

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 25/2009 OF 16th JULY, 2009

BETWEEN

CONSKY ENGINEERING SERVICES LTD (APPLICANT)

AND

KAJIADO NORTH DISTRICT (PROCURING ENTITY)

Review against the decision of the Tender Committee of Kajiado North District dated 24th June, 2009 in the matter of Tender No. KJD-N/T/1/2008-2009 for the Proposed Construction of the District Headquarters Offices

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant, Consky Engineering Services Ltd

- Mr. Ernest Githuka - Advocate, Nduku Githuka Mwashimba & Co
Advocates
- Mr. Peter Korinko Mositet - Director
- Mr. Martin Kaurai - Administrator

Procuring Entity, Kajiado North District

- Mr. Kamau Mburu - District Procurement Officer
- Mr. Nyamwaya J. K - District Accountant
- Mr. Nyabuga David - Accounts

Interested Candidates

- Mr. Gerald Maina - Manager, Truckline Ltd
- Mr. Simon Kanoru Mugo - Director, Priska Engineering & Construction
Co. Ltd
- Mr. N. M. A - Director, Darina Constructors Ltd
- Ms. Mercy N. Tonkei - Director, Oloirien Le Africa Ltd

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 for the construction of the Kajiado North District Headquarters was not advertised. A committee comprising the District Commissioner, the District Architect and the District Procurement Officer in a meeting held on 2nd June, 2009 agreed to use restricted tendering method due to time constraints. The committee

indicated that the recommended open tendering method would not be feasible considering the time available before the closure of the financial year. They agreed to jointly select names of contractors who would be invited to bid for the works.

The bids were closed and opened on 15th June, 2009 at 10.00 a.m. Sixteen bids submitted and their tender sum at the opening of the bids were as follows

BIDDER	TENDER SUM
1. Kensionary Marketing & System	16,834,146.20
2. Consky Engineering Services	14,851,688.80
3. Oloirien Le Africa Ltd	22,790,821.60
4. Priska Engineering Construction Co. Ltd	15,749,590.00
5. Zoar Gen Construction Ltd	18,557,645.20
6. Barina Contractors Ltd	17,208,263.60
7. Star General Contractors Ltd	14,924,409
8. Truckline Ltd	20,130,825.60
9. Pepco Construction Ltd	19,610,339.40
10. J.S.M. Builders (Nairobi) Ltd	13,623,120.00
11. Masosa Construction Ltd	21,562,068.40
12. Jdesign Enterprises	19,562,212.00
13. Apex Projects Ltd	21,163,295.20
14. Colombia Dev (K) Ltd	14,995,568.00
15. Konexxion Systems Ltd	17,022,226.30
16. Aswa Developers & Constructors	21,462,145.00

EVALUATION

The evaluations of the bids were done twice. The first Evaluation was conducted by the Ministry of Works Officials led by the District Works Architect and the District Works Officer Kajjado. The committee ranked the bids from the highest to the lowest and only evaluated the six lowest bids.

The first lowest tenderer M/s J. S.M Builders (Nairobi) Ltd was disqualified for the following reasons:-

- The Form of Tender was not fully filled
- Provisional Construction Sum (P.C/PS) and VAT were not included in the tender sum
- Registration certificate was not attached and the name did not appear in the Ministry of Works Register
- The error percentage was not manageable within the contract i.e Kshs 4,688,369.20

The second lowest bidder M/s Consky Engineering Services was disqualified as it had not included the P.C /PS in the tender sum and the percentage error of 23.76% was not manageable

The committee recommended the tender be awarded to the 3rd lowest tenderer M/s Star General Contractors at their tender sum of 14,924,409.20. It was noted that the firm's margin of error of 14.02% was manageable in the contract and the tender sum included the PC/PS and the VAT. The evaluation report is dated 18th June, 2009.

On 19th June, 2009 a second evaluation was conducted by a committee comprising the Senior District Officer, District Accountant and the District Procurement Officer. The Works Officer declined to attend the committee and recommended that the evaluation report forwarded to the District should comprise his contribution.

