

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO. 40/2004 OF 2004

BETWEEN

ZADOK FURNITURE SYSTEMS LTD

(APPLICANT)

AND

KENYA AIRPORTS AUTHORITY

(PROCURING ENTITY)

Appeal against the Award Decision of the Tender Committee of the Kenya Airports Authority (Procuring Entity) dated 10th September 2004, in the matter of Tender No. KAA/8/2003-04 of March 2004.

BOARD MEMBERS PRESENT

1. Mr. Richard Mwongo (Chairman)
2. Mr. Adam S. Marjan
3. Prof. N. D. Nzomo
4. Eng. D. W. Njora
5. Mr. John Wamaguru
6. Ms. Phyllis Nganga
7. Kenneth N. Mwangi (Secretary)

BOARD'S DECISION

Upon hearing the submissions of the parties and the Interested Candidates, and upon considering the information contained in all the documents before it, the Board hereby makes its decision as follows:

BACKGROUND

The tender herein for the supply, delivery and installation of Passenger terminal lounge seats, was advertised in the media on 30th and 31st March 2004, and 1st April 2004. The closing/opening date was 30th April 2004 at 10.00 a.m. Twenty tenderers purchased tender documents and, twelve returned completed bids.

Tender opening took place on 30th April 2004, as advertised, in the presence of interested bidders, all of whom sent a representative. Tenders opened were as follows:

Bidder's Name	Read out Price/Options	Currency	Exchange Rate
1. OMK Design	Opt 1 – 135,892,820 Opt 2 – 151,148,540	Kshs Kshs	
2. Pisu & Company	102,718,000	Kshs	
3. Adra (K) Ltd	Opt 1 – 1,259,725.20 Opt 2 – 1,307,702.80	Euros Euros	(92.66) (92.66)
4. Office Mart	14,741,280	Kshs	
5. Designer Wear Ltd	Opt 1 – 40,716,000 Opt 2 – 52,896,000 Opt 3 – 37,062,000	Kshs Kshs	
6. Multi Options Ltd	60,854,760	Kshs	
7. Zadok Furniture Systems	Opt 1 – 39,927,482 Opt 2 – 34,381,998	Kshs Kshs	
8. Wapa Woodcraft	110,553,382	Kshs	
9. Furniture Land Ltd	29,835,499.20	Kshs	
10. Victoria Furnitures Ltd	Opt 1 – 733,352 Opt 2 – 1,351,980	USD Euros	(78.35) (92.66)
11. G/Arreda Ltd	162,480,492.40	Kshs	
12. Space and Style	193,408,332	Kshs	

Evidently the lowest priced tender was Office Mart at Shs 14,741,280/= and the highest priced tender was Space and Style at Shs.193,408,332/=, a difference of over Shs. 178 million.

The Tender, as designed, provided for two stages of evaluation, namely:

1. Responsiveness evaluation under Sec 3. Instructions to Tenderers (ITT) Condition 21, for conformation to the terms, conditions and

specifications of the tender documents, leading to rejection of tenders not so conforming.

2. Price evaluation under ITT Conditions 22 and 23 at which prices would be evaluated, and arithmetic errors corrected.

Thereafter, the award would be made to the tenderer whose tender was determined to be substantially responsive to the tender documents and who had offered the lowest evaluated tender price.

Responsiveness, or preliminary, evaluation was carried out as shown in the Procuring Entity's Evaluation Report, and the following five (5) firms were found to be responsive:

1. OMK Design Ltd
2. Adra (K) Ltd
3. Wapa Woodcraft
4. Victoria Furnitures
5. Space and Style

The seven non-responsive firms were rejected for various failures to comply with the responsiveness requirements. In particular, the Applicant's tender was rejected for failure to provide a valid tender security, in that its tender security had a shorter validity period than the duration of the tender validity.

