

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 19/2008 OF 20TH JUNE, 2008

BETWEEN

PYRAMID CONSTRUCTION LTD..... (APPLICANT)

AND

**MUNICIPAL COUNCIL OF ELDORET..... (PROCURING
ENTITY)**

Appeal against the decision of the Tender Committee of the Eldoret Municipal Council dated 9th June, 2008 in the matter of Tender No. EMC/EU/2008/2009/01 for Construction of Kahoya Market.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Ms. Loise Ruhiu	-	Member
Ms. J. A. Guserwa	-	Member
Ms. Natasha Mutai	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Ms. P. K. Ouma	-	Secretariat

PRESENT BY INVITATION

Applicant, Pyramid Construction Company Ltd

- Mr. Geoffrey Ouma Mulanya - Advocate, Akide & Co. Advocates
- Mr. John Oscar Juma - Advocate, Akide & Co. Advocates
- Mr. Henry Lelei - Director
- Mr. Joachim Wafula - Quantity Surveyor

Procuring Entity, Municipal Council of Eldoret

- Mr. Stanislas Ondimu - Town Clerk
- Mr. Nicholas Ngeno - Architect 1
- Mr. Michael Wangai - Ag. Procurement Officer

Interested Candidates

- Mr. Gideon Kosgey - Director, Thwama Building Services
- Mr. Samuel Ruto - Manager, Thwama Building Services
- Mr. Harrison Mogere - Director, Harmo Engineering and Building Construction Company
- Eng. Charles Ogutu - Mokubo Builders and Engineering Works

BOARD'S DECISION

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

BACKGROUND

The tender was advertised on 17th April, 2008 and closed/opened on 12th May, 2008 in the presence of bidders' representatives who chose to attend. Ten bids were opened and the tender prices were as follows:

Bidder No.	Bidder's Name	Tender Price (Kshs)
1.	Harmo Engineering	22, 257, 797.00
2.	Gragab Agencies Ltd	21, 479, 137.70
3.	Wilkori Building	23, 043,452.20
4.	Cheptilis Construction Co.	20,761, 773
5.	Eldo Rotsa Construction	19, 792, 442.00
6.	Thamwa Building Services Ltd	23, 538, 800.00
7.	Pyramid Construction Ltd	16, 600, 302.00
8.	Alf Construction	27, 000, 000.00
9.	Mukubo Builders & E. Works	29, 745, 010.00
10.	Talent Graphics	18, 229, 011.00

EVALUATION

The Evaluation Committee conducted a technical evaluation based on a total score of 60 marks and later a financial evaluation based on a total score of 40 marks. The technical evaluation was based on the following parameters:

- Qualification information
- Work method, schedule and charts
- Legal status
- Value of construction work for last 5 years
- Experience in works of similar nature
- Major construction equipments
- Qualification and experience of key personnel
- Litigation information
- Annual volume of work
- Contract manager with at least 5 years experience
- Proposal for timely acquisition of equipments
- Experience as main contractor

The summary of the technical evaluation results were as tabulated below:-

S/No	Bidder	Total score
1.	Harmo Engineering & Building Construction	17
2.	Gragab Agencies Ltd	34.5
3.	Wilkori Building Construction	disqualified
4.	Cheptilis Construction Co	disqualified
5.	Eldo Rotsa Construction	31
6.	Thwama Building Services Ltd	43
7.	Pyramid Construction Ltd	47
8.	Alf Construction Co. Ltd	45
9.	Mukubo Builders & Engineering Works	24
10.	Talent Graphics Ltd	34.5

Bidder No. 3 was disqualified for not being registered with the Ministry of Roads and Public Works category E and that it had erased entries at page 50 of its BQ and had not initialled them. Bidder No.4 was disqualified for filling its summary page No. 5 using a pencil. The evaluation committee further noted that bidder No. 5 and No. 10 did not meet the conditions of the tender as regarding a bid bond. Bidder No. 5 had a bid bond from an insurance company which was not acceptable while bidder No. 10 had no bid bond. However these two bids were evaluated and not declared non responsive.

The Evaluation Committee then carried out a financial evaluation based on the following criteria:-

- Audited reports for the last 5 years
- Evidence of adequacy in working capital
- Authority to seek reference from banks
- Liquid assets, credit facilities
- Tender security
- Bank guarantee
- Bank statements

The summary of the financial evaluation scores and the tally of the total marks are as tabulated.

Bidder No.	Bidder	Quoted sum	Corrected sum	Financial marks (out of 40 marks)	Total marks	Ranking
1.	Harmo Engineering & Building Construction	22,257,797.00	23,178,545.80	30	47	6
2.	Gragab Agencies Ltd	21,479,137.70	20,074,359.12	25	59.5	4
5.	Eldo Rotsa Construction	19,792,442.00	24,955,474.00	14	45	8
6.	Thwama Building Services Ltd	23,538,800.00	23,643,280.00	27	70	2
7.	Pyramid Construction Ltd	16,600,302.00	17,508,442.00	27	74	1
8.	Alf Construction Co. Ltd	27,000,000.00	24,955,474.00	25	70	2
9.	Mukubo Builders & Engineering Works	29,745,010.00	25,699,540.00	25	49	5
10.	Talent Graphics Ltd	18,229,011.00	18,765,905.80	11	45.5	7

The Evaluation Committee recommended the award of the tender to bidder No.7, Pyramid Construction Co. at its corrected price of Kshs. 17, 508,442.60. The Tender Committee however differed with the recommendations of the evaluation Committee and noted that the tender price of Pyramid Construction Co. was lower than that of the engineers estimate by more than Kshs.6 million and it might not be able to complete the works.

