

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 20/2010 OF 8TH APRIL, 2010

BETWEEN

BETECH CONTRACTORS.....APPLICANT

AND

DISTRICT COMMISSIONER/ TENDER COMMITTEE,
MOGOTIO DISTRICT.....PROCURING ENTITY

Review against the decision of the District Tender Committee, Mogotio District dated 15th March, 2010 in the matter of Tender No. MGT/7/2009-2010 for Proposed Construction of Kimngorom Secondary Girls Secondary School

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Eng. C. A. Ogut	-	Member
Mr. Akich Okola	-	Member
Mr. Sospeter Kioko	-	Member

IN ATTENDANCE

Mr. P. M. Wangai	-	Holding Brief for Secretary
Ms. Kerina A. Rota	-	Secretariat

PRESENT BY INVITATION

Procuring Entity, District Tender Committee, Mogotio District

Mr. Obadiah K. Maina - District Procurement Officer
Ms. Mary W. Gichanga - District Works Officer
Mr. Gangre O. Jacktone - District Education Officer

Applicant, Botech Contractors

Mr. Seth Ojienda - Advocate, Ojienda & Co. Advocates
Mr. Kibet Noah - Managing Director

Interested Candidates

Mr. Moses Rutto - Director, Tuiokim Contractors
Mr. William Lelkutwo - Director, Lelkutwo Contractors
Mr. Simon Chesire - Managing Director, Belion Contractors

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 Office of the Deputy Prime Minister and the Minister for Finance under Economic Stimulus Programme on 21st January, 2010. The tender was for Proposed Construction of Kimngorom Girls Secondary School Centre of Excellence. The tender closed/opened on 4th February, 2010 in the presence of the bidders' representatives. The

tenderers who responded and their respective tender prices were as follows:

S/No.	Contractor's Name	Tender Sum (Kshs.)
1.	Zepheli Construction Ltd	114, 753, 000.00
2.	Alewa Builders & Renovators	115, 459, 457.40
3.	Belion Hardware & Building Contractors	107, 481, 838.10
4.	Betech Contractors	98, 428, 351.32
5.	Besko Investment Ltd	113, 649, 514.00
6.	Tuiokim Contractors	145, 876, 664.00
7.	Lelkutwo Contractors	95, 657, 373.00
	Official Estimate	102, 061, 506.00

Technical Evaluation

The technical valuation was based on the following mandatory requirements:

1. Proof of works of similar magnitude and complexity undertaken in the last five years.
2. Bid bond in form of Bank guarantee from a reputable bank or approved insurance company.
3. Adequate equipments and key personnel
4. Sound financial standing and adequate access to bank credit line.
5. Litigation history
6. Confidential business questionnaire

7. Tax compliance certificate
8. Proof of registration with the Ministry of Works in category "H" and above

Other reasons for declaring a tender non-responsiveness were as follows:

- i) A tender from a tenderer whose on-going project(s) is/are behind schedule and without approved extension.
- ii) A tender from tenderer who has been served with a default notice on on-going project(s)
- iii) A tender from a tenderer with more than four on-going projects
- iv) A tender from a tenderer whose tender sum was $\pm 10\%$ of the Official Estimate.

Upon evaluation all the bidders were found non-responsive for failing to comply with some of the requirements of the tender. Nevertheless, three bidders, namely Leikutwo Contractors, Betech Contractors and Belion Contractors were allowed to proceed to the financial evaluation since their tender sums were within the range of $\pm 10\%$ of the Official Estimate.

Financial Evaluation

This involved correction of arithmetic errors and comparison of prices. The Evaluation Committee made the following observations on each tender:

1. Leikutwo Contractors
 - Had arithmetic errors of +7.20%
 - Its rates on major items were reasonable

- Had not priced many items of the Bills of Quantities on electrical and mechanical works
 - Its tender sum is 6.27% below official estimate.
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2. Betech Contractors

- Arithmetic error of +8.108%
- Had reasonable rates for major items
- Did not price a few items of the Bill of Quantities
- Did not forward the figure for kitchen equipments and mechanical ventilation correctly in the final tender figure
- Tender sum was 3.6 % below official estimate.
- No proof of works undertaken in the last five years and equipments.

3. Belion Contractors

- No arithmetical errors
- Rates on major items are reasonable
- Tender sum within acceptable limit of +10%
- No proof of financial resources and equipments
- Contractor well known having undertaken several projects in the neighbouring districts.
- Registered in category C in building works

In view of the above information, the Evaluation Committee recommended the award of the tender to Belion Hardware and Building Contractors at its tender sum of Kshs. 107, 481, 838.10.