There followed what the Evaluation Committee in its report called a Technical Responsiveness evaluation. The five firms that qualified under the preliminary evaluation were subjected to the technical evaluation. This evaluation was simply carried out by the evaluation committee awarding one (1) point for each item of the technical specifications indicated in ITT Section 10 B1-B6 and A(d)(ii), (pg 25), and ITT Section 14 (Manufacturer's Authorisation).

During this technical evaluation, the Procuring Entity wrote on 6th July 2004 to the five responsive firms undergoing evaluation, and requested them to provide samples of the seats they were offering to supply. All firms responded, and the Applicant, upon discovering that seat samples had been called for, also insisted on submitting its own samples, which it did. All samples were evaluated including the Applicant's. The outcome of the technical evaluation was the disqualification of three out of five of the responsive bidders. Those who satisfied the technical requirements and proceeded to price evaluation were:

- | | | | |
|----|---------------------|---|--------------------|
| 1. | Victoria Furnitures | - | Shs.125,274,466.80 |
| 2. | Space & Style | - | Shs.193,408,322.00 |

Victoria Furnitures, having the lowest evaluated tender price, were recommended for award of the tender by the evaluation committee. The Procuring Entity, through its Tender Committee meeting held on 3rd September 2004, at Paper No. 7, awarded the tenderer to Victoria Furnitures at the quoted price of Euro 1,351,980.00, equivalent to Kshs.125,274,466.80 at an exchange rate of Kshs.92.66 per Euro. Letters of notification to all tenderers were written on 10th September 2004.

THE APPEAL

The Applicant has appealed against the said decision of the Tender Committee through its Application filed on 30th September 2004. It has raised four (4) grounds of appeal which we deal with as hereunder:

GROUND NO. 1

This was a complaint that the technical specifications given for the seats under Sec. 10 of the tender, were not clear, contrary to Reg. 14 of the Public Procurement Regulations.

The Applicant argued that Sec. 10 merely provided for the basic requirements for goods, and the tenderers were required to submit with their offers the detailed specifications for the products they intended to supply as indicated in Sec. 10A(a). This amounted to shifting the onus of providing specifications from the Procuring Entity, to the tenderers. Further, the Applicant complained that the evaluation method or criteria was not contained in the tender documents. Finally, the Applicant pointed out that, had the bidders been bidding on an equal basis using similar technical specifications, the price differential between the lowest and highest bidder would not have been so large.

In response, the Procuring Entity pointed out that Sec.10 part B contained the detailed technical specifications for the seats. These include specifications as to quality, dimensions, design, fabrication e.t.c. The Procuring Entity further argued that if the Applicant had any difficulty in following the technical specifications provided, it should have sought for clarification as provided for in the Instructions to Tenderers Condition 6.1 or during a Site Visit as provided for in Tender Condition 4.1. With regard to price differential, this could be explained by the differences in quality and, in any event, that there is nothing in the Regulations that requires that tender prices be "near equal".

We have carefully considered the parties' contentions. We have also perused the tender documents and tenders submitted by the tenderers. At the outset, we note that the requirement in the tender conditions at Sec. 10A(a) that indicates

the Tender Specification, General aspects, and which appears to shift the burden of providing detailed specifications on tenderers, is reproduced directly from the Standard Tender Document for Procurement of Goods Sec. G Technical Specifications, General. This is as required by Reg. 24 (1) on the use of standard tender documents, and the Procuring Entity's inclusion of that provision cannot be criticised.

We also agree with the Procuring Entity that it is incumbent upon a bidder who is uncertain as to specifications, to seek clarification which can be done by a Procuring Entity making modification to the tender, via an addendum, as provided for in Reg. 26.

The foregoing notwithstanding, it is the primary duty of the Procuring Entity to provide specifications that are clear, correct and complete. Where appropriate, the specifications should be based on international standards where such exist or otherwise recognized standards under Reg. 14(3). This enables proper evaluation on a like-for-like basis, and reduces the likelihood of large differentials on the basic characteristics of the goods. We consider that this tender was of the kind that required reference to Standards, since they exist.

