

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.9/2008 OF 5TH MARCH, 2008

BETWEEN

MUCMAR MANAGEMENT CONCEPTS LTD.....APPLICANT

AND

KENYATTA UNIVERSITY.....PROCURING ENTITY

Appeal against the decision of the Tender Committee of Kenyatta University in the matter of tender No.KU/HR.CSR/OCT/2007 for Consultancy Services for Restructuring and Staff Rationalization.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	-	Chairman
Mr. Joshua W. Wambua	-	Member
Amb. C.M Amira	-	Member
Mrs. L. G. Ruhiu	-	Member
Mr. Akich Okola	-	Member
Ms. Natasha Mutai	-	Member
Ms. Judith Guserwa	-	Member
Eng. C. A. Ogut	-	Member

IN ATTENDANCE

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

PRESENT BY INVITATION FOR APPLICATION NO.9/2008

Applicant, Mucma Management Concepts Ltd

- Mr. Muchara - Human Resources Consultant
- Ms. Jackie Sereta - Business Executive

Procuring Entity, Kenyatta University

- Mr. L. Mungai - Advocate, Lawrence Mungai & Co. Advocates
- Mr. J. G. Kuria - Advocate, Lawrence Mungai & Co. Advocates
- Prof. D.N. Mugendi - Deputy Vice Chancellor, Finance, Planning & Development
- Mr. Nelson M. Karagu - Registrar
- Mr. S. K. Wambua - Deputy Finance Officer
- Mr. Aaron Tanui - Legal Officer
- Ms. Hoglah Kuria - Purchasing Officer

Interested Candidates

- Ms. Jeniffer Amanda - Business Analyst, Deloitte Consulting Ltd
- Mr. Gabriel Musila - Director, PKF Consulting Ltd
- Ms. Sarah Namuganza - Executive Consultant, PKF Consulting Ltd
- Mr. Muma - Advocate, Professional Training Consultants
- Mr. Nicholas Karichi - Human Resources Consultant, Resources Associates Ltd
- Ms. Caroline Kayando - Human Resources Consultant, Ernest & Young

BOARDS DECISION

Upon hearing the representation 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 29th October, 2007. The tender closed/opened on 15th November, 2007 in the presence of bidders' representatives. Nine bidders returned their bids before the closing /opening date of the tender. The bidders who responded to the tender notice were as follows:

1. Adept Systems Management Consultants
2. Resources Associates Ltd
3. Ernest & Young
4. Professional Training Consultants
5. Eureka Education & Training Consultants
6. Osano & Associates
7. Mucmar Management Concepts Ltd
8. PKF Consulting Ltd
9. Delotte

Technical Evaluation

This was carried out by a committee chaired by a Mr. J. K. Wambua using the evaluation criteria set out in the Bid evaluation Form. The criteria were as follows:

Aspect	Evaluation Scale					Total
	Poor	Below average	Average	Good	excellent	
	2	4	6	8	10	
Documentation						
Methodology						
Organization						
Personnel						
Quality						
Cost						
Oral presentation						
Responsiveness						
Migration plans						
General						
Overall Scores						

A summary of the technical evaluation was as follows:

S/No	Firm	Evaluator 1		Evaluator 2		Average %	Rank
		Out of 78	100 %	Out of	100 %		
1.	Eureka Educational Training Consultants	26	33	26	33.3	33.3	9
2.	Resources Associates	45	57.7	44	56.4	57.1	8
3.	Ernest & Young	64	82.1	62	79.5	80.8	6
4.	Mucmar Management	56	71.8	57	73.1	72.4	7
5.	Professional training Consultants	74.5	95.5	74	94.9	95.2	1
6.	Adept Systems	65	83.3	65	83.3	83.3	4
7.	Deloitte	64	82.1	64	82.1	82.1	5
8.	PKF Consulting Ltd	73	93.6	75	96.2	94.9	2
9.	Osano & Associates	71.5	91.7	71	91.0	91.3	3

Arising from the above, two bidders namely Eureka Educational Training Consultants and Resources Associates were disqualified for failing to attain a score of 65 % which was the cut-off mark. The other seven bidders qualified for financial evaluation.

