

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 4/2013 OF 25TH JANUARY, 2013

BETWEEN

HULLOW ENTERPRISES.....APPLICANT

AND

NORTHERN WATER SERVICE BOARD (MANDERA NORTH DISTRICT).....PROCURING ENTITY

Review against the decision of the Northern Water Service Board (Mandera North District) dated 20th December, 2012 in the matter of Tender No. NWSB/MDR-N/T/UWS/01/2012-2013 for RhambuDimtu Water Supply Distribution Works.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	- Chairman
Ms. Judith Guserwa	- Member
Eng. Christine Ogut	- Member

Mr.AkichOkola - Member

Mrs. LoiseRuhui - Member

IN ATTENDANCE

Mr. Philemon Chemoiywo - Holding Brief for the Secretary

Ms Judith Maina - Secretariat

PRESENT BY INVITATION:

Applicant - Hullo Enterprises

Mr.AbdikarimDaud Abdi

Procuring Entity - Northern Water Service Board (Mandera North District)

Mr. Mohamed A. Hussein - District Supply Chain Management

Mr.Abdi A Abdille - District Water Officer

Interested Parties

Mr. Ryad Hassan -Northern Star Company Ltd

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 OF THE TENDER

Advertisement:

The tender was advertised on 21th November 2012 through Local Notice. In response to the advertisement, four (4) prospective bidders bought tender documents.

Closing/Opening:

Closing date/time was 13th December, 2012 at 3.00 pm.

The bids as read out during tender opening were as follows:

<i>Bid No</i>	<i>COMPANY NAME</i>	<i>Total quoted (kshs)</i>
1	Hanamal Construction Company Ltd	5,100,000
2	Hullow Enterprises Co. Ltd	5,595,108
3	Northern Star Co Ltd	4,899,876
4	Guba Investment Co Ltd	5,261,466

EVALUATION

The Evaluation Committee developed a scoring matrix comprising two stages capturing the relevant aspects against which the bidders were evaluated. These stages are Preliminary and financial stages

Tenderers were evaluated against the following criteria:-

No	Parameters to be evaluated	Yes Score	No Score
A	Preliminary Evaluation		
A1	Proof of company registration	5	0
A2	Copy of Pin	5	0
A3	Copy of VAT Registration	5	0
A4	Proof of Tax Compliance	10	0
A5	Copy of Licence to undertake Water Works	15	0
A6	Proof of Past experience in similar works	10	0
A7	Proof of adequate technical & financial capacity	10	0
A8	Litigation History	5	0
A9	Bid Bond from a recognized financial	10	0
	<i>Score sub -totals range</i>	75	0
B	Further Evaluation		
B1	Deviation from official estimate	15	0

	within +/-5%		
B2	Margin of Arithmetic error within +/-5%	10	0
	Score Sub - Totals Range	25	0
	Score Total Range	100	0

Note: 1.the official estimate for the works is kshs.4, 948,000

- Bidders who scores less than 55 under preliminary shall be deemed to be not sufficiently responsive and shall therefore not be considered for further evaluation

A summary of the results of Preliminary Evaluation were as follows:

No	Parameters to be evaluated	Bidder 1	Bidder 2	Bidder 3	Bidder 4
A	Preliminary Evaluation				
A1	Proof of Company Registration	5	5	5	5
A2	Copy of Pin	5	5	5	5
A3	Copy of VAT Registration	0	5	5	5
A4	Proof of Tax Compliance	0	10	10	0
A5	Copy of Licence to undertake Water Works	15	15	15	0
A6	Proof of Past experience in	0	0	5	0

	similar works				
A7	Proof of adequate technical & financial capacity	0	0	5	0
A8	Litigation History	0	0	5	0
A9	Bid Bond from a recognized financial	0	10	0	0
	Score sub -totals range	25	50	55	15
B	Further Evaluation				
B1	Deviation from official estimate within +/-5%			15	
B2	Margin of Arithmetic error within +/-5%			10	
	Score Sub - Totals Range			25	
	Score Total Range			80	
	Additional remarks	2nd lowest	Highest	Lowest	3rd lowest

