

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 50/2009 OF 10TH NOVEMBER, 2009

BETWEEN

**JOINT VENTURE OF PC SUPPLIES LTD
IN ASSOCIATION WITH PONDOPARK
INVESTMENT & REPCON ASSOCIATES.....APPLICANT**

AND

MINISTRY OF ENERGY..... PROCURING ENTITY

Review against the decision of the Ministerial Tender Committee of the Ministry of Energy, the Procuring Entity dated 28th October, 2009 in the Matter of tender No. MOE/ONT/10/2009-2010 for Afforestation of Upper Tana River Catchment

BOARD MEMBERS

Mr. P. M. Gachoka	-	Chairman
Mrs. Loise G. Ruhiu	-	Member
Amb. Charles M. Amira	-	Member
Mr. Sospeter Kioko	-	Member
Ms. Natasha Mutai	-	Member

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant, Joint Venture of PC Supplies Ltd in Associations with Pondopark Ltd and Repcon Associates

- | | | |
|---------------------|---|---|
| Mr. Wachira Mari | - | Advocate, Wachira Ndungu & Co.
Advocates |
| Mr. Simon Kanyingi | - | Director, PC Supplies |
| Mr. Michael Wairagu | - | Managing Consultant, Repcon
Associates |
| Mr. A. M. Ochino | - | Consultant, Repcon Associates |
| Mr. Charles Karanja | - | Director, Pondpark Investment |

Procuring Entity, Ministry of Energy

- | | | |
|------------------------|---|--------------------------------|
| Mr. Paul G. Ngatia | - | Senior Deputy Secretary |
| Mr. Erick F. N. Akotsi | - | Ag. DRE |
| Mrs. M. M. Kaburu | - | Principal Procurement Officer |
| Ms. Faith Odongo | - | Chief Renewable Energy Officer |
| Mr. David Gatumo | - | Senior Wood Scientist |
| Mr. Joseph Mathuki | - | Chief Procurement Officer |
| Mr. Moffat Kitheka | - | Clerical Officer |

Interested Candidates

- | | | |
|----------------------|---|--|
| Dr. David Kamweti | - | Director, Kamfor Co. Ltd |
| Mr. Mbiri Gikonga | - | Director, Kamfor Co. Ltd |
| Mr. Nicholas Bunyige | - | Consultant, Kamfor Co. Ltd |
| Ms. C. Wangari | - | Director, Multychoice
International |

BOARD'S DECISION

Upon hearing the representations of the parties and Interested Candidates herein, 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 2nd and 23rd September, 2009. It was for Afforestation of Upper River Tana Catchments. The initial tender opening date was 23rd September, 2009 but it was extended to 7th October, 2009 through an addendum issued by the Procuring Entity. The bidders who responded to the tender notice and their respective tender prices and bid bonds were as tabulated below:

BID NO.	BID NAME & ADDRESS			TENDER SUM			BID BOND			
	Bidders Number	1.	2.	(Kshs.)		5	6	(Kshs.)		10
1.	Attain Enterprises Ltd.			100,950,000/=			5,005,750/=			11
2.	Kamfor Company Ltd			119,792,580/=			2,521,852/=			
3.	P.C Suppliers Ltd.			79,100,000/=			1,600,000/=			
4.	Across Africa Consultants			70,450,000/=			No Bid Bond			
5.	Promise Dairy Farm			95,251,000/=			2,000,000/=			
6.	Foma Water & EMC			95,350,000/=			2,000,000/=			
7.	Global Center			79,721,000/=			2,000,000/=			
8.	Dangga Services Ltd.			132,585,000/=			3,051,200/=			
9.	Bennah Contractors			464,200,000/=			No Bid Bond			
10.	Multytouch International			97,777,500/=			1,955,470/=			
11.	Aberdare Technologies Ltd.			131,589,240/-			2,631,784/=			

Evaluation

This was conducted by a committee chaired by Mr. David Gatumo and was carried out in three stages namely preliminary, technical and commercial evaluation stages in that order.

