

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 17/2017 OF 16TH FEBRUARY 2017

BETWEEN

TRIPPEX CONSTRUCTION COMPANY LIMITED.....APPLICANT

AND

RONGO UNIVERSITY.....PROCURING ENTITY

Review against the decision of **Rongo University** in the matter of Tender No. RU/OT/13/16-18 for the Proposed Construction of Main Campus Gate and Gate House at **Rongo University**.

BOARD MEMBERS PRESENT

- | | | |
|----|-------------------------|-----------------------|
| 1. | Mrs. Josephine Mong'are | -Member(in the Chair) |
| 2. | Mrs. Gilda Odera | - Member |
| 2. | Eng. Weche Okubo, OGW | - Member |
| 4. | Mr. Hussein Were | - Member |

IN ATTENDANCE

- | | | |
|----|--------------|-------------------------------|
| 1. | Philip Okumu | - Holding Brief for Secretary |
| 2. | Evelyn Abuga | - Secretariat |

PRESENT BY INVITATION

Applicant - Trippex Construction Company Limited

- | | | |
|----|-------------|------------------------------------|
| 1. | Isaac Owuor | - Advocate, Owuor, Nyahanga & Ass. |
|----|-------------|------------------------------------|

2. Gilbert Kowuocha - Contractor
3. George Orondo - Contractor

Procuring Entity - Rongo University

1. Maloba Kayika - Advocate, Kiruki & Kayika Advocates
2. Francis Ndar - Legal Officer
3. Fredrick Mangicho - Procurement Officer

Interested Parties

1. Odegi Kwesi - Director; Edmar Enterprises

BOARD'S DECISION

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

BACKGROUND OF AWARD

Advertisement

This tender was advertised on 1st December, 2016 in the *Daily Nation* Newspaper.

Tender Opening

This tenders were opened on Thursday, 5th January, 2017 at 10.00 a.m.

Evaluation Committee

The evaluation committee carried out the evaluation on 12-15th January, 2017.

B/NO	NAME OF THE FIRM	AMOUNT QUOTED (KSHS)	BID BOND (KSHS) 2% OF THE TENDER SUM
1.	M/s. CAROLINA CONSTRUCTION CO. LTD	18,320,871.20	366,417.42
2.	M/s. POLISH CONTRACTORS CO. LTD	13,885,588.00	277,712.00
3.	M/s. CLIFFMAX KENYA ENTERPRISES LTD	13,316,644.81	266,333.00
4.	M/s. DAMOVIN ENGINEERING SERVICES LTD	14,923,597.00	300,000.00
5.	M/s. NYOBU ENTERPRISES	16,343,976.02	350,000.00
6.	M/s. GOMA AZUL INVESTMENTS	14,235,108.20	286,000.00
7.	M/s. ELTERICSE.A. LTD	14,558,794.02	290,731.00
8.	M/s. EDMAR ENTERPRISES LTD	15,136,334.80	300,000.00
9.	M/s. DAPALK CONSORTIUM CO. LTD	13,586,719.82	271,735.00
10.	M/s. SIM BUILDING CONTRACTORS	14,663,600.00	300,000.00
11.	M/s. UNAMI CONSTRUCTION CO. LTD	13,881,064.02	287,388.00
12.	M/s. STEM INVESTMENTS LTD	14,572,898.00	300,000.000
13.	M/s. TRIPPEX CONSTRUCTION CO. LTD	12,760,000.00	255,200.00
14.	M/s. GOBOL ENGINEERING INTERNATIONAL CO. LTD	13,155,484.00	263,110.00
15.	M/s. JORO BUILDING & GENERAL CONTRACTORS LTD	17,627,299.10	352,546.00

PRELIMINARY EVALUATION

This was an elimination stage where each vendor's submission was checked for completeness and compliance to the stated tender submission requirements. Tenderers were required to submit copies of MANDATORY

DOCUMENTS which would be used during PRELIMINARY EXAMINATION to determine responsiveness.

