

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.24, 25&26/2007 OF 27TH APRIL, 2007

BETWEEN

HURLINGHAM BUTCHERY LIMITEDAPPLICANT

AND

MINISTRY OF STATE FOR DEFENCE.....PROCURING ENTITY

Appeal against the decision of the Tender Committee of the Procuring Entity Ministry of State for Defence (Procuring Entity) of 5th April, 2007 rejecting the Applicant's tender in the matter of tenders No. MOD/423(254, 256 & 255) 06/07 for Supply of Meat (Beef) on Bone to DOD. CAU, CTS Kabete, NDC&DSC, Moi Airbase (Eastleigh), and Kahawa Garrison.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Ms Phyllis N. Nganga	-	Member
Eng. D. W. Njora	-	Member
Mr. J. W. Wambua	-	Member
Mr. John W. Wamaguru	-	Member
Mr. P. M. Gachoka	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Holding Brief for Secretary
Mr. I. Ruchu	-	Secretariat

Present By Invitation For Applications No. 27/2007

Applicant, Hurlingham Butchery Limited

Mr. J. W. Wanjohi - Advocate, J.N. Wanjohi & Company
Mr. Diamond - Managing Director

Procuring Entity, Ministry of State for Defence

Mr. Z.G. Ogendi - Chief Procurement Officer

The interested candidates

Recreation Base Butchery

Mr. Gichohi - Advocate
Mr. Michael Goa - Advocate, Goa & Co. Advocates

Prudential Farmers Butchery Ltd

Mr. Joseph G. Njenga - Director.

Joycha Butchery

Mr. Charles Onkundi - Director

Kenya Meat Commission

Mr. Ngala Oloiptip - Procurement Manager, KMC
Mr. Julius Musyoki - Company Secretary, KMC
Ms Scholastica Agutu - Sales & Marketing Manager, KMC

BOARD'S DECISION

INTRODUCTION

The Applicants in Application Nos. 24/2007, 25/2007 and 26/2007 filed their Memoranda of Appeal against the Procuring Entity's decision on 27th April, 2007. The Procuring Entity filed its Memorandum of response and accompanying documents on 7th May, 2007. On their part, the interested

candidates i.e. Recreation Butchery Ltd and Prudential Farmers Butchery Ltd., filed their memoranda of information and arguments pursuant to Regulation 42(4) of the public Procurement Regulations on 15th may, 2007.

BACKGROUND

These were open tenders for the supply of meat (beef) on bone, which were advertised in the local dailies in the month of January, 2007.

The opening/closing date of the tenders was 31st January, 2007.

The following are the tenderers who bought and returned their completed tender documents:-

For Appeal No. 24/2007:

Tender No. MOD/423 (254)2006/2007 Supply of meat (beef) on bone to DOD, CAU, CTS Kabete, AFMH, NDC, DSC.

Five (5) firms bought the tender documents and all returned their completed documents. The firms were the following:-

1. Hurlingham Butchery
2. Jojen Butchery
3. Kenya Meat Commission Ltd
4. Kiwaka General Supplies
5. Meat Master Ltd.

For Appeal No. 25/2007:

Tender No. MOD/423(256) 2006/2007 Supply of meat (beef) on bone to MOI Airbase (Eastleigh).

Thirteen firms bought the tender documents and the following ten(10) firms returned their completed documents:

1. Kiwaka General Supplier
2. Hurlingham Butchery Ltd
3. Jojen Butchery
4. Kenya Meat Commission Ltd
5. Joycha Café

6. Meat Master Ltd
7. Elomat Ltd
8. Vet Farm Products Ltd
9. Recreation Base Butchery Ltd
10. Prudential Farmers Butchery

For Appeal No. 26/2007

Tender No. MOD/423(255) 2006/2007 Supply of meat (beef) on bone to Kahawa Garisson.

Nine (9) firms bought the tender documents and the following eight (8) firms returned their completed tender documents.

1. Kiwaka General Supplier
2. Hurlingham Butchery Ltd
3. Recreation Base Butchery Ltd
4. Jeslem Agencies
5. Kenya Meat Commission Ltd
6. Sellian Welfare
7. Meat Master Ltd
8. Vet Farm Products Ltd.

