REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 10/2011 OF 16th MARCH, 2011

BETWEEN

GRAVITY CONTRACTORS LIMITED.....APPLICANT

AND

ALLIANCE HIGH SCHOOL.....PROCURING ENTITY

Review against the decision of the Tender Committee of Alliance High School dated 24th February ,2011 in the matter of Tender No. AHS/1/1/2011 for Building works for Proposed Resource Centre.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. Sospeter Kioko	-	Member
Eng. C. A. Ogut	-	Member
Ms. J. A. Guserwa	-	Member
Amb. C. M. Amira	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Mr. Nathan Soita	-	Secretariat
Ms. Maurine Namadi	-	Secretariat

PRESENT BY INVITATION

Applicant, Gravity Contractors Limited

Mr. C. N. Kihara	-	Advocate

Procuring Entity, Alliance High School

Ms. Gloria Khafafa	-	Advocate
Mr. M. Matheka	-	Advocate
Mr. David G Karuiki	-	Principal
Mr. David Situma	-	Architect

BOARD'S DECISION

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

BACKGROUND OF AWARD

Advertisement

The Procuring Entity advertised the tender for Building works for the proposed Resource Centre for Alliance High School in the newspapers with the closing date given as 31st January 2011 at noon.

Closing/Opening:

Twelve (12) tenderers bought the bid document but only eleven (11) submitted their bids as at the time of tender closing. The firms that returned their bids were:

1. Javisapa Enterprises
2. Laton Engineering Ltd
3. Niaz Engineering Ltd
4. Richardson Company
5. Vee Vee Enterprises
6. Juanco Contech Ltd
7. Waruhiu Construction Ltd

8. TKM Maestro Ltd
9. Policol International Co. Ltd
10. Gravity Contractors Ltd
11. Alfatech Contractors Ltd

EVALUATION

Submitted tenders were evaluated in two stages namely;

1. Prequalification
2. Technical analysis

Prequalification/Responsiveness

All the bids were subjected to the prequalification criteria provided in the advertisement and awarded scores with the maximum score being 100%.

The evaluation criteria used at this stage is as follows:

1. Must be registered with Ministry of Public Works in category C and above. Certificates must be attached.
2. Avail copies of certificates of registration/incorporation, VAT registration and PIN number.
3. Proof of works of similar magnitude and complexity undertaken in the last five years.
4. The Bid Bond must be in form of Bank guarantee from a reputable bank or approved Insurance company.
5. Adequate equipment owned by the company and key personnel for the specified types of works. (copies of logbooks should be attached incase of vehicles).
6. Proof of sound financial standing and adequate access to bank credit line.
7. Any litigation history of the company (both court and arbitration cases)

8. Confidential business questionnaire.
9. Tax compliance certificate
10. Must provide a bid security of Kenya Shillings two hundred and fifty thousand (Kshs. 250,000.00) for main contractors, only from reputable bank, or insurance company valid for one hundred and fifty (150) days from the opening date.
11. Copy of receipt for the purchase of tender documents.
12. Audited financial statements for the last two years.

Results of the Prequalification of Bidders is as summarized below:

Criteria	NAME OF BIDDER										
	Javisapa Enterprise	Laton Eng.	Niaz Eng.	Richardson	Vee Vee Enter.	Juanco Contech	Waruhiu Const.	TKM Maestro	Policol Int. Co.	Gravity Contr.	Alfatech Contr.
1	0	5	5	5	5	5	5	5	5	5	
2	5	5	5	5	5	5	5	5	5	5	
3	0	10	10	5	5	10	10	5	5	0	
4	5	5	5	5	5	5	5	5	5	5	
5	5	5	5	10	10	15	20	15	10	5	
6	0	5	5	10	10	13	5	5	5	0	
7	2	2	2	2	2	2	2	2	2	2	
8	3	3	3	3	3	3	3	3	3	3	
9	10	10	10	10	10	10	10	10	10	10	
10	5	5	5	5	5	5	5	5	5	5	
11	2	2	2	2	2	2	2	2	2	2	
12	10	10	10	10	10	10	10	10	10	10	
Total	47	67	67	72	72	85	82	72	67	52	

Bidders scoring less than 65% were disqualified at this stage.

