

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 16/2010 OF 16th MARCH, 2010

BETWEEN

ZACTER AGENCIES.....APPLICANT

AND

**OUR LADY OF MERCY SECONDARY SCHOOL - KAMUKUNJI
CONSTITUENCY.....PROCURING ENTITY**

Review against the decision of the Board of Governors of Our Lady of Mercy Secondary School, Kamukunji Constituency dated 8th March, 2010 in the matter of Tender No. BK 3/2/6952/14-10 for the Proposed Model School of Excellence at Our Lady of Mercy Shauri Moyo Secondary School- Nairobi

BOARD MEMBERS PRESENT

| | | |
|-------------------|---|----------|
| Mr. P. M. Gachoka | - | Chairman |
| Mr. J.W. Wambua | - | Member |
| Eng. C. A. Ogut | - | Member |
| Ms. J. A. Guserwa | - | Member |

IN ATTENDANCE

| | | |
|---------------------|---|-----------------------------|
| Mrs. Pamela K. Ouma | - | Holding Brief for Secretary |
| Ms. Kerina A. Rota | - | Secretariat |

PRESENT BY INVITATION

Applicant, Zacter Agencies

- Ms. Angela Ogolla - Corporate Lawyer
Mr. Sylvester Okoth - Director
Mr. Bon Musumba - Director

Procuring Entity, Our Lady of Mercy Secondary School, Kamukunji

Constituency

- Mrs. Lucy Musyoki - Chairperson, Board of Governors
Mr. David G. Choka - Quantity Surveyor, Ministry of Public Works
Mrs. Esther Angwenyi - Principal
Mr. James Ongati - District Education Officer - Kamukunji
Mr. Wycliffe Mutsotso - Bursar

Interested Candidates

- Mr. David K. Gitau - Director, Castle Investments Co. Ltd
Mr. Anthony Muhuyu - Director, Castle Investments Co. Ltd
Mr. Kibathi Karanja - Castle Investment Co. Ltd
Mr. Abusa Nyabuto - Director, Grivirico General Works
Mr. Ezekiel Angwenyi - Director, Grivirico General Works

BOARD'S DECISION

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

BACKGROUND

The Office of the Deputy Prime Minister and Ministry of Finance advertised a Tender Invitation Notice, for Labour only Contracts, on 31st December, 2009 in the Daily Nation newspaper under the Economic Stimulus Programme (ESP) to upgrade existing Secondary Schools into Centre(s) of Excellence in every Constituency. On 25th January, 2010, the tender closing/opening date was extended to 4th February, 2010.

Closing/Opening:

The bids closed/opened on 4th February, 2010 and four bids were submitted as follows:

- | | | |
|------------------------------|---|---------------------|
| 1. Njomoza Enterprises | - | Kshs. 15,947,746.00 |
| 2. Castle Investment Co. Ltd | - | Kshs. 9,199,171.00 |
| 3. Grivirico General Works | - | Kshs. 9,911,349.00 |
| 4. Zacter Agencies | - | Kshs. 10,744,746.62 |

The Official Estimate of the contract was Kshs. 10,684,114. It was noted that the Form of Tender of M/s Njomoza Enterprises was not filled. The minutes of the tender opening indicate that M/s Njomoza Enterprises was declared a "no tender".

EVALUATION

The bids were evaluated for responsiveness on the following parameters:

- i. Filled and signed Form of Tender
- ii. Proof of Registration with the Ministry of Public Works
- iii. Bid Bond from an established Bank or approved Insurance Company of Kshs.10,000
- iv. Filled Confidential Business Questionnaire
- v. Proof of Experience of works of similar magnitude in the last five (5) years.
- vi. Valid Tax Compliance Certificate
- vii. Tender sum must be within $\pm 10\%$ of the estimated cost of the project.

One of the firms, namely M/s Njomoza Enterprises was found non-responsive on two parameters namely lack of proof of experience and not being within the $\pm 10\%$ Estimate range. The other bids were declared responsive and were subjected to detailed technical evaluation.

TECHNICAL EVALUATION:

The summary of the results of the technical evaluation was as follows:

1. Castle Investment Co. Ltd:

- a) Submitted a bid that was 8.01% Lower than the Attendant Bill Estimate and had an arithmetic error of -14.84%(to their disadvantage)
- b) Their rates were generally consistent.
- c) Had filled all the required forms.