In this case, we noted that many of the bidders submitted catalogues with their bids, in which standards for conformance are clearly set out for the various components of the seats. The Procuring Entity on its part, merely set out the heads of requirement, without indicating the standards against which the seats were expected to comply. The catalogues submitted by bidders included the following standards:

- Fire Ignitability - BS 5852 of 1990
- Combustion by Cigarettes - IS0 8191-1/88
- Strength test requirement (durability) - BS4875 (1985)
- Resistance to boiling water, staining and cigarette burns - IS0 4586
- Fire Rating - IS0 476 Class 2
- Fatigue Class (resistance to wear) - BS 3379
- Alloy conformity - BS 1490
- Perforated steel - BS 4875 (strength of steel tables)

All the above components were indicated in the tender specifications, minus the standards. There was therefore no basis for equality of evaluation which led to each tenderer offering highly different qualities of the goods, at greatly varying prices. In addition, no testing was carried out as to conformance of the samples to any standards nor was any documentary evidence provided that the samples submitted conformed to any standards.

Accordingly, this ground of appeal succeeds.

GROUND NO. 2

This was a complaint that Reg. 30 (8) (b) of the Regulations was breached in that the Tender was not awarded to the lowest evaluated bidder. Here, the Applicant complained that price is not the sole determinant of an award, and that so long as the Applicant had met all requirements, it should have been awarded. This complaint concerns the tender evaluation.

The Procuring Entity pointed out how the evaluation was conducted, resulting in only two firms being qualified for financial evaluation. These were:

Victoria Furnitures, and
Space and Style.

The Procuring Entity also indicated that the Applicant failed in responsiveness at the preliminary evaluation stage, in that its tender security validity period ran only up to July 28, 2004, a period of ninety (90) days.

In reply, the Applicant argued that their tender security could not have been invalid for two reasons. First, that there was no requirement in the tender document as to validity period of the security; and second, that the Procuring Entity wrote to the Applicant on 26th and 27th August 2004, requesting it, and other bidders, to extend their tender validity and tender surety.

We have considered the parties contentions herein. A perusal of the Applicant's tender security shows that it was valid up to 28th July 2004, after which it would expire. On the tender security, the Tender document provided as follows:

Sec. 3 Condition 11.1

“The tender shall remain valid and open for acceptance for a period of one hundred and twenty days (120 days) from the specified date of tender opening or from the extended date of tender opening.”

Sec 3 Condition 12.3

“Any tender not accompanied by an acceptable Tender Surety will be rejected by the Employer as non-responsive.”

Condition 12.2 required the tenderers to furnish a tender in accordance with the format and following the sample form of the Tender Surety contained in the tender document. The sample form was contained in Sec. 5 Form of Tender Security (pg. 18) of the tender document. The last paragraph of that form reads as follows;

“This guarantee will remain valid and in force up to and including thirty (30) days AFTER THE PERIOD OF TENDER VALIDITY . . .”
(emphasis added).

Now, if tender validity was 120 days after the tender opening date of 30th April, 2004, that takes us to 28th August 2004. The Tender security should therefore have been valid for at least thirty (30) days thereafter, that is 28th September 2004.

The Applicant's tender security therefore failed in this regard, and it was properly eliminated for failing to be responsive. As such, it could not have qualified for technical or financial evaluation, and therefore the Applicant had no basis for complaint on this ground.

Accordingly this ground of appeal fails.

However, the Board also observed the following with regard to this ground. The tender securities of most other bidders expired on 30th August, 2004, whilst the proper expiry date should strictly have been at least 28th September, 2004. On this basis, the successful bidder's tender should also have been found to have been non-responsive, by the evaluation committee, and disqualified.

GROUND NO. 3

This is a complaint that the Procuring Entity required tenderers to modify their tender by requesting them to submit samples of the lounge seat, contrary to Reg. 32.

The Applicant had three limbs to its argument on this ground. That there was Pre-award modification, then, Post-award modification, and finally, Price modification.