Three bidders namely; Javisapa Enterprises Ltd, Gravity Contractors and Policol International Ltd were disqualified at this stage for not meeting the requirements while four bidders namely; Laton Engineering Ltd, Niaz

Engineering Ltd, Richardson Company Ltd and TKM Maestro Ltd were disqualified for their tender sum being beyond the 10% of the Surveyor's Estimate.

Technical Analysis

The following four bidders were subjected to Technical analysis:

1. Juanco Contech Ltd
2. Vee Vee Enterprises Ltd
3. Alfatech Contractors Ltd
4. Waruhiu Construction Co. Ltd.

At this stage, bids were analyzed for their substantial responsiveness, reasonableness, balanced and consistent rates, general pricing level, sectional cost competitiveness, qualification information and capacity to perform, error magnitude and requisite correction factor, directors and company capital shareholding. All the four bids were found reasonably responsive. M/s Juanco Contech Ltd met all the mandatory requirements and were found to be the lowest evaluated.

RECOMMENDATIONS

The Evaluation Committee recommended that the contract be awarded to M/s Juanco Contech Ltd at their tender sum of Kshs. 54,850,000.00 which could still be negotiated downwards.

THE TENDER COMMITTEE DECISION

The Tender Committee at its meeting held on 24th February 2011 approved award of the contract for building works for the proposed Resource Centre for Alliance High School to M/s Juanco Contech Ltd at their tender sum of Kshs. 54,850,000.00 subject to negotiation.

THE REVIEW

The Request for Review was lodged by M/s Gravity Contractors Limited on 16th March,2011 against the decision of the tender committee of Alliance High School in the matter of Tender No. AHS/1/1/2011 for Building works for Proposed Resource Centre. The Applicant was represented by Mr. C.N Kihara, Advocate while the Procuring Entity was represented by Ms. Gloria Khafafa, Advocate and Mr. M. Matheka ,Advocate.

The Applicant has raised twelve grounds of Appeal and urged the Board to make the following orders:

1. The award of the tender be stopped in accordance with section 94 of the PP&D Act 2005 until a review is carried out by the Board.
2. To order a re-evaluation of the bids.
3. The Quantity Surveyor's and Consulting Architects evaluation reports be submitted to the board for review.
4. The tender be awarded to the Applicant as the best evaluated bidder.
5. The respondent to pay the costs of the suit.
6. The Board make any further orders as to the loss to be suffered by the Applicant as per Section 93(i) of the PP&D Act 2005.

Grounds: 1 Breach of Section 67 (2) of the Act

The Applicant submitted that the Procuring Entity breached Section 67 (2) of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Act") by failing to notify it that its bid was unsuccessful simultaneously with the Successful bidder. It stated that from the respondents reply, the letters of

notification to the Successful bidder and unsuccessful bidders were dated differently and not dispatched on the same date.

In response, the Procuring Entity submitted that it would rely on the memorandum as filed. On the issue of the failure to notify bidders simultaneously, it stated that it had advertised many tenders and that there was a mix up in the dating and dispatch of the letters.

The Board has considered the submissions of the parties and examined the documents presented before it and makes the following findings:

i. That the letter of award to the Successful bidder was dated 24th February, 2011 whereas that of the Applicant was dated 2nd March 2011;
ii. That the Procuring Entity did not submit evidence of when the notification letters were dispatched to enable the Board establish whether notification was effected at the same time as required under section 67(2) of the Act;
iii. The Applicant was able to obtain a copy of the notification letter on 15th March, 2011 and filed its Request for Review on 16th March, 2011.

The Board notes that Section 67(2) of the Act provides as follows:

> ***"At the same time as the person submitting the successful tender is notified, the Procuring Entity shall notify all persons submitting tenders that their tenders were not successful."***

In view of the above, the Board finds that the Procuring Entity failed to notify both the Successful and unsuccessful bidders at the same time as required under section 67 (2). However, the Applicant has not suffered any prejudice as

a result of the action by the Procuring Entity as it was able to file its application in time.

Grounds 2,3,4,5 & 6 Breach of Section 64(1) of the Act

These grounds have been consolidated since they raise similar issues on the evaluation of the tenders.

