

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 33/2009 OF 18TH SEPTEMBER, 2009

BETWEEN

J.K. CONSTRUCTION LIMITED APPLICANT

AND

**MUNICIPAL
COUNCIL OF NANYUKI PROCURING ENTITY**

Appeal against the decision of the Municipal Council of Nanyuki dated 11th August, 2009, in the matter of Tender No. NMC/RDS/07/08-08/09/2 for Implementation of Drainage Works on Various Roads within the Municipality of Nanyuki.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Mr. A. Okola	-	Member
Mr. S. K. Munguti	-	Member
Ms. N. Mutai	-	Member

IN ATTENDANCE

Mr. G. Kimaiyo	-	Holding brief for Board Secretary
Ms. K. Rota	-	Secretariat

PRESENT BY INVITATION

Applicant, J.K. Construction Limited

- Mr. J. Karanja - Managing Director, J.K. Construction Limited.
- Mr. Ian Maina - Maina Muiruri and Company Advocates

Procuring Entity, Municipal Council of Nanyuki

- Ms. Florence M. Mwangangi - Advocate, Mwangangi and Company Advocates.
- Lucy N. Nyaga (Mrs) - Town Clerk, Municipal Council of Nanyuki.
- Mr. M. C Ntonjira - Ag. Deputy Treasurer, Municipal Council of Nanyuki.
- Ms. Mary W. Nganga - Pupil, Mwangangi and Company Advocates.

Interested Candidates

- Mr. Stephen Mogaka - Advocate, Musyoki Mogaka and Company Advocates, Triple (K) International Services Limited
- Mr. Michael Kinyua - Director, Triple (K) International Services Limited
- Mr. Herman Githinji - Director, Triple (K) International Services Limited
- Mr. Stephen M. Mbau - Director, Ndongoro General Construction Ltd

Eng. Basco Mwenda - Engineer, Ndongoro General Construction Ltd

Mr. J.Kai - Staff, Buldel Enterprises Ltd

BOARD'S DECISION

Upon hearing the representations of the parties and upon examining the documents before it, the Board decides as follows: -

BACKGROUND OF THE AWARD

This tender No. NMC/RDS/07/08-08/02 was advertised by the Procuring Entity on 22nd June, 2009. The tender was for the Implementation of Drainage Works on various Roads within the Municipal Council of Nanyuki. The tenders were closed and opened on 14th July, 2009 in the presence of the bidders' representatives.

The following bidders submitted their bids:-

1. M/s Buldel Enterprises Ltd
2. M/s Milestone Engineering Ltd
3. M/s Glad Works Enterprises
4. M/s Leneka 2004 Mega Works
5. M/s Ndongoro General Contractors Ltd
6. M/s J.K. Construction Ltd
7. M/s Geokim Supplies Co. Ltd
8. M/s Tripple (K) International Services Ltd

EVALUATION

The Evaluation Committee carried out the technical and financial evaluation using the following evaluation criteria:-

1. Registration with the Ministry of Roads in category 'F' - 5%
2. Qualifications and experience of key personnel - 12%
3. Equipment Availability - 13%
4. Experiences of similar magnitude or general experience - 20%
5. Certified copies of PIN, VAT and Tax Compliance - 5%
6. Financial status profile (PF) of the company
 - (i) Working Capital - 2%
 - (ii) Bank Balance - 3%
 - (iii) Audited Report - 5%
7. Provision of appropriate Bid Security - 10%
8. Tender sum (Engineer Estimate) - 15%

Points were allocated based on deviation from Engineers estimate (positive or negative).

0-5% = 15%

6-10% = 10%

11-15% = 5%

Positive or Negative 16% and above = 0%

At the evaluation stage, the Evaluation Committee ranked the bidders according to the scores that were awarded. M/s Tripple (K) International Services Limited was ranked the highest with a score of 82% out of the possible 100%.

The Tender Committee in its Meeting held on 10th August, 2009, awarded the tender to M/s Tripple (K) International Services Limited.

The Procuring Entity notified the Successful bidder vide a letter dated 11th August, 2009, while the unsuccessful bidders were notified vide letters dated 12th August, 2009.

THE REVIEW

This Request for Review was lodged on the 18th day of August, 2009, by J.K. Construction Limited against the decision of the Municipal Council of Nanyuki dated 12th August, 2009 in the matter of Tender No. NMC/RDS/07/08-08/09/2 for Implementation of Drainage Works on Various Roads within the Municipality of Nanyuki.

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

1. That, the Procuring Entity, the Town Clerk, Municipal Council of Nanyuki shall suspend the procurement process forthwith until the Review is concluded and determined;
2. That, the Board rescinds the decision to award the tender to the alleged successful tender;
3. That, the Applicant's tender is the lowest evaluated and should be awarded the contract.

The Applicant was represented by Mr. J. Karanja the Managing Director while the Procuring Entity was represented by Ms. Florence M. Mwangangi, Advocate. The interested candidates, M/s Triple (K) International Services Limited, M/s Ndongoro General Construction Ltd were represented by Mr. Stephen Mogaka , Advocate and Mr. Stephen M. Mbau ,Director, respectively.

