REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 18/2009 OF 11TH MAY, 2009

EDWARD MBURU IRUNGU
AND MARGARET WANGUI T/A
RONSHAN ENTERPRISES..... APPLICANT

AND

CITY COUNCIL OF NAIROBI..... PROCURING ENTITY

Review against the decision of the Tender Committee of the City Council of Nairobi dated 30th April, 2009 in the matter of Tender No. CCN/DOE/T/059/2008-2009- Tender for Solid Waste Collection, Transportation and Disposal (Dagoretti Zone).

BOARD MEMBERS PRESENT

Mr.P. M. Gachoka	-	Chairman
Mrs. Loice Ruhiu	-	Member
Mr. Joshua Wambua	-	Member
Mr. Akich Okola	-	Member
Mr. Sospeter M. Kioko	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Board Secretary
Mr. Kerina Rota	-	Secretariat
Mr. Gilbert Kimaiyo	-	Secretariat

PRESENT BY INVITATION

Rwathe Construction Company

Mr. L. M. Nyang'au	-	Advocate, Masore Nyang'au & Co. Advocates
Ms. Edward Mburu	-	Proprietor, Ronshan Enterprises

Procuring Entity, City Council of Nairobi

Mr. Julius Ndichu	-	Counsel, City Council of Nairobi
Mr. G.K. Njamura	-	Director of Procurement, City Council of Nairobi
Mr. Kinuthia	-	Law Clerk, City Council of Nairobi

BOARD'S DECISION

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

BACKGROUND

The tender was advertised by the Procuring Entity on 16th February, 2009. The tender No.CCN/DOE/T/059/2008-2009 was for Solid Waste Collection, Transport and Disposal contract for Dagoretti Zone. The tender closing/opening date was first scheduled for 6th March, 2009 however it was extended to 10th March, 2009. The bids were opened in the presence of the bidders' representatives.

The following are the bidders who submitted their bids:-

Tender No. CCN/DOE/T/059/2008-2009 (DAGORETTI)

1. M/s Jane Wangare Mwangi Ltd
2. M/s Ron Shan Enterprises

EVALUATION

The two bids that were received were evaluated in conformity with Clause 25.4 of the Tender Documents.

(a) Completeness of documents

- Examination of whether tenders were complete
- Checked for any computational errors
- Checked whether documents were properly signed

(b) Tender responsiveness

- Certificate of registration (or in corporation) of business or company
- VAT Registration Certificate
- PIN Certificate
- Latest City Council of Nairobi Single Business Permit
- Acceptable tender Security (Kshs. 100,000/=) either in the form of Bank Guarantee, Cash or Banker's Cheque payable to City Council of Nairobi
- Tender validity (90 days)
- Completeness of Schedule of particulars

(c) Technical and Financial Capacity

- Relevant experience
- Vehicles and equipment
- Personnel
- Finance
- Registration with NEMA
- Other experience

(d) Unit price

Clause 19.0 of the tender document provided that in addition to the evaluation criteria stated above, the following listed parameters would be scored and assigned weights as follows:-

Parameter	**Maximum**	**Score Percentage**
Completeness of documents	3	8.33
Tender responsiveness	7	19.44
Technical Capacity	23	63.89
Financial Consideration	3	8.33
Total	**36**	**100**

Bidders who attained a minimum score of 27 points or 75% and above were considered for further evaluation.

M/s Jane Wangari Mwangi Enterprises Ltd attained a minimum score of 27 points and was considered responsive while M/s Ronshan Enterprises Ltd was disqualified for scoring 25 points, which is below the required minimum score of 27 points.

The Tender Committee in its Meeting No. 16/2008-2009 of 24th and 25th April, 2009 observed that the Procuring Entity required two (2) contractors for Dagoreti Zone but only one qualified. It therefore moved M/s Ole Suguti who had quoted Kshs. 800/= for Embakasi zone to this Zone at a rate of Kshs. 1,210 per tonne.

The Tender Committee awarded the tender for Dagoretti zone to M/s J.W. Mwangi and M/s Ole Suguti at a bid sum of Kshs. 1,210/= per tonne.

The Procuring Entity notified both the Successful and Unsuccessful bidders on 30th April, 2009.