The Applicant stated that it submitted a responsive bid in accordance with Section 64(i) of the Act. It further submitted that its bid was the most responsive having complied with the mandatory requirements. It stated that its bid of Kshs.55, 000,000 compared against the Quantity Surveyor's Estimate of Kshs.57, 500,000 was within 10% of the estimate. It further stated that its tender was second lowest at the bid opening and had good tender rates. It alleged that its bid was the lowest evaluated bid in the absence of the bid by Ms Javisapa Enterprises which was disqualified on technical grounds.

In response, the Procuring Entity submitted that it was not in breach of Section 64(1) of the Act. It argued that the provisions of Section 64(1) of the Act which provides that, a tender is responsive if it conforms to all the mandatory requirements in the tender documents was clear.

The Procuring Entity referred the Board to a table in the evaluation report that scored bidders based on the criteria provided in the bid document. It submitted that at the bottom of the said table was a rider stating that " ***if a bidder scores less than 65%, then he/she is immediately disqualified.***" It further submitted that it undertook the technical evaluation followed by the financial evaluation. It stated that based on the evaluation report on responsiveness, the Applicant did not demonstrate that it had the capacity to

carry out the works of similar magnitude nor adequate equipment. In addition, it submitted that the Applicant failed to demonstrate that it had suitable personnel to undertake the works as required. It stated that the Applicant also failed to give proof of sound financial standing and bank line of credit. The Applicant who scored 52% was therefore disqualified as it did not meet the 65% threshold as required.

The Board carefully considered the submissions of the parties and the documents presented before it. The Board notes that the Procuring Entity advertised an invitation for tenders for building works for the proposed Resource Centre for Alliance High school from eligible contractors and sub-contractors. The sub-contracts were Electrical, Plumbing & drainage, Laboratory fitting and LPG gas. The Board also notes that in processing of the tender, the Procuring Entity engaged the services of Consultants namely; Kenchuan Architects as the project manager, Miradi & Nyara Ltd as the Quantity Surveyor, Twee Trove Systems as Electrical Engineer, Mauzito Engineers as the Mechanical Engineer and Multiscope Consulting Engineers as the Civil/Structural Engineer.

The Board has carefully examined the evaluation report and notes that the Procuring Entity carried out an evaluation in two stages; namely responsiveness/technical and financial evaluation.

The issue for determination is whether the Applicant was properly disqualified.

The Board notes that the Applicant was disqualified for failing to provide proof that it had capacity to carry out the works of similar magnitude and complexity in the last five years. The Board further notes that the Applicant

provided a list of 6 works undertaken with a value ranging between Ksh.4 million and Ksh.8 million in the last five years. Board also notes that the tender document required a bidder to have carried out works of similar magnitude of above Kshs.50 Million in the last five years. It is therefore clear that the applicant did not meet this tender criterion. The Board has established that the Successful bidder listed 14 works done in the last five years ranging from Ksh.2,081,770 to Ksh.135,000,000.

With regard to criteria on proof of adequacy of equipment owned by the Applicant and key personnel for specified types of work, the Board notes that the Applicant in its bid document provided only three names of key personnel namely the site manager, the foreman and project manager. As regards the equipment, it only provide that it had a concrete mixer, vibrator, pick up Isuzu trooper and all tools. However, the Board finds that the Applicant did not attach copies of log books to prove ownership of the vehicles. Further the Board finds that the Applicant failed to provide a list of qualified personnel and therefore it did not meet the criteria. The Board also finds that the tools and equipment did not meet the criteria set out in the tender document.

The Board observes that the Successful bidder provided a list of thirteen names of key personnel for the works which included the project manager, engineer, quantity surveyor, site agent, plumber, electrician foreman among others. The Successful bidder also provided a list of motor vehicles, machinery and equipment intended for the works.

The Board further observes that the Applicant did not provide proof of sound financial standing and adequate access to bank credit line, therefore it failed to meet this requirement which was clearly set out in the tender document.

In these circumstances, the Board finds that the Procuring Entity acted appropriately by disqualifying the Applicant as it failed to meet the minimum score of 65%.

Accordingly these grounds fail.

Grounds 7, 8 and 11

These are not grounds of appeal but mere statements that are not supported by any breach of the Act or Regulations and the Board needs not to make any finding.

Ground 9 Breach of Section 66 of the Act.