Preliminary Evaluation

This was conducted to determine the responsiveness of the tenders to the mandatory requirements of the tender. The results of the preliminary evaluation were as follows:

Instructions to tenders	Particulars of appendix to instructions to tenders	Bidder's Number							
		1	2	3	4	5	6	7	8
2.1.1	Certificates of Incorporation or Business registration	Y	Y	X	X	X	Y	Y	Y
2.1.2	Prove of fulfilling statutory obligations(PIN,VAT &Tax Compliance)	Y	Y	Y	Y	Y	Y	X	Y
2.1.3	Tenders must have professionals in Environmental management, Forestry, Agriculture or related professions	Y	Y	Y	X	X	Y	X	Y
2.1.4	Tenderers must have been involved in Afforestation work for at least Three (3) years.	Y	Y	Y	Y	X	Y	X	Y
2.1.5	List of Afforestation for the last three (3) years.	Y	Y	X	X	X	Y	X	Y
2.1.6	Financial reports for the last three (3) years e.g. balance sheet, profit & loss statements.	X	Y	Y	Y	X	Y	Y	Y
2.1.7	Experience in community mobilization	Y	Y	Y	Y	X	Y	Y	Y
2.1.8	Method and Work Plan for Carrying out the Afforestation.	Y	Y	Y	Y	X	Y	X	Y
2.1.9	Company Profile	Y	Y	X	Y	X	Y	Y	Y
2.1.10	Tender Security (2% of tender sum)	Y	Y	Y	Y	X	Y	Y	Y
OVERALL COMPLIANCE		X	Y	X	X	X	Y	X	Y

Arising from the above information, bidder Nos.1, 3, 5, 6 and 8 were found non-responsive for failing to comply with some of the mandatory requirements. Thus their tenders were disqualified from further evaluation. Bidder Nos. 2, 7 and 11 qualified for evaluation having complied with all the mandatory requirements.

Technical Evaluation

This was conducted using the following criteria:

Criteria	Requirements	Maximum Marks
Academic Qualifications & Experience	Lead Person	5
	Team Members	10
Experience in Afforestation	Provide Schedule of afforestation ongoing/completed projects in the last 3 years	10
Experience in community mobilization	Schedule of ongoing/completed projects/assignments involving community mobilization	10
Experience in local conditions	Projects carried out in the catchment area	5
Method and work plan	Proposed method and work plan for afforestation	15
Ability to source for seedlings	List of nurseries owned and number of indigenous seedling therein	10
	List of community nurseries accessible to the firm and number of indigenous species seedlings therein	10
Financial reports	Turn over	5
	Cash flow	5
	Net assets	5
Evidence of financial resources	Cash & cash equivalent (liquidity position)	5
	Lines of credit (amount of overdraft)	5
TOTAL		100

A summary of the technical evaluation report was as tabulated below:

	BIDDERS NO.		2	7	11
	CRITERIA		Max Marks		
	Academic qualifications and experience				
A	Lead Person				
	i. Masters & above - 1 mks; 1 st Deg.0.5, -		1	1	1
	ii. Relevance 2 mks Forestry 1.5 Agr, Envi.r & Proj mgt - markI		2	2	1.5
	iii. Experience 3<2mks 2 yrs 1.5 mks, 1 year-1 mark, less than a year - 0 score		2	2	2
	Sub Criteria Score		5	5	4.5
B	Team Members				
	i. Education - 5 major degrees were considered i.e forestry, Agr., Finance, Sociology & Comm. as relevant	Academic Qualification - 1 st Degree - 1 mark Diploma 0.5 mks, certificate 0.3 marks Maximum of 5 marks	5	4	2
		Relevance - Forestry, Agr. Fin. Soc & Comm. Each 0.5 mks; Maximum 2.5 marks	2.5	2	1
	ii. Relevant Experience	3 years & above - 0.5 2 years - 0.3 1 year - 0.1	2.5	2	1
	Sub Criteria Score		10	8	4
2.	Experience In Afforestation Work				
	Schedule of projects	3 proj or more - 3 marks, 2 prj - 2 mks, 1 proj- 1 mark	3	3	3
	Complete Projects (Value)	30 m or more 7 mks, 20-30- 6 mks 10-20-5 mks 5-10, 4 mks, 4-5- 3mks, 4-3-2mks, - 2-3-1 mks	7	6	7
	Sub Criteria Score		10	9	10
3.	Experience in Community Mobilization				
	Schedule of projects	<u>Unit of measure communities</u> 5 community mobilization proj.-10 mks 4 community mobilization proj.- 8 mks 3 community mobilization proj.- 6 mks 2 community mobilization proj.- 4 mks 1 community mobilization proj.- 2 mks and No project-0 SCORE		10	
	Sub Criteria Score		10	10	8
4.	Experience in Local Condition(catchment)				
	Projects in Catchment Area	Project value 100,000-2m-0.5mks, 2-4m- 1 mark 4-6m-1.5mks, 6-8m-2 mks 8-10m -2.5mks 7	2.5	2.5	2.5
	Projects Undertaken	Each project 0.5 mks Max No. 5 or more 2.5 mks	2.5	2.5	2.0
	Sub Criteria Score		5		4.5