2. Grivirico General Works:

- a) Submitted a bid that was 0.88% Lower than the Attendant Bill Estimate and had an arithmetic error of +0.63% (to their advantage)
- b) Their rates were generally consistent.
- c) Had filled all the required forms.

3. Zactar Agencies:

- a) Submitted a bid that was 7.44% Higher than the Attendant Bill Estimate and had an arithmetic error of -12.1% (to their disadvantage)
- b) Their rates were generally consistent.
- c) Had filled all the required forms

The comparison of the submitted tender prices and the corrected tender sums were as follows:

| | Name of Firm | Submitted Tender Sum | Corrected Tender Sum | Arithmetic Error | % Above/ Below Estimate |
|----|---------------------------|----------------------|----------------------|------------------|-------------------------|
| 1. | Castle Investment Co. Ltd | Kshs. 9,199,171.55 | Kshs. 10,549,487.00 | -14.84 | -8.01 |
| 2. | Grivirico General Works | Kshs. 9,911,349.14 | Kshs. 9,857,764.15 | + 0.63 | -0.88 |
| 3. | Zactor Agencies | Kshs. 10,744,276.62 | Kshs. 12,029,991.38 | -12.10 | +7.44 |

The Evaluation committee then recommended M/s Castle Investment Co. Ltd be awarded the contract at their price of Kshs. 9,199,171.55

THE BOARD OF GOVERNORS DECISION

The Board of Governors of the School in their meeting held on 5th March, 2010 deliberated on the recommendation of the evaluation committee and awarded the tender to the recommended bidder M/s Castle Investment Co. Ltd at their price of Kshs. 9,199,171.55

Bidders were notified of the award vide letters dated 8th March, 2010.

THE REVIEW

The Request for Review was lodged by M/s Zactar Agencies on 16th March, 2010 in the matter of tender No. BK 3/2/6952/14-10, for the Proposed Model School of Excellence at Our Lady of Mercy Shauri Moyo Secondary School-Nairobi. At the hearing, the Applicant was represented by Ms. Angela Ogolla, Advocate and the Procuring Entity was represented by Mrs. Lucy Musyoki, and Mr. David G. Choka. The Interested Candidates present namely Castle Investment Co. Ltd and Grivirico General Works were represented by Mr. David K. Gitau and Mr. Abusa Nyabuto, respectively

The Applicant seeks for the following orders from the Board:

- 1 "Procuring Entity be compelled to stop the award process until the public procurement Administrative Review Board completes the review work.***
- 2 And after the review work is complete, the award be handed over to the suitably ranked bidder who to our opinion is the applicant pursuant to Section 66 (4) of public Procurement and Disposal Act of 2005.***

3 The applicant be compensated for all costs arising from this appeal."

The Applicant raised four (4) grounds of review which the Board deals with as follows:

Grounds 1 & 3- Breach of Section 66(2) of the Act

During the hearing, these grounds were combined and argued together, as they raised similar issues on evaluation.

The Applicant alleged that the Procuring Entity breached the provisions of Sections 66 (2) of the Public Procurement and Disposal Act, 2005 (hereinafter the "Act") which restricts the evaluation and technical committee to follow the procedures and criteria set out in the tender documents. It stated that the advertisement notice that appeared in the Newspaper indicated that tenderers whose tender sum were more than plus or minus 10% of the Official Estimate were to be declared non-responsive and were to be automatically disqualified. It submitted that, it had information that the Successful Bidder's quoted price was Sh 9,199,171.00 which was 16.14% less than the Official Estimate and therefore should have been automatically disqualified for failing to meet the evaluation criteria. It therefore urged the Board to find that the Procuring Entity did not evaluate the bids based on the set criteria and hence breached Section 66(2) of the Act.

An Interested Candidate, Grivirico General Works, in support of the Applicant submitted that it had met all the requirements of the tender. It

stated that at the tender opening, its tender sum of shs. 9,911,349.14 was -7% from the Official Estimate and was the lowest. It submitted that based on the above fact, it ought to have been awarded the tender.