The second Evaluation Committee recommended the award of the tender be made to M/s J. S. M. Builders (Nairobi) Ltd at the tender price of Kshs.18,023,000.00. This was the summation of the quoted price of Kshs.13,623,120 and PC sum of Kshs. 4,400, 000. The committee stated that the firm had included its bank statements, copies of PIN, VAT and registration certificate from the Ministry of Public Works in

category E. It further stated that the tenderer had no errors in the builders work and that though the PC sums were not included in the total bid price, it was not a requirement in the bid document to include them.

THE TENDER COMMITTEE DECISION

The District Tender Committee in its meeting held on 22nd June, 2009 was informed of the reason for the choice of the alternative procurement as provided for in Section 29 and 73. The committee then ratified the earlier decisions and approved the tender process as the Tender Committee was not in place when the procurement started.

The committee deliberated on the report from the second evaluation and awarded the works to JSM Builders (Nairobi) Ltd at a total cost of Kshs. 18,023,000.00

THE REVIEW

The request for review was lodged on 16th July, 2009 by Consky Engineering Services Ltd against the decision of Kajiado North District Tender Committee of 22nd June 2009 regarding the award of Tender No. KJD-N/T/1/2008 for the proposed construction of the District Headquarters Office Block. The Applicant was represented by Mr. Ernest Githuka, Advocate, Ndung'u Githuka Mwashimba & Company Advocates. The Procuring Entity was represented by Mr. Kamau Mburu, District Procurement Officer. The Successful bidder M/s JSM Builders Nairobi Ltd was invited for the hearing but was not present. All the Interested Candidates were notified by Phone, Fax and e-mail on 5th August, 2009, the day the Procuring Entity submitted their contact details together with other documents requested by the Board.

At the commencement of the hearing, the Board noted a preliminary issue on Jurisdiction in the Procuring Entity's response. After consultation, the Procuring Entity decided to argue the preliminary issue together with the substantive arguments. The Board will address this issue first.

The Procuring Entity stated that the Board did not have jurisdiction under Section 93(2) (c) to hear the Request for Review since a contract had been signed in accordance with Section 68 of the Act. It stated that all notification letters, to the successful and unsuccessful candidates, were sent out on 24th June 2009 and that the fourteen days appeal window expired on 7th July 2009. Upon expiry of the Appeal window, it signed a contract with the successful candidate on 9th July 2009, in accordance with Section 68 of the Act.

On enquiry on how it posted the notification letters, the Procuring Entity stated that it posted the letters by ordinary mail but it did not have any evidence to show when this was done other than producing a copy of the notification letter dated 24th June 2009. It argued that in its letter of 10th July 2009 to Public Procurement Oversight Authority, the Applicant had admitted that it had learnt that other bidders had received apology letters which confirms that the notification letters were indeed sent out.

On further enquiry, the Procuring Entity agreed that the postal address Box No. 4165-00200 on the notification letter to the Applicant differed from the address Box No. 4105 – 00200 shown on the Applicant's Form of Tender document. The Procuring Entity insisted that it did not avoid notifying the Applicant simultaneously with the other bidders and stated that the wrong address was a mere typographical error. It however admitted that the effect of the wrong address amounted to a failure to notify the Applicant.

In response, the Applicant stated that to date, it had not received any notification from the Procuring Entity. It further stated that it only confirmed from another unsuccessful bidder on 7th July, 2009 that the tender had already been awarded. It argued that there was a deliberate ploy on the part of the Procuring Entity to withhold the outcome of the award.

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

The Board notes that the notification letters to both successful and unsuccessful bidders were dated 24th June, 2009. The Procuring Entity affirmed that it sent all letters by ordinary mail on the same date of 24th June, 2009. However, there was no evidence on the dispatch of the letters. The Board further notes that the postal address used on the Applicant's notification letter was different from that on its Form of Tender. The letter sent to the Applicant was addressed to P. O. Box 4165 – 00200, Nairobi whereas its correct address as per the form of tender was P. O. Box 4105 – 00200 Nairobi. The Procuring Entity indeed admitted that there was a typographical error on its part.