A) Preliminary evaluation (Mandatory requirements)

To be deemed as responsive, tenders were checked for the following mandatory requirements:

1. Copy of certificate of incorporation/registration
2. Copy of valid Tax Compliance Certificate from KRA
3. Valid NCA Certificate Category 6 and above.
4. Must submit a tender security in the amount of 2% of the tender sum valid for 150 days from the date of tender opening.

COMMENTS

The following bidders were non-responsive in the listed area:

M/s. CAROLINA CONSTRUCTION CO. LTD - B.1

1. No valid NCA certificate (No valid NCA practicing certificate attached).

M/s. DAMOVIN ENGINEERING SERVICES LTD - B.4

1. No valid NCA certificate (No valid NCA practicing certificate attached).

M/s. ELTERICSE.A. LTD - B.7

1. No valid Tax Compliance Certificate. Expired on 21st October, 2016.
2. No valid NCA certificate (No valid NCA practicing certificate attached).

M/s. SIM BUILDING CONTRACTORS - B.10

1. No valid NCA certificate (No valid NCA practicing certificate attached).
2. Tender security valid for 146 days instead of 150 days as was stated in the tender document.

M/s. STEM INVESTMENT LTD - B.5

1. No valid NCA registration certificate.

M/s. TRIPPEX CONSTRUCTION LTD - B.8

1. No valid NCA registration certificate. (No valid NCA practicing certificate attached).

TECHNICAL EVALUATION

The following firms proceeded to the technical evaluation stage.

1. M/S. Polish Contractors Co. Ltd - B.2
2. M/S. Cliffmax Kenya Enterprises - B.3
3. M/S. Nyobu Enterprises - B.5
4. M/S. Goma Azul Investments - B.6
5. M/S. Edmar Enterprises - B.8
6. M/S. Dapalk Consortium Co. Ltd - B.9
7. M/S. Unami Construction Co. - B.11
8. M/S. Gobol Engineering International - B.14
9. M/S. Joro Building & General Contractors Ltd - B.15

TECHNICAL EVALUATION OF PROPOSED CONSTRUCTION OF MAIN CAMPUS GATE AND GATE HOUSE AT RONGO UNIVERSITY.

This will be done by comparing details of the works to be offered against the minimum requirements/technical specifications and confirming the same from the technical Literature/Specifications submitted.

B) Technical Evaluation Stage

Only bidders who score **70 points** and above will be subjected to financial evaluation. Those who score **below 70 points** will be eliminated at this stage from the entire evaluation process and will not be considered further.

The Lowest Evaluated Responsive Bid amongst the bidders with a score of **70 points** will be recommended for award based on competitiveness of each individual firm. If none of the bidders score **70 points** the cutoff point will be reduced to **65 points**. The lowest bidder will be recommended from the firm which has submitted the lowest responsive bid from the list of the firms which have attained the minimum score of either **70 points** or **65 points** if no firm has attained **70 points**.

			B2	B3	B5	B6	B8	B9	B11	B14	B15
Item	Description	Max. Point	Points Scored	Points Scored	Points Scored	Points Scored	Points Scored	Points Scored	Points Scored	Points Scored	Points Scored
	Tender questionnaire Form Signed and stamped-----	10	10	10	10	5	10	10	10	10	10

----- ----- ----- 10 Signed but not stamped or vice versa ---- ----- ----- 5 Not signed nor stamped - ----- ----- ----- ---- 0											
Confiden tial Business Question naire Form. Complete ly filled -- ----- ----- ----- ----- --- 10 Partially filled ---- ----- ----- ----- ----- ---- 5 Not filled -----	10	5	10	10	10	10	10	10	10	10	5

