

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 1/2014 OF 10TH JANUARY, 2014

BETWEEN

BURA ENTERPRISESAPPLICANT

AND

BURA SECONDARY SCHOOLPROCURING ENTITY

Review against the decision of the Tender Committee of Bura Secondary School in the matter of Tender No: BSS/01/2013, BSS/02/2013 AND BSS/07/2013 for the Supply of Foodstuff & other Items and Supply of Meat/Goats.

BOARD MEMBERS PRESENT

Mrs. Josephine Wambua Mong'are	- Member (in the chair)
Mr. Peter Bitu Ondieki	- Member
Mrs. Gilda Odera	- Member
Mr. Hussein Were	- Member
Mr. Nelson Orgut	- Member

IN ATTENDANCE

Philemon Kiprop	- Holding brief for Secretary
Judy Maina	- Secretariat

PRESENT BY INVITATION

Applicant - Bura Enterprises

Abdi Rizak Shafat

Abdi Buthul Shafat

Procuring Entity -Bura Secondary School

B. J. Mbaya - Advocate

Tola M. Jilo - Principal

BOARD'S DECISION

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

BACKGROUND OF AWARD

The tender was opened on 3rd December 2013 by a committee of three members chaired by Mr. Kennedy Osano in the presence of five bidders. The response was as below.

LOT 1 - BSS/01/2013 - Supply of foodstuff

The bidders who applied for lot 1 were:

1. Bura Enterprise
2. Bura Shopping centre
3. Jibril Kedia Bulle

LOT 2 - (BSS/02/2013) - Supply of foodstuff and other items

The bidders who applied for Lot 2 were:

1. Bura enterprise
2. Bura shopping center

LOT 7 - BSS/07/2013 - Supply of meat/goats

The following bidders applied for lot 7:

1. Bura Enterprise
2. Bura Shopping Centre
3. Yussuf Ali Keyre
4. Muhumed Omar Hassan
5. Gorot Hussein Abdi
6. Mohamed Garane Hassan .

TENDER EVALUATION

Tender was evaluated by two members namely Abdulahi Duntow Chairman and Kevina Wekesa being Secretary who carried out price evaluation for various products. Before price analysis was carried out Preliminary Examination involved the examination of tenders for compliance with the following requirements:-

- Documents (out of 60%)
 - a. Business licence
 - b. Tax compliance certificate
 - c. Public health certificate
- Price Evaluation (out of 40%)

PRICE EVALUATION

WEIGHTED EVALUATION TABLES

BSS/01/2013 - FOR THE SUPPLY OF FOODSTUFF (LOT 1)

Item	Quantity	Price x Quantity		
		Bidder 1 Bura Enterprise	Bidder 2 Bura Shopping Centre	Bidder 3 Jibril Kedie Bule
Sugar	50kg	Kshs.3,799	Kshs.4,500	Kshs.5,200
Rice	50kg	Kshs.2,499	Kshs.2,800	Kshs.4,000
Beans	50kg	Kshs.2,189	Kshs.2,700	Kshs.5,200
TOTAL		Kshs.8,487	Kshs.10,000	Kshs.14,400

Although bidder 1 had the lowest price, the evaluation committee observed that it had under quoted.

It is evident from the above analysis that the eventual outcome of the examination was largely premised on the bidder's prices for the various Lots.

The first outcome of these evaluations was the award of the tender the subject matter of this dispute to M/s Bura Shopping (Bidder 2) as it offered reasonable price commensurate to market price against the Applicant's bid price which was observed it was under quoted. The same analysis, observation and recommendation was made for the other lots

TENDER COMMITTEE DECISION

The members resolved to award the tenders to M/s Bura Shopping Centre for Lot 1 Lot 1 (BSS/01/2013) - foodstuff supply, 2(BSS/02/2013) - foodstuff and others and 3(BSS/07/2013) - meat/goat in its meeting held on 4th December, 2013. Bidder 1 under-quoted prices as compared to the market survey price and the government procurement prices. Other bidders lacked the necessary documentation.

THE REVIEW

The Request for Review was lodged on 1/2014 OF 10th January, 2014 against the decision of Bura Secondary School dated 21st February, 2013 in the matter of Tender No: BSS/01/2013, BSS/02/2013 AND BSS/07/2013 for the Supply of Foodstuff, Supply of Foodstuff and other Items, and Supply of Meat/Goats.