THE REVIEW

This Request for Review was lodged on the 11th day of May, 2009 by Ronshan Enterprises against the decision of the Tender Committee of the City Council of Nairobi dated 30th April, 2009 in the matter of Tender No. CCN/DOE/T/059/2008-2009 for Solid Waste Collection, Transportation and Disposal (Dagoretti Zone).

The Applicant was represented by Mr. Masore Nyang'au, Advocate, while the Procuring Entity was represented Mr. Julius Ndichu, Counsel.

The Applicant in its Request for Review raised twelve (12) grounds of Review. The Board has considered the submissions by the parties and the documents presented before it and decide as follows:

Grounds 1, 2, 6, 7 & 8 –Breach of Section 2 and 52 of the Public Procurement and Disposal Act.

These grounds have been combined as they raise a similar issue on how the tender process was conducted.

The Applicant submitted that the decision made by the Procuring Entity failed to promote competition, fairness, integrity and to increase transparency and accountability in the tendering procedure that it undertook in breach of section 2 of the Act (herein after referred to as the Public Procurement and Disposal Act,2005). It argued that the purpose of the Act is further repeated in Section 39(1) of the Act, wherein it is stated that:

> ***"Candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the regulations."***

The Applicant argued that Section 27(1) of the Act made it clear that a public entity must ensure that the Act and the regulations are complied with. Thus failure by the Procuring Entity to comply with Section 2 of the Act constituted a breach of Section 27(1) of the Act.

The Applicant further submitted that the Procuring Entity breached Section 52 of the Act by preparing tender documents which were not specific, contradicted the tender notice and failed to adhere to the requirements as to how many copies of the tender documents a tenderer was to submit.

The Applicant finally argued that in some cases, bidders who had not tendered for certain zones were awarded a contract for these zones. It cited as examples, Ole Sugut Enterprises, which bid for the Embakasi Zone, but was awarded the Dagoretti Zone. It argued that such bidders were not responsive and should not have been awarded the contract arising from their respective bids.

In response, the Procuring Entity stated that the tender documents contained enough information to allow fair competition among those who wished to submit tenders. It stated further that the tender documents provided by the Procuring Entity herein included among other things:-The general and specific conditions, Instructions for the preparation and submission of tenders including, the forms for tenders, the number of copies to be submitted with the original tender, the procedures and criteria to be used to evaluate and compare the tenders.

As to the claim by Applicant that some bidders had been awarded tenders for zones for which they had not bid, the Procuring Entity pointed to Clause 20.0 of the Tender Documents which states that:

> ***"A bidder may be considered for a zone that was not bided for as long as he or she has attained a minimum score of 27 points or 75% in any one of the zones."***

In addition, the Procuring Entity submitted that it had not breached Sections 2 and 27(1) of the Act. In support of this contention, it pointed out that it had advertised the tender in two daily newspapers, namely the Standard, and the Daily Nation, respectively, of February 16th, 2009.

It further argued in this regard that the whole process was open, transparent and accountable as evidenced by the fact that all tenderers were allowed to witness the opening of the tenders.

The Board has carefully considered the submissions of the parties and the documents that were presented before it.

The Board notes that Section 2 of the Act states that:

> ***"the purpose of the Act is to establish procedures for procurement and the disposal of unserviceable, obsolete, or surplus stores and equipment by public entities to achieve the following objectives-***
>
> ***(a) To maximize economy and efficiency;***
> ***(b) To promote competition and ensure that competitors are treated fairly;***
> ***(c) To promote the integrity and fairness of those procedures;***
> ***(d) To increase transparency and accountability in those procedures; and***
> ***(e) To increase public confidence in those procedures.***
> ***(f) To facilitate the promotion of local industry and economic development.***

The Board further notes, that Section 52 of the Act states the information that must be included in the tender document to allow fair competition. The Board notes, that the Procuring Entity advertised different tenders for various Zones in Nairobi and a bidder had to buy separate tenders if it wished to participate in tendering for these different zones.

The Board has further noted that Clause 20.0 of the tender document provided as follows:

> ***"A bidder may be considered for a zone that was not bidded for as long as he or she has attained a minimum score of 27 points or 75% in any one of the zones".***

The Board finds that though clause 20.0 of the tender document provided that a bidder could be considered for a different zone if he attains 75% at the technical evaluation stage, the tender document did not contain the criteria for determining how the bidders could be moved into a different zones where more than one bidder scored over 75%.

