

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 42/2008 OF 28TH NOVEMBER, 2008

BETWEEN

ONGATA WORKS LIMITED.....APPLICANT

AND

KENYATTA UNIVERSITY.....PROCURING ENTITY

Appeal against the decision of the Tender Committee of Kenyatta University, the Procuring Entity in the matter of Tender No.KU/TNDR/BLDG/WK/LIB/1/2008-2009 for Construction of a the Proposed Post Modern Library-Main Works

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Amb. C. M. Amira	-	Member
Mr. Akich Okola	-	Member
Ms. Natasha Mutai	-	Member
Eng. C. A. Ogut	-	Member

IN ATTENDANCE

Mr. P. M. Wangai	-	For Board Secretary
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PRESENT BY INVITATION

Applicant, Ongata Works Limited

- Mr. Mwenda Guantai - Advocate, Muriungi & Co.
Advocates
- Mr. G. G. Wambugu - Managing Director
- Mr. Josphat M. Munyoki - Project Manager

Procuring Entity, Kenyatta University

- Mr. Muhammed Nyaoga - Advocate, Mohammed Muigai
Advocates
- Mr. Geoffrey Imende - Advocate, Mohammed Muigai
Advocates
- Mr. E. Weta ngula - Advocate, Mohammed Muigai
Advocates
- Prof. D. N. Mugendi - Deputy Vice Chancellor, Finance,
Planning & Development
- Prof. G.M. Muluvi - Deputy Vice Chancellor
(Administration)
- Mr. P. Kibuthi Muiruri - Deputy Registrar
- Mr. J. K. Wambua - **Finance Officer**
- Mr. Aaron Tanui - **Legal Officer**
- Mr. Tirus K. Mburu - Procurement Officer

Interested Candidate, Landmark Holdings

- Mr. E. K. Gikandi - Quantity Surveyor

BOARD'S DECISION

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

BACKGROUND

This tender was advertised by the Procuring Entity on 28th August, 2008. The tender was for Construction of the Proposed Post Modern Library. The tender opened on 19th September, 2008 in the presence of the bidders' representatives. The bidders who responded to the tender notice were as follows:

1. Dinesh Construction Ltd
2. Njuca Consolidated Co. Ltd
3. EPCO Builders Ltd
4. Landmark Holdings Ltd
5. China Jiangxi International (K) Ltd
6. Seyani Brothers & Co. (K) Ltd
7. Ongata Works Ltd
8. N. K. Brothers Ltd
9. Magic Co.
10. Don-Woods Company Ltd

PRELIMINARY EVALUATION

This was conducted to determine the responsiveness of the tenders to the mandatory requirements of the tender. Magic General Contractors Ltd was disqualified at this stage for failing to comply with all the mandatory requirements.

TECHNICAL EVALUATION

A summary of the technical evaluation was as tabulated in the next page.

CODE	NAME OF TENDERE	EVL. 01	EVL 02	EVL 03	EVL 04	EVL 05	EVL 06	EVL 07	EVL 08	TOTAL SCORE	AVERAGE SCORE OVER 70	AVERAGE SCORE OVER 100%	REMARKS
5	CHINA JIANGXI CORPORATION	70	68	68	70	68	68	68	70	550	68.8	98.3	QUALIFIED
3	EPCO BUILDERS LTD	68	63	70	66	69.5	63	70	68	537.5	67.2	96.0	QUALIFIED
6	SEYANI BROTHERS & CO. (K) LTD	61	67	61	61	59	67	61	60	497	62.1	88.7	QUALIFIED
1	DINESH CONSTRUCTION LTD	62	59	63	57	62	59	63	57	482	60.3	86.1	QUALIFIED
8	N.K. BROTHERS LTD	60	55	63	55	60	55	63	59	470	58.8	84.0	QUALIFIED
4	LANDMARK HOLDINGS	60	54	60	58	59	56	60	58	465	58.1	83.0	QUALIFIED
7	ONGATA WORKS LTD	60	60	52	54	59	60	52	54	451	56.4	80.6	QUALIFIED
10	DON-WOODS COMPANY LTDQ	54	55	57	56	56	55	57	59	449	56.1	80.1	QUALIFIED
													DISQUALIFIED FOR:-
2	NJUCA CONSOLIDATED CO. LTD	46	49	48	43	48	49	40	43	366	45.8	65.4	- Scoring below Pass mark
9	MAGIC GENERAL CONSTRUCTORS LTD	0	0	0	0	0	0	0	0	0	0.0	0.0	Lack of mandatory requirements:- - Bid Security - Tax compliance certificate

Arising from the above information, Njuca Consolidated Co. Ltd was disqualified for failing to attain the cut-off mark. 8 bidders attained the cut-off mark and therefore qualified for financial evaluation.