The Applicant was represented by Mr. Abdi Rizak Shafat and Abdi Buthul Shafat, while the Procuring Entity was represented by Mr. B. J. Mbaya, Advocate.

The Applicant seeks for the following orders:

- 1. THAT the decision of the procuring entity awarding Tender Numbers BSS/01/2013, BSS/02/2013 and BSS/07/2013 to successful bidder be nullified**
- 2. THAT the Board substitutes the decision of the procuring entity awarding the tender to the successful bidder and award the said tender to the complainant herein or the lowest evaluated bidder.**
- 3. THAT in the alternative and without prejudice to the foregoing, that the Board do cancel and nullify the award of the above tender to the successful bidder and direct the procuring entity to re-evaluate the tender in accordance with the law and the relevant procurement procedures.**
- 4. THAT further in the alternative, that the Review Board pursuant to Section 98(a) and (b) of Public Procurement & Disposal Act, 2005 annul the procurement proceedings in their entirety and do direct the procuring entity to re-tender using a standard tender requirements and specifications and invite all the bidders including the applicant.**

The matter first came up for hearing on 22nd January, 2014 but was adjourned to 29th January, 2014 at the request of the Procuring Entity with the concurrence of the Applicant. The Board ordered the Procuring Entity to pay the requisite

adjournment fees and also to meet the Applicant's transport cost to and from Garissa resulting from the adjournment.

When the hearing resumed on 29th January 2014, the Advocate for the Procuring Entity raised an objection to the presence of Mr. Abdi Rizak Shafat in the hearing claiming that he was a stranger to the proceeding as it was only Mr. Abdi Buthul Shafat who rightfully represented Bura Enterprises. In reply the Bura Enterprises team argued that the company is a family business and Mr. Abdi Rizak Shafat would only be assisting Mr. Abdi Buthul Shafat in his submission because of his limited knowledge of the English language.

The Board's ruling was that since it is interested in clarity of issues, there is no harm in Mr. Abdi Buthul Shafat being assisted in this regard by Mr. Abdi Rizak Shafat.

The Applicant raised four (4) Grounds for Review, namely:-

- 1 Discriminatory practices against the lowest bidder***
- 2 Disallowing competition amongst the eligible bidders and failing to set evaluation procedures.***
- 3. Violation of section 67(2) requiring notification of bidders/losers.***
- 4. Conflict of interest by some members of the tender committee.***

The four grounds above that the Applicant raises for review can be summarised as follows:

Ground 1, 2 and 3 - Breach of Section 66(3), (4) and 67 of the Public Procurement and Disposal Act, 2005 (hereafter referred to as-"the Act").

The grounds can be consolidated as they raise issues in relation to evaluation and notification.

The Applicant avers that the Procuring Entity did not award Tenders No's: BSS/01/2013, BSS/02/2013 and BSS/07/2013 for Supply of Foodstuff, Supply of Foodstuff and Other Items and Supply of Meat/Goats to the lowest bidder and the decision to award tenders as it did is in breach of the letter and spirit of Section 66(4) of the Act. Section 66(4) provides as follows;

"The successful tender shall be the tender with the lowest evaluated price".

The Applicant avers that the Tender Document did not set any objective and quantifiable evaluation criteria, procedure or even minimum requirements for due diligence purpose like legal status/registration, technical capability, financial capacity and/or even statutory certifications such as premises certification or food hygiene licence contrary to Section 66(3) of the Act.

The Applicant avers that the Procuring Entity unilaterally and unprocedurally awarded the tender in blatant disregard of the provisions of Section 67 of the Act requiring notification to other bidders and/or losers to be done at the same time. The Applicant states that on the eve of the school opening day of 6th January 2014, it learnt that one bidder in the above-mentioned tender had already delivered the supplies to the school rendering their delivery nugatory. As a result, the Applicant suffered a huge financial loss, untold pain & unimaginable mental anguish especially since the 2013 contract was basically still in effect and the school still owed the Applicant a substantial outstanding balance of KSH 600,000.00 which to date remains unpaid.