The Board notes that for Dagoretti zone, the following bidders were awarded the tender:-

(i) M/s J.W. Mwangi

(ii) M/s Ole Suguti Enterprises

M/s Ole Suguti Enterprises had not tendered for this zone.

Accordingly, these grounds of appeal succeed.

Ground 3 - Breach of Section 53 of the Public Procurement and Disposal Act.

The Applicant submitted that the Procuring Entity breached Section 53 of the Act by failing to issue an addendum upon extending the closing/opening date of the tenders. In support of this argument the

Applicant pointed out that according to the advertisement inviting tenderers, the tenders were to be opened/closed on March 6th, 2009, and that it relied on this advertisement, it completed the tender documents and submitted them on that date, only to be told verbally by the Procuring Entity that the closing/opening of the tenders had been extended to March 10th, 2009. While conceding the fact that the Procuring Entity had the right to extend the closing/opening date, it nevertheless argued that in such circumstances, the Procuring Entity had a duty to communicate such a decision in writing to all tenderers.

In response, the Procuring Entity submitted that it did not breach Section 53 of the Act by extending the deadline for submitting the tender documents. It asserted that what was extended was the time for opening of tenders and this did not involve preparation of documents.

It argued that the extension of closing/opening date of the tender was communicated to every bidder by way of a notice to that effect, which was attached to the Tender Documents. In this regard, it pointed to the fact that other tenderers submitted their bids with the notice of extension attached to their bids, thus validating its claim that the notice was attached to the Tender Documents, and that the Applicant must also, therefore, have received the said notice.

The Board notes that Section 53 (1) of the Act allows the Procuring Entity to ***"amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum"*** while Clause 19.2 of the tender document allows the Procuring Entity ***"at its discretion to extend the deadline for submission of tenders by amending the tender***

documents in accordance with clause 8.4 in which case all rights and obligations of the Procuring Entity and candidates previously subject to the deadline will thereafter be subject to the deadline extended". Section 53(3) of the Act further requires the Procuring Entity to promptly provide a copy of the addendum to each person to whom the Procuring Entity provided copies of the tender documents. The Board also notes that Clause 8.2 of the tender document provided that any addendum would be notified in writing or by cable, telex or facsimile to all prospective tenderers who purchased the tender documents.

Having examined the documents, the Board notes that the tender advertisement notice and Clause 18.2(b) of the tender document instructed tenderers to submit their tenders to the Procuring Entity on or before 12.00 noon of 6th March, 2009. However, on the supposed opening date the Applicant avers that she was at City Hall and the tenders were not opened. She further claimed that she was verbally informed by the City Hall staff that the opening date of the tender had been extended to 10th March, 2009. Based on the tender documents the Board notes that the Procuring Entity prepared a Notice dated 17th February, 2009, which is the date immediately following the publication of the tender notice, advising tenderers on the change of closing and opening date of the tenders.

The Board finds that some bidders received notification of extension of the tender closing/opening date and, accordingly, accepts the submission by the Procuring Entity that it attached the said notice to the Tender Documents.

The Board further finds that notwithstanding the claim by the Applicant that it did not receive the notice of the extension of the closing/opening date in writing, it nevertheless was, by its own admission, verbally notified of the change when it submitted its bid on the 6th of March, 2009, and was consequently able to attend the tender closing/opening on March 10th, 2009. This is evidenced by the record of the tender opening register and the Applicant's own admission. The Applicant therefore suffered no prejudice.

The Board has further noted that the Applicant was able to prepare and submit its tender on time.

Accordingly, this ground of appeal fails.

Ground 4 - Breach of Section 55 of the Public Procurement and Disposal Act.

The Applicant submitted that the Procuring Entity breached Section 55 of the Public Procurement and Disposal Act by extending the tender closing/opening date from 6th March, 2009 up 10th March, 2009.

The Board notes that Section 55 of the Act refers to the time for preparing the tenders. Section 55(1) of the Act, read together with Regulation 40, gives the minimum time allowed for the preparation of tenders as twenty one days. The Board notes that the tenders were advertised on 16th February, 2009 and were scheduled to be opened on 6th March, 2009 but the closing/opening date was extended to 10th March, 2009. The time between the tender advertisement date and the date of opening of tender is about 21 days. Section 55(2) of the Act

further states that ***"if the tender documents are amended under section 53 when the time remaining before the deadline for submitting tenders is less than one third of the time allowed for the preparation of tenders, the Procuring Entity shall extend the deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders***". This appears to be the reason why the Procuring Entity extended the tender closing/opening period to March 10th, 2009. In this instance, the Procuring Entity amended the date of closing/opening of the tender from, 6th March 2009 to 10th March, 2009.