The tender committee recommended a re-evaluation of the bids of the three best bidders namely, Pyramid Construction, Thwama Building Services and Alf Construction Ltd. The second evaluation report was submitted to the Tender Committee on 4th June, 2008. The Tender Committee observed that the Evaluation Committee had not made recommendation on the award of the tender. The Committee then resolved that Pyramid Construction Ltd, Thwama building Services and Alf Construction Company Ltd be requested to avail their bank statements for the last one year to ascertain their financial capability.

In the meeting held on 6th June, 2008, the bank statements of Pyramid and Thwama were availed and the Tender Committee scrutinized them. The Tender Committee noted that the bank statement of Pyramid was not satisfactory and their bid price was below the engineers estimates. It therefore awarded the tender to Thwama Building Services Ltd at Kshs. 23, 643, 280.00. Bidders were notified of the outcome of the tender vide letters dated 9th June, 2008.

THE REVIEW

This Appeal was lodged on 26th June by Pyramid Construction Ltd against the decision of the Tender Committee of Eldoret Municipal Council.

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

GROUND 1, 2, 3 AND 6: BREACH OF SECTION 67(2) OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005 (hereinafter referred to as the Act)

At the hearing, the Applicant argued grounds 1, 2, 3 and 6 together, as they all dealt with the issue of notification of the award.

The Applicant submitted that the Procuring Entity deliberately failed to notify it about the award, contrary to Section 67(2) of the Act. It stated that the letter of notification was addressed to the wrong address. It pointed out that the letter of notification was addressed to "P.O. Box 3566, ELDORET", whereas the Applicant's correct postal address was "P.O. Box 3566 – 00100 NAIROBI". In the view of the Applicant, use of the wrong address was done mischievously and with the intention of denying it the opportunity to apply for a review.

In its reply, while not denying the error regarding the postal address, the Procuring Entity submitted that it wrote the letters of notification on 9th June, 2008 in accordance with the Act. The letters were signed on 13th June, 2008 and were either mailed or handpicked. The Applicant picked its letter of notification at the offices of the Council on 13th June, 2008, and signed for it. According to the Procuring Entity, the Applicant had notice of the award in sufficient time, and in accordance with Section 67(2) of the Act.

After hearing the submissions by the parties, and upon perusing the supporting documentary exhibits, the Board agrees that Grounds 1, 2, 3 and 6 of the

application deal with the same subject matter, namely, the question of notification, and accordingly treats them as one ground.

Regarding the merit of the grounds, the Board holds that the Applicant was not prejudiced by the incorrect address on the letter of notification as it picked the letter on 13th June, 2008. It had sufficient time to lodge the review and indeed it did so on 20th June, 2008 within the Appeals window time. Accordingly, the Applicant has not suffered any prejudice.

GROUND 4 AND 5: BREACH OF SECTION 66(4).

The Applicant argued that according to Section 66(4), a tender should be awarded to the lowest responsive and evaluated bidder. By awarding the tender to Thwama Building Services Ltd, which had quoted Kshs. 23,538,800, compared to the Applicant's offer of Kshs. 16,600,302, the Procuring Entity had breached Section 66(4) of the Act. In support of this contention, the Applicant pointed out that, in monetary terms, their offer was the lowest. Moreover, they had fully complied with the Tender Notice by providing all the information required by the Procuring Entity and further by providing a bank statement. In addition, the Procuring Entity had carried out site visits to satisfy itself about the Applicant's competence to perform the contract.

In response, the Procuring Entity argued that the Applicant was not the lowest evaluated bidder. The award was given to the lowest evaluated bidder based on their financial strength as disclosed by their bank statement as compared to that of the Applicant and therefore, did not breach Section 66(4) as alleged.

Further, it argued that although the Technical Evaluation Committee had recommended that Pyramid Construction Company be awarded the contract, its Tender Committee did not however award the tender to the recommended bidder for the reason that the quoted price was lower than the Engineer's estimate by about Kshs. 6 million. In the circumstances, the Tender Committee

directed the Evaluation committee to re-evaluate the three best tenders which had scored 74%, 70% and 70% respectively.

The Evaluation Committee was required to:

- i) Compare the tenderers prices with the Engineer's estimate.
- ii) Get financial statements of the three tenderers, for the last six months and ascertain their financial capabilities.
- iii) Consult the referees and visit some of their indicated previous works done by the tenderers.