In its meeting held on 15th March, 2010, the District Stimulus Project Tender Committee concurred with the recommendations of the Evaluation Committee. However, the Committee noted that the tender sum of Kshs. 107, 481, 838.10 quoted by the successful bidder, Hardware and Building Contractors, was above the Kshs. 30 million which had been allocated to the project. The Committee scaled down the scope of works to commensurate with available funding as follows:

S/No.	Item	No. of Unit	Total (Kshs)
1.	Classroom	5	7.5
2.	Administration Block	1	9.1
3.	Dormitory	1	6.9
4.	Pit Latrine	1	1.0
5.	External works(fencing)	1	0.9
6.	V.A.T		4.8
7.	TOTAL		30.2

Upon scaling down the scope of works, the Committee awarded the tender to Belion Hardware and Building Contractors at Kshs. 29, 974, 301.40

Notification letters to the successful and the unsuccessful bidders are dated 23rd and 25th March, 2010 respectively.

THE REVIEW

This Request for Review was lodged on 8th April, 2010 by Betech Contractors against the decision of the District Tender Committee, Mogotio District dated 15th March, 2010 in the matter of tender No. MGT/7/2009-2010. The tender was for Proposed Construction of Kimngorom Secondary Girls Secondary School. The Applicant was represented by Mr. Seth Ojienda, Advocate while the Procuring Entity was represented by Mr. Obadiah K. Maina, District Procurement Officer. Tuiokim Construction Ltd and Belion Hardware & Building Contractors, Interested Candidates, were represented by Mr. Moses Rutto, Director and Mr. Simon Chesire, Director, respectively.

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

- “1. The board reverses the decision of the Procurement entity as the award was irregular and unprocedural.
2. Our company be awarded the works since we are technically qualified and financially responsive at 2nd lowest bid with all the requirements”.

The Board deals with the grounds of appeal raised by the Applicant as follows:

Grounds One and Two: Breach of Clauses 5.4 and 5.7 of the tender documents

The two grounds have been consolidated as they raise similar issues regarding the evaluation of tenders.

The Applicant stated that upon learning through rumours circulating in the community that the tender was going to be awarded to the Successful Bidder, who in its view was not the lowest evaluated bidder, it took up the matter with the District Commissioner and was informed that the reason for its failure to win the award was that there were arithmetic errors in its tender, which rendered its bid non-responsive. It argued that the decision of the Procuring Entity to disqualify the Applicant on the grounds of correction of errors was in breach of Clauses 5.4 and 5.7 of the Instructions to Tenderers. The Applicant submitted that if indeed its tender had arithmetic errors, the Procuring Entity should have sought clarifications from it in accordance with Sections 62 and 63 of the Act and Clause 5.7 of the tender document.

The Applicant further submitted that the ground cited by the Procuring Entity in its Ground 1 of opposition to the Request for Review, namely, that the Applicant had failed to complete all parts of the Bill of Quantities, was not sustainable. It argued that Clause 3.3 of the tender document provided that, in such event, *“items for which no rate or price is entered by the tenderer*

will not be paid for when executed and shall be deemed covered by the other rates and prices in the Bill of Quantities."

As regards the failure by the Applicant to provide a financial statement and evidence that it had qualified personnel as required by the tender document, the Applicant stated that it submitted the required financial statement, and other supporting documents confirming that it had qualified personnel. It argued in this regard that, if it had not fulfilled this requirement, the Procuring Entity would have disqualified it at the preliminary evaluation stage.

The Applicant further argued that its tender price of Ksh. 98,428,351.32 was well within $\pm 10\%$ of the Official Estimate.

On the issue of the Procuring Entity requiring bidders to be registered with the Ministry of Works under Category "F", the Applicant submitted that the Procuring Entity could not rely on this ground of opposition as the tender notice merely required a tenderer to be registered in Category "H" and above.

On the issue of discounts, the Applicant stated that it had given a discount of 5% before taxes as to do otherwise would mean denying the Government legitimate taxes. It argued that that the discounts were to be reflected in the total value of the cost after any taxes and levies, and not before.

On the basis of these submissions, the Applicant argued that by the time the process moved to the financial evaluation stage, it was the lowest evaluated bidder because M/S Lelkutwo Contractors, which had quoted the lowest price, was rejected at the technical evaluation stage. In its view, it followed that it should have been awarded the contract. It therefore urged the Board to annul the award of the tender and award to the Applicant.

In response, the Procuring Entity submitted that the Applicant was not the lowest evaluated bidder having failed to comply with some of the tender requirements set out in the advertisement notice. The Procuring Entity stated that the offer by the Applicant was far below the 10% allowed by the Ministry of Public Works estimates. It further stated that the Applicant had failed to provide evidence of sound financial standing and key personnel.