Financial Evaluation

The financial proposals were opened on 4th January, 2008 in the presence of the bidders' representatives. The prices quoted by the bidders were as follows:

S/No	Bidder's name	Price Quoted (Kshs)
1.	Mucmar Management Consultants	5, 928, 760.00
2.	Osano & Associates	13, 131,200.00
3.	Professional Training Consultants	5,535,750.00
4.	Ernest & Young	9,483,591.02
5.	PKF Consultants Ltd	2,028,840.00
6.	Adept Systems	6,269,800.00
7.	Deloitte	9,318,019.00

The technical scores and the prices were combined using the weight of 65 % and 35 % respectively.

The combined scores were as follows:

S/No	Bidder	Tech. Scores (65 %)	Financial Scores (35 %)	Combined scores	Ranking
1.	PFK Consulting Ltd	61.69	35.0	96.69	1
2.	Professional T. Consultants	61.88	12.83	74.71	2
3.	Mucmar Management	47.06	11.98	59.04	7
4.	Adept Systems	54.15	11.33	65.48	3
5.	Deloitte	53.37	7.62	60.99	5
6.	Ernest & Young	52.52	7.49	60.01	6
7.	Osano & Associates	59.35	5.41	64.76	4

Based on above information, the evaluation committee recommended the award of the tender to PKF Consulting Ltd at their price of Kshs. 2,028,840.00

In its meeting held on 8th January, 2008, the Tender Committee concurred with the recommendations of the evaluation committee and awarded the tender to PKF Consulting Ltd.

Letters of notification of award to the successful/ unsuccessful bidders were dated 28th February, 2008.

THE APPEAL

This Request for Review was lodged by Mucmar Management Concepts Limited on 5th March, 2008 against the decision of the Tender Committee of Kenyatta University, the Procuring Entity in the matter of tender No.KU/CSR/OCT/2007 for Consultancy Services for Restructuring and Staff Rationalization.

The Applicant was represented by Mr. M. Muchara, Human Resources Consultant while the Procuring entity was represented by Mr L. Mungai, Advocate. Professional Training Consultants and PKF Consultants, Interested Candidates, were represented by Mr. Muma, Advocate and Mr. Gabriel Musilu respectively.

The Applicant raised four grounds of appeal and urged the Board to make the following orders:

1. An order prohibiting the Kenyatta University, its Vice Chancellor, tender Committee, agents and/or employees from acting or deciding unlawfully or from following an unlawful procedure in relation to the **Tender No. KU/HR/CSR/OCT/2007-Consultancy Services for Restructuring and Staff Rationalization;**
2. An order requiring the Kenyatta University, its Vice Chancellor, Tender Committee, Agents and/or Employees to act or proceed in a lawful manner or to reach a lawful decision with regard to the award of the **Tender No. KU/HR/CSR/OCT/2007-Consultancy Services for Restructuring and Staff Rationalization;**
3. An order requiring preservation of all primary data and tender documents pertaining to **Tender No. KU/HR/CSR/OCT/2007-Consultancy Services for Restructuring and Staff Rationalization** for evaluation by an independent and neutral committee;

4. An Order annulling the refusal to award the said tender to the Applicant herein or the decision or any decision that may have been reached awarding the subject tender to a person other than the Applicant;
5. An Order substituting for any award that may have been made by the procuring entity herein, and award of the **Tender No. KU/HR/CSR/OCT/2007-Consultancy Services for Restructuring and Staff Rationalization** to the Applicant herein.
6. An order revoking and declaring null and void the whole exercise or any order or contract given as pertaining to **Tender No. KU/HR/CSR/OCT/2007-Consultancy Services for Restructuring and Staff Rationalization** and ordering a repeat in a lawful and procedural manner of the whole exercise.

The Applicant argued the Grounds of Appeal as follows:-

GROUND NO. 1 - BREACH OF REGULATION 29(1), 38(e) AND 66(2)

The Applicant submitted that the tender advertisement by the Procuring Entity contravened the regulations. It submitted that the advertisement had a provision to the effect that the Procuring Entity reserved the right to reject any tender without giving reasons for that decision.