	----- ----- ----- ----- 0											
I	Key Personnel (Attach evidence)	1	10	5	10	10	10	5	10	0	5	
	At least 1 No. degree/diploma of key personnel in relevant engineering field	0										
	o With over 10 years relevant experience	2										
	o With over 5 years relevant experience	0										
	o With under 5 years relevant	5	0	0	5	0	0	0	0	0	0	

experienc e ----- ----- - 1										
At least 1No certificate holder of key persone l in relevant Engineeri ng field										
o With over 10 years relevant experienc e ----- ----- - 5										
o With over 5 years relevant experienc e ----- ----- --- 3	5	0	0	0	0	5	0	0	5	0
o With under 5 years relevant experienc e ----- ----- --1										
Capacity										

	<p>to acquire construction Materials</p> <p>o Demonstration of capacity to acquire construction materials e.g. Evidence of letter of credit agreements with suppliers ----- 5</p>										
V	<p>Contract completed in the last five (5) years (Max of 2 No. Projects)</p> <p>o Project of similar nature, complexity and magnitude ----- 3</p> <p>o Project of similar nature</p>	6	0	2	6	2	6	2	0	3	2

	but of lower value than the one in consideration ----- --- 2										
	o No completed project of similar nature ---- ----- ----- 0										
VI	On-going projects (Max of 1 No. Project)	3	0	0	3	0	3	1	1	1	1
	o Project of similar nature, complexity and magnitude ----- 3										
	o Project of similar nature but of lower value than the one in consideration --1										
	o No										

	ongoing project of similar nature - -- ----- ----- -0											
VI I	Schedule of contractors equipment and transport (proof or evidence of ownership) o Means of transport (Vehicle) ----- ----- ----- 5	5 1 1	5	0	5	5	5	0	5	5	5	
	o No means of transport ----- ----- ----- ----- 0	6	0	6	0	6	0	0	6	6	0	
	For each specific equipment required in the											

	installatio n of the Work being tendered for(Maxi mum No. of equipmen t to be considere d - 3 No.) ----- ----- --- 2										
VI II	Financial report 10										
	Audited financial report (last three (3) years 2013, 2014, 2015	10	0	0	2	0	10	6	6	4	4
	o Turn over greater or equal to 5 times the cost of the project --- 10										
o Turn over greater or equal to 3 times the cost of the project ---											

	- 6										
	o Turn over greater or equal to the cost of the project --- ----- 4										
	o Turn over below the cost of the project --- ----- -----2										
IX	Evidence of Financial Resources (cash in hand, lines of credit, overdraft facility etc)	10	5	5	5	0	10	0	5	5	5
	o Has financial resources equal or above the cost of the project-- 10										
	o Has financial resources below the										

	cost of the project --- -----5										
	o Has not indicated sources of financial resources ----- -0										
X	Access to Liquid Finances	5	5	5	0	0	5	5	0	5	5
	o Evidence of access to liquid finances from a reputable bank or credit facility of upto 5 million----- ----- ----- ----- 5										
	o Not provided -----										
XI	Litigation History	5	5	0	5	0	5	5	5	5	0
	o Filled -- ----- ----- ----- -----										

	----- ---5										
	o Not filled										
XI I	Sanctity of the tender document	10	10	10	10	10	10	10	10	10	10
	o Having the document intact(not tampered with in any way) -----10										
	o Having mutilated or modified the tender document -----0										
	TOTAL	100	55	53	71	48	89	54	68	69	52

NOTED:

That the following bidders failed to score 70 points hence could not proceed to the Financial Evaluation Stage. This was due to the following reasons:

M/s. POLISH CONTRACTORS CO. LTD - B.2

1. No personnel was a holder of a certificate in relevant Engineering field.
2. No demonstration of capacity to acquire construction materials.
3. No completed project of similar nature.

4. No ongoing project of similar nature.
5. No evidence of equipment.
6. No audited financial report (last three (3) years 2013, 2014, 2015).

M/s. CLIFFMAX KENYA ENTERPRISES - B.3

1. No personnel was a holder of a certificate in relevant Engineering field.
2. No demonstration of capacity to acquire construction materials.
3. No ongoing project of similar nature.
4. No evidence of means of transport attached.
5. No audited financial report (last three (3) years 2013, 2014, 2015).
6. No litigation history attached.