4. RECOMMENDATION

Only bidder No.3 was found to be responsive .the same has the lowest bid of Ksh.4, 899,876.00.Hence the evaluation committee recommends that the tender for RhamuDimtu Water Supply Distribution works be awarded to Bidder No.3, who is M/s Northern Star Company Ltd, Po Box 28 Rhamua at the offered sum of Ksh4, 899,876.00

5. THE TENDER COMMITTEE DECISION

The Tender Committee in its meeting held on 20th December, 2012 deliberated on the recommendations of the Evaluation Committee and approved the Award to M/s Northern Star Company Ltd, Po Box 28 Rhamua at the offered sum of Ksh4,899,876.00

THE REVIEW

The Applicant Hullo Enterprises lodged the Request for Review on 25th January, 2013 against the decision of Northern Water Service Board (Mandera North District) dated 20th December, 2012 in the matter of Tender No. NWSB/MDR-N/T/UWS/01/2012-2013 for RhambuDimtu Water Supply Distribution Works.

The Applicant was represented by Mr. Abdikarim Daud Abdi while the Procuring Entity was represented by Mr. Mohamed A. Hussein, District Supply Chain Management and Mr. Abdi A Abdille, District Water Officer while the interested party was Mr. Ryad Hassan

The Applicant requests the Board for the following orders:-

- *The tender be re-evaluated and award according to the Act and regulation*
- *That the Applicant has suffered loss of business opportunity because of Procuring Entity action.*

The Applicant has raised two grounds of review which the Board deals with as follows;

Ground 1- Award of Contract to a bidder that was not responsive

The Applicant alleged that the Procuring Entity awarded the tender to a non-responsive bidder who did not provide Bid Bond. It stated that at the time of tender opening it was the only firm that met the all the requirements as per the tender documents. It further stated that the Tender

Committee changed the requirement on the Bid Bond, hence the award to the Successful bidder. It submitted that it had over ten (10) years' experience as a contractor and had been recommended by various Government Agencies.

The Applicant alleged that because of corruption of the chairman of the tender committee /The District Water Officer Mandera North that the Tender was awarded to Northern Star Company. It further submitted that the District Water Engineer telephoned it on 15th January, 2013 to notify it that its bid had been unsuccessful. It further submitted that it was never notified in writing by the Procuring Entity. It stated that it saw the notification letter for the first time when it was served with the Procuring Entities response to the Request for Review it had filed.

The Applicant urged the Board to order a re-evaluation of the tender under review.

In response, the Procuring Entity submitted that the Applicant was the only bidder who provided the Bid Bond at the tender opening. It further submitted that out of the eight bidders who had purchased the bid document, only four (4) bidders returned their bids at the close/opening of the tenders on 13th December, 2012. It stated that the evaluation committee completed the evaluation process on 17th December, 2012 and it provided scores for all criteria set out in the tender document. It alleged that although the Applicant, Hullo Enterprises provided the Bid Bond it did not score well against other parameters during the evaluation. It argued

that the Applicants bid price of Kshs. 5,595,108 was the highest priced among all the Bidders. It further stated that its budget for the project was Kshs. 4,948,000. It further argued that the Applicant failed to demonstrate its ability to undertake the aforementioned works.

The Procuring Entity submitted that on 20th December, 2012, the Tender Committee made an award based on the Evaluation Committees recommendation to the lowest evaluated bidder, M/s Northern Star Company Ltd. It further submitted that during the said tender committee meeting, the evaluation report was studied and deliberated upon. It stated that the issue of the bid bond was conclusively discussed in the meeting and the members **unanimously agreed to waive the requirement** at this stage as it was found to have no impact on the rankings. It argued that the Bid bond was found to be a non-substantive parameter.

The Procuring Entity submitted that the, Applicant was contacted to come to the office and collect its notification letter in person but it had to date declined to do so. It further submitted that it registered the notification letter to the Applicant on 10th January, 2013 after having a telephone conversation with the Applicant. It alleged that during the said telephone conversation the Applicant stated that it was going to file a request for review against the decision of the tender committee. It stated that up to date it had not received any written request from Applicant asking for reasons why it was unsuccessful in the tender. It further stated that the Request for review as filed by the Applicant had therefore come late and

was only causing delays in the execution of the subject contract. It also stated that the Request for Review was filed out of time.