The Applicant further submitted that the tender documents were not clear on the evaluation criteria, specifically the scoring system. It stated that some scores were adding up to 6/10 and others 8/10. Therefore the 100% score in the criteria was not attainable.

Finally, the Applicant submitted that the Procuring Entity breached Regulation 29(1) of the Public Procurement and Disposal Regulations, 2006 by failing to use the standard tender documents.

In response, the Procuring Entity submitted that it did not breach the Act and the Regulations as alleged. It stated that the first part of the ground did not disclose what kind of breach the Procuring Entity committed.

On the allegation that the Procuring Entity breached Section 66(2) , it submitted that there were minor deviations during evaluation. It stated that Section 64(2) of the Act anticipated deviations from the standard forms. It further submitted that even if there were minor deviations, all the Tenderers were treated equally.

Finally, the Procuring Entity submitted that the Applicant's letter of 8th February, 2008, did not request for reasons as to why it was unsuccessful. Rather, the letter only requested to establish whether the Applicant was successful.

The Board has considered the submissions by the parties and examined the documents submitted before it.

The Board has noted that Regulations 29(1) and 38(e) which were purportedly breached by the Procuring Entity provide as follows:-

29(1) "The standard tender documents for purposes of Section 29(4) of the Act shall be as set out in the Third Schedule to these Regulations".

38(e) *"For the purposes of section 52(3) (k) of the Act, the tender documents shall contain:-*

a)

b)

c)

d)

e) *the procedure and criteria to be used to evaluate and compare the tenders as set out in regulations 46 to 52".*

The Board has also perused the Request for Proposal document issued to the bidders and noted that the evaluation criteria were set out at paragraph 5 of the Terms of Reference. However, the criteria did not include the procedures for preliminary and financial evaluations save for technical evaluation at paragraph 5 of the Draft Terms of Reference.

It is clear that the Procuring Entity failed to use the appropriate standard tender document as provided for under Regulation 29(1). Further, the Tender Document used by the Procuring Entity did not provide a clear procedure and criteria to be used to evaluate and compare the tenders. This was a breach of Regulation 38(e). Therefore, in the absence of clear and objective criteria, it was not possible for the Procuring Entity to evaluate and compare tenders as envisaged by Section 66(2) and 3 of the Act.

Accordingly, this ground of Appeal succeeds.

GROUND 2 - BREACH OF REGULATIONS 45(1)(b), 46, 49(1) AND 50(1)

The Applicant submitted that technical evaluation ought to be completed before financial evaluation is done. It stated that at the opening of the financial proposals, it had requested for the technical scores, but the Chairman of the Financial Evaluation Committee, indicated to them that the technical evaluation was not complete. In addition, the Applicant submitted that the Procuring Entity had admitted that the oral presentation had been removed from the criteria of evaluation. To the Applicant, this was a confirmation that the technical evaluation was not complete at the time of the opening of the Financial Bids.

Finally, the Applicant submitted that the criterion on oral presentation, which attracted 10 % of the total score, was a major component. Therefore, it could not be treated as a minor deviation.

In response, the Procuring Entity denied that it breached the Regulations as alleged. It submitted that the Regulations required the financial bids of the unsuccessful bidders to be returned unopened. It stated that it complied with this requirement, and returned the financial bids of the two unsuccessful tenderers before opening the financial bids.

It denied the allegation that the technical evaluation had not been completed at the time of opening of the financial bids. It stated that the technical evaluation was completed on 8th December, 2007.

The Procuring Entity further submitted that the technical scores were merely unavailable at the financial bids opening meeting.

Further, the Procuring Entity submitted that oral presentation was treated as a minor deviation in the evaluation. It stated that the information required had already been submitted in writing and this requirement amounted to duplication. It argued that all bidders were treated equally as none of them was requested to give oral presentations.

The Board has considered the submissions of the parties and examined the documents submitted before it.

It is clear that the submission by the Applicant that the technical evaluation was not complete at the time of opening of the financial bids is a mere allegation that is not backed by any evidence.

The Board has perused the bid documents and in particular the bid evaluation form. The Bid Evaluation Form provided the evaluation parameters for technical evaluation and the score attached to each parameter. The criteria did not provide for a preliminary evaluation. Accordingly, the proposals were not subjected to a preliminary evaluation prior to the technical evaluation.

