

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 47 OF 2017 DATED 29TH MAY, 2017

BETWEEN

ELECTROSERVE LIMITED.....APPLICANT

AND

**DEDAN KIMATHI UNIVERSITY OF
TECHNOLOGY.....PROCURING ENTITY**

Review against the decision of the Dedan Kimathi University of Technology in the matter of Tender No. DEKUT/OT/LT/035/2016-17.- In Relation to the Proposed Installation of Electrical Works for the Main Lecture Theatre.

BOARD MEMBERS PRESENT

1. Mrs Josephine Wambua-Mong'are-Member(In the Chair)
2. Mr.Hussein Were - Member
3. Mr. Peter B. Ondieki, MBS - Member
4. Gilda Odera - Member
5. Eng Weche Okubo,OGW -Member

IN ATTENDANCE

1. Philemon Kiprop - Holding Brief for Secretary
2. Maureen Namadi - Secretariat

PRESENT BY INVITATION

Applicant - Electroserve Limited

Alex Thangei - Advocate
Betty Muthoni - Administrator
Eliud Maina - Director
Josphat Kimani - Director

Procuring Entity – Dedan Kimathi University of Technology

Ms. Nelius Mwangi - Legal Officer
Ms. Anne Muraguri - Ag. Procurement Officer

BACKGROUND OF AWARD

Introduction

The Procuring Entity advertised for the tender on 3rd February, 2017 in both the Nation and Standard newspapers and also posted in the University website and IFMIS portal.

Closing/Opening

Tenders were closed/opened on 27th February, 2017 at the University Resource Centre II Dome at 10. The procurement was planned for in 2016-2017 financial years and is funded by the GOK.

During the tender opening meeting, ten bidders responded as shown in the table below:

S.NO	COMPANY NAME	BID PRICE
1.	Sky Light international Ltd	23,401,782.00
2.	Nicepat Enterprises	11,938,940.00
3.	Electro Serve Ltd	14,639,328.34

4.	Kihara Electrical Ltd	13,750,182.80
5.	Micronet Power Sytems Ltd	16,587,176.40
6.	Miu Electric Company ltd	20,002,332.40
7.	Merrimack Power Systems ltd	26,781,182.00
8.	Powerware Systems Ltd	2,083,063.84
9.	Contemporary Electrical Enterprises Ltd	14,959,950.40
10.	Jupiter Electrical Engineers and general Contactors Ltd	26,247,132.00

A. BID EVALUATION PROCESS

Evaluation was carried out in three stages namely:

- i. Preliminary
- ii. Technical
- iii. Financial

1. PRELIMINARY EVALUATION

Only those bidders who met the minimum criteria set out in the bid documents and supported by the relevant documents during submission of bids were considered for further evaluation.

Out of the ten bidders, only two met all the requirements and proceeded to Technical Evaluation: Eight bidders were disqualified from proceeding to Technical Evaluation due to the following reasons:

1. Sky Light International Limited

The bidder did not provide a certified copy of tax compliance certificate, certified copy of NCA certificate, the ERC registration License was class C instead of B and above, the audited financial statements were just for 2013, business permit had expired (2016) and the document was not serialized, stamped and signed in all pages of the bid document hence disqualified.

2. Nicepart Enterprises

The bidder did not provide a certified copy of certificate of incorporation/registration, certified tax compliance certificate, certified copy of NCA certificate, audited accounts for the last three years, proof of works of similar magnitude & complexity in the last five years and proof of sound financial standing & adequate access to bank credit lines hence disqualified.

3. Kihara Electrical Limited

The bidder did not provide the following mandatory requirements; valid copy of NCA certificate, proof of works of similar magnitude and complexity in the last five years, proof of sound financial standing &

adequate access to bank credit and the bid document was not serialized, stamped and signed in all pages hence disqualified.

4. Micronet Power Systems Limited

The bidder did not provide a certified copy of tax compliance certificate, certified copy of NCA certificate, proof of sound financial standing & adequate access to bank credit and the bid document was not serialized, stamped and signed in all pages hence disqualified.