5.	Method and Work Plan						
	Method & Work Plan	Site identification - 1 mark		1	1	0	1
		Sourcing of seedlings - 3 marks		3	3	0	2
		Community mobilization - 2marks		2	2	1	2
		Creating awareness - 2 mks		2	2	0	2
		Protection & mgt - 3mks		3	3	0	3
		Site preparation-2 mks		2	2	0	2
		Tree planting-2 mks		2	2	0.5	2
Sub Criteria Score			15	15	1.5	14	
6.	Ability to Source for Seedlings						
	Owned nurseries And Number of Seedlings therein.	Seedlings therein(No. of Seedlings available)	100,000<5 mks 80,000-100,000-4mks 60000-80000-3mks 40000-60000-2 mks, 20000-40000 - 1 mk, less 20,000- 0 score	5	2	5	0
		Own Seedlings	The No. of Nurseries Max 5 No. each 1 mark	5	2	3	0
		Sub Criteria Score		10	4	8	0
		List of Nurseries (Owned)	100,000<5 mks 80,000-100,000-4mks 60-80-3mks 40-60-2 mks, 20-40 - 1 mk, less 20,000- 0 score	5	5	0	0
		Outsourcing of Seedlings	Number of nurseries max 5 each 1 mark seedling there in	5	5	2	0
Sub Criteria Score			10	10	2	0	
TECHNICAL SCORE			75	66	42.5	38.5	
FINANCIAL SCORE			25	25	25	25	
GRAND TOTAL			100	91	67.5	63.5	

In view of the above information, bidder Nos. 7 and 11 were disqualified after failing to attain the cut-off score of 75% in the technical evaluation.

Recommendation

Kamfor Company Ltd was the only bidder found technically responsive and was therefore recommended for award of the tender at its tender price of Kshs.119, 721, 000. 000.

In its meeting No. 06/2009-2010 held on 26th October, 2009, the Ministerial Tender Committee concurred with the recommendations of the evaluation committee and awarded the tender to Kamfor Company Limited.

Notification letters to the successful and unsuccessful bidders are dated 28th October, 2009.

THE REVIEW

This Request for Review was lodged on 10th November, 2009 by the Joint Venture of P.C Supplies Ltd, PondoPark Investment Ltd and Repcon Associates against the decision of the Tender Committee of the Ministry of Energy dated 28th October, 2009 in the matter of tender No.MOE/ONT/10/2009-2010 for Afforestation of Upper River Tana Catchment.

At the hearing the Applicant was represented by Mr. Wachira Mari, Advocate while the Procuring Entity was represented by Mr. Paul G. Ngatia, Senior Deputy Secretary. Kamfor Company Ltd and Multytouch International, Interested Candidates, were represented by Dr. David Kamweti, Director and Ms. C. Wangari also a Director respectively.

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

1. To annul the whole decision of the Procuring Entity in regard to this tender;
2. To require the Procuring Entity to act in a lawful manner;
3. To revise the unlawful decision by the Procuring Entity and substitute the same with its own decision to the effect that the lowest qualified tender be awarded;
4. Any other order that the Board may deem just in the circumstances.

Grounds 1 and 2: Breach of Sections 64 and 66 of the Act as read together with Regulations 47, 49 and 50.

These grounds have been consolidated as they raise similar issues regarding the evaluation and award of the tender.

The Applicant submitted that its tender had complied with all the mandatory requirements, as set out in the tender document, and was therefore responsive. It argued that the Procuring Entity's failure to declare its tender as responsive was in breach of Section 64 of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Act") as read together with Regulation 47 of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the Regulations"). This, it further argued was contrary to the objectives of the Act as set out in Section 2 of the Act.

The Applicant further submitted that had the Procuring Entity carried out technical and financial evaluation on its tender, it would have found it to be the lowest evaluated tenderer. This failure on the procuring entity's part, it argued, was in breach of Section 66 of the Act as read together with Regulations 49 and 50.