The Board finds that in effect the Applicant has to date not been notified which is contrary to section 67(2) which mandates that all bidders are to be notified at the same time. Consequently, the contract that the Procuring Entity purports to have signed with the Successful Candidate is void as it is not in line with Section 68(2) which states as follows,

“The written contract shall be entered into within the period specified in the notification under section 67(1) but not until at least fourteen days have elapsed following the giving of that notification.”

The Board further finds that Section 93(2)(c) of the Act on which the Procuring Entity based its argument, only bars the Board from hearing a Request for Review, where a contract has been signed in accordance with Section 68. As the Board has already held the signing of the contract in this tender did not satisfy the requirements of Section 68 of the Act

Accordingly, the Board finds that the Request for Review was properly filed before it and hence the Board has jurisdiction to hear and determine the Request for Review.

Ground 1 – Breach of Section 59(1), (2) and (3)

The Applicant submitted that the Procuring Entity allowed JSM Builders (Nairobi) Ltd (hereinafter referred to as JSM Builders) the successful candidate, to change the substance of its tender after the deadline for the submission of tenders. It further submitted that at the tender opening, it was noted that JSM Builders, had not completed its Form of Tender and that it had not filled the Tender questionnaire. Further, the Successful Candidate did not enclose its Certificate of Registration with the Ministry of Works. The Applicant averred that the Tender Opening Committee at that point had declared the tender for JSM Builders Nairobi Limited as disqualified on the grounds that it was incomplete. It argued that it was not possible for a tender that had been disqualified at tender opening to end up as the successful bid.

The Applicant further argued that the Evaluation Committee ought to have disqualified the Successful Bidder in accordance with Regulation 47(2) since its tender had not been presented in the correct format. Alternatively, it argued, if the form received by the Evaluation Committee was complete, then the Procuring Entity had breached Section 59(1), (2) and (3) which bar a party from changing the substance of the Tender. It argued that the Tender Form was incomplete at tender opening and therefore it could only have been completed after tender opening.

In response, the Procuring Entity stated that no tenderer was allowed to change the substance of its tender. It submitted that the tender sum of Kshs. 13,623,120 for the Successful Bidder as read out at the tender opening was the same one which was used as basis for award of the tender. Further, the Procuring Entity stated that it had only adjusted the figure with 4.4 million which was the Provisional sums. Further, the Procuring Entity admitted that the VAT had not been included in the tender sum of the Successful Bidder.

On the issue of the Ministry of Works Registration Certificate, the Procuring Entity stated that the document had been submitted. However it did not produce a copy since, according to it, the certificate was attached to the original tender document which had been forwarded to the District Works Officer, Kajiado. It argued that it had not photocopied the attachments for inclusion in the copy of the tender document that was presented to the Board.

Two Interested Candidates, Oloirien Le Africa Ltd and Darina Contractors Ltd submitted that they had attended the tender opening and it was noted that the Form of Tender for JSM Builders was incomplete. They stated that the Successful tenderer was therefore disqualified at the tender opening.

The Board has considered the submission of the parties and examined the documents presented before it.

The Board notes that Section 60 of the Act stipulates the manner in which the tender opening should be carried out. Section 60(4) and (5), sets out the function of the Tender Opening Committee which include; assigning an identification number to each tender, reading aloud and recording in the tender opening register the name of the person submitting the tender, the total price of the tender including any modifications or discounts received and the tender security if applicable. The Board notes that the Applicant and two of the interested candidates claim that the Tender Opening Committee disqualified the successful candidate on basis of an incomplete Form of Tender. However, the Procuring Entity denied that it disqualified the Successful Bidder at tender opening. The Board notes that there was no evidence that the Successful Bidder was disqualified at the tender opening meeting. Therefore the Board finds that the Procuring Entity was right in allowing all the bidders including the successful candidate to proceed to the evaluation stage as disqualification of tenders is the duty of the Evaluation Committee.