In the additional submission the Applicant contend that section 2(b) and (d) of the Act enlists the objectives of the Act as intending to promote competition and transparency respectively. He further observed that section 52(1) (2) as read together with section 56(1) of the Act mandate a Procuring Entity to prepare tender documents containing enough information to allow for fair completion amongst bidders and issue the same to any bidders wishing to participate in any particular procurement. The Applicant further argues that section 52(3)(h)(i) provides that the tender documents issued by a Procuring Entity must contain procedures and criteria of evaluation of tenders, further more section 66(1)(2) of the Act stipulates that the Procuring Entity shall evaluate and compare responsive tenders using the criteria set out in the tender document and no other criteria shall be used. The Applicant proceeded further to submit that what the Procuring Entity issued in "Request for Quotation" letters for instructions to bidders were not the tender documents envisaged in the law as they neither provided the bidders with the criteria to be evaluated and compared on, nor provide for a clear description of the items that were required. According to the Applicant, this made it difficult for bidders that participated in the tendering process to properly compete as the law requires. Therefore no lowest evaluated bidder can emerge as anticipated by section 66(4), for the simple reason that the criteria used for evaluation was not known to the Tenderers prior to the submission of the bids.

In view of the above observations, the Applicant argues that it was not possible for the Procuring Entity to determine that they quoted unrealistically lower than market prices and urged the Board to disregard the Procuring Entity's assertion. Indeed the Applicant reiterated that he could supply at the prices quoted because their company was now a wholesaler and were ready to reduce their profit margin, hence the lower prices quoted.

In its response the Procuring Entity stated that there was no discrimination against the Applicant as the tender was opened by a tender opening committee as per Section 60 of the Act, which does not require the opening committee to award the tender. The Procuring Entity averred that the tendering process allowed competitiveness and no eligible bidder was locked out of the process. All bidders had their quotations reach the tendering committee and were evaluated alongside all others. In his oral submission before the Board the Counsel for the Procuring Entity contested the grounds adduced by the Applicant in the written submissions. He was of the view that there was a misconception on the part of the Applicant that this was an open tender as envisaged under sections 52 and 66 of the Act. As far as the Procuring Entity is concerned, this particular procurement was a "Request for Quotations" whose processes are subject to sections 88 and 89 of the Act; Regulations 59 to 61 and the Schools Procurement Manual of 2009 issued by the Ministry of Education. It was the Procuring Entity's submission that therefore there was no requirement to comply with the other provisions of the Act as this was not an open tender.

Further in response to the fact that indeed the Applicant offered the lowest prices to the tender; the respondent admitted that it was sceptical that he would supply the commodities at those low prices because his previous prices were much higher as can be attested by a sample of invoices before the Board. The Procuring Entity was therefore not bound to award him the tender in spite of his prices being the lowest.

On the issue of compliance with Section 67 of the Act, which requires notification of the outcome be communicated to all participants at the same time, the Procuring Entity avers that notification to the winning tender as well to the losers was made on 3rd January, 2014, but it had been unable to trace the Applicant in person, with whom it had previously transacted business with, either in the Procuring Entity's office or in the Applicant's shop, and hence the Applicant was not given the notification at the same time with the other Tenderers. The Procuring Entity admitted that indeed the Applicant had at one time won competitively a tender to supply the school with foodstuffs sometimes in 2011 and had also continued to make supplies for 2013, 2012, 2010, 2009 and 2008 although no tenders had been floated.

The Board having heard both parties on issues and read all written submissions by the parties must determine whether this particular procurement was done as require by the Act and Regulations. The board notes indeed the Procuring Entity had chosen to use the request for proposal method of procuring the school supplies for Meat and other foodstuffs as per Section 88 and 89 of the Act.

The Board finds that there are two (2) issues for determination. These are:

- (i) Whether the Procuring Entity evaluated the tenders in accordance with the requirements set out in the "Request for Quotation" document.
- (ii) Whether notification of the outcome of the Tender was in accordance to the provisions of Section 67 of the Act and Regulation 19(2) of Legal Notice No.106 of 18th June, 2013.