The Board has further noted that during the technical evaluation, the evaluation committee fixed a cut-off mark at 65% and disqualified two bidders who failed to attain this mark.

The Board has also noted that the Request for Proposal document did not provide procedures for financial evaluation. However, during the evaluation, the committee conducted a financial evaluation and combined the financial and technical scores using the weights of 35% for financial proposals and 65% for technical proposals. This was not provided for in the Request for Proposal document issued to the bidders.

On the issue of oral presentation, the Board has noted that it had been allocated 10% of the total scores. The Procuring Entity removed this parameter during evaluation. This was not a minor deviation as argued by the Procuring Entity. Sections 64(1) of the Act envisages only minor deviations that would not affect the substance of the tender. The action by the Procuring Entity amounted to alteration of the evaluation criteria. Indeed, the Board has also noted that the criteria on cost was not considered by the Evaluation Committee. In addition, the 10 marks assigned to the item known as '*general*' criteria were reduced to a maximum of 8 during the technical evaluation.

The Board has further noted that the proposals were opened on 15th November, 2007. The evaluation ought to have been completed by 15th December, 2007. However, the financial proposals were opened on 4th January, 2008. This was outside the stipulated period under Regulation 46. Nonetheless, this was within the tender validity period.

Taking all the above into consideration, it is clear that the entire evaluation process was not done in accordance with the Act and Regulations.

Accordingly, this ground of Appeal succeeds.

GROUND 3 - BREACH OF REGULATION 66 OF THE ACT

The Applicant submitted that the Procuring Entity breached Regulation 66 by failing to communicate the award of the tender to the successful and unsuccessful bidders simultaneously. It stated that it was verbally informed by the Procuring Entity on 6th January, 2008 that the award had been made to another bidder. It submitted that no written communication was made even after making enquiries on 8th February and 4th March, 2008. Finally, the Applicant submitted that the Procuring Entity faxed a letter of notification on 7th March, 2008 after the filing of the Request for Review on 5th March, 2008.

In response, the Procuring Entity stated that it communicated to all the bidders and produced letters dated 28th February, 2008. It submitted that the post-election skirmishes of January, 2008 caused the failure to notify the tenderers within a reasonable time after the award of the tender on 8th January, 2008.

The Procuring Entity admitted that it could not confirm to the Board how the letters of notification were dispatched to the tenderers.

The Board has considered the arguments of the parties and all the documents before it. The Board notes that Regulation 66 does not deal with communication of award to the bidders. The relevant provision is Section 67(2) of the Public Procurement and Disposal Act, 2005. Nevertheless, the Board has noted that all notification letters to the successful and unsuccessful bidders are dated 28th February, 2008. However, the Procuring Entity did not have any evidence on the mode of dispatch of the letters. The letter to the successful tenderer was collected and signed for on 5th March, 2008 but it is not clear how and when the other letters were dispatched.

In addition, the letter to the successful bidder, partly read as follows:-

"As per Terms of Reference (TORS) specified in the bid document, the contract will be for a period of three (3) months commencing 3rd March, 2008".

This statement contradicts Section 68 of the Act on creation of a contract.

The Board holds that the Procuring Entity did not communicate on the award of the tender as envisaged by Section 67(2) of the Act. However, the Applicant has not suffered any prejudice as it has been able to file and argue its appeal in time.

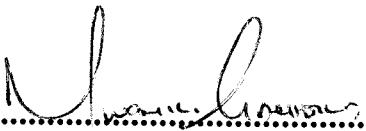
GROUND 4

This was not a ground of Appeal but a general statement that was not supported by any allegation of breach of the Act or Regulations as required under Regulation 73(2) (a). Therefore, the Board need not make any finding on it.

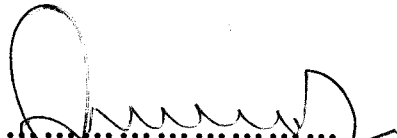
Taking into account all the foregoing matters, the Appeal succeeds and the tender is hereby annulled.

Accordingly, the Procuring Entity may retender.

Dated at Nairobi this 28th day of March, 2008.



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CHAIRMAN
PPARB



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SECRETARY
PPARB