M/s. GOMA AZUL INVESTMENT-B.6

1. Tender questionnaire form is partially filled.
2. No personnel was a holder of a certificate in relevant Engineering field.
3. No demonstration of capacity to acquire construction materials.
4. No ongoing project of similar nature.
5. No audited financial report (last three (3) years 2013, 2014, 2015).
6. Has not indicated sources of financial resources.
7. No audited financial report (last three (3) years 2013, 2014, 2015).
8. Financial resources is below the cost of the project.
9. No evidence of access to liquid finances from a reputable bank.
- 10.No litigation history.

M/s. DAPALK CONSORTIUM CO. - B.9

1. No personnel was a holder of a certificate in relevant Engineering field.
2. No demonstration of capacity to acquire construction materials.
3. No means of transport attached.
4. No equipment attached.
5. Has not indicated sources of financial resources.

M/s. UNAMI CONSTRUCTION CO. LTD - B.11

1. No at least 1No certificate holder of key personnel in relevant Engineering field.
2. No demonstration of capacity to acquire construction materials.
3. No contracts of similar nature completed.
4. Project is of similar nature but of lower value than the one in consideration.
5. No access to liquid finances.

M/s. GOBOL ENGINEERING INTERNATIONAL LTD - B.14

1. No personnel was a holder of a diploma/degree certificate in relevant Engineering field.
2. No personnel was a holder of a certificate in relevant Engineering field.
3. Attached only project of similar nature completed in the last five years instead of two.
4. Ongoing projects handled are of similar nature but of lower value than the one in consideration.
5. The turnover is greater or equal to the cost of the project.

M/s. JORO BUILDING & GENERAL CONTRACTORS - B.15

1. Confidential business questionnaire is partially filled.
2. No personnel was a holder of a certificate in relevant Engineering field.
3. No demonstration of capacity to acquire construction materials.
4. Projects handled are of similar nature but of lower value than the one in consideration.
5. No equipment attached.
6. No litigation history.

That the following bidders scored above 70 points hence proceeded to the Financial Evaluation Stage.

1. M/s. NYOBU ENTERPRISES - B.5
2. M/s. EDMAR ENTERPRISES - B.8

TABLE 3: FINANCIAL EVALUATION OF PROPOSED CONSTRUCTION OF MAIN CAMPUS GATE AND GATE HOUSE AT RONGO UNIVERSITY.

C) Financial Evaluation Stage

B/NO.	NAME OF THE FIRM	AMOUNT QUOTED (KSHS)	RANKING
8.	M/s. EDMAR ENTERPRISES LTD P.O. BOX 12719-20100 NAKURU NAKURU-KABARAK ROAD, TEL: 0722397310 / 0722279936 EMAIL: edmarenterprisesltd@gmail.com	15,136,334.80	1
16.	M/s. NYOBU ENTERPRISES P.O. BOX 447-40100 KISUMU KAKAMEGA ROAD TEL: 0722992086	16,343,976.02	2

RECOMMENDATION:

That Bidder No. 8 (M/s. EDMAR ENTERPRISES LTD) be awarded the tender at a cost of Kshs. 15,136,334.80 being the lowest evaluated responsive bidder. This is subject to Rongo University undertaking due diligence exercise on firm.

Professional Opinion

The Ag. Procurement Officer of the University issued his professional opinion on 16th January, 2017 in which he made the following observations, and

1. *"That the difference from the approved budget is quite minimal (Kshs. 4,449.81). Management to raise the budgetary allocation to cover the cost of the works instead of cancelling the tender on the basis of inadequate budgetary allocation.*
2. *In an event that the allocation is increased, the evaluation team be allowed to conduct due diligence on this firm before the award is done. This is in accordance with Section 83(1) of the PPADA 2015."*

The Accounting Officer of the Procuring Entity, the Vice-Chancellor, approved the recommendations of award to M/s Edmar Enterprises Ltd, who was found to be responsive at a cost of Kshs. 15,136,334.80 being the lowest evaluated responsive bidder, on 18th January, 2017.

