

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 57/2010 OF 18TH OCTOBER, 2010

BETWEEN

**VEE VEE ENTERPRISES LTD TRADING
AS TETRALINK TAYLOR & ASSOCIATES
EAST AFRICA LTD.....APPLICANT**

AND

**SIGALAGALA TECHNICAL
TRAINING INSTITUTE.....PROCURING ENTITY**

Review against the decision of Tender Committee of Sigalagala Technical Training Institute dated 2nd October 2010 in the matter of Tender No. STTI/T.B/001/2010-2011 FOR Erection and Completion of a Tuition Block Phase 1.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Ms. Loise Ruhiu	-	Member
Amb. C. M. Amira	-	Member
Mr. Sospeter Kioko	-	Member

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant, Vee Vee Enterprises Ltd Trading as Tetralink Taylor & Associates East Africa Ltd.

Ms. Ann N. Kaguru - Advocate
Mr. Paul Obado - Representative
Mr. Francis Omondi - Representative

Procuring Entity , Sigalagala Technical Training Institute

Mr. Bulemi Bukhala - Chairman, Tender Committee
Mr. Kennedy Shilaho - Vice Chairman
Mr. Ignatius Muhati - Secretary
Mr. Josphat Ksawe - Principal
Mr. H. K Silungi - Quantity Surveyor

Interested Party, M/S Ramagon Construction Ltd

Mr. Wafula Ezekiel - Advocate
Mr. Nagaye Mohammed - Director

BOARD'S DECISION

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

BACKGROUND OF AWARD

This tender was advertised by the Procuring Entity in the Daily Nation Newspaper of 18th August 2010. The tender was for the works under proposed Erection and Completion of a Tuition Block, Phase 1. Tender No. STTI/TB/001/2010-2012.

Closing/Opening

The tender closed/opened on 7th September 2010 in the presence of the bidders' representatives. The tender attracted bids from seventeen different firms as shown here below:-

NO	BIDDERS NAME	AMOUNT QUOTED (KSHS)	BID FROM	BOND
1	Backbone Construction Ltd	34,125,450.00	1 st Co.	Assurance
2	Bonstore Constructors	NO TENDER	NO BID	BOND
3	Tulsi Construction Ltd	39,997,940.00	NO BID	BOND
4	Diaspora Design Build Ltd	37,201,670.00	Pacis Co.	Insurance
5	Broadband Engineering	55,493,814.00	Amaco	
6	Kiu Construction Co.	32,950,570.00	Amaco	
7	Tetra Link Taylor &	33,160,406.00	Amaco	

	Associates E. A. Ltd		
8	Atmax Design Build Ltd	35,879,326.12	Equity Bank
9	Kora Construction Co. Ltd	33,313,187.40	Co-Operative Insurance Co.
10	Kishan Builders	NO TENDER	Amaco
11	S. K. Kerai Construction	36,611,079.00	Bank Of Baroda
12	Richardson Co. Ltd	39,169,710.00	Amaco
13	Benai Building Contractors	34,833,518.00	Invesco Insurance
14	Ramagon Construction Co.	33,179,543.00	Amaco
15	Lunao Enterprises	37,350,828.40	Amaco
16	Wilkori Building & Cival Eng.	37,648,177.00	Kenindia Insurance
17	Thelmax Construction Co.	32,646,825.00	Co-Operative Bank

EVALUATION

Tender Evaluation was carried out in three stages i.e. Preliminary Evaluation, Technical Evaluation and the Financial Evaluation.

The evaluations were carried out by a committee consisting of three members being;

- K. Silungu - Provincial Quantity Surveyor
- F. N. Jayuga - Superintendent Electrical
- E. K. Murey - District Works Officer

Preliminary/Technical Evaluation

The Committee conducted a responsive exercise for the evaluation of the bids using the following parameters:

- Forms of bid
- Bid security

- Financial capability
- Personal capability forms
- Candidates summary forms
- Experience record form
- Source of funding forms
- Bill of Quantities
- Equipment capability forms
- Litigation history forms
- Tax compliance certificate

According to the tender documents, other reasons for declaring a tender non-responsive were as follows:

- On going project(s) behind schedule without approved extension of time
- Served with default notice on on-going project (s) or terminated
- On-going projects exceeding four in number
- Tender sum is plus or minus 10% of the official estimate.