The Board makes the following observation:

- a). The tender notice of 1st November 2013 gave the bidders 10 days to submit their documents. The tender was re-advertised on 15th November, 2013 closing on 3rd December, 2013 (18 days) following a resolution by the executive board meeting of 14th November, 2013 (MIN/BOG/02/2013) to allow more bidders to participate.
- b). The Procuring Entity used the "Request for Quotation" method for the procurement of goods.
- c). The "Request for quotation" document had no evaluation criteria indicated, nor does it request for any other details apart from the contact of the bidder and their bid price.
- d). The Procuring Entity appears to have introduced its own criteria as follows:-

DOCUMENTS (Out of 60%)	a) Business License
	b) Tax Compliance Certificate
	c) Public Health Certificate
PRICE EVALUATION (Out of 40%)	
TOTAL (Out of 100%)	

- e). The "Price Evaluation (Out of 40%)" was done by comparing the bid price to the prices of the market survey and "government procurement price". How the comparison was to be calculated to arrive at the lowest evaluated price was not indicated in the documents provided by the Procuring Entity
- f). The Procuring Entity avers that it indeed it compared the Prices of the Applicant in previous supplies, those of the winning bidder and the market survey.

- g). The Prices of the Applicant in the Request for Quotation were the lowest in all cases.
- h). The tender was awarded to M/s. Bura Shopping Centre by the Tender Committee, in its meeting of 4th December, 2013.
- i). The letters of Notification for the winning and losing bidders were dated 3rd January, 2013.
- j). The Procuring Entity did not provide any evidence of dispatch of or receipt of the notification letters.
- k). The Request for Review No. 1/2014 was lodged on 10th January, 2014.

From the foregoing, the Board is of the view that this procurement had to observe section 89(2)(b) that envisages a competitive process. In this regard therefore, the "Request for Quotation" document should have contained evaluation criteria as per the requirements of Section 66(2) of the Act. In absence of any set of requirements the Procuring Entity would only use the price as the evaluation criteria.

On the first issue for determination, the Board finds the Applicant to have quoted the lowest prices as required by section 89(4). This ground of appeal therefore succeeds. Section 89(4) provides as follows; ***"The successful quotation shall be the quotation with the lowest price that meets the requirements set out in the Request for Quotations"***.

The Board finds that as regards the issue of evaluation the Applicant provided the lowest quotation and as such since there was no other evaluation criteria the Procuring Entity had no reasonable grounds to disqualify his quotation. Any other reason introduced at this stage would

have been extraneous and introduced without due compliance to the Act and the Regulations of the Public Procurement and Disposal Act, 2005.

With regard to the 2nd issue of whether the Procuring Entity notified all the participants of the outcome of the tender, as required by section 67(2) and Regulation 19(2) of Legal Notice No.106 of 18th June, 2013. The Board notes that in spite of the Procuring Entity providing copies of letters of Notification to both the winning and losing bidders dated 3rd January, 2014, no evidence (for example, text messages, signed delivery book, registered mail etc.) to show that every effort was made to reach the Applicant. Despite this anomaly, the Applicant managed to file the Request for Review with the Board on 10th January, 2014 which was within seven days required by the regulation. The Board finds that the Applicant suffered no prejudice as it was able to file the Application for review within time.

Applicant's Grounds 4: Breach of Section 40 of the Act

This ground was not conversed during the hearing but had some written submissions from both parties. The ground relates to allegations on corrupt practice.

The Applicant avers that some members of the tender committee have openly exhibited favouritism, bias, segregation and greed hence manipulating the tender in general and specifically the tender criteria, evaluation procedures and secretly awarding (without notifying others) to an uncompetitive bidder.

In response the Procuring Entity avers that the tender committee's proceedings were transparent.

The Board notes that the Applicant has not substantiated his allegations to prove that Section 40 of the Act was breached.

Taking into consideration all the issues conversed with regard to this tender, the Board is persuaded that the Application for Review has merit and allows the same with the following orders;

1. That the award of the tender No's. BSS/01/2013, BSS/02/2013 and BSS/07/2013 to M/S Bura Shopping Centre is hereby annulled.
2. The Board in exercise of its powers conferred by Section 98(c) of the Public Procurement and Disposal Act, 2005, directs the Procuring Entity, M/S Bura Secondary School to award tenders No's. BSS/01/2013, BSS/02/2013 and BSS/07/2013 to Mr. Abdi Buthul Shafat trading as M/S Bura Enterprise, being the lowest priced bidder forth with at the prices provided in his Request for Quotation.
3. The Board makes no orders as to costs.

Dated at Nairobi on this 5th day of February, 2014


.....
CHAIRMAN
PPARB


.....
SECRETARY
PPARB