads and Public Works class B and above;*
 - (h) *Latest audited financial statements for the last 3 years (main contractor); and*
 - (i) *Proof of access to line of credit of not less than Kshs. 20 million from a reputable bank/financial institution (not insurance company).*
- 3) Clause 6.6 of the Tender Documents states (in part):-
Prior to the detailed evaluation of tenders, the Employer will determine whether each tender (a) meets the eligibility criteria defined in clauses 1.4 and 1.5; (b) has been properly signed; (c) is accompanied by the required securities; and (d) is substantially responsive to the requirements of the tendering documents. A

substantially responsive tender is one which conforms to all the terms, conditions and specifications of the tendering documents, without material deviation or reservation.

In regard to the Procuring Entity's Tender Report as contained in the Minutes of the Evaluation of Tender meeting of 28th and 29th May, 2008, the Board noted that:-

- i) The Procuring Entity determined that the mandatory qualification criteria comprised the nine mandatory requirements plus the correct number of copies of tender documents submitted (One Original and Six Copies), all as set out in both the Tender Notice and Tender Documents;
- ii) the Procuring Entity carried out a preliminary evaluation, as required to by Clause 6.6 of the Tender Documents and the Procurement Rules and Regulations, as to the eligibility and responsiveness of the tenders submitted prior to detailed evaluation of only the tenders that met the mandatory set criteria.;
- iii) the Procuring Entity proceeded to determine three out of the seven bidders as non-responsive for failure to meet some of the mandatory requirements;
- iv) the Procuring Entity determined the Applicant to be non-responsive for reasons of not having submitted the required number of copies;
- v) the Procuring Entity did not state any other mandatory requirements that the Applicant failed to meet;
- vi) the Procuring Entity proceeded to carry out a technical evaluation of the responsive bids and determined that only two bidders were technically qualified;
- vii) the Procuring Entity then proceeded to carry out a financial evaluation of the technically qualified bids; and
- viii) In its financial evaluation of the bids, the Procuring Entity used the application of the weighted scoring formula given in the Tender Document clause 5.5.

The Board notes the following provisions in the Regulations:-

- i) Regulation 47(1)(d) states that upon opening of the tenders under Section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether the required number of copies of the tender have been submitted;

- ii) Regulation 47(2) states that the evaluation committee shall reject tenders which do not satisfy the requirements set out in paragraph (1); and
- iii) Regulation 48(1) states that the Procuring Entity shall reject all tenders which are not responsive in accordance with Section 64 of the Act.

The Board also notes Section 64(1) of the Act which states that a tender is responsive if it conforms to all the mandatory requirements in the tender documents.

After carefully examining the documents submitted before it and the parties' submissions, The Board finds as follows:-

Firstly, that the submission of one original and six copies of the tender documents as set out in the tender notice and tender document was a mandatory requirement. Further, there was no evidence to prove or disprove that the Applicant submitted or failed to submit the required number of copies of its bid.

Secondly, that the Procuring Entity did not state, in the evaluation report that the Applicant was non-responsive for reasons of not complying with all the mandatory requirements of the Tender Documents in that the Applicant did not provide the current single business permit issued by the relevant local authority, the latest audited financial statements for the last three years, and proof of access to the credit of not less than 20 million from a reputable bank.

Finally, that although there is no evidence to prove or disprove that the Applicant submitted or failed to submit the required number of copies of its bid, it is clear that it had not complied with the three of the nine mandatory requirements cited above and could therefore not have been the lowest evaluated and responsive bidder as it alleged.

Accordingly, this ground of appeal fails.

Ground 6 – Breach of Regulation 51 (1) (d).

The Applicant alleged that the Procuring Entity did not give it reasons as to why its tender was rejected and that this was contrary to Regulation 51 (1) (d).

In its response, the Procuring Entity stated that the Tender Evaluation Report showed that it had complied with the said Regulation.

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. The Procuring Entity was only obliged to provide reasons where so requested by the Applicant. Therefore, Regulation 51(1) (d) does not require the Procuring Entity to give the Applicant reasons for rejection of its tender.