The Board has further noted that an Evaluation Committee comprising of the Ministry of Works officials, led by the District Works Architect and the District Works Officer, Kajiado met on 18th June, 2009 and did in fact disqualify JSM Builders for the following reasons:

- The Form of Tender was not fully filled
- Provisional Construction Sum (P.C/PS) and VAT were not included in the tender sum.
- Registration certificate was not attached and the name does not appear in the Ministry of Works Register
- The error percentage was not manageable within the contract i.e. Kshs 4,688,369.20.

The Board further notes that on 19th June, 2009 another evaluation was conducted by the Senior District officer, District Accountant and the District Procurement Officer. The Works Officer declined to attend the committee and stated that the evaluation report forwarded to the District Officer should comprise his contribution.

The second Evaluation Committee recommended the award of the Tender be made to JSM Builders at the tender price of Kshs. 18,023,000.00. This was the summation of the quoted price of Kshs. 13,623,120 and PC sum of Kshs 4,400,000. The committee also stated that the JSM Builders had included its registration certificate from the Ministry of works in Category E. It further stated that the tenderer had no errors in the building works and that though the PC sums were not included in the total bid price, it was not a requirement in the bid document to include them.

The Board takes note that on 22nd June, 2009, the District Tender Committee met and deliberated on the evaluation report from the second Evaluation Committee. The Board further takes note that the District Procurement Officer was a member of the

second Evaluation Committee as well as the Secretary to the Tender Committee that awarded the tender.

The Board further notes that both the Evaluation Committees took into account only the bidders with the six lowest quoted prices. The other ten bidders were omitted from the evaluation.

The Board finds that the Procuring Entity changed the substance of the tender as the sum awarded was not the sum which the Successful Bidder had quoted. Indeed, the minutes of the first Evaluation Committee clearly indicated that the Form of Tender of the Successful Bidder was incomplete. However, upon perusal of a copy of the Form of Tender submitted to the Board, it was complete. This raises serious doubts as to the manner the evaluation was conducted as the minutes of the first Evaluation Committee and the second Evaluation Committee contradict each other.

The Board also finds that the evaluation process was not carried out in accordance with the law. The Procuring Entity could not justify the setting aside of the recommendations of the first Evaluation Committee which had disqualified JSM Builders.

Taking into account all the foregoing matters, we find that the process was irregular and therefore this ground of review succeeds.

Ground 2 - Breach of Section 60(6)

The Applicant submitted that the Procuring Entity refused to provide it with a copy of the tender opening register. It argued that Section 60(6) was framed in mandatory terms and hence it was not optional for the Procuring Entity to choose whether or not to give the register. It referred the Board to a copy of its letter to the Procuring Entity dated 14th July 2009 which had indicated the letter as having been received by a secretary on 15th July, 2009.

In response, the Procuring Entity stated that no bidder including Consky Engineering had requested for the tender opening register and that it would not hesitate to give the register to any bidder who requested it.

The Board notes that the letter was hand delivered to the Procuring Entity's offices and a copy signed for acknowledgement by a secretary on 15th July 2009. As at the time of hearing the Procuring Entity had not responded to the Applicant. The Board further notes that a copy of the said letter was indeed part of the Procuring Entity's response document. It was therefore not right for the Procuring Entity to claim that it was not aware of any such request.

Accordingly this ground succeeds.

Ground 3 - Breach Section 62(1) and (2)

The Applicant submitted that the Procuring Entity failed to seek clarifications from it in regard to the evaluation and comparison of the tenders. It stated that had the Procuring Entity sought clarifications, it would not have adjusted the Applicant's tender sum since the amount quoted by it was already inclusive of the provisional sums as well as VAT.