The Procuring Entity submitted that the Applicant had been awarded the following tenders: "Supply and Delivery of 33KVA Diesel Powered Genset" and "Supply of Materials for Construction of Hay store at Tabicho Centre". It argued that the Applicant had not raised the issue on corruption when it was awarded the two tenders. It stated that the Applicant had not substantiated its allegation and on its part it had acted transparently. It further stated that the award was made after considering equitable distribution of tenders amongst the few contractors in Mandera. In conclusion the Procuring Entity requested the Board to allow it to proceed with the signing of the contract agreement as soon as possible.

The Successful Bidder, M/s Northern Star Company Ltd., submitted that with regard to the allegation on corruption, it had not had any discussions with the Procuring Entity prior to the award. It stated that the Applicant needed to substantiate its allegation on corruption.

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

Arising out of the foregoing, the issues for determination are as follows:

- Was this Request for review filed out of time?

- Was the evaluation done based on criteria set out in the tender document?
- Did the evaluation Committee recommend for award a bidder who was non responsive?

To answer the first question, the Board notes the following:

- That the letters of notification to the Successful Bidder and the unsuccessful bidders were dated 20th December, 2012.
- That the Procuring Entity send a registered letter to the Applicant on 10th January, 2013 addressed to "Hullo Enterprises Co. Ltd., P.O.Box 14, Rhamu".
- That the correct address for the Applicant based on its bid document was "Hullo Enterprises Co. Ltd., P.O.Box 14-70300, and Rhamu-Mandera".
- That the Applicant admitted in its submission that the District Supply Chain Officer telephoned it on 15th January, 2013 to inform it that its bid was unsuccessful.
- That the Applicant wrote a complaint letter to the Director General PPOA on 21st January, 2023.
- That the Applicant was able to obtain a copy of the notification letter on 5th February, 2013 after it filed this Request for Review on 25th January, 2013.

The first issue to be determined by the Board is whether the Request for Review was lodged within 14 days pursuant to Regulation 73(2) (c) (ii) and Sections 67 or Section 83 of the Act.

The Board has noted that Regulation 73(2) (c) gives aggrieved bidder discretion as to when to make a request for review. This may be:-

- (a) Within fourteen days of occurrence of the breach in cases where the aggrieved party choose to make its request for review before the award or;
- (b) Within fourteen days of notification required under Section 67 or 83 of the Act.

As already noted, the Applicant has denied receiving the letter of notification before filing the request for review. The Boards notes that the Procuring Entity sent the letter of notification to the Applicant on 10th January, 2013. Assuming that time for purposes of filing the Appeal starting running on 11th January, 2013, the Appeal window would have closed on 24th January, 2013. However, the Board finds that the code for the Applicants postal address was missing in the registered mail which sustains the Applicants claim that it never received the notification. In this regard time for purposes of notification can only run after the Applicant has been properly notified.

In view of the fact that the Applicant was not properly notified in accordance with section 67 of the Act by reason of the fact that the letter of notification was miss addressed, the Board finds that this Request for Review was filed on time. This finding by the Board is based on the fact that the Applicant received information from the Procuring Entity on 15th January, 2013.

Regarding the second issue namely the evaluation criteria, the Board notes that the criteria spelt out in the tender documents were for the bidders to provide the items listed below in addition to dully filled bills of quantities:-

1. A valid copy of company registration certificate,
2. A valid copy of certificate of registration as a contractor,
3. A valid copy of certificate of registration as a water works contractor,
4. PIN Copy,
5. VAT compliance evidence,
6. A demonstration of ability (including financial, personnel and equipment) and past experience to undertake these works,
7. Detailed statement of the companies past and present litigations,
8. Bid bond of at least the specified amount from a reputable banking institution and
9. Competitive prices inclusive of all taxes, fees, insurance premiums, accidental and incidental costs, actual costs, profits and overheads

The Board further notes that the evaluation criteria that were used and formed the basis of award were as below:-

No	Parameters to be evaluated	Yes Score	No Score
A	Preliminary Evaluation		
A1	Proof of company registration	5	0
A2	Copy of Pin	5	0
A3	Copy of VAT Registration	5	0
A4	Proof of Tax Compliance	10	0
A5	Copy of Licence to undertake Water Works	15	0
A6	Proof of Past experience in similar works	10	0
A7	Proof of adequate technical & financial capacity	10	0
A8	Litigation History	5	0
A9	Bid Bond from a recognized financial	10	0
	<i>Score sub -totals range</i>	75	0
B	Further Evaluation		
B1	Deviation from official estimate within +/-5%	15	0
B2	Margin of Arithmetic error within +/-5%	10	0
	Score Sub - Totals Range	25	0
	Score Total Range	100	0

The Board further notes that the Evaluation was carried out in two stages namely the Preliminary Evaluation (A) and "Further "Evaluation stage(B). The Board also notes that new criteria were introduced during evaluation.