Accordingly, this ground of appeal fails.

Grounds 7 and 10 – Breach of Regulation 52(2).

These grounds have been consolidated because they raise similar issues.

In these grounds, the Applicant alleged that the Procuring Entity breached Regulation 52(2) by not accepting its tender. It argued that it had met all the conditions under the Act and was therefore the lowest responsive tenderer. The Applicant alleged that the Procuring Entity had no option but to accept its tender and in failing to do so, it exercised its discretion wrongly.

In response, the Procuring Entity stated that the Applicant did not meet the mandatory requirements and in particular the one on original bid and six copies.

The Board notes that Regulation 52 provides as follows:-

“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 allows the Procuring Entity an opportunity to confirm, prior to award, the qualifications of the lowest evaluated responsive tenderer, and should the lowest evaluated responsive tenderer be found not qualified, the Procuring Entity should 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 notes that as found under Ground 4, the Applicant could not have been the lowest responsive tenderer as it alleged. Further, the Board notes that the Tender Documents did not have a provision for the Procuring Entity to confirm qualifications of bidders prior to award of tender. Finally, the Procuring Entity did not apply post tender qualification procedure.

Accordingly, this ground of appeal fails.

Grounds 11 and 12 - Loss suffered.

This is a statement of perceived losses/ damages arising from anticipated profit, which the Applicant would have made if it was awarded the tender. Clause 1.7 of The Instructions To Tenderers stipulates that "The tenderer shall bear all costs associated with the preparation and submission of its tender, and the Procuring Entity will in no case be responsible or liable for those costs."

In open competitive bidding there is no guarantee that a particular tender will be accepted and just like any other tenderer, the Applicant took a commercial risk when it entered into the tendering process. In view of the foregoing, it cannot claim the cost or damages associated with the tendering process, which resulted in the award of the tender to another bidder.

Grounds 14 and 15 - Breach of Section 67 (2) of the Act.

The Applicant alleged that by failing to notify it promptly about the rejection of its tender, the Procuring Entity breached Section 67(2) of the Act. The Applicant submitted that it only received the notification letter when it went to find out from the Procuring Entity the progress of the tender on 4th June, 2008.

In response the Procuring Entity conceded that it did not send the notification letters to the bidders and instead telephoned them to collect the letters. It alleged that the Applicant's telephone numbers did not go through when called.

The Board has carefully examined the documents submitted before it and the parties' submissions and finds that the Procuring Entity breached Section 67(2) of the Act which requires the Procuring Entity to notify both the successful and unsuccessful bidders at the same time. However, the Applicant was not prejudiced because it succeeded in lodging its Application for Review.

Accordingly, this ground of appeal fails.

Ground 16 – Breach of Section 31(2) of the Public Procurement and Disposal Act 2005

The Applicant alleged that the Procuring Entity did not seek any additional information from it during the tender evaluation as required under Section 31(2) of the Act.

The Board notes Section 31(2) of the Act:-

The procuring entity may require a person to provide evidence or information to establish that the criteria under subsection (1) are satisfied.

The Board finds that the application of this Section by the Procuring Entity is discretionary and not mandatory and therefore the Procuring Entity was not obliged to seek further information from the Applicant.

Accordingly, this ground of appeal fails.

Ground 17 – Breach of Section 66(4) and Regulation 10(2)(e).

The Applicant alleged that any award other than to the lowest and responsive tenderer would be in breach of the very tenets and spirit of the Act and Regulations.

In its response, the Procuring Entity submitted that the tender was awarded to the lowest evaluated bidder.

The Board notes that under Regulation 10(2) (e), the function of the Procuring Entity's tender committee is to ensure that the Procuring Entity does not pay in excess of prevailing market prices.

The Board also takes note of the Tender Document's Preliminaries Section of the Bills of Quantities page P/7 item A - Official Estimate which states that:-

Any tender which is 10% lower or higher than the official estimate as read out during the tender opening shall be treated as non responsive and therefore disqualified automatically.