A summary of the Preliminary/Technical evaluation was as follows:

Bidder	Eligibility Cat.A-D	Form of tender	Bid security	Tax compliance	Tender sum +/- 10%	Experience in 2 projects	Proposal For equip	Contract manager	Liquid assets	Acceptance for detailed examination
Thelmax Contractors	okay	okay	okay	okay	Not okay	Not okay	okay	okay	Not okay	NO
KIU Construction Co	okay	okay	okay	okay	Not okay	Not okay	okay	okay	Not okay	NO
Tetralink Taylor & Associates E. A	okay	okay	Not okay	okay	okay	okay	okay	okay	okay	NO
Ramagon Construction Co.	okay	okay	okay	okay	okay	okay	okay	okay	okay	YES
Kora Construction	okay	okay	okay	okay	okay	okay	okay	okay	okay	YES
Backbone construction Ltd	okay	okay	okay	okay	okay	okay	okay	okay	okay	YES
Benai Building contractors	Not okay	okay	Not okay	Not okay	okay	okay	okay	okay	Not okay	NO

Artmax Build Ltd	Design	okay	okay	Not okay	Not okay	okay	okay	okay	okay	okay	NO
S.K Construction	Kerai	okay	okay	okay	okay	okay	okay	okay	okay	okay	YES
Diaspora building	design	okay	okay	Not okay	okay	okay	okay	okay	okay	okay	NO
Lunao Enterprises		okay	okay	okay	okay	okay	okay	okay	okay	okay	YES
Wilkori building & civil construction		okay	okay	okay	Not okay	okay	Not okay	okay	okay	okay	NO
Richardson company ltd		okay	okay	okay	okay	okay	okay	okay	okay	okay	YES
Tulsi construction ltd		okay	okay	Not given	okay	okay	okay	okay	okay	okay	NO
Broadband Engineering		okay	okay	okay	Not okay	Not okay	okay	okay	okay	okay	NO
Kishan Builders		okay	Not okay	okay	N/A	okay	okay	okay	okay	okay	NO
Bonstore Contractors		okay	Not okay	Not given	N/A	okay	okay	okay	okay	Not okay	NO

Out of the seventeen bidders, only six bidders were found to be responsive and were thus recommended to proceed to the financial evaluation. The Six bidders were:-

- M/S Ramagon Construction Co. Ltd
- M/S Kora Construction Co.
- M/S Backbone Construction Co.
- M/S S.K. Kerai Construction Ltd
- M/S Lunao Enterprises
- M/S Richardson Co. Ltd

The Applicant was eliminated at the Preliminary/Evaluation Evaluation stage for reasons that its bid bond was incomplete having

omitted condition no. 2 'a' & 'b' of the prescribed format in the standard conditions of contract which stated;

2. (a) *fails or refuses to execute the form of agreement in accordance with the instructions to Tenders, if required; or*
(b) *fails or refuses to furnish the Performance Security, in accordance with the Instructions to Tenderers.*

Further the bid bond lacked the seal as prescribed in its own format and was not duly signed by the authorized signatory therefore rendering the bid security invalid.

Financial Evaluation

This involved comparison of prices quoted by the technically responsive bidders as follows:

S/No.	Bidder's Name	Tender Sum (Kshs)
	Ramagon Construction Co. ltd	33, 179, 543.80
	Kora Construction Co. Ltd	33, 313, 187.40
	Backbone Construction Co.	34,125,450.00
	S. K. Kerai Construction Ltd	36, 611, 079.00
	Lunao Enterprises	37, 350, 828.40
	Richardson Company Ltd	39, 161, 710.00

In view of the above information, the evaluation committee recommended the award of the tender to Ramagon Co. Ltd at its tender sum of Kshs.33, 179, 543.00.

Tender Committee Decision

The Tender committee, in its meeting held on 30th September 2010 deliberated on the recommendation of the Evaluation Committee and approved the award of the tender to M/S Ramagon Construction Company at a tender sum of Kshs. 33,179,543.80

THE REVIEW

The Applicant lodged this request for Review on 18th October 2010 against the decision of the tender committee of Sigalagala Technical Training Institute in Tender No. STTI/TB/001/2010-2012 for the Works under the proposed Erection and Completion of a Tuition Block, Phase 1.

At the hearing, the Applicant was represented by Miss Anne N. Kaguru Advocate, while the Procuring Entity was represented by Mr. Bulemi Bukhala, Chairman of the Tender Committee.

The Applicant, in its request for review has raised four (4) grounds of review and urged the Board to make the following orders:

- a) *"To annul/cancel or set aside the award of tender to the purported successful tenderer and award the tender to the applicant, or alternatively,*

- b) *To annul the procurement proceedings in their entirety, and consequently,*
- c) *To direct the procuring entity to re-tender taking into account the requirement to provide a tender document that provides sufficient information."*

The Board deals with the four grounds of review as follows;

Ground 1: Breach of Regulation 16(1) of the Public Procurement and Disposal Regulations 2006.