- *Apportioning of marks to the parameters which were not stated in the Tender Documents issued to the Bidders as shown above*
- *The pass mark of 55 points was not stated in the tender documents*
- *Part B "further evaluations" was not stated either, were the Procuring Entity apportioned marks to Deviation and arithmetic errors.*

The Board finds that the Procuring Entity's act of introducing new criteria in the evaluation process was is in breach of Section 66(1)& (2) of the Act which states as follows:-

Section 66(1)

"The procuring entity shall evaluate and compare the responsive tenders other than tenders rejected under section 63(3)".

Section 66(2)

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used."

With regard to the waiver of mandatory requirements, the Board notes the provisions of Section 64 of the Act and Regulations 47(1) & (2) and 48(1) which provide as follows:-

Section 64(1)

"A tender is responsive if it conforms to all the mandatory requirements in the tender documents."

Regulation 47(1)

"Upon opening of the tenders under Section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether:-

- The tender has been submitted in the required format*
- Any tender security submitted is in the required form, amount and validity period*
- The tender has been signed by the person lawfully authorized to do so;*
- The required number of copies of the tender have been submitted;*
- The tender is valid for the period required;*
- All required documents and information have been submitted; and*
- Any required samples have been submitted."*

Regulation 47(2)

"The evaluation committee shall reject tenders, which do not satisfy the requirements set out in paragraph (1)."

Regulation 48(1)

"A Procuring Entity shall reject all tenders, which are not responsive in accordance with Section 64 of the Act."

The Board notes that Regulations 47(1) &(2), 48(1) are worded in mandatory terms. The Board further notes that the above Regulations envisages that only those bidders who were found to be responsive at the preliminary stage shall be qualified to be evaluated in the next stage. The Board has examined bids of all the bidders and notes that the Applicant is the only bidder who provided the bid bond. In this case, the Evaluation Committee applied powers that it did not have to change the requirements of the tender by allowing three bidders who did not provide the mandatory bid bonds to be evaluated further. The tendering process is a competition governed by rules set out in the tender documents. Therefore the evaluation process cannot be fair and transparent if certain criteria are waived to benefit certain bidders. The Board finds that the waiver of mandatory requirement during the evaluation process was not proper and not curable within the powers of the Evaluation Committee.

With regard to the allegation that the tendering process tainted in corruption, the Board holds that the Applicant has not adduced any evidence to support this allegation.

Consequently, it is clear that the evaluation of this tender was not done in accordance with the Act and the Regulations. Therefore the award could not have been made to the bidder with the lowest evaluated tender price in accordance with Section 66(4) of the Act.

Accordingly this ground of Review Succeeds.

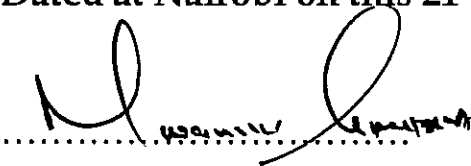
Grounds 2 – loss

This is not a ground but the Applicant's statement of loss and the Board need not make a finding on it.

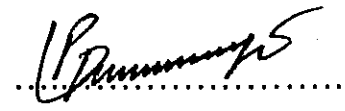
Taking all the above matters into consideration, the Board finds that the tender process was flawed and therefore this request for review succeeds and the Board pursuant to provisions of Section 98 of the Act directs as follows:-

- The award of the tender to the successful Bidder M/S Northern Star Company Ltd is hereby annulled.
- In view of the importance of the subject tender, the Board orders, pursuant to Section 98 (b) of the Act that the Procuring Entity re-evaluates the bids and awards the tender using the criteria set out in its Tender Documents within 30 days.
- There will be no orders as to costs.

Dated at Nairobi on this 21st day of February, 2013



CHAIRMAN
PPARB



Ag. SECRETARY
PPARB