The Board finds that the Procuring Entity's official estimate as read out at the tender opening was Kshs 433,341,629, however, the Procuring Entity determined Ongata Works Limited's tender of Kshs. 485,087,733 as responsive and carried out a technical evaluation of its bid, which was contrary to the Tender Documents item A on page P/7 of the Preliminaries Section of the Bills of Quantities which required any tender which is 10% lower or higher than the official estimate as read out at tender opening to be treated as non responsive and disqualified automatically.

In view of the foregoing, the Board finds with regard to the breach of Regulation 10(2)(e) that although the Procuring Entity had provided for a mechanism, in its Tender Documents, to ensure that it does not pay in excess of prevailing market prices, the Procuring Entity failed to apply this mechanism in its tender evaluation.

On the issue of Section 66(4) of the Act, the Board noted that the Section provides as follows:- "*The successful tenderer shall be the tender with the lowest evaluated price*". The Board further noted that the Tender Document's Clauses 1.4 (i), 5.4 and 5.5 depict a two envelope system of tendering where tenderers submit their technical bids and financial bids in

separate envelopes, and only financial bids of technically qualified tenderers are opened and evaluated.

Secondly, the Tender Document's Clause 6.2 depicts a one envelope system where the tender prices are read out at the tender opening.

Thirdly, the Procuring Entity followed the one envelope system by reading the bidders' prices at tender opening and applied a two tender envelope system approach (weighted formula) in the financial evaluation of the technically qualified bids. The Board further notes that Regulation 45(1)(b) and (2) provides as follows:-

“(1) Pursuant to section 60(5)(b) of the Act, the total price of the tender-

(b) shall not be read out where a tender is preceded by a technical evaluation and such tender has not met the technical evaluation criteria.

*(2) Where a tender fails a technical evaluation under paragraph (1)
(b) a procuring entity shall return the financial proposal unopened.”*

The Board notes that having read the tender prices at the tender opening, the Procuring Entity could not use the weighted formula as provided for in Clause 5.5 of the Tender Document, contrary to the provisions of Regulation 45(1)(b) cited above.

Further, the Board notes that in its financial evaluation of the technically responsive bids, the Procuring Entity should have carried out an arithmetic check as required in the Tender Documents Clauses 6. 7 and 6.9, and that there is no evidence in its Evaluation Report that the Procuring Entity did so.

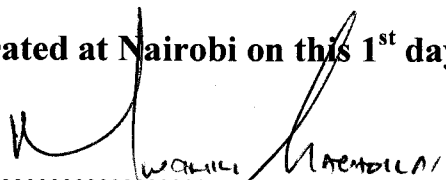
Finally, the Board finds that on the Breach of Section 66(4) of the Act, it was clear that the evaluation process was flawed and therefore the Procuring Entity could not have awarded the tender to the tenderer with the lowest evaluated price.

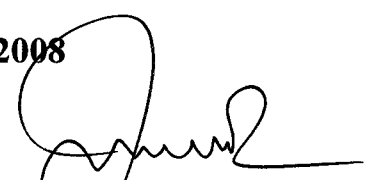
Accordingly, this ground of appeal succeeds.

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

- i) the decision to award the tender to the successful tenderer, Capital Construction Limited is hereby nullified;
- ii) the Procuring Entity should repeat the tender evaluation process to be carried out in accordance with the criteria stated in the Tender Document;
- iii) the weighting formula as stated in the Tender Documents Clause 5.5 and other related clauses on the two envelope system should not be applied because their application in this tender evaluation is contrary to Regulation 45(1)(b) and (2);
- iv) the Procuring Entity should carry out the tender evaluation and award before expiry of the tender validity period (27 July, 2008). Further, the Procuring Entity should instruct the tenderers to extend their bid bonds to cover the period of re-evaluation and award.

Dated at Nairobi on this 1st day of July, 2008


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CHAIRMAN
PPARB


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SECRETARY
PPARB