The Applicant argued that the Procuring Entity breached regulation 16(1) of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as the Regulations) in that it did not appoint a Tender Evaluation Committee in accordance with the regulations.

The Applicant further argued that the Procuring Entity did not follow the due procedure stipulated in Regulation 18(1) with regard to the transfer of the Procurement process to another entity. It submitted that the Procuring Entity did not have the relevant authority to effect transfer of the Procurement Process and cited regulation 18(3) under which, according to it, transfer could only be effected with written agreement of the Accounting Officers or the heads of the two Procuring Entities.

Finally, the Applicant alleged that there was no proof whatsoever of any agreement for transferring the procurement responsibility by the Procuring Entity to the Ministry of Public works and that indeed the Procuring Entity had indicated that the Ministry of Public Works was acting as a procuring agent for it.

In response, the Procuring Entity denied that it breached Regulation 16(1) read together with Regulation 18(1). It submitted that it is a Technical Training Institute and not a construction company. and therefore all construction works were initiated and supervised by the Ministry of Public Works which has the expertise. It stated that it had consulted the Ministry of Public Works in Kakamega to assist in these procurement proceedings because it had used the Ministry of Public works in determining the Bills of Quantities for the said works.

Further, the Procuring Entity submitted that the Ministry of Public Works was better placed to handle such matters of technical/construction nature and that indeed other Government institutions rely on the Ministry in the evaluation of such technical procurements. It stated that it had used the Ministry of Public works in doing evaluation in its other previous tenders.

The Procuring Entity further submitted that, besides the evaluation by the Ministry of Public Works, it had selected a few teachers from the institution who went out to the field to assess the performance of

the selected contractors in order to confirm that they did not expose it to dealing briefcase contractors.

Finally, it submitted that the Ministry of Public Works stepped in and assisted it in evaluating the tenders by forming an evaluation committee which evaluated the tenders in line with the law.

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

The only issue for the determination by the Board in this ground is whether it was proper for the Procuring Entity to use the services of Ministry of Public Works in evaluating this tender.

To answer this, it is important first for the Board to make a distinction between procuring services (in the case of a procuring agent) and acquiring services between Government departments.

The Board notes from the evaluation report presented that a detailed evaluation was carried out in three stages namely, Preliminary, Technical and Financial. According to the evaluation report submitted to the Board, the evaluation was conducted by an evaluation committee comprising of three persons from the Ministry of Public works namely:

1. H.K. Silungi-Provincial quantity Surveyor
2. F.N. Jayuga-Supretendent Electrical
3. E.K. Murey- District Works Officer

The Board draws the attention of the Provisions of Section 4(2) (C) which states as follows:-

Section 4 (2) For greater certainty, the following are not procurements with respect to which this Act applies-

(a).....

(b).....

(c) the acquiring of services provided by the Government or a department of the Government.

The Board notes that under Section 4(2), one department of Government can seek assistance from another Department. The Board further notes that this was a tender for construction of a tuition Block and that it was in order for the Procuring Entity to seek the assistance of the technical personnel from the Ministry of Public Works to carry out the evaluation.

Taking the above into consideration, The Board finds that the Procuring Entity was right in using the services of the Ministry of Public works in evaluating this tender. In any event, the Board notes that the Applicant did not state any particular action by the

evaluation committee in the process of the evaluation which could have prejudiced its position.

Consequently, this ground of appeal fails.

Ground 2: Breach of Section 31(a) the Public Procurement and Disposal Act 2005

The Applicant argued that the Procuring Entity breached the provisions of Section 31 (a) of the Public Procurement and Disposal Act, 2005 (herein after referred to as the Act) by not awarding it the tender despite having met all the requirements as envisaged by Section 31(a) of the Act and the criteria specified in the tender documents.

The Applicant further submitted that the Procuring Entity wrongly disqualified it on the basis that its bid security did not comply with the prescribed format in accordance with clause 2(a) and (b) in the prescribed format of the Bid Security. It argued that the format of the Bid Security was optional in that it allowed it to follow either of the options by choosing Clause (1) or (2)(a)&(b).

In response, the Procuring Entity submitted that it disqualified the Applicant at the Preliminary evaluation stage due to the fact that its Bid Bond omitted Clause 2 (a) and (b) as prescribed. It submitted that

the Applicants' bid bond covered only Clause 1 of the conditions of obligation. Finally, the Procuring Entity submitted that the Bid Bond by the Applicant also lacked the seal and was not signed by an authorized signatory. Accordingly, the Applicant was disqualified for failing to meet a mandatory requirement.