TENDER EVALUATION

The tender evaluation process was carried out in three stages, i.e. a preliminary evaluation stage that involved examination of tender documents as required in the tender documents, a technical evaluation stage that involved the physical verification of existing facilities and a commercial evaluation which was based on price rating.

Preliminary Examination

The bidders documents were examined on the following requirements: -

1. Documentation i.e. Valid Trade Licence, Certificate of Incorporation, Bid Bond and Certificate of Public Health;
2. Completeness of tender documents; and
3. Tenderers Contacts/Addresses.

Based on the preliminary examination, the following firms qualified for the technical evaluation: -

For Appeal No. 24/2007

1. Hurlingham Butchery Limited;
2. Jogen Butchery;
3. Kenya Meat Commission Limited;
4. Kiwaka General Merchants; and

For Appeal No. 25/2007

1. Hurlingham Butchery Limited;
2. Kenya Meat Commission Limited;
3. Elomatt Limited;
4. Recreation Base Butchery Limited;

For Appeal No. 26/2007

1. Hurlingham Butchery Limited;
2. Sellian Welfare Association;
3. Kenya Meat Commission Limited;
4. Kiwaka General Merchants;
5. Meat Master Limited;
6. Vet Farm Products;
7. Recreation Base Butchery Limited; and
8. Jostem Agencies.

Technical Evaluation

This was carried out by a different team for each tender. The bidders were evaluated based on the parameters specified under Clause 10 of Section D of the Special Conditions of Contract. The parameters and their maximum scores were as follows:-

1. Line of Business.....25 points
2. Capacity.....35 points
3. Transport.....15 points

The qualified firms scored as tabulated below:-

Appeal No. 24/2007

S/No.	Firm	Line of Business	Capacity	Transport	Total	Rank
1.	Hurlingham Butchery Ltd	25	35	15	75	1
2.	Kiwaka General Merchants	25	15	15	55	3
3.	Jojen Butchery	25	15	5	45	4
4.	Kenya Meat Commission	25	35	0	60	2

Appeal No. 25/2007

S/No.	Firm	Line of Business	Capacity	Transport	Total Points
1.	Hurlingham Butchery Ltd	24	34	15	73
2.	Recreation Base Butchery	20	32	15	67
3.	Elomatt Limited	15	20	10	45
4.	Kenya Meat Commission	21	34	15	70

Appeal No. 26/2007

S/No.	Firm	Line of Business	Capacity	Transport	Commercial Evaluation	Totals
1.	Hurlingham Butchery Ltd	24	35	15	24.2	98.2
2.	Kiwaka General Merchants	20	15	5	24	64
3.	Jostem Agencies	19	15	5	22.4	61.4
4.	Kenya Meat Commission	25	35	15	24	99
5.	Sellian Welfare Association	15	15	5	14	49
6.	Recreation Base Butchery	20	30	15	25	90
7.	Meat Masters	20	35	5	24.4	84
8.	Vet Farm Products	10	35	15	23.1	83.1

All firms in Appeals Nos. 24/2007 and 25/2007 proceeded to commercial evaluation.

Four firms in Appeal No.26/2007, i.e. Kiwaka General Merchants, Selian Welfare Association, Meat Masters and Vet Farm Products though technically evaluated, had not qualified on the preliminary examination of tenders for failure to provide various documents specified in the Special Conditions of Contract as indicated below:-

- a) Kiwaka General merchants - Attached Individual public health test form instead of the required health certificate for business premises, Certificate of incorporation/registration was not provided.
- b) Vet Farm Products - Attached individual public health test form instead of the required health certificate form for business premises.
- c) Meat Master Ltd - Certificate of incorporation/registration was not provided. Attached receipt for application of medical health certificate.
- d). Sellan Welfare Association - Bid bond, valid trade licence, certificate of incorporation and certificate of public health was not provided.

The above four firms did not proceed to commercial evaluation.