5. Miu Electric Company Limited

The bidder did not provide a certified copy of tax compliance certificate, audited accounts for the last three years (only 2013&2014), proof of works of similar magnitude & complexity in the last five years, proof of sound financial standing & adequate access to bank credit lines and the bid document was not serialized, stamped and signed in all pages hence disqualified.

6. Merrimack Power Systems Limited

The bidder did not provide a certified copy of tax compliance certificate, certified copy of NCA certificate, the ERC registration License was class C instead of B and above, audited accounts for the last three years, proof of works of similar magnitude & complexity in the last five years and the bid document was not serialized, stamped and signed in all pages hence disqualified.

7. Power ware Systems Limited

The bidder did not provide a certified copy of certificate of incorporation/registration, the bid bond presented was less than 2% of the tender sum, proof of works of similar magnitude & complexity in the last five years and the bid document was not serialized, stamped and signed in all pages hence disqualified.

8. Jupiter Electrical Engineers And General Contractors Limited

The bidder did not provide a certified copy of certificate of incorporation/registration, certified tax compliance certificate, certified copy of NCA certificate; proof of works of similar magnitude & complexity in the last five years and the bid document was not serialized, stamped and signed in all pages hence disqualified.

2. TECHNICAL EVALUATION

Bidders were required to meet the following requirements:

- i. Statement of Compliance
- ii. Tender Questionnaire Form
- iii. Confidential Business Questionnaire Form.
- iv. Key Personnel (Attach evidence)
- v. Contract completed in the last five (5) years (A max of 5 No. Projects)
- vi. On-going projects (A max of 5 No. Projects)

- vii. Schedules of contractor's equipment and transport (proof for evidence of ownership)
- viii. Audited financial report (last three (3) years)
- ix. Evidence of Financial Resources (cash in hand, lines of credit, overdraft facility etc)
- x. Name, Address and Telephone of Banks (Contractor to provide)
- xi. Litigation History
- xii. Sanctity of the tender document.

Bidders were required to achieve 60% pass mark to proceed to financial evaluation. The two bidders met the requirements and proceeded to financial evaluation:

3 .FINANCIAL EVALUATION

Evaluation was carried out in two sections

1. Preliminary examinations
2. Tendersum comparisons

i. Preliminary Examination: Arithmetic Errors

S/no.	Bidder	Amount quoted (Kshs)	Corrected Amount (Kshs)	Error (+ or -) Kshs	% Error Factor
1.	Contemporary Electricals Enterprises Ltd	14,959,950.40	0	0	0

2.	Electro Serve Limited	14,639,328.34	0	0	0
----	-----------------------	---------------	---	---	---

NB: The two bidders had no arithmetic errors.

ii. TENDERSUM COMPARISONS

This consisted of comparison of prices offered by the tenderers and the financial scores (Fs) were determined using the formulae below:

The financial score was allocated a maximum of 20%.

$$F_s = \frac{f_m}{f}$$

Where F_s is the financial score, f_m is the lowest priced responsive financial bid and f is the price of the bid under consideration:

Hence:

Electro Serve Limited $F_s = 14,639,328.34 / 14,639,328.34 * 20$
 $= 20\%$

Contemporary Electricals $F_s = 14,639,328.34 / 14,959,950.40 * 20$
 $= 19.57\%$

iii. FINAL SCORE

Technical and Financial Score were combined as follows:

Technical score carried a weight of 80%

Electro Serve Ltd Ts= $80/100 \times 80 = 64\%$

Final score= Ts+ Fs =64%+20%
=84%

Contemporary Electricals Ts= $95/100 \times 80 = 76\%$

Final Score=Ts+ Fs
=76%+19.57%
=95.57%

Order of Rank

S. No	Bidder	Combined score	Order of Rank
1.	Contemporary Electricals Enterprises Ltd	95.57%	1
2.	Electro Serve Limited	84%	2

Due diligence carried out by the evaluation committee indicated that the works undertaken by the two bidders is satisfactory.