The Board finds that the decision by the Procuring Entity to extend the tender closing/opening was quite legitimate as it complied with Section 55(3) of the Act.

Accordingly, this ground of appeal fails.

Ground 5 and 9 -Breach of Section 58 and 60 of the Public Procurement and Disposal Act.

These grounds have been combined as they raise a similar issue.

The Applicant submitted that the Procuring Entity breached Section 58 of the Act by accepting and receiving some of the tenders after the closing of the tender box. It further alleged that the said tenders were received when more than half of the tenders had been opened.

The Applicant argued that the decision to extend the closing/opening of the tenders was made to favour certain tenderers who submitted

their tenders when the opening of tenders was already in progress. In support of this claim, it pointed out that some of the bidders, such as Ravina Agencies and Dorkam Waste Enterprises, who did not even have the required Tender Documents, presented their bids when the process was well underway. Their tenders were accepted and read out. It submitted that this irregular extension did not promote competition, transparency and accountability, and undermined public confidence in the procurement system.

In response, the Procuring Entity stated that all tenders were brought within the stipulated time and those that could not fit in the tender box were accepted in the manner determined by the Procuring Entity as provided for under the Public Procurement and Disposal Act.

The Board notes that Section 58 of the Act describes the procedures followed in submission and receipt of tenders as follows:-.

"Section 58(1)... ... ...

(2)... ... ...

(3) A tender must be submitted before the deadline for submitting tenders and any tender received after that deadline shall be returned unopened.

(4) The Procuring Entity to ensure that the place where tenders must be submitted is open and accessible and shall provide, in that place, a tender box that complies with the prescribed requirements.

(5)Each tender that is delivered shall be placed unopened in the tender box-

(a)... ... ...

(b)... ... ...

(6) ... ...

(7)If a tender or part of the tender is too large to be placed in the tender box it shall be received in the manner set out in the tender documents or the invitation to tender or, if no such manner is set out, in the manner determined by the Procuring entity."

Having examined the tender opening register, minutes of tender opening, the Board notes that the tenders were opened on 10th March, 2009 at 12.00 pm in the presence of bidder's representatives. The tender opening minutes shows that six tenders were submitted by the tenderers. The Board further notes that the Applicant stated in the supporting affidavit that M/s Dorkam Waste Enterprises brought its tender documents out of time when half of the tenders had been opened and handed it directly to the tender opening committee. However, when giving oral submissions on the claim, the Applicant was unable to explain why she, and other bidders present, did not object to this procedure. This testimony and the contents of the Applicant's affidavit are denied by the Procuring Entity.

In a situation such as this, where conflicting testimony over disputed events is given by parties to a dispute, an adjudicative body has to weigh the events very carefully in order to arrive at a conclusion as to which of the parties to believe. Having considered the facts and documents submitted before the Board, there is no evidence to show that tenders were submitted late. Indeed it is noteworthy that the

Applicant submitted that none of the bidders who were present complained at that particular time.

Accordingly, the Board finds that the breach complained of did not occur.

This ground of appeal therefore fails.

Ground 10 -Breach of Section 82 of the Public Procurement and Disposal Act.

The Applicant argued that the Procuring Entity failed to evaluate the tenders in accordance with Section 82 of the Act.

In response the Procuring Entity stated that this was an open tender document and not a request for proposal document and hence Section 82 of the Public Procurement and Disposal act do not apply. It further stated that the evaluation was done as per Section 66 of the Act.

The Board notes that Section 82 of the Act refers to evaluation of proposals and the tender under reference is an open tender. Accordingly, Section 82 of the Act has no relevance in this tender and this ground has no merit.

This ground of appeal therefore fails.

Ground NO. 11 & 12 – is a general statement that is not supported by any breach of the Act.

Taking into account all the above matters, it is clear that the evaluation and the award of this tender was not done in a fair and objective manner, accordingly, the Request for Review succeeds and the award to the Successful bidders for Dagoretti zone is hereby nullified and the Procuring Entity is ordered to retender for that zone.

Dated at Nairobi on this 9th day of June, 2009

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Chairman, PPARB

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Secretary, PPARB