

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.39/2009 OF 14TH OCTOBER, 2009

BETWEEN

INTEX CONSTRUCTION LTD- SS MEHTA & SONS JV

AND

MINISTRY OF ROADS (PROCURING ENTITY)

Review against the decision of the Tender Committee of the Ministry of Roads dated 19th October, 2009 in the matter of Tender No. Europe Aid/126354/D/WKS/KE Lot. No. 3 for Rehabilitation of Webuye-Malaba (A 104) Road Contract No.RD 0584

BOARD MEMBERS PRESENT:

Mr. Mwaniki Gachoka	-	Chairman
Mr. Akich Okola	-	Member
Mrs. Loise Ruhiu	-	Member
Mr. Sospeter. K. Munguti	-	Member
Ms. Natasha Mutai	-	Member

IN ATTANDANCE

Mr. C. R. Amoth	-	Board Secretary
Ms. Kerina Rota	-	Secretariat

PRESENT BY INVITATION

Applicant , Intex Construction Ltd - Ss Mehta & Sons Jv

Mr. Sajay Obarei - General Manager

Procuring Entity, Ministry of Roads

Mr. Kenneth Mwangi - Director of Procurement

Eng. S. M. Osiro - Specialist

Interested Parties

Mr. C. N. Kihara - Advocate, H. Young & Co. (E.A.)
Ltd.

Ms. Anne Kagiri - Legal Assistant, H. Young & Co.
(E.A.) Ltd.

Mr. Sagara - Court Clerk, H. Young & Co. (E.A.)
Ltd.

Mr. Anil Puri - Manager, H. Young & Co. (E.A.)
Ltd.

Mr. Paul Murage - Representative H. Young & Co.
(E.A.) Ltd.

Mr. P. S. Sehmi - Contracts Engineer,
Stirling/Kabuito, Spenco J.V

Mr. George Lugalini - Administrative Office , Sogea
Satom

BOARD'S DECISION

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

This Request for Review was lodged by Intex Construction Ltd on 14th October 2009.

The Applicant was represented by Mr. Sajay Obarei, while the Procuring Entity was represented by Mr. Kenneth N. Mwangi, Director of Procurement. The successful candidate was represented by Mr. C. N. Kihara, Advocate.

The Applicant had raised one ground of Appeal and prayed that the tender awarded to Maltauro-H. Young JV be cancelled and be awarded to it.

PRELIMINARY OBJECTION

The Procuring Entity filed a preliminary objection that the Board did not have jurisdiction to hear and determine this Request for Review on the following grounds;

1. That the tender was carried out in accordance with European Commission Procurement Procedures, that are known as the practical guides to Contract Procedures for European Commission external actions for the 9th EDF.
2. There was a financing agreement between the Government of Kenya and European Commission.
3. The European Commission Procurement has a different bid protest procedures as stated under article 37 of the Instructions to tenderers in the Tender Dossier.

The successful candidate Maltauro/H. Young Joint Venture also filed preliminary objections on the ground that;

1. The Request for Review was filed outside the stipulated appeal window contrary to Regulation 73, 2, (c).
2. That this was a donor funded project and therefore the Board did have jurisdiction in view of the provisions of Section 7 of Public Procurement and Disposal Act, 2005.

At the commencement of the hearing, the Board directed that the Preliminary Objections be argued first.

The Procurement Entity in brief submissions argued that the Board did not have jurisdiction to hear and determine the Request for Review as

the procurement was conducted under the European Commission Procurement Procedures.

The Procurement Entity submitted that this tender falls under the Financing Agreement between The European Commission and the Republic of Kenya for the Northern Rehabilitation Programme - Phase III. The Financing Agreement was signed on 23rd November 2007. It stated that Article 37 of the Instructions to Bidders provides for different bid protest procedure which is different from the one set up by the Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Act")

The Procurement Entity further submitted that an aggrieved tenderer who believed to have been harmed by an error of irregularity during the award process had to take the following steps;

- (i) Petition the Contracting Authority directly and inform the European Commission;
- (ii) The contracting Authority must reply within 90 days of receipt of the complaint;
- (iii) The European Commission shall then communicate its opinion to the Contracting Authority and do all it can to facilitate an amicable solution between the Complainant (Tenderer) and the Contracting Authority;

The Procuring Entity stated that if the above procedure failed, the Tenderer could have recourse to procedures established under the National Legislation of the state of the Contracting Authority, that is the Public Procurement Administrative Review Board, established under the Public Procurement and Disposal Act, 2005.

In conclusion, the Procuring Entity submitted that section 7 of the Public Procurement and Disposal Act, 2005 ousts the jurisdiction of the Board where there is a conflict between the Act, Regulations or any directions of the Authority and a condition imposed by the donor of funds. It argued that the tender was funded by a donor and therefore the Board did not have jurisdiction.

On its part, the successful candidate Maltauro/H. Young J.V. associated itself with the submissions of the Procuring Entity. In addition, it submitted that the Request for Review was filed outside the stipulated appeal window under Regulation 73 (2) (c)

The successful candidate argued that the Procuring Entity notified the parties on 28th September 2009 and therefore the last day for filing the Request for Review was 13th October 2009. It stated that the Request for Review was filed on 14th October 2009 and was therefore filed out of time.