PROCUREMENT OFFICER'S PROFESSIONAL OPINION

The Head of Procurement opined that the tender process was fairly conducted and the evaluation process was fairly carried out in accordance with the criteria as stipulated in the bid document.

And concurred with the recommendation of the evaluation committee to award tender for the Proposed Construction of Main Lecture Theater, Electrical Installation Works to the bidder with the highest combined score M/S Contemporary Electricals Enterprises Ltd of P.O. Box 8446-00300 Nairobi at their tender sum of KES Kshs 14,959,950.40. This is below the budget (Engineers estimate) of KES 22,040,000. The Accounting Officer approved awards recommended on 13th February, 2017

REQUEST FOR REVIEW NO.42/2017

The Request for Review was lodged by M/s Electroserve Limited on 29th May, 2017 in the matter of the tender No DEKUT/OT/LT/035/2016-17 by Dedan Kimathi University of Technology for the Proposed Installation of Electrical Works for the Main Lecture Theatre.

During the Request for Review, the Applicant was represented by M/s Alex Thangei from the firm of M/S Waruhiu K' Owade & Ng'ang'a while the procuring entity was represented by Ms. Nelius Mwangi, its Legal Officer.

The Applicant sought the following orders:

- 1. The respondent's decision be reversed and the awards be nullified forthwith under Section 73(a) of the Act**

2. The Tender for category 2 (electrical works) be awarded to the Applicant as provided for under Section 173 (c) of the Act.
3. Costs be awarded to the Applicant

The Applicant raised Six (6) grounds of review which we have consolidated as follows:

Grounds 1,2,3,4,5 and 6 - Breach of Sections 3,79,80 and 86 of the Public Procurement and Disposal Act and Regulations No. 49, 50 and 66 of the Public Procurement and Disposal Regulations 2006.

SUBMISSION BY PARTIES

The Counsel for the Applicant submitted that the Procuring Entity offended the provisions of Section 80(2) by failing to apply the evaluation criteria in the Tender Document in evaluating and awarding the tender, and instead used considerations other than those set out in the tender document. He averred that the decision of the Procuring Entity was therefore unfair and wrong decision.

The Counsel in particular, drew the attention to the Board to page (vi) of the Tender Document on Stage 2-Financial Evaluation and pointed out that on item "Tender Sum Comparisons" the Procuring Entity failed to disclose the formula to compare the tender prices and determine the Financial Score for each tender. While the maximum Financial score was given as 20% the Applicant averred that the omission of the formula rendered it impossible to work out Financial Score and consequently the combined score for Financial

and Technical scores for each bidder. The Counsel also made reference to Section 86(1)(b) and submitted that this was an Open Tender and not a Request For Review (RFP) and the Procuring Entity should not have combined the technical and financial scores in arriving at the lowest responsive evaluated tender. Making reference to its Letter of Regret of 18th May, 2017, the Applicant stated two bidders made to the Financial Stage and that its tender price was the lowest evaluated price and should have been awarded the tender.

In response the Legal Officer for the Procuring Entity stated that evaluation was carried out in accordance with the criteria set out in the tender document on page (vi) in Stage 2 of Financial Evaluation hence it upheld Section 3 of Public Procurement and Asset Disposal Act,2015 by ensuring that the tender process was open to any interested bidder through open tender. The Legal Officer explained that the tender was advertised as an Open Tender on 3rd February, 2017 and thereafter evaluation was carried out in two stages-Technical and Financial Evaluation. The bidders who scored 60% and above marks proceeded to Financial Evaluation. Only two bidders including the Applicant qualified for financial evaluation.

The Procuring Entity further averred that it applied both technical and financial scores to arrive at the combined score which was used in making the award.

THE BOARD'S FINDINGS

Having heard all parties and perused the documents submitted for the Request for Review, the Board makes the following findings:

The Applicant's Request for Review was premised on six (6) grounds but upon hearing the submission by both parties the Board identified only one issue for determination to wit:

- (i) *Whether the Procuring Entity was justified to evaluate the Applicant's tender in accordance with the Criteria set out in the Tender Document and in breach of the provisions of Sections 80(2),(3)(a) and 86(1)(a) of the Act*

In determining this issue Board's attention is first drawn to Section 80(2),(3)(a) of the Act on the evaluation of tenders that states that:

"80(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."