In response, the Procuring Entity stated that it was not mandatory for it to seek clarification from the bidder unless the bid was not clear. It argued that in this case, it did not have any reason to seek for clarification from the Applicant.

The Board notes that a clarification is sought only when there is an issue that needs to be clarified, and further that Section 62 (1) gives the Procuring Entity the discretion to determine when to seek for clarification.

Accordingly the ground of appeal fails.

Ground 4 - Breach of Section 63(1), (2) and section 66(2), and (3)

The Applicant submitted that the Procuring Entity in evaluating its tender took into account alleged arithmetic errors without notifying it. It argued that the Procuring Entity was obligated under Section 63(1) to notify it so that it would have an opportunity to either reject the error or to stand by its tender sum.

In response, the Procuring Entity stated that it did not rely on any error correction in arriving at the lowest evaluated price. It argued that the difference between the bid of Consky Engineering and that of the Successful Candidate remained the same whether the provisional sums were added to the two bids or not.

The Board notes that section 63 of the Act stipulates how corrections of arithmetical errors are to be carried out. The first evaluation report indicated that the Applicant's tender sum had an error of 23.76%. The Board further notes that the sums tendered by the Applicant and successful bidder are consistently changed in the Procuring Entity's Analysis document. There is no evidence provided to indicate whether the correction of the arithmetic errors was communicated to the Applicant as required by Section 63(2) of the Act. The Procuring Entity had a duty under Section 63 (1) and (2) to inform the bidders of the corrections that were made in their bids. The Procuring Entity failed to do so and accordingly this ground of review succeeds.

Grounds 5 and 6 - Breach of Section 64(1), (2) and (3)

The Applicant alleged that the Procuring Entity erred in declaring it non-responsive whereas its tender conformed to all the mandatory requirements. It further alleged that the Procuring Entity, in the evaluation of bids, used criteria and procedures not set out in the tender document.

In response, the Procuring Entity stated that it did not at any point declare the Applicants bid to be non-responsive.

The Board notes that Section 64 stipulates that a tender is responsive if it conforms to all the mandatory requirements in the tender document. We note that the tender document had the following requirements as stipulated in Clause 1.2 of the Tender Document.

- a) "Copies of certificates of registration and principal place of business.**
- b) Total monetary value of construction work performed for each of the last five years**
- c) Experience in works of a similar nature and size for each of the last five years and clients who may be contacted for further information on these contacts**
- d) Major items of construction equipment owned**
- e) Qualification and experience of key site management and technical personnel proposed to the contract.**
- f) Report on the financial standing of the tenderer such as profit and loss statement and auditor's reports for the last five years**
- g) Authority to seek reference from the tenderer's bankers"**

The first evaluation report indicated that the Applicant had complied with the many requirements of the tender but was disqualified for not providing the Provisional Construction (PC) Sums in the tender sum and that its margin of error was not manageable. The second evaluation report did not fault the Applicants' tender apart from adding the PC sums and therefore making the Applicant's bid higher than that of the successful bidder.

Therefore, the Board finds that the Procuring Entity did not breach Section 64 of the Act since it did not declare the applicant to be non-responsive.

Accordingly this ground of appeal fails.

Ground 7 - Breach of section 66 (4)

The Applicant alleged that the Procuring Entity erred in declaring the bid for JSM Builders Nairobi Ltd to be the lowest evaluated bid. It argued that JSM Builders price of Kshs 13,623, 120.00 as read out at the tender opening was exclusive of VAT. Such VAT, it averred would amount to Kshs 2, 179, 699 bringing the tender sum for JSM Builders to Kshs 15,802,819.

In response, the Procuring Entity asserted that it did not breach this section as it awarded the tender to JSM Builders whose bid was the lowest evaluated bid.

Another Interested Candidate, Priska Engineering Construction Co. Ltd submitted that the tender document had required both the VAT and provisional figures to be included as part of the tender sum. It argued, therefore that it ought to have been awarded the tender since its figure of Kshs 15, 749, 590 was all inclusive.