Preliminary Issue

The Procuring Entity raised a Preliminary Issue in which it claimed that in filing the Request for Review against The Town Clerk, Municipal Council of Nanyuki, the Applicant had filed the Review against the wrong party contrary to the provisions of Sections 3(i)(d), 4(i)(a), 93(i), 96 and Parts IV and V of the Act and Regulations 3 and 73(i). It also claimed that the Applicant had not brought itself within the provisions of Section 93 of the Act in that it had not shown or even claimed that it had suffered or risked suffering loss or damage.

The Applicant did not respond to these claims.

The Board has carefully examined the documents before it and the parties' submissions. The Board has noted that the heading in the Request for Review reads 'Town Clerk, Municipal Council of Nanyuki'. However, it is clear from the submitted Memorandum of Response that the Municipal Council of Nanyuki has submitted all the documents as the Respondent to the Request for Review. These documents included:

- (i) Memorandum of Response;
- (ii) Minutes of the Tender Opening;
- (iii) Minutes of the Evaluation Committee;
- (iv) Minutes of the Tender Committee;
- (v) All original tender documents submitted by the bidders.

Section 96(d) of the Act gives the Board the power to determine the parties to a Review. The Municipal Council of Nanyuki fully participated in the hearing and it is the one which made the award of the tender which is the subject of the Request for Review.

Therefore, the Board determines that the addition of the words 'Town Clerk' in the heading does not change the substance of the case.

With regard to the claim that the Applicant had not shown or claimed that it had suffered or risked suffering loss, the Board notes that the Applicant has claimed that the tender was awarded unfairly to the Successful Bidder. It has further claimed that it was the lowest evaluated tenderer and that it ought to have been awarded the tender. The Board finds that although the Applicant has not tabulated the loss it suffered or risked suffering, the Request for Review clearly shows the loss or loss it risked suffering, it has stated in the Request for Review that it would have been awarded the tender if the evaluation was conducted fairly.

Accordingly, the Board will hear and determine the Request for Review on merits.

The Applicant in its Request for Review has raised five grounds of appeal.

The Board deals with the Grounds as follows:-

Grounds 1, 2, 3 and 5 – Breach of Sections 64 and 66 of the Act, Breach of Regulation 47

These grounds have been consolidated because they raise similar issues regarding the responsiveness of the bid submitted by the Successful tenderer and the evaluation process.

The Applicant stated that it had submitted a responsive tender that qualified for detailed evaluation pursuant to Clause 1 of the Tender Document, Regulation 47 and Section 64 of the Act. It argued that it emerged the lowest evaluated tenderer under the provisions of Clause 7.1 of the Tender Documents and Section 66 of the Act. It alleged that contrary to Regulation 47 and Section 64 of the Act, and Clause 1.2 of the Tender Document, the Procuring Entity failed to reject the Successful bidder's tender which did not satisfy the set criteria for responsiveness because its tender did not have Evidence of Work Capital, Bank Balances and Audited Report, as required under the Tender Documents. The Applicant further alleged that the Procuring Entity breached Section 66 of the Act in that it admitted the non responsive bid from the successful tenderer for detailed evaluation.

In its response, the Procuring Entity stated that upon examining all the eight bids received for general compliance with the tender requirements, it found that none of the bids was compliant because of minor deviations. It further stated that it subsequently accepted all the bids including that of the Applicant's as responsive bids pursuant to the provisions of Sections 64(2) (a) and 64(3) of the Act. It submitted that all the bids went through to evaluation and were evaluated impartially and in strict adherence to the evaluation criteria set out in the Tender Document. It further submitted that all the requirements of the tender were set out in the Tender Document and were applied uniformly to all the bidders.

The Successful Candidate associated itself fully with the Procuring Entity's submissions.

The Board has carefully examined the documents submitted before it and the parties' submissions.

With regard to responsiveness of tenders, the Board notes the following relevant provisions in the Public Procurement and Disposal Regulations, 2006:-

- i) Regulation 47(1)(f) states that upon opening of the tenders under Section 60 of the Act, the Evaluation Committee shall first conduct a preliminary evaluation to determine whether all required documents and information have been submitted;

ii) Regulation 47(2) states that the Evaluation Committee shall reject tenders which do not satisfy the requirements set out in paragraph (1); and

iii) Regulation 48(1) states that the Procuring Entity shall reject all tenders which are not responsive in accordance with Section 64 of the Act.

The Board also notes Section 64(1) of the Act states that:

“a tender is responsive if it conforms to all the mandatory requirements in the tender documents”.

The Board further notes Section 64(2) (a) of the Act which states that minor deviations that do not materially depart from the requirements set out in the tender documents do not affect whether a tender is responsive.

The Board observes that the mandatory requirements under Clause 1.2 of the Tender Document, Instructions to Tenderers, for various information and documents required to be submitted with the tenders, were as follows:

(a) Copies of certificate of registration with Ministry of Roads and Public Works.