On Pre-award modification, the Applicant argued that the request by the Procuring Entity for seat samples after tender closing, amounted to a modification of the tender. On Post-award modification, the Applicant produced a copy of a letter written on 29th September, 2004 by the winning bidder, Victoria Furnitures. In it, the winning bidder states:

“We thank you for accepting our offer and your request to us to arrange to send the proposed adjustable footrests and two armrests. This has been forwarded to the suppliers in Spain who shall despatch the same shortly for presentation to you soonest...” (emphasis added).

From this, the Applicant argues that the winning tenderer did not meet the sample specifications and was being permitted to supply new armrests and footrests after the award of the tender to enable it to qualify, and that other bidders were not accorded a similar opportunity.

On price modification, the Applicant argued that the winning bidder quoted its unit and total prices in Euros, rather than in Kenya Shillings, as required by the tender conditions. As a result, this would lead to changes in price should there be fluctuations in the exchange rate of the shilling to the Euro.

The Procuring Entity in response to the first limb, pointed out that Sec. 4 Special Conditions 4(i) (Pg 17) of the Tender permitted the Procuring Entity to request samples during evaluation. The request by the Procuring Entity did not therefore amount to a modification.

On the second limb, the Procuring Entity pointed out that the tender specifications required both armrests for each seat, and adjustable footrests for thirty (30) seats under Sec. 10 B1, B2 and B3(b). Accordingly, there was no modification to the tender.

On the third limb, the Procuring Entity admitted that the prices were required to be quoted in shillings pursuant to Tender Condition 10.2 which required both unit rates and total prices to be in shillings. However, it argued that at tender opening, the tender prices were all converted at the then ruling exchange rates so that subsequent exchange rate fluctuations would not affect the final bid prices. The Procuring Entity also produced the letter of award in which the price quoted had been converted to Kenya Shillings.

We have carefully considered the parties’ arguments, and we deal with each limb as hereunder:

- (a) Pre-Award Modifications: The provisions of Sec 4 Special Conditions item (i) states as follows:

“The employer may request bidders to submit the actual samples of the seats during the evaluation process to determine the quality of the seats to be delivered.”

There is no doubt from this provision that the Procuring Entity was vested with discretion to request samples during evaluation. Their exercise of that discretion, cannot therefore amount to a modification of the tender. This allegation therefore fails.

- (b) Post-Award Modifications: We have perused the successful bidder's letter of 29th September 2004, and the notification of award to the successful bidder. We have earlier cited the relevant content of the successful bidder's said letter. The Procuring Entity's letter of notification of award reads, in part, as follows:

"...in the meantime please arrange to send us a sample of the proposed adjustable footrest and two armrests for us to fit on the sample you provided for our confirmation. The final confirmation for total supply will be made once samples of proposed adjustable footrest and two armrests have been received and accepted by the Authority..." (emphasis added)

There is no doubt, from this letter, that the Procuring Entity was yet to finally confirm and accept the armrests and adjustable footrests, yet the award was being made. A perusal of the Evaluation Committees undated Report on this point reveals as follows:

At Pg 8 – the Victoria Furniture sample:

- “- Did not have adjustable footrest
- sample did not have two middle armrests
- satisfied all other technical specifications”

At Pg 9 – the Recommendation was that:

“The best evaluated bidder for the supply, delivery and installation of Airport Lounge seats within specified areas of the passenger departure terminal is M/s Victoria Furniture Ltd.”

In our view, the seat sample submitted by Victoria Furniture did not comply with the requirements as to footrests and armrests and therefore did not meet the specifications. The Procuring Entity's requirement under Sec 10b(1) was for:

- 670 three seater bench with armrests for each seat and fixed tables at one end
- 30 units of seats to be fitted with adjustable footrests.

At the end of the sample evaluation, the criteria on armrests and footrests had not been fulfilled by any tenderer, and the post award request for these samples

by the Procuring Entity, amounted to a substantial modification to the tender requirements.

This allegation therefore succeeds.