Commercial Evaluation

The firms that passed the technical evaluation stage were evaluated commercially based on the formula specified in the tender document. The combined technical and financial scores of the firms were as tabulated below:

Appeal No 24/2007

	Tenderer	Technical Score	Commercial Score	Total Score
1.	Hurlingham Butchery Ltd	75	25	100
2.	Kenya Meat Commission Ltd	60	24.90	84.90
3.	Kiwaka General Merchants	55	24.90	79.90
4.	Josten Butchery	45	23.12	68.12

Appeal No. 25/2007

	Tenderer	Technical Score	Commercial Score	Total Score
1.	Hurlingham Butchery Ltd	73	24.11	97.11
2.	Kenya Meat Commission Ltd	70	24.01	94.01
3.	Recreation Base Butchery	67	25	92
4.	Elomat Limited	45	23.12	68.12

Appeal No. 26/2007

	Tenderer	Technical Score	Commercial Score	Total Score
1.	Kenya Meat Commission Ltd	99	24.01	123.0
2.	Hurlingham Butchery Ltd	98.2	24.11	122.3
3.	Recreation Base Butchery	90	25	115
4.	Josten Agencies	61.40	22.24	83.6

THE APPEALS

The appeals were filed by Hurlingham Butchery Limited against the decisions of the Tender Committee of the Ministry of State for Defence on 5/1/2007 in the matter of the three (3) tenders for supply of Meat (Beef) on Bone to various units within Nairobi Area.

The Applicant requested the Board for orders to:

1. Annul the decision of the Procuring Entity
2. Require the Procuring Entity to act in a lawful manner
3. Revise the unlawful decision by the Procuring Entity and substitute the same with its own decision.

The Applicant was represented by Mr. J. W. Wanjohi, Advocate. The Procuring Entity was represented by Mr. Z. G. Ogendi, the Chief Procurement Officer. Recreation Base Butchery, the initial candidates, and Prudential Butchery Ltd, the interested candidates, were represented by Mr. Gichohi, Advocates and Mr. Joseph. G. Njenga, Director respectively.

At the hearing, all parties to the appeals including the interested candidates agreed that a concurrent hearing of all the applications be held due to the following reasons:-

- The three tenders in dispute contained same tender conditions.
- The grounds of appeal were the same in all applications.
- There would be a saving of time and non-repetition of evidence and arguments.
- Concurrent hearing would allow for consistency of the decisions issued by the Board.

APPEAL NO. 24/2007 AND NO. 25/2007

Ground 1 - Breach of Section 64 read together with Regulation 47.

The Applicant alleged that the Procuring Entity refused to evaluate and compare the responsive tenders in accordance with the criteria set forth in the tender documents. The Applicant argued that although it was responsive in tenders Nos. MOD/423(254) 2006/2007 and MOD/423(256) 2006/2007 based on the tender requirements, the Procuring Entity failed to award the tenders to it, thus defeating the object of the Regulations. The Procuring Entity also treated the Applicant unfairly and discriminatively hence and breached Regulation 47.

Finally, the Applicant argued that since it had met the tender requirements and its price was the lowest, it was therefore the best placed to be awarded tenders Nos. MOD/423(254) 2006/2007 and MOD/423(256) 2006/2007.

In response, the Procuring Entity stated that it evaluated the tenders as stipulated in the tender documents and in a transparent and non-discriminatory manner. The award of the tenders to Kenya Meat Commission (KMC) was because the company had the highest combined technical and commercial score and hence the lowest evaluated tenderer. Further, the Procuring Entity stated that it also took into account the need of promoting the KMC being a Government organization.

The Board has examined the submitted documents in regards to Appeals Nos. 24/2007 and 25/2007 and noted that the evaluation of tender Nos. MOD/423(254) 2006/2007 and MOD/423(256) 2006/2007 was carried out

in accordance to the criteria set out in the tender documents. The Procuring Entity however did not award the tenders as per the recommendations in the evaluation report and no reasons were given for disregarding the evaluation report.

The Board has further noted that the Applicant had the highest marks and was ranked No.1 for tenders Nos. MOD/423(254)2006/2007 and MOD/423(256) 2006/2007 but the Tender Committee awarded the tender to the Kenya Meat Commission contrary to the recommendations of the Evaluation Committee.

The Board finds that the Applicant was unfairly denied the award of the tenders. Accordingly, this ground succeeds.