Further, the Procuring Entity sought to justify these directives given by the Tender Committee to the Evaluation Committee by pointing to Regulation 52 (1), which states that:

“Where so indicated in the tender documents, a Procuring Entity may, prior to award of the tender confirm the qualifications of the tenderer 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.”

The Board has carefully considered the submissions of the parties and perused the documents relating to the tender.

The Board has noted that the Procuring Entity did not carry out preliminary evaluation of the bids to determine responsiveness of the Bidders. This is a mandatory requirement under Regulation 47 (1). The Board has further noted that bidder No. 5, Eldo Rotsa Construction Company Ltd had provided a bid bond from an insurance company which was not acceptable and bidder No. 10, Talent Graphics had no bid bond. However, the Evaluation Committee

evaluated these two bids yet they were non responsive. These two bidders ought to have been disqualified at the preliminary evaluation stage.

Finally, the Board has noted that the Successful Bidder had not given prior authority to the Procuring Entity to seek reference from its bank as stipulated in Clause 1.5 (h) of the Instruction to Tenderers. This was a mandatory requirement and failure to provide the authority with its submitted bid rendered its bid non-responsive.

The Board holds that, all the Bidders who did not submit the mandatory documents, including the successful bidder, were not qualified to move to the stages of technical and financial evaluation.

The Board further finds that the directive of the Tender Committee to the Evaluation Committee to consider other matters that were not set out in the tender document was in effect introducing additional criteria of evaluation, contrary to Section 66(2) of the Act. These additional criteria required that a comparison of the tenderers' prices be compared with the Engineer's estimate, Bank statements be obtained for the last six months to ascertain their financial capabilities and consultations be done with the referees of the respective tenderers for the purpose of visiting some of their indicated previous works.

On the issue of Regulation 52 (1), the Board finds the argument by the Procuring Entity is not sustainable as the tender documents did not allow for this type of inquiry. If it wanted to use the said Regulation, it should have stated so in its tender document. Furthermore, the Tender Committee excluded other tenderers from benefiting from the additional criteria of Evaluation while it precluded other participants in the second evaluation, which it had created by selecting only three out of the six bidders who had participated in the tender. By doing so the Tender Committee discriminated against those excluded contrary to Section 39 (1) of the Act.

Taking into account all the above, these grounds of appeal succeed.

GROUND 7: BREACH OF SECTION 64(1)

The Applicant argued that the Procuring Entity awarded the contract to a non-responsive bidder on the ground that the bidder had not submitted a bid security of not less than 2% of the quoted price which is contrary to Section 64 (1) of the Act.

In response, the Procuring Entity submitted that the Successful Bidder was responsive because the requirement for the tender security would be met so long as the bid security was within the range of 0.5% to 2%. It further stated that the tender by Thwama Building Services was responsive and that it had submitted a sufficient bid bond of 0.5%. Therefore the contract met all the mandatory requirements of the tender. It finally submitted on this issue that it felt that going by the nature of the tender, a minimum of 0.5% of the bid bond would have been sufficient.

On its part, the Successful Bidder admitted that the shortfall in their bid security arose because they based their calculation on the tender sum net of VAT, instead of using the gross figure. It clarified that its tender price was Kshs. 23, 538,800 but it calculated its bid security erroneously based on Kshs. 20, 292,000. Therefore, the bid bond submitted was of Kshs. 100,000.

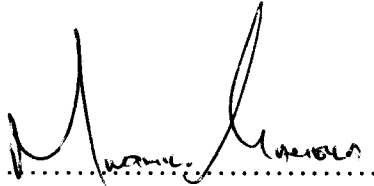
After carefully considering the submissions by the parties and the supporting documents, the Board has noted that the successful tenderer quoted a sum of Kshs.23,538,800 and provided a bid bond of Kshs.100,000. On the basis of simple arithmetic, the bid bond provided by the Successful bidder had a value of only 0.42% which is lower than the stipulated 0.5% - 2%. Further the Board observes that the Clause on bid bond was not specified as a figure, but was rather given as a range. Failure to specify a specific percentage for the bid bond

resorted to the bidders giving bid bonds of varying percentages. This is contrary to the provisions of Section 57 (2) of the Act, which requires Procuring Entities to specify the form and amount payable as bid bond. The Board further notes that bidders in a tender must be evaluated on a like to like basis. Therefore, the evaluation criteria must be specific and clear for bidders to understand.

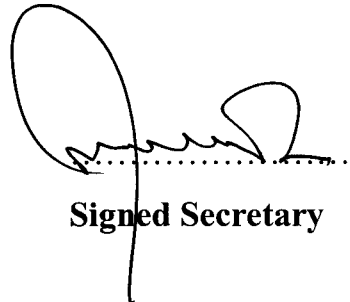
In the circumstance, the Board finds that the Procuring Entity breached Section 64(1) and further Section 57 (2) of the Act. Therefore this ground of Appeal succeeds.

Taking into account all the above, the Appeal succeeds and the Award to the successful tenderer is hereby annulled. The Procuring Entity may retender.

Dated at Nairobi on this 18th day of July, 2008



Signed Chairman



Signed Secretary