The Procuring Entity submitted that the Applicant failed to fill all parts of the Bill of Quantities as was required by the tender documents. In particular, it pointed out that the Applicant failed to provide figures for kitchen equipments and mechanical ventilation. It argued that this omission was deliberate and was intended to lower the figures quoted by the Applicant with a view to making it appear as if its tender was the lowest. The Procuring Entity contended that could not have been the lowest evaluated bidder having failed to comply with the conditions set out in the tender document and in the Bill of Quantities

The Procuring Entity further submitted that although the tender notice provided that the bidders needed to be registered under category "H" and above, according to the Ministry of Public Works ratings, a bidder under this category could only perform works of up to Ksh. 20,000,000. In light of the value of this tender, which was over Ksh. 100,000,000, the Applicant could not qualify.

In addition, the Procuring Entity questioned the motives and propriety of the Applicant's actions in obtaining information on the decision by the Tender Committee before notification of the award. It noted in particular that the Applicant's letter to the District Commissioner was dated 19th March, 2010, whereas the notification letters were dated 21st March, 2010. It submitted that this action was in breach of the Act.

Finally, the Procuring Entity stated that although the official estimates for the tender was in excess of Ksh. 100,000,000, it scaled down the award to Ksh. 30,000,000 on instruction of the Ministry of Education as these were the only funds available for the project. On this basis, it decided to award the tender to the lowest evaluated bidder.

In view of these submissions, the Procuring Entity submitted that the tender was properly awarded and prayed that it should be upheld by the Board.

On its part, one of the unsuccessful bidders, Tuoikim Construction Ltd, stated that the tender documents were not available until one week before

closing/opening, thus leaving bidders with insufficient time to complete the documents. It further pointed out that the architectural drawings for the project to enable the tenderers to make accurate costs of the Bill of Quantities were not provided. It further submitted that because of insufficient time, it was not possible to seek clarifications in accordance with the provisions of the tender documents.

Lelkutwo Contractors, another unsuccessful bidder, associated itself with the submissions of Tuoikim Construction Ltd.

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

The Board notes that seven bids were received by the time of closing/opening tenders. The tenders were then evaluated based on the mandatory requirements that were set out in the advertisement notice. According to the evaluation report, none of the seven bidders was fully compliant with all the requirements of the tender. The following observations were made on each tender:

1. Lelkutwo Contractors

- Not attached documents for work done, equipments and personnel, financial statements*
- Not filled mechanical items in BQ*

2. *Betech Contractors*

- *Not attached proof documents for work done, personnel and equipments*

3. *Belion Hardware & Building Contractors*

- *They have not attached financial statements*

4. *Besko Investments Ltd*

- *They are above official estimate by 11.35%*
- *Therefore automatically disqualified*

5. *Zepheli Construction Co.*

- *Not attached proof documents for work done, equipments and financial statements*
- *They are above financial estimates by 12.44%*
- *Therefore automatically disqualified*

6. *Alewa Building and Renovators*

- *They are above the official estimate 13.13%*
- *They are therefore automatically disqualified*

7. *Tuiokim Construction Ltd*

- *They are above official estimate by 46.84%*
- *Therefore automatically disqualified.*

Despite these observations, three bidders, namely, Lelkutwo Contractors, Belion Hardware & Building Contractors and the Applicant were allowed to proceed to the financial evaluation. It appears the three bidders were selected on the basis of having quoted within $\pm 10\%$ of the Official

Estimate. The Board notes that the requirements which the bidders were evaluated on were mandatory requirements as indicated in the tender notice and Clause 1.5 of the Instructions to Tenderers. It was therefore irregular to waive all the other mandatory requirements of the tender and concentrate on one parameter (Official Estimate) to determine the bidders to qualify for the financial evaluation stage.

The Board notes that the recommendation of the evaluation committee to award the tender to Belion Hardware & Building Contractor was forwarded to the tender committee. The tender committee noted that it could not award the tender at the recommended price of Kshs. 107, 481, 838.10 as it was beyond the available budget of Kshs. 30 million. Hence the committee scaled down the scope of works in accordance with a Ministry of Education circular which provided as follow:

- That where it is realized that the lowest responsive bids exceed the amount of money allocated then the scope of works must be reduced to reflect the amount of money allocated (30 Million).
- That the works that should be included in the contracts must be such works that once commenced will be completed using the funds allocated.
- That any additional funding in subsequent years will be for completion of works undertaken in this contract.

The Board has also perused the original tender documents submitted by the Applicant and observes that the Applicant had attached a list of:

- a) the projects it had undertaken between 2001 and 2009;
- b) equipments; and
- c) key personnel

It is therefore, not clear as to how the Procuring Entity came to the conclusion that the Applicant failed on these requirements as indicated in the evaluation report. However, the Board notes that the Applicant did not provide evidence of sound financial standing and adequate access to bank credit as required in the tender advertisement notice and the bid document. The only document provided by the Applicant in this regard is a letter Ref No.fwy/003/05 dated 28th February, 2005 from the Equity Bank Ltd, Fourway Branch. The Board notes that the letter was addressed to Ministry of Roads and Public Works and had no reference regarding cash in hand to demonstrate evidence of financial resources.