FINANCIAL EVALAUTION

The financial proposals were opened on 30th October, 2008. The bidders' prices less material on site and after the correction of errors was as follows:

S/No.	Bidder's Name	Tender Price (Kshs)
1.	Dinesh Construction Ltd	794, 548,250.00
2.	Epcu Builders Ltd	803,262,250.00
3.	Landmark Holdings Ltd	679,109,220.00
4.	China Jiangxi Corporation	639, 316, 012.00
5.	Seyani Brothers & Co. Ltd	751, 765, 780.00
6.	Ongata Works Ltd	658, 998,580.00
7.	N. K. Brothers Ltd	799,909,101.00
8.	Don-Woods Co. Ltd	759, 835, 100.00

Arising from the above information, the evaluation committee recommended the award of the tender to China Jiangxi International (K) Ltd at its tender price of Kshs. 639, 319, 248.00 and a contract period of 82 weeks. This price was less the materials on site valued at Kshs. 113, 081, 410.00.

In its meeting held on 13th November, 2008 the Tender Committee concurred with the recommendations of the evaluation committee and awarded the tender to China Jiangxi International (K) Ltd.

Letters of notification of award were sent to both the successful and unsuccessful bidders on 15th November, 2008.

REQUEST FOR REVIEW

This request for review was lodged by Ongata Works Limited on 28th November, 2008 against the decision of the Tender Committee of Kenyatta University, Procuring Entity of 14th November, 2008 in matter of tender No.KU/TNDR/BLD/WK/LIB/1/2008-2009 for Construction of the Proposed Post Modern Library.

The Applicant has raised five grounds of appeal which the Board deals with as follows:-

PRELIMINARY ISSUE RAISED BY THE PROCURING ENTITY

At the outset, the Procuring Entity raised a preliminary objection regarding the Board's jurisdiction to hear the Application. In its submission the Procuring Entity claimed that the contract on the subject matter of the Application was signed between the Procuring Entity and the successful bidder on 29 November, 2008, and consequently the Board no longer had jurisdiction. In support of its contention the Procuring Entity cited Section 93(2), which sets out matters which are not subject to review by the Board.

Section 93(2) states that "The following matters shall not be subject to review under subsection(1):-

(a).....

(b).....

(c) where a contract is signed in accordance to section 68

It averred that, the Applicant was notified of the decision to award the contract to the successful bidder vide a letter dated 14th November, 2008, in accordance with section 67 of the Act. In its view the fourteen days statutory period within which the Applicant was entitled to appeal this decision started running from that date, and ended on 28th November, 2008. Following the expiry of this period it signed a contract with the successful bidder on 29th November, 2008 and the successful bidder moved onto site on 1 December, 2008. The Procuring Entity argued that in the circumstance the Board had no

jurisdiction to hear and determine the Appeal and further that the application was out of time, and frivolous.

In its response, the Applicant while claiming that it did not receive the letter of notification, nevertheless submitted that the statutory period started running from 16th November, and not the 15th, as claimed by the Procuring Entity. In support of this contention it cited section 57 of the Interpretation and General Provisions Act Cap. 2 of the Laws of Kenya, which in its view would mean that the period, during which the appeal window remained open run up to 1st December, 2008. Accordingly, the contract signed between the Procuring Entity and the successful candidate was not signed in accordance with section 68 and is, therefore, null and void.

The parties agreed to proceed with the Application on its merit, and, accordingly, the Board deferred consideration of the preliminary objection.