- (c) With regard to Price Modification, we observe that the tender had a mandatory requirement that unit and total prices be quoted in shillings. The successful bidder did not do this in respect of either its US Dollar offer, Option 1, or the Euro offer, Option 2.

We have perused the original tender and, in particular, the price Schedule for Goods therein. Option 1 shows the unit and all total prices in dollars. The bottom of the page bears the bidder's stamp and an initial. There is no indication of the exchange rate to be used at all. Option 2 shows the unit prices and all totals in Euro. There is also a handwritten note below the figures as follows:

“Exchange rate 92.66 30/04/04.”

There is no signature against the handwritten note.

At the bottom of the page there is the bidder's stamp and an initial, as indicated on all other pages on which the bidder has provided information in the bid as part of the bidder's offer at the time of the tender opening.

In our view, there is no verifiable evidence that the exchange rate was indicated.

It is therefore unsafe to rely on the prices offered in Euros as fixed at the rate of exchange given, even though we note that the letter of award fixes the total price at the exchange rate of Shs. 92.66 to the Euro.

Accordingly, this allegation succeeds to that extent.

Taking into account our other observations herein, this ground of appeal succeeds, overall.

GROUND 4

This was a complaint that the letter requesting samples amounted to inducing bidders to breach the provisions of Reg. 31(2) on confidentiality. The Applicant's argument was that the mischief intended to be arrested by Reg. 31 (2) included a requirement that a Procuring Entity is not allowed to initiate communication for an illegal purpose.

The Procuring Entity on its part, argued that no breach was committed since the tender document allowed for the calling of samples, and Reg. 12 requires all such communications to be in writing

We agree with the Procuring Entity on this point which we dealt with earlier and this ground fails.

The Procuring Entity also argued that it was the Applicant who breached the requirements on confidentiality. After the Procuring Entity requested for samples, the Applicant, not having been contacted on account of its non-responsiveness, wrote an unsolicited communication to the Procuring Entity. Their letter, dated 20th August 2004 reads in part as follows:

“We apologise should our inquisitive behaviour be out of expected norms.

If you recall our anxiety on the ongoing (sic) of the above tender made us stumble into information that other people had been invited to bring their sample . . . finally we were verbally asked to deliver the sample . . .

We are once again anxious about the results, though we have made telephone calls our concern still remains because as you know though it is not anybody’s intention, awards, I can be challenged within 21 days from the date of the award.....”

That letter contains evidence of a litany of most obnoxious breaches of Reg 31 (2) by which bidders are barred from engaging in unsolicited communications with the Procuring Entity, or attempting to influence the Procuring Entity’s examination and evaluation of the tenders. So persistent was the Applicant in regard to this breach, that the Procuring Entity not only felt obliged to accept the Applicant’s uncalled for sample, but it also went ahead to evaluate the same. This merely complicated further, an already complicated situation. The Evaluation Committee made a record of this problem at Pg. 7 of its Evaluation Report.

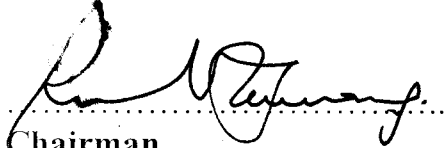
The Board has repeatedly expressed its concern that the integrity of the tender evaluation process must always be maintained. Here is a situation where it was compromised by the misconduct of the Applicant, which misconduct was not dealt with firmly by the Procuring Entity. The Applicant has therefore come before this Board with dirty hands, and is warned against repeating such conduct in any future public procurement.

In, conclusion, two grounds of appeal have succeeded and two have failed. Taking into account all the foregoing matters and the complaints of the other interested candidates, and in particular, the flawed tender evaluation and

successful bidder's unresponsive tender security, we are constrained to find that the tender process was fatally flawed.

We therefore annul the tender award, and order re-tendering using proper specifications and clearly defined evaluation criteria.

Delivered at Nairobi this 27th Day of October, 2004.



Chairman
PPCRAB



Secretary
PPCRAB