With regard to the bid submitted by the Successful Bidder, the Board notes that the bidder did not also provide evidence of access to financial resources as required. It was also noted that the Successful Bidder attached certificates of completion of two projects as evidence of similar works it has done. However, the certificates do not indicate the value of the projects to confirm that they are of similar magnitude and complexity as the project being tendered for. In any event the requirement of sound financial standing was reduced by the reduction in the scope of works to Ksh. 30 million.

With regard to breach of Clauses 5.4 and 5.7 of tender documents on the corrections of arithmetical errors, the Board notes that the evaluation report

indicates that the Applicant's tender had an error of +8.108%. This was based on the errors that were noted in the Applicant's tender. Further, the Applicant was not disqualified on the basis of correction of arithmetic errors alone. According to the evaluation report, the Applicant was disqualified at the financial evaluation stage for failing to price certain items in the Bills of Quantities; failing to forward the figure for kitchen equipments and mechanical ventilation correctly in the final tender figure thus making its tender lower than the Official Estimate; and for failing to attach proof documents for works undertaken for the last five years and the equipments. The Board notes that Clause 3.3 of the Instruction to Tenderers provides that items for which no rate or price were entered by the tenderer would not be paid for when executed and would be deemed to be covered by other rates and prices in the Bill of Quantities.

After carefully examining these documents and weighing the submissions by the parties the Board finds that the whole evaluation was flawed. As noted herein, the Procuring Entity had specified mandatory requirements in the tender notice and the tender document, which all bidders had to meet. The evaluation report indicates that none of the bidders, including the Applicant and the Successful bidder, met all these requirements. Neither the Successful bidder nor the Applicant provided satisfactory evidence of sound financial standing and access to financial resources, as required. Furthermore, although the Successful Bidder attached certificates of completion of two projects as evidence of similar works it had done, the certificates did not indicate the value of the projects to confirm that they are of similar magnitude and complexity as the project being tendered for. In

the circumstances all the bidders should have been disqualified as being non-responsive, in accordance with Section 64 of the Act.

The Board further finds that the bidders were not given sufficient time to prepare their tenders. As noted earlier, the tender was advertised in the Daily Nation on 21st January, 2010. According to the notice the tenders were to be opened on 4th February, 2010. However, according to evidence received by the Board, which was not contradicted by the Procuring Entity, the tender documents were not available for collection by bidders until January 28th, 2010, thereby leaving bidders with only seven days to complete them. The time allowed for bidders to complete the tender documents was not in conformity with section 55(2) of the Act which provides that:

“For purposes of this section, the time allowed before the deadline for the preparation of tenders is the period of time between whatever steps the procuring entity takes to bring the invitation to tender to the attention of those who may wish to submit tenders and the deadline for submitting tenders.”

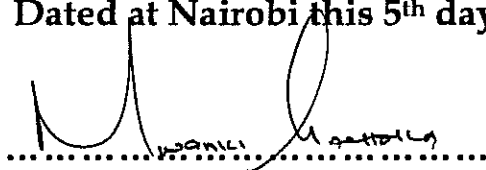
Furthermore, the Board finds that the architectural drawings for the project were not made available to the bidders, thereby making it difficult for them cost the Bill of Quantities correctly.

Regarding the letter by the Applicant to the Procuring Entity dated 19th February, 2010, the Board finds that action was highly irregular and contravened Section 38(1) (a) of the Act which states that:

“no person who has submitted a tender...shall make any unsolicited communications to the procuring entity...”

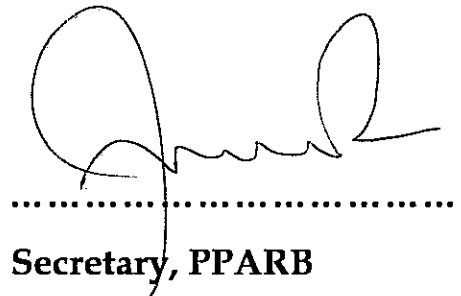
Taking into account the circumstances, the Board finds the tender process flawed. However, in light of the fact that the funds for the project must be spent within this financial year which ends in June this year, it would be futile to ask the Procuring Entity to repeat the whole exercise. In the circumstances, therefore, the Board exercises its powers under section 98 and annuls the decision to award the tender to the Successful Bidder and orders that the Procuring Entity should repeat the exercise by way of restricted tender method. The Procuring Entity should invite all the bidders who had participated in the tender process.

Dated at Nairobi this 5th day of May, 2010



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Chairman, PPARB



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Secretary, PPARB