(3)The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2) —

(a) the criteria shall, to the extent possible, be objective and quantifiable

The Board observes that there was no dispute by both parties about the Technical Evaluation and that they agreed that two bidders including the Applicant proceeded beyond this stage to Financial Evaluation. At the

Financial evaluation the Procuring Entity calculated the Financial Score for each of the two bidders which was respectively added to the technical score to achieve a combined score. In coming up with the Financial Score the Procuring Entity used the formula $F_s = F_m / F$; -Where F_s is the Financial score, F_m is the lowest priced responsive financial bid and F is the price of the bid under consideration: The Board has noted that this formula was indeed not provided in the evaluation criteria other than stating the maximum score and the definition of component items in the purported in the formula. By not disclosing the Financial Score formula, the Procuring Entity violated the Provisions of Section 80(3)(a) and the evaluation criteria to that extent was not quantifiable and the Board holds that the Procuring Entity was not justified to evaluate the Financial Scores by a formula not included in the Evaluation Criteria.

The Board also takes cognizance of Section 86(1) (a) (b) of the Act which provides as follows:

86. (1) the successful tender shall be the one who meets anyone of the following as specified in the tender document-

(a) The tender with the lowest evaluated price;

(b) The responsive proposal with the highest score determined by the procuring entity by combining. For each proposal, in accordance with the procedures and criteria set out in the request for proposals. The scores assigned to the technical and financial proposals where Request for Proposals method is used;

Both parties were in agreement that this tender was advertised as an Open Tender in accordance with Section 96 of the Act and not a Request for Proposal (RFP). After perusing the Tender Document, the Board has noted that the Procuring Entity used Evaluation Criteria for Request for Proposal to award the tender to the bidder with highest combined score. In awarding the tender on the basis of combined score and a flawed criteria, the Procuring Entity violated the provisions of Section 86(1)(a) in respect to Open Tenders.

In determining the issue the Board has also noted there was no dispute about Technical evaluation and that only two bidders namely Contemporary Electricals Enterprises Ltd with bid price of ksh.14,959,950.40 and Electro Serve Limited Ksh.14,639,328.34 respectively reached the Financial stage. The Board therefore finds that this having been an open tender the tender the bid by the Applicant should have been *the tender with the lowest evaluated price* in accordance with Section 86 (1) (a) and on this ground the Board proceeds to find that the Request for Review succeeds and is allowed.

COSTS

Costs follow the event. The applicant in this matter has been successful in its request for review and is therefore entitled to costs. However the applicant explained to the Board that this being one of the major procurements carried out by the university it relied on documents prepared by the County Procurement Board and hence the mix up in the evaluation criteria and it was therefore pleading with the Board to be lenient in its

decision making. The board noting that has found in favour of the Applicant will therefore not award it costs.

FINAL ORDERS

In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, the Board makes the following orders on this Request for Review.

- (a) The Request for Review filed by M/S Electroserve Limited on 29th May, 2017 against the decision of the Procuring Entity in the Matter of Tender No DEKUT/OT/LT/035/2016-17 by M/S Dedan Kimathi University of Technology for the Proposed Installation of Electrical Works for the Main Lecture Theatre succeeds and is allowed.
- (b) The Board being satisfied that the Applicant's bid emerged the lowest most responsive tender and proceeds to substitute the award of the Procuring Entity by awarding the Tender No. DEKUT/OT/LT/035/2016-17.- In Relation to the Proposed Installation of Electrical Works for the Main Lecture Theatre to M/s. Electro Serve Limited at its tender sum of Kshs 14,639,328.34

(c) The Procuring Entity is ordered to proceed with the procurement as ordered here above

(d) The Board directs each party to bear its own costs of this Request for Review

Dated at Nairobi on this 20th day of June, 2017.


.....
CHAIRMAN
PPARB


.....
SECRETARY
PPARB