The Applicant submitted that the Procuring Entity breached Section 66 of the Act, by specifying criteria that were not objective and quantifiable. It further submitted that criteria No.5 and 6 of the tender notice were not easily quantifiable and attainable in an objective way. The two cited criteria read as follows:

> *(5) Adequate equipment owned by company and key personnel for specified types of work (copies of log books should be attached in case of vehicles),*
> *(6) Proof of sound financial standing and adequate access to bank credit line.*

It argued that this criteria was not objective.

In response, the Procuring Entity stated that it carried out the evaluation based on procedures and criteria set out in the bid document. It submitted that the Applicant had not shown the Board how the evaluation was done using criteria and procedures outside the Act and the tender document. With regard

to the allegation by the Applicant that the evaluation criteria were not objective, the Procuring Entity referred the Board to section 31 of the Act which provides as follows:

> **31(1)** ***A person is qualified to be awarded a contract for procurement only if the person satisfies the following criteria-***
>
> ***(a)The person has the necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured;***
>
> **(b)**.....
>
> **(c)** .....
>
> **31(2)** ***The Procuring Entity may require a person to provide evidence or information to establish that the criteria under subsection (1) are satisfied.***

It argued that the Act required it to consider the qualification, capabilities, experience, resources and equipment. It further argued that the Applicant fell short of specific tender requirements as earlier stated.

The Procuring Entity stated that Section 66(4) of the Act provides that the successful tender shall be the tender with the lowest evaluated price.

It submitted that to determine the lowest evaluated price, an evaluation had to be done first based on technical specifications, followed by the financial evaluation which would address the issue of price. In conclusion it submitted that the Successful bidder was the lowest evaluated bidder.

The Board has examined the criteria No.5 and 6 and finds that it was objective. The requirements in the tender document required bidders to demonstrate that they had adequate equipment, key personnel, and proof of sound

financial standing and adequate access to bank credit line. The Board finds that the set criteria was clear and objective.

Accordingly, this ground of Appeal fails.

Ground 10: Breach of Regulations 49 and 50.

The Applicant alleged that the Procuring Entity manipulated the evaluation to favour a predetermined bidder. It stated that both the technical and financial evaluation were not done separately and therefore the Procuring Entity breached Regulations 49 and 50 of the Public Procurement and Disposal Regulations, 2006.

The Applicant further submitted that the Procuring Entity signed a contract with the Successful bidder despite the fact that it had been notified that this Request for Review had been filed. It argued that the contract was signed in contravention of the Law and this demonstrates that the Procuring Entity had a predetermined bidder.

In response, the Procuring Entity submitted that it was served with the notification of the Appeal on 16th March, 2011 at 3.00pm, the same day the site handing over was taking place. It stated that it had no intention whatsoever to breach the law as documents submitted before the Board indicate that the contract agreement was signed on 15th March, 2011, a day before the site handing over. It argued that it had no intention to manipulate the tender.

The Board notes that under Section 68(2) of the Act, a contract can only be signed after expiry of 14 days from the date of notification. As the Board has already noted notifications by the Procuring Entity were not proper.

However, the Board has already held the Applicant was not responsive and was properly disqualified from the tender process. Therefore, the Applicant has not suffered any prejudice as the tender was awarded to the lowest evaluated bidder.

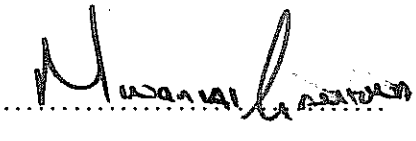
Grounds 11 and 12

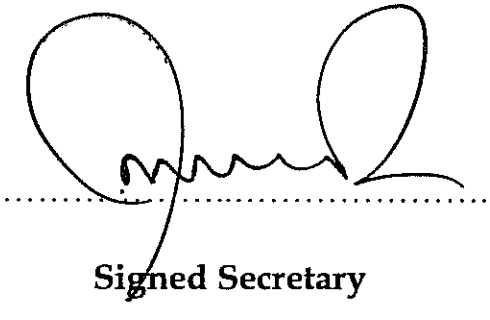
These two are statements of loss.

The Board has on several occasions, held that costs incurred by tenderers at the time of tendering are commercial risks borne by people in business and therefore each bidder carries its own costs.

Taking into consideration all the above matters, this request for review fails and is hereby dismissed. The Board orders that the Procurement process may proceed.

Dated at Nairobi on this 7th day of April, 2011





Signed Chairman **Signed Secretary**