The Board has carefully examined the documents submitted before it and the parties' submissions and finds as follows:

On the issue raised by the Procuring Entity by way of preliminary objection as to the Board's jurisdiction, the Board finds that the appeal window opened on 16th November, 2008, this being the day after the letter of notification was dispatched by registered mail. The Board has consistently held that the period commences the day after notification is mailed. Counting from this date the appeal window remained open until 29th November, 2008, and as such the contract should not have been signed on or before this date. The earliest date the contract could have been signed was 30th November, 2008. Therefore, the contract signed by the Procuring Entity and the successful bidder was not in accordance with Section 68 of the Act. The Applicant filed the Request for Review on 28th November, 2008 which was within the appeal window and it was therefore not out of time as argued by the Procuring Entity.

Accordingly, the Board has determined that it has jurisdiction to hear the request for review and the preliminary objection fails.

Grounds 1&2 - That the Applicant was the Lowest Evaluated Bidder

These grounds have been combined because they raise similar issues.

The Applicant submitted that it was the lowest evaluated bidder in that the successful bidder failed to disclose in its bid the period within which it would complete the works. In its view this was a fatal error, which rendered the tender non-responsive. It argued that the successful bidder having failed to provide this information at the tender opening, could not rectify the error by providing the information afterwards as this was prohibited by section 5.5 of the Instructions to Tenderers. According to the Applicant section 5.5 prohibits rectification or alteration of bids which, if permitted, might affect competition.

It further argued that the Procuring Entity could not rely on Section 53 of the Act either as resort to that section would require that all other bidders be informed of any request for modification. In any event other bidders were not informed of this modification. In its view the tender should have been declared non-responsive, which if done, would have resulted in the Applicant's bid being the lowest evaluated bid.

The Applicant further submitted that having submitted the lowest evaluated bid, the Procuring Entity must have considered some extraneous matters in order for it not to be awarded the contract. It argued that the criteria for evaluating bidders required that those attaining a score of 70 per cent were to move to the financial evaluation stage. It further argued that it had passed the technical evaluation stage but that when its bid was subjected to financial evaluation, the Procuring Entity used extraneous factors to reach the decision that its bid was not successful.

In its response, the Procuring Entity submitted that the tender document provided for ninety weeks for completion and the successful bidder had confirmed that it would complete the work

within the period stipulated in the tender document. Moreover, no further information was sought from the successful bidder as alleged by the Applicant. The Procuring Entity further averred that in any event, the evaluation carried out considered every bidder equally so long as completion was within the period of ninety weeks.

The Procuring Entity further stated that it did not use any extraneous matters to decide that the Applicant was not the best bidder to award the contract to. In this regard, it pointed out that the Applicant was evaluated at the financial stage together with seven other bidders who had passed the technical evaluation stage.

The Board has carefully examined the documents submitted before it and the parties' submissions and finds as follows:

On the question of whether the successful bidder did not comply with the tender document by failing to indicate the period of completion the Board notes that there was no tender opening form prepared by the Procuring Entity as required under Section 60(5) of the Act. This form would have provided the tender prices, time duration and tender security details. In the absence of this form, Board has examined the tender returned by the successful bidder to ascertain whether or not the time duration was given and finds that in the form of tender the successful bidder had given a completion period of 82 weeks. The Board also observes that the successful bidder combined both the technical and financial documents. This is unlike those of all the other bidders who complied with the instructions to bidders to submit two separate envelopes. The question which this anomaly gives rise to is why was this bid not rejected?

The Board finds this anomaly serious and warns the Procuring Entity to observe the provisions of its own tender documents in the future in order to avoid the impression of impropriety in its tender proceedings. This impropriety does not, however, translate into the Applicant having been the lowest evaluated bidder, as claimed by it.

Ground 3: Breach of Section 39 of the Act and Regulation 28 of The Regulations

The Applicant argued that whereas the bid documents provide that bidders who are Kenyans would be given a preferential margin of 10%, the Procuring Entity failed to apply this margin of preference. It further argued that had this preference been applied its bid would have been the lowest evaluated one. It pointed out that section 39(5) of the Act makes it mandatory for a procuring entity to comply with the provisions of the Act when processing procurement in respect of preferences and reservations. It further pointed out that although Regulation 28(1) (b) stated that the threshold for exclusive preference for Kenya citizens was KSh 200mn, Regulation 28(2)(b) provided for the application of a graduated scale of preference for tenders in excess of KSh 200mn. It argued that by not applying preference in this case, the Procuring Entity breached the Act and Regulations. It further argued that the Procuring Entity had admitted in its written response that it had not applied any preferences in evaluation of the tenders.