The Applicant stated that it had submitted a tax compliance certificate dated 5th October, 2009 which was in the name of Palavi Commodity suppliers Ltd. It further stated that the name Palavi Commodity was changed to PC Supplies Ltd vide certificate of change of name No. C44094 of 20th October 2002. It submitted that the change of name was duly lodged with KRA as evidenced by the VAT certificate issued by KRA in the name of PC suppliers Ltd on 17th Dec, 2002. It urged the Board to note that the PIN Number did not change even if the name of the company changed. Therefore, it argued, it was wrong for the Procuring Entity to use this as an excuse to declare its tender as non-responsive. It averred that this was just a minor deviation and ought to have been overlooked as allowed under section 64 (2)(a) of the Act.

The Applicant submitted that it had supplied a memorandum duly signed by all the members of the joint venture to the effect that PC Supplies Ltd could sign on behalf of the other two joint venture partners. It further submitted that the Act does not require that there be a written joint venture agreement and that there was no such requirement in the tender documents. It argued that it was therefore

wrong for the Procuring Entity to declare its bid as non responsive for lack of a Power of Attorney, authorizing PC Supplies Ltd to act for and on behalf of the other two companies.

It further submitted that it had provided all the necessary documents in regard to proof of fulfillment of statutory obligations in regard to PC Supplies Ltd. It argued, therefore that it was not necessary to provide the documents in regard to the other joint venture members as this was not a requirement in the tender documents.

The Applicant took time to guide the Board through their tender document in a bid to prove that the Procuring Entity's written response was unjustified. It argued that they had indeed provided all the required information in regard to the following:

- Experience in local conditions
- Evidence of financial resources
- Demonstration of ability to source for seedlings
- Experience in community mobilisation
- Experience in afforestation.

It added that it was therefore wrong for the Procuring Entity to deny it of its right to technical and financial evaluations since it had met all the mandatory requirements.

In conclusion, the Applicant stated that it ought to be awarded the tender since its bid was the lowest responsive tender.

In response, the Procuring Entity submitted that the tax compliance certificate which was in the name of Palavi Commodity Suppliers Ltd was not acceptable since the certificate of registration was in the name of PC Supplies Ltd. It further submitted that this failure to supply a valid compliance certificate was in breach of section 64 of the Act as read together with regulation 47.

The Procuring Entity stated that the Applicant was not qualified to be awarded the tender since it did not provide evidence that it had the capacity to sign the contract which was in breach of section 31(1)(b) of the Act. It argued that the applicant ought to have provided a Power of Attorney authorizing PC Supplies Ltd to sign the contract on behalf of the other joint venture members.

The Procuring Entity stated that the Applicant's bid was rejected at the preliminary stage for failure to satisfy the mandatory requirements in regard to Compliance Certificate and Power of Attorney. As a result, it added the Applicant's bid did not proceed to technical and financial evaluation. The Procuring Entity argued therefore, that it was wrong for the Applicant to claim that its tender was the lowest evaluated bid since it did not meet the qualification as provided under section 66 of the Act as read together with regulations 49 and 50.

The Procuring Entity noted that it had notified both successful and unsuccessful bidders in the correct manner as stipulated under Section

67 of the Act. It argued that Section 67 of the Act does not require the Procuring Entity to give reasons for non-responsiveness unless otherwise requested to do so by the bidders, in accordance with Regulation 66. It further argued that in this case, there was no breach since as at the time of the hearing, the Applicant was yet to request for reasons as to why its tender had been unsuccessful.

The successful candidate, Kamfor Company Limited, requested the Board to rely on its written submissions to the effect that the procurement process was carried out in a transparent manner and that they had already received and accepted the award of tender.

An interested candidate, Multytouch International confirmed to the Board that their bid was for Kenya Shillings 97.7 million and not the 1.9 million as recorded in the evaluation report. It also claimed that it had indeed provided a bid bond to the tune of 1.9 million. The Procuring Entity conceded that its evaluation committee's records were wrong on both points and prayed for the Board's indulgence.

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

The Board notes that the applicant was disqualified at the preliminary stage due to the following reasons:

- a) It did not provide a power of attorney giving authority to PC Supplies Ltd to sign on behalf of the other members of the joint venture.
- b) The Applicant's tax compliance certificate was in the name of Palavi Commodity Supplies Ltd, whereas the certificate of registration was in the name PC Supplies Ltd.

The Board notes that the Applicant's form of tender included a statement to the effect that PC Supplies Ltd was authorized to sign on behalf of the joint venture members.