The Board notes that the Procuring Entity declared JSM Builders the lowest evaluated bidder yet it only considered six out of the sixteen submitted bids. Further it was wrong for the Procuring Entity to try to use "lack of time" as a basis for justifying its failure to evaluate ten of the sixteen bidders. This amounted to discrimination as the set criteria for evaluation was not uniformly applied to all the sixteen bidders. As a result of this omission, it is not clear that the bid was awarded to the "lowest evaluated tenderer" in accordance with Section 66(4) of the Act. The Board has further noted that two bidders had quoted a tender sum of Kshs. 17 million and its probable these tender sums had incorporated the provisional sums thus making their tender sum lower than that of the successful candidate which had been adjusted to Kshs 18 million.

The Board has also noted that M/s Star General Contractors who were recommended by the first Evaluation Committee was disqualified by the second Evaluation

Committee on the basis that it was a past contractor for the entity and that the workmanship was not satisfactory. This bidder had included the PC sum in its tender sum of Kshs. 14,924, 409.20. The consideration of the past performance was not one of the evaluation criteria and further the Procuring Entity had not submitted any evidence or report indicating poor performance of this bidder.

Therefore, the Board finds that the Procuring Entity erred in declaring the bid for JSM Builders as the lowest evaluated bid while failing to follow the due process to arrive at the lowest evaluated price.

Accordingly, this ground of appeal succeeds.

Grounds 8 and 9 - Breach of section 67(1), (2) and 68(2) of the Act.

We combine these grounds as they raise similar issues.

The Applicant claimed that the procuring entity failed to notify it of the outcome of the tender and hence the contract with JSM Builders was done before the expiry of the mandatory fourteen days.

The Board has already dealt with this ground under the preliminary issue and held that there was a breach on the part of the Procuring Entity.

Accordingly these grounds of appeal succeed.

Finally, the Board wishes to make the following observations:-

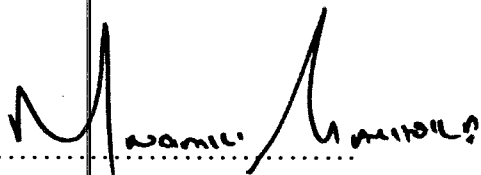
1. After the hearing, the Procuring Entity submitted the original tender document of the Successful Candidate. The tender document is properly bound and on the first page of the bound document, it was marked as No. 10. The Tender Opening Committee duly signed on that page which is consistent with the copy of the tender document which had been submitted earlier

The Board notes that the mandatory documents stated as missing in the first tender evaluation report have been stapled to the top cover page. Clearly, this document could not have been submitted as part of the original tender document and were merely added onto the document after the opening in order to legitimize the participation by the successful bidder.

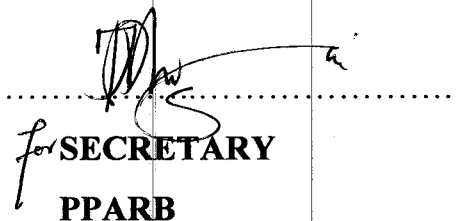
2. The Applicant had full copies of the evaluation report and Tender Committee minutes. He informed the Board that he had not been supplied with the documents officially but that he had obtained them through his own sources. This is contrary to Section 44 and 45 of the Public Procurement and Disposal Act.
3. The Board notes that the Procuring Entity proceeded by way of restricted tendering. However it did not have a list of pre-qualified bidders in accordance with Section 73 of the Act. The Board further notes that the pre-qualification list used was prepared by the District Commissioner and the District Architect a day before tenders were invited. The Board finds that the action of the Procuring Entity is contrary to Section 73 of the Act and Regulation 54

Taking into account all the foregoing matters, the Request for Review succeeds and the award to the successful tenderer is hereby annulled. The Procuring Entity may retender.

Dated at Nairobi this 12th day of August, 2009



CHAIRMAN
PPARB



for SECRETARY
PPARB