On its part, the Interested Party M/S Ramagon Construction Company (the successful Bidder) aligned itself with the submissions of the Procuring Entity. It relied on the letter it had filed through its advocate E. Wafula & Associates in which it stated that it was awarded the tender fairly after complying with all the requirements of the tender.

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

The Board notes that the Tender documents provided the following criteria for the preliminary evaluation in order to determine the Bidders responsiveness:-

- Forms of bid
- Bid security
- Financial capability
- Personal capability forms
- Candidates summary forms
- Experience record form
- Source of funding forms
- Bill of Quantities

- Equipment capability forms
- Litigation history forms
- Tax compliance certificate

The Board further notes that a prescribed Form of Tender Security was provided in the Tender documents in a prescribed format which the conditions read in part as follows:-

"THE CONDITIONS of this obligation are:-

1. *If after the tender opening, the tenderer withdraws his tender during the period of tender validity specified in the instructions to tenderers*

OR

2. *(a) fails or refuses to execute the form of agreement in accordance with the instructions to Tenders, if required; or*

(b) Fails or refuses to furnish the Performance Security, in accordance with the Instructions to Tenderers."

Upon examining the bid bond by the Applicant dated 6th September, 2010 which was issued by Amaco Insurance Co., the Board notes that the said bid bond only covered Clause 1 of the above conditions.

Further, the Board has taken note of the provisions of the following two relevant clauses from Standard Tender Document prepared by the Procuring Entity for this tender:

1. Clause 3.8: The format of the Tender Security should be in accordance with the form of tender security included in Section G- Standard forms or any other form acceptable to the employer.

2. Clause 3.9 any tender not accompanied by an acceptable Tender Security shall be rejected.

The Board finds that the conditions of the obligations under the provided format were not optional and that the Applicants Bid Bond ought to have covered both conditions. The Board therefore finds that the interpretation by the Applicant that the requirements were to cover either of the obligations was wrong and that it misconstrued the intended purpose.

The Board therefore holds that the Applicants Bid was properly disqualified at the preliminary stage.

Consequently, this ground of appeal also fails.

Ground 3 & 4: Breach of Sections 44(3), 45(3), 66(5) and Regulations 51(1)

These two grounds have been consolidated as they raise similar issues on the summary of the evaluation report.

The Applicant alleged that the Procuring Entity breached Sections 44(3), 45(3) and 66(5) of the Act and Regulation 51 (1) by not

providing it with a summary of the evaluation and comparison of tenders despite its numerous requests.

In response, the Procuring Entity submitted that it had received a letter from the Applicant on the morning of 18th October 2010 requesting for a summary of the evaluation report. It stated that, even before it could respond to that letter, it received yet another letter from the Applicant in the afternoon of the same day indicating that it had lodged an appeal with the Review Board.

The Procuring Entity further submitted that on 19th October 2010, it received a letter from the Public Procurement Administrative Review Board indicating that there was an Appeal lodged against its decision in this tender.

Finally, it submitted that it therefore could not respond to the Applicants request due to lack of time given the above chronology of events.

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

The Board has noted that the Applicant did not actually request for a summary of evaluation report. Instead, the Applicant sent an undated letter which was received by the Procuring Entity on 15th October, 2010 requesting for the following:-

1. Certified copy of the tender opening minutes on 4th September 2010
2. Certified copy of tender evaluation committee minutes
3. Certified copy of tender committee minutes of September 30th, 2010 which purported to have rejected our bid

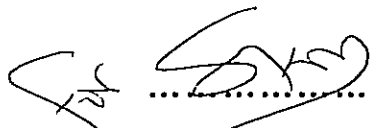
The Board further notes that this Request for Review was lodged on 18th October, 2010 and notification of the appeal was send to the Procuring Entity by Public Procurement Administrative Review Board on 19th October, 2010.


The Board finds that the Applicant did not request for a summary of the evaluation report as provided for in Section 44(3) of the Act. Further, the Board notes that a Procuring Entities have fourteen days to give a summary of evaluation report to a tenderer upon request. As can be noted, the Applicant lodged its Request for Review three days after it had delivered its letter to the Procuring Entity on 15th October, 2010.

The Board therefore finds that this ground lacks merit and therefore fails.

Taking all the above into consideration, this Request for Review fails and is hereby dismissed. The Board orders, pursuant to Section 98 of the Act, that the procurement process may proceed.

Dated at Nairobi this 15th day of November, 2010


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CHAIRMAN
PPARB


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SECRETARY
PPARB