Section 31(1)(b) which the Applicant is said to have breached states as follows:

"the person has legal capacity to enter into a contract for procurement"

The Board notes that the Tender Document did not require that a Power of Attorney be provided. All it required is that a bidder be in a position to legally enter into a contract. In this case the signatures of all the joint venture members with their respective rubber stamps were appended to the form of tender clearly authorizing PC Supplies Ltd to sign on behalf of all the joint venture parties. The Board finds that this is well within the requirements of section 31(1) (b) and that it was wrong for the Procuring Entity to disqualify the Applicant's bid on this ground.

The Board therefore finds that this limb of the ground of appeal succeeds.

With regard to the tax compliance certificate, the Board notes as follows:

- a) Palavi commodity Supplies Ltd changed it's name to PC Supplies Ltd vide Certificate of Change of Name dated 25th October, 2002.
- b) Tax Certificate in the name of Palavi Commodity Supplies Ltd dated 25th October 2002 indicates that the PIN No. of the company was P051147248B.
- c) VAT certificate No. 0126078A in the name PC Supplies Ltd dated 17th December 2002 quoted the company's PIN No. as P051147248B which is the same as PIN No. quoted on the PIN Certificate in the name Palavi Commodity Supplies Ltd as above.

Ordinarily, the Board would rule in favor of a Procuring Entity who rejects a compliance certificate that is in a name different from that appearing on the certificate of incorporation. But in this case, the Board notes that there is overwhelming evidence to prove that the Kenya Revenue Authority is using the same file for a company even after the change of name and that the PIN number remains unchanged. The Board further notes that the Kenya Revenue Authority is using the two names interchangeably. However, the Board observes that the onus is on the bidders to ensure that their records at Kenya Revenue Authority are updated to reflect the correct names.

The Board finds that the tax compliance certificate provided by the Applicant was indeed valid. The Board therefore finds that this limb of the ground of appeal succeeds.

Ground three: Loss and Damage.

The applicant alleged that in participating in the tender, it suffered loss of business and incurred costs due to the decision arrived at by the Procuring Entity.

In response, the Procuring Entity stated that it evaluated and ranked the bidders in accordance with Regulation 53(3). It argued that the award was made to the right candidate pursuant to Section 66(4) of the Act. It submitted that this was an open tender in which bidders were aware of costs involved.

The Board notes that the costs incurred by the tenderers at the time of tendering are commercial risks borne by people in business; this being an open tender where risks are involved, each bidder carries its own costs.

Before concluding, the Board makes the following observations in relation to the tender process as follows:

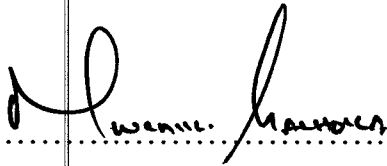
The Evaluation Report contained numerous mistakes e.g.:

- a) Bidder No. 8 was disqualified at the preliminary evaluation stage for failing to submit a bid bond. However according to the minutes of the tender opening committee, the bidder had submitted a bid bond of Kshs 3,051,200.00 as required.
- b) Bidder No. 10 was recorded in the tender opening report as having a tender sum of Kshs 1,955,470 and with no bid bond. However, in the summary of bidders, the same bidder was noted to have a tender sum of Kshs 97,777,500 again with no bid bond. When the Board raised the issue at the hearing, it turned out that the bid sum was indeed Kshs 97,777,500 while the bidder had actually submitted a bid bond to the tune of Ksh 1,955,470.
- c) The table on "Results on Prequalification"
Board members noted several anomalies especially in regard to the applicant. On inquiry, as to whether these mistakes had been corrected, the Board was informed that the mistakes had been corrected on a soft copy by the Ministerial tender committee who were said to have discovered the mistakes. The Procuring Entity was not able to satisfy the Board why a soft copy of the Evaluation Report was different from the hard copy was duly signed by the evaluation committee members.

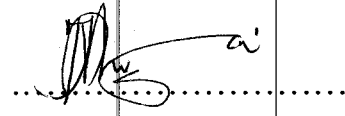
Taking into account all the above, this request for review succeeds and the award of the tender to the successful candidate is hereby annulled pursuant to Section 98 (a) of the Act.

The Board further orders, pursuant to Section 98 (b) of the Act, that the Procuring Entity re-evaluates all the tenders in accordance with the Tender Documents, the Act and Regulations.

Dated at Nairobi on this 8th day of December, 2009

A handwritten signature in black ink, appearing to read 'W. M. Mwangi', written over a horizontal dotted line.

Chairman, PPARB

A handwritten signature in black ink, appearing to read 'M. M. Mwangi', written over a horizontal dotted line.

For Secretary, PPARB