In response, the Procuring Entity denied that it breached Section 66(2) of the Act when evaluating and awarding the Tender. It stated that it evaluated the bids in compliance with the evaluation criteria as set out in the tender documents. It submitted that the requirement that the bids should be priced at 10% plus or minus the Official Estimate was one of the criteria for evaluation among others and that these were followed to the letter. It submitted that, from the evaluation report on the bids, it was clear which bids were responsive and which were not.

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

The issue for the Board to determine is whether the Procuring Entity followed the evaluation criteria as set out in the tender documents to arrive at the Award.

The Board notes that the Evaluation Committee did a preliminary evaluation of the bids based on the criteria as stipulated in the advertisement notice. At this stage it is noted that one bidder was declared non-responsive on two parameters, namely its price being beyond 10% deviation from the Official Estimate and also due to lack of proof of experience on similar works, all being criteria set in the tender document.

The Board further notes that the responsive bids were corrected for arithmetic errors and the results were as tabulated below:

| Name of Firm | Tender Sum (Kshs.) | Corrected Tender Sum (Kshs.) | Arithmetic Error |
|---------------------------|-----------------------|------------------------------------|---------------------|
| Castle Investment Co. Ltd | 9,199,171.55 | 10,549,487.00 | -14.84 |
| Grivirico General Works | 9,911,349.14 | 9,857,764.15 | + 0.63 |
| Zactor Agencies | 10,744,276.62 | 12,029,991.38 | -12.10 |

The Board also takes note of Clause 5.7(f) of the tender documents which provided for the correction of errors.

In addition, the Board takes note of Clause 5.9 of the tender documents, which states that the Procuring Entity will determine for each tender the evaluated tender price by adjusting the tender price as follows:-

- a) *"Making any correction for errors pursuant to Clause 5.7*
- b) *Excluding provisional sums and the provision*
- c) *... ..*
- d) *... .."*

In this regard, the Board notes that the Procuring Entity corrected arithmetic errors and the results of the corrections are set out in the table above. The Board further notes that during the evaluation exercise the bids were evaluated for responsiveness on the following parameters:-

- i. Filled and signed Form of Tender
- ii. Proof of Registration with Ministry of Public Works

- iii. Bid Bond from an established Bank or approved insurance Company of Kshs.10,000
- iv. Filled Confidential Business Questionnaire
- v. Proof of Experience of works of similar magnitude in the last five (5) years.
- vi. Valid Tax Compliance Certificate
- vii. Tender sum must be within $\pm 10\%$ of the estimated cost of the project

The Board finds that based on the Criteria as set out above, the bids which passed the Preliminary Evaluation Stage were evaluated further. It is further noted that ultimately Castle Investment Company Ltd was recommended for the Award at its bid price of Shs 9,199,171.55 which was -8.01% from the Official Estimate. In this regard, the Board finds that the Procuring Entity evaluated the bids in line with the requirements of the Tender Document and did not breach Section 66 (2) of the Act.

Accordingly, these grounds of appeal fail.

Ground 2- Breach of Section 64 of the Act

The Applicant alleged that the Procuring Entity breached Section 64 of the Act by evaluating non-responsive bidders, instead of disqualifying them as appropriate. It stated that one of the bidders, namely Castle Investments Company Limited, did not have its Form of Tender filled at the time of tender opening, and hence should not have been evaluated. The Applicant stated that the non-responsive bids should have been disqualified automatically.

It concluded that, the Procuring Entity, by not disqualifying the said bidder, breached Section 64 of the Act.

In response, the Procuring Entity denied the allegations that it breached Section 64 of the Act. It stated that, indeed, one of the bidders did not have its Form of Tender filled at the time of opening the Tenders. It submitted that the Bidder who had this omission was not Castle Investments Co. Ltd, the Successful Bidder, as claimed by the Applicant. The Quantity Surveyor from the Ministry of Works, who was one of the members of the Evaluation Committee, stated that, at the time he received the bid documents from the Procuring Entity for evaluation, the Form of Tender for Castle Investments Ltd was among the documents he received. The Procuring Entity argued that the Applicant's allegations were mere suspicions backed by no evidence and hence urged the Board to find that the ground had no merit.

The Successful Bidder, Castle Investments Co. Ltd, associated itself with the Procuring Entity's submissions. It added that it had met all the requirements of the Tender as set out in the Tender documents and therefore urged the Board to dismiss the Request for Review.