Notification of Award / Regrets

The notification and regret letters was done on 2nd February, 2017.

THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s. Trippex Construction Company Limited on 16thFebruary, 2017 in the matter of the tender NoRU/OT/13/16-18 for the Proposed Construction of Main Campus Gate and Gate House at Rongo University.

The Applicant seeks for the following orders:

- a) The decision of the Procuring Entity declaring the Applicant's bid as unsuccessful is illegal and the same be annulled in whole;*
- b) The Board be pleased to order the Applicant's bid as responsive;*
- c) The Board be pleased to order the Procuring Entity to evaluate the Applicant's bid as it is responsive; and*
- d) The Procuring Entity be condemned to pay costs of this Request for Review to the Applicant.*

The Procuring Entity in its response stated that the Request for Review lacks merit and ought to be dismissed with costs.

At the hearing of the Request for Review, the Applicant was represented by Mr. Isaac Owour Advocate of M/S Owuor Nyahanga and Associates Advocates while the Procuring Entity by Mr. Maloba Kayika Advocate of M/S Kiruki and Kayika Advocates.

The Submission by Parties

The Applicant's Request for Review was premised on four grounds but upon hearing of the submission by all the parties the Board identified one issue for determination to wit:

“ Whether the Procuring Entity unfairly disqualified the Applicant at the preliminary stage of evaluation in breach of Section 80 (1) and (2) of the Public Procurement and Disposal Act, 2015 as read together with Regulation 49 (1) of the Public Procurement and Disposal Regulations, 2006 and Clause 5.8 of the Tender Document by failing to carry out evaluation of the Applicant’s bid.”

Counsel for the Applicant Mr. Isaac Owour Advocate submitted that the Applicant had met all mandatory requirements of the Tender document and had in fact submitted a valid National Construction Authority (NCA) certificate as required. Mr. Isaac Owour Advocate referred the Board to pages 73 and 74 of the Applicant’s bundle of documents for the Request for Review where he pointed out copies of the NCA certificate and NCA License that the Applicant had submitted. Counsel for Applicant questioned how the Procuring Entity could declare the Applicant’s bid unresponsive to proceed for the technical evaluation yet they had submitted all mandatory documents. He argued that the Procuring Entity failed to protect public funds by awarding the tender to the Interested Party whose bid cost exceeded that of the Applicant by over ksh.3,000,000/=. Counsel for Applicant requested the Board to annul the award, declare the Applicant’s bid responsive and to order the Procuring Entity to evaluate the Applicant’s tender.

In response, Counsel for the Procuring Entity Mr. Maloba Kayika Advocate submitted that all bidders were required to submit a valid NCA Registration Category 6 certificate and that the said certificate indicated that it was only valid if a contractor submits a valid NCA license alongside with it. Counsel for Procuring Entity further argued that the requirement for a contractor to attach a valid NCA license together with the NCA registration certificate in

order to be duly recognized as a qualified and approved contractor did not emanate from the Procuring Entity but from the National Construction Authority itself who are the issuers of the NCA registration certificates and licenses. Mr. Maloba Kayika Advocate for the Procuring Entity referred the Board to item no. 3 of the mandatory requirements in the evaluation criteria of the tender documents which stated as follows: '*Copy of a valid NCA category 6 and above*' and however argued that it is expected that the NCA registration certificate to have been accompanied by the NCA Practicing License as indicated on the NCA registration certificate hence the Applicant ought to have taken that into account. He argued that the Applicant only submitted a NCA Registration Certificate and but did not include a copy of a valid NCA Practicing license thus failing to meet the mandatory requirements and that this was not a minor deviation as it pointed to the Applicant's capacity to undertake the works if awarded the tender in question. Counsel for the Procuring Entity further argued that it is not prudent to award a tender to a company that is not licensed and since the Applicant did not show any proof of licensing, it could not proceed to the next stage of the tender process.