In the course of this hearing, the Board interrupted its proceedings in order to give the parties an opportunity to acquaint themselves with a recent High Court decision in which the issue has been examined in the case of **the REPUBLIC versus THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD and THE KENYA REVENUE AUTHORITY (Miscellaneous Application No. 540 of 2008)**.

In its response, the Procuring Entity admitted that while it did not apply the preference stipulated in Section 39 and Regulation 28 and the tender document clause 5.12, it argued that these provisions were only available where the amounts are below prescribed thresholds. It further argued that the provisions only apply where the funds for the procurement in question came from the Government. It submitted that in this case, the funds came partially from school fees paid by students. It further submitted that even if the margins had been applied the Applicant would not have been the lowest bidder.

The Board has carefully examined the documents submitted before it and the parties' submissions and finds as follows:

As regards breach of Section 39 of the Act and Regulation 28, the Board notes that notwithstanding the fact that the Procuring Entity, in its Tender Document clause 5.12, provided for preference for Kenya citizens, it made no attempt to factor this provision in its evaluation. The Board also notes the recent High Court decision in which the issue has been examined in the case of **the REPUBLIC versus THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD and THE KENYA REVENUE AUTHORITY (Miscellaneous Application No. 540 of 2008)**, Justice Nyamu held that "The margin of preference consideration was a statutory one and although in the Act the provision is couched in discretionary terms due to the use of the word "may", in the Regulation 28(2)(a) the preference is couched in mandatory terms and therefore forms part of the substantive law on procurement."

As is the case in the present application the preference is also incorporated in the tender documents in mandatory terms. Moreover, section 39(5) is quite categorical in terms of what procuring entities must do when processing procurement in respect of preferences. It states that-

"A procuring entity shall, when processing procurement comply with the provisions of this Act and the regulations in respect of preferences and reservations."

We find that the Procuring Entity breached section 39(8) (b)(ii) of the Act and Regulation 28(2)(b) by failing to evaluate the Applicant's bid as stipulated in these provisions and the tender documents.

Accordingly, this ground of appeal succeeds.

Grounds 4&5: Discrimination against the Applicant

The Applicant submitted that by not being notified by the Procuring Entity of the outcome of the tender process, it had been discriminated against. It stated that it had requested the Procuring Entity for

information regarding its fate but had to date not been officially notified, whereas other bidders had been notified. It further pointed out that the mailing address as recorded by the Procuring Entity in its mailing register, provided for the Applicant to peruse at the hearing, was incorrect.

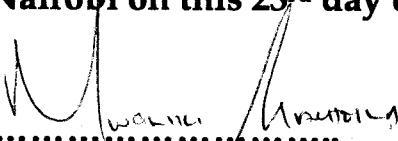
In its response, the Procuring Entity claimed to have written to the Applicant notifying it that its bid was not successful. In support of this claim, it pointed to the registered postal slip which indicated that the letter had been mailed to the Applicant and other bidders on 15 November, 2008.

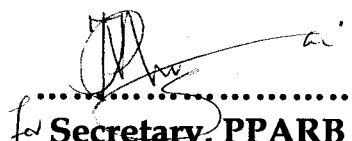
The Board has carefully examined the documents submitted before it and the parties' submissions and finds as follows:

As to the claim by the Applicant that it has been discriminated against, the Board finds that a notification letter was posted by registered mail to the Applicant simultaneously with those to the other bidders although the letter to it had the incorrect postal address for the Applicant. That notwithstanding, the Board finds that the Applicant had suffered no prejudice as a result of this as it had succeeded in filing its request for review.

In light of matters considered above, the Board orders pursuant to Section 98 of the Act, the Procuring Entity to reevaluate the tenders in accordance with its Tender Documents, the Act and Regulations.

Dated at Nairobi on this 23rd day of December, 2008


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Chairman, PPARB


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Secretary, PPARB