- (b) Physical address and principal place of business;
- (c) Copies of current licenses, PIN and VAT Certificates;
- (d) Experience in works of similar nature and size for each of the last ten (10) and details of work under way or contractually committed. Details of clients, who may be contacted for further information on those contracts, MUST also be submitted.
- (e) Major items of construction equipment owned.
- (f) Qualification and experience of key site management and technical personnel proposed for the contract.
- (g) Evidence of adequacy of work capital or access to credit facilities for this contract.
- (h) Total Monetary value of construction work performed for each of the last five years.
- (i) Report on the financial standing of the tenderer such as profit and loss statement and auditors reports for the past five years.
- (j) Authority to seek reference from the tenderer's bankers.

The Board also observes that Clause 4.4(e) of the Tender Document states that tenders will be invalid if the Tenderer does not fulfil the terms of submission of tenders and Instructions to tenderers.

From the Tender Report Min. No. EC/19/10 contained in the Minutes of the Evaluation Committee meeting held on 22 July, 2009, the Board notes that the Procuring Entity evaluated all the eight bids it received by applying the evaluation criteria set out in Clause 5.3 of the Tender Document save for the criteria of General Compliance with tender requirements which had a maximum score of 10%. The Board also notes the submissions at the hearing, of the Chairman of the Evaluation Committee who explained that the committee had applied the said criteria but none of the bidders were found to be compliant as each had deviations which the committee decided were minor pursuant to Section 64(2) (b) of the Act.

From the Schedule of the Evaluation Report titled Technical/Financial, the Board observes the following:

- i) Registration with the Ministry of Roads "F": five bidders including the Applicant scored zero out of a maximum of 5 marks for failing to have this registration.
- ii) Bank Balances: five bidders including the Successful Bidder scored zero out of a maximum of 3 marks for failing to submit these documents.

iii) Audited Report: four bidders including the Successful Bidder scored zero out of a maximum of 5 marks for failing to submit these reports.

The Board finds that the submission of these three documents was a mandatory requirement in the Tender Document as follows:

- i) Under Clause 1.2(a) certificate of registration with Ministry of Roads and Public Works was mandatory;
- ii) Bank Balances were mandatory under Clause 1.2(g) and a bidder had to give evidence of adequacy of work capital or access to credit facilities;
- iii) Audited Reports were mandatory under Clause 1.2(i) and a report on financial standing of the tenderer such as profit and loss statement and auditor's reports for the past 5 years was required.

The Board takes cognisance of the Successful Bidder's admission that it did not supply audited accounts and that it has only been in existence since the year 2008 whereas the Tender Document required audited accounts for the past 5 years.

The Board further finds that these documents are necessary to determine whether a bidder is qualified or not to be awarded the contract and their

omission cannot therefore be deemed to be a minor deviation pursuant to Section 64(2) (b) of the Act as argued by the Procuring Entity.

Accordingly, these grounds of appeal succeed.

Ground 4 - That the composition of the Tender Evaluation Committee was improper

The Applicant alleged that the composition of the Tender Evaluation Committee was improper and was constituted to skew the outcome of the process in favour of the Successful Bidder.

In its response, the Procuring Entity stated that the Evaluation Committee was properly constituted under the Act and Regulations and that it was in existence even before the subject procurement under review was commenced.

The Board has carefully examined the documents submitted before it and the parties' submissions.

The Board notes that Regulation 16(3) provides that an Evaluation Committee shall consist of a Chairman and at least two other members all appointed by the Accounting Officer or head of the Procuring Entity, and that further Regulation 16(4) provides that no person shall be appointed to the Evaluation Committee if such a person is a member of the Tender Committee.

From the Tender Evaluation Committee minutes, the Board finds that the Evaluation Committee comprised six members including the Chairman, all of whom were appointed by the Town Clerk, who is the Procuring Entity's Accounting Officer. From the Tender Committee minutes, the Board finds that none of the members of the Evaluation Committee was a member of the Tender Committee.

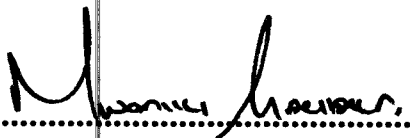
Accordingly, this ground of appeal fails.

From the foregoing, it is clear that the Procuring Entity evaluated bids which were non-responsive. This is contrary to Section 64 of the Public Procurement and Disposal Act, 2005 and Regulation 47 of the Public Procurement and Disposal Regulations, 2006.

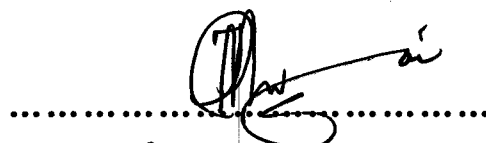
Accordingly, the Appeal succeeds and the Board orders, pursuant to Section 98 of the Act, that:-

- i) the award of the tender to the Successful Tenderer, Tripple (K) International Services Limited, is nullified; and
- ii) the Procuring Entity may re-tender for this procurement.

Date at Nairobi on this 16th day of September, 2009



**CHAIRMAN
PPARB**



**SECRETARY
PPARB**