Counsel for the Procuring Entity therefore urged the Board to dismiss the Request for Review with costs as it had lacked merit given that the Applicant had failed to submit a copy of a valid NCA license.

In reply Counsel for the Applicant stated that the Procuring Entity did not specify in the mandatory requirements which NCA document they required. The Board also gave the Interested Party a chance to comment but the Interested Party had no comment to make.

The Board's Findings

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

The Board notes that the mandatory documents required for the said tender were listed as follows:

1. Copy of Certificate of incorporation/registration
2. Copy of valid Tax Compliance Certificate from KRA
3. **Valid NCA Category 6 and above**
4. Must submit a Tender Security in the amount of 2% of the tender sum valid for 150 days from the date of tender opening

According to the above list the Board finds no requirement of a valid NCA practicing license. However, on perusal of the NCA registration certificate submitted by the Applicant, the Board finds the following written on the registration certificate: *'This certificate must be accompanied with a valid annual practicing licence'*. On perusing the attached NCA practicing licence, the Board notes that it indicates *'...is duly registered asand is licensed to practice as such'*. It is the Board's opinion that in the event that the Procuring Entity required a valid *NCA Practicing License* as a mandatory requirement, the same should have been listed as part of the evaluation criteria document. The Board further observes that mandatory item no. 3 of the evaluation criteria does not indicate whether a registration certificate or NCA practicing licence was required. This therefore left the discretion to the bidder as to which NCA document to submit.

Section 80 (2) of the Public Procurement and Disposal Act 2015 states as follows:

The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents... ..

The Board further noted the provisions of Section 79 (1), (2) and (3) which provide as follows:

"79 (1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents'

(2) A responsive tender shall not be affected by-

a) minor deviations that do not materially depart from the requirements set out in the tender documents, or

b) errors or oversights that can be corrected without affecting the substance of the tender

(3) A deviation described in subsection (2) (a) shall-

a) be quantified to the extent possible; and

b) be taken into account in the evaluation and comparison of tenders"

The Board finds that the NCA registration certificate submitted by the Applicant in its tender documents was valid and that the Applicant had met the mandatory requirements as per the evaluation criteria set out in the tender document. Having considered all the above, the Board finds that this Request for Review succeeds and will allow it.

Costs

It is trite law that costs follow the event. The Board in evaluating the Request for Review notes that the Applicant provided all the mandatory documents as demanded by the Procuring Entity in the Tender Document. However through mischief on the part of the Procuring Entity the Applicants bid was rejected on very flimsy grounds. The Board notes that this action by the

Procuring Entity necessitated the filing of the Request for Review and led to the Applicant incurring unnecessary costs in the process. The Board is therefore satisfied that this is a good case to award costs and will award the Applicant the costs incurred in filing the matter before the Board and a further sum of Kshs. 100,000 towards legal expenses incurred by it.

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, 2015 the Board makes the following orders on this Request for Review.

1. **The Request for Review dated 16th February 2017 filed by M/S Trippex Construction Company Limited against the decision of Rongo University in the Tender No. RU/OT/13/16-18 for the Proposed Construction of Main Campus Gate and Gate House at Rongo University succeeds and is hereby allowed.**
2. **The decision by Rongo University to award Tender No. RU/OT/13/16-18 for the construction of Main Campus Gate and Gate House in Rongo University is hereby nullified.**
3. **The Procuring Entity is hereby ordered to admit and evaluate the tender documents of M/S Trippex Construction Company Limited within 7 days from the date of this order.**

4. The Procuring Entity is directed to reimburse the applicant costs incurred in filing the Request for review and a legal expenses assessed at Kshs.100,000 payment of which should be done within the next Seven(7) days and proof of the same filed with the Board for records.

Dated at Nairobi on this 6th day of March, 2017.



CHAIRMAN
PPARB



SECRETARY
PPARB