The Board has considered the representations of the Parties and perused the documents presented before it.

The Board notes that the minutes of the Tender Opening Committee indicated that one of the bidders, M/s Njomoza

Enterprises, had not filled the Form of Tender and hence there was "no tender". Indeed, on perusal of the original bid document submitted by the said bidder, the Board finds that the Form of Tender is neither filled nor signed. The Board further notes that the evaluation report shows that the said bidder was declared non responsive for failing to provide a filled Form of Tender and proof of experience. In addition, it was disqualified on the ground that its price beyond the required range of $\pm 10\%$ of the Official Estimate.

The Board has also examined the bid documents of the Successful Bidder, namely Castle Investment Co. Ltd, and found that it had provided a duly filled and signed Form of Tender.

In this regard, the Board finds that the submissions by the Applicant are unsustainable and accordingly, this ground of appeal also fails.

Ground 4-Breach of Section 44(1) (c) and (d) of the Act

The Applicant alleged that the Procuring Entity breached Section 44 (1) (c) and (d) of the Act which prohibits disclosure of information relating to evaluation, comparison or clarification of tenders or contents of tenders. It alleged that it was evident that one bidder, namely Castle Investments Co. Ltd, had some contact with member(s) of the Tender Evaluation Committee before the process of evaluating and awarding the tender was completed. It added that a letter that was availed before the full Board of Governors meeting, attended by all bidders by invitation,

indicated that some of the complainant's papers had been plucked from their bid documents. It therefore alleged that this was a proof that there was collusion. The Applicant stated that the Procuring Entity therefore failed to handle the Tender in a confidential manner in line with the requirements of the Act and showed lack of ethical standards and independence.

In response, the Procuring Entity denied breach of Section 44(1), (c) and (d) of the Act as alleged by the Applicant. It stated that during and after the procurement process, it never made any disclosures to unauthorized person(s) regarding the Tender. It stated that these allegations were baseless and had no merit.

It submitted that as the tender evaluation process was in progress, it received a letter from the District Commissioner, with allegations that some documents had been plucked from the bid document(s) for this tender. It stated that following the allegation, the Evaluation Committee checked the said Bid documents and found no documents missing. It challenged the Applicant to disclose their source of information regarding the complainant who wrote the anonymous letter to the District Commissioner, because as far as they were concerned, there was no mention of the firm that wrote the said anonymous letter. The Procuring Entity submitted that after receiving the anonymous letter it decided to appoint a new Evaluation Committee to ensure that the evaluation of the bids would be carried out transparently and independently. It further stated that, a meeting of all the bidders was convened during which an assurance was given to all the bidders regarding

their bid documents and the evaluation process of the tender thereof. It averred that this did not amount to a disclosure of information to an unauthorized person(s) nor did it amount to breach of the Act. In this regard, it requested the Board to find the submissions by the Applicant baseless.

The Board has considered the submissions of the Parties and also perused the documents presented before it and notes the following:-

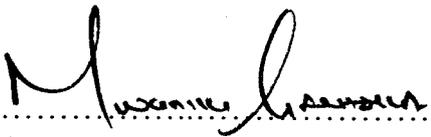
- i) That an Evaluation Committee was appointed after the tender opening and commenced the evaluation process.
- ii) That the Procuring Entity invited the Bidders to a meeting, which meeting they attended and were briefed on the anonymous letter that the Procuring Entity had received from the District Commissioner, regarding the alleged tampering with the bid documents.
- iii) That upon checking on the alleged plucked off documents; to the contrary, the Procuring Entity found that all the bid documents were intact.
- iv) That following these allegations, a new team of Evaluation Committee was appointed by the Procuring Entity, in order to carry out the evaluation of the bids, following which the Committee made its recommendations and ultimately the Award was made.

Based on the above, the Board holds that no evidence has been given or proof adduced to show that the Procuring Entity

disclosed any information on the tender process un-procedurally. Accordingly, the Board finds that this ground has no merit.

Taking into consideration all the above matters, the Request for Review fails and is hereby dismissed. The Procuring Entity may proceed with the Tender Process.

Dated at Nairobi on this 14th day of April 2010


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Chairman, PPARB


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for Secretary, PPARB