In response, the Applicant submitted that although the tender was conducted under the European Commission Procurement Procedure,

the Board had jurisdiction to hear and determine the Request for Review.

The Applicant stated that it wrote a letter of protest to the Contracting Authority on 9th October 2009 and the Contracting Authority replied by a letter dated 19th October 2009. The letter dated 19th October 2009 gave the reasons why the Applicant was disqualified. It argued that having written a letter of complaint to the Contracting Authority it had followed the procedure set out under the European Commission bid protest mechanism

The Applicant further submitted that since the Procuring Entity had written a letter dated 19th October 2009, which reiterated the earlier decision to disqualify the Applicant, it would file another request for Review challenging that decision.

The Applicant further submitted that although the letter of notification is dated 28th September 2009, it was received in their offices 1st October 2009, as evidenced by the stamp on the letter. On the allegation by the Procuring Entity, that the letter of notification was collected by a lady called Josephine on 28th September 2009, the Applicant's representative stated that he was not in a position to confirm that information.

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

The issue that arises for determination is whether the Board has jurisdiction to hear and determine this matter.

It is common ground that this tender was conducted under the European Commission Procurement procedures. It is also not disputed that the tender falls under the Financing Agreement between The European Commission and the Government of Kenya for the Northern Corridor Rehabilitation Programme Phase III. The Financing Agreement was signed on 23rd November 2007 and is to end on 30th April 2012.

The Board has noted that this tender for the Northern Corridor Rehabilitation Programme Phase III is to cover the following roads:

- (i) Timboroa-Eldoret
- (ii) Eldoret-Webuye and;
- (iii) Webuye-Malaba

It is also clear that this Request for Review only relates to Lot 3, Webuye-Malaba (A 104) Road Contract No.RD 0584.

The Board has also carefully examined the Tender Dossier (which under Kenyan Law is referred to as the tender documents). Article 37 of the Instructions to Tenderers sets out the bid protest procedure which is different from the one set up under the Public Procurement and Disposal Act, 2005.

The bid protest mechanism under the European Commission Procurement procedure is as follows;

- (i) Any aggrieved bidder who believes that he has been harmed by an error of irregularity during the award process may petition the Contracting Authority directly and inform the European Commission;
- (ii) The Contracting Authority must reply within 90 days of receipt of the Complaint;
- (iii) The European Union Commission shall then communicate its opinion to the Contracting Authority and do all it can to facilitate an amicable solution between the Complainant (Tenderer) and the Contracting Authority; and
- (iv) If the above procedure fails, the Tenderer may have recourse to procedures established under the National Legislation of the state of Contracting Authority.

It is clear that when a tenderer participates in a tender that falls under European Commission Procurement procedures, it is bound to follow all the instructions including the bid protest mechanism. It is also clear that under the European Commission Procurement procedures, the Contracting Authority is given a period of 90 days within which to reply to a complaint. The complaint should also be copied to the European Commission. The Commission shall thereafter communicate

its opinion to the Contracting Authority and shall also facilitate an amicable solution between the tenderer and the Contracting Authority.

It is only after the Commission has given its opinion that a bidder can have recourse to procedures set up under the National Legislation of the Contracting State. This procedure is different from the one under the Public Procurement and Disposal Act 2005, which provide that an aggrieved bidder has to lodge a Request for Review within fourteen days of occurrence of breach complained of where the Request for Review is made before the making of an award or within fourteen days of the notification of the award. Thereafter, the Request for Review has to be determined within thirty days of the filing.

The Board has also noted that sections 6 (1) and 7 (1) of the Act, contain provisions covering the conflict between International agreements and also conditions on donor funds respectively. The said sections provide as follows:

“6. (1) Where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty or other agreement to which Kenya is a party, this Act shall prevail except in instances of negotiated grants or loans.

7. (1) If there is a conflict between this Act, the regulations or any directions of the Authority and a condition imposed by the donor of funds, the condition shall prevail with respect to a procurement that uses those funds and no others.

(2) This section does not apply if the donor of funds is a public entity”.

As the Board has already noted, this tender falls under the Financing Agreement between the European Commission and the Government of Kenya that was signed on 23rd November 2007. The agreement is for a negotiated grant as contained in Article 1 which provides as follows:-

“ARTICLE 1 - NATURE AND PURPOSE OF THE OPERATION

1.1 The Community shall contribute to the financing of the following project:

**Title: Northern Corridor Rehabilitation Program -
Phase III**

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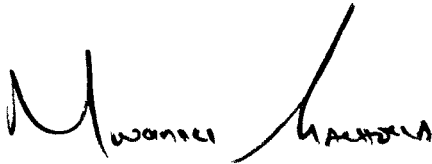
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1.2 This project will be implemented in accordance with the financing agreement and the annexes thereto: the General Conditions (Annex I) and the technical and Administrative Provisions (Annex II).”

In view of the foregoing, the Board holds that the Applicant is bound to follow the bid protest mechanism under the European Commission Procurement procedures.

Accordingly, the Preliminary Objections succeed and the Request for Review is hereby dismissed. The Procurement Process may proceed.

Dated at Nairobi on this 2nd day of November, 2009



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CHAIRMAN
PPARB



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SECRETARY
PPARB