Ground 2 - Breach of Section 66 Read together with Regulations 49-50.

The Applicant alleged that the Tender Committee breached Section 66 of the Act and Regulations 49 and 50 by not awarding the tenders to it though had offered the lowest priced tender which met all the technical requirements as per the tender requirements.

The Procuring Entity responded that tender awards were not necessarily made to the lowest priced tender but to the tender with the lowest evaluated price pursuant to Section 66(4) of Public Procurement and Disposal Act 2005. The Ministerial Tender Committee was not barred from making awards that were contrary to the recommendations in the evaluation report.

The Board has observed that the Applicant was evaluated and ranked No.1 in tender Nos. MOD/423(254) 2006/2007 and MOD/423(256) 2006/2007. The Tender Committee however awarded these tenders to the Kenya Meat Commission contrary to Regulations 11(1) (b) and 11(2) (b). The Tender Committee minutes availed to the Board were not detailed and failed to indicate the basis of these awards.

Accordingly, this ground succeeds.

Ground 3 - Breach of Section 66 (2) & (3) read together with Regulation 52(1).

The Applicant alleged that the Tender Committee failed and or refused to consider the capability of the Applicants past performance as indicated in the Special Conditions in the tender documents. The Applicant had supplied the Ministry of Defence in the past without problems and the Procuring Entity ought to have taken this fact into consideration while evaluating tenders. The Applicant further argued that the Procuring Entity had improperly conducted a partial evaluation and comparison of the tenders contrary to the stipulations of Section 66(2) of the Act and the Special Conditions in the tender documents.

The Procuring Entity responded that it did not breach Section 66(2) of the Act and stated that the past performance of the Applicant in supplying meat to various units of the Procuring Entity has been wanting. To substantiate this statement, the Procuring Entity submitted written complaints from various consumer units regarding the Applicant's performance.

In response, the Applicant argued that it had not received any letters from the Procuring Entity complaining of its poor performance. The only letter received by the Applicant in connection with its performance was a request to commence supply of meat after expiry of a contract. If there were any complaints on past performance, then the Applicant should have been disqualified at the opening of tenders or as per Regulation 45(2) and (3) and should not have passed the technical evaluation.

On the argument by the Procuring Entity that it wanted to promote the Kenya Meat Commission, the Applicant argued that it also had labour which risked unemployment should the tenders not be awarded to it. The Applicant further argued that since the advertisement in the local dailies invited all qualified candidates to tender, it should not be denied the award of the tenders.

Counsel for Recreation Base Butchery, an interested candidate, associated the candidate with the submissions of the Applicant. Counsel stated that Recreation Base Butchery had offered the lowest price in tender No. MOD/423(256) 2006/2007 and passed the technical evaluation. Besides, the candidate had a good past performance record and considering the contents of Clause 16 of the Special Conditions of Contract/Tender which referred to a candidate's past performance, it ought to have been awarded the tender.

Mr. Njenga representing Prudential Farmers Butchery, an interested candidate stated as follows:

Prudential Farmers Butchery fully associated itself with the comments made by the Applicant and interested candidate. In the case of Tender No. MOD/423(256)2006/2007, it had not received a notification to date. It had the ability to supply meat in Nairobi area and had previously supplied the same commodity to the Procuring Entity without any complaints.

The Procuring Entity in response asserted that the evaluation was properly carried out and non-responsive bidders were disqualified at each stage of the evaluation process. The notifications to both the successful and unsuccessful tenderers were done simultaneously.

The Kenya Meat Commission, the successful bidder, stated that it had no comments to make.

The Board has carefully considered the representations of the parties and the documents before it. It has observed that the Evaluation Committee conducted a thorough evaluation and made recommendations in favour of the Applicant but the Tender Committee overturned the recommendations contrary to Regulations 11(1) (b) and 11(2) (b). Further there were no details in the detached extracts of the minutes of the Tender Committee availed to the Board indicating the rationale for rejecting the recommendations of the Evaluation Committee.

The Board finds that the Applicant was discriminated against by the Tender Committee. Accordingly, this ground also succeeds.

Ground 4 - Loss suffered

This is a statement of perceived losses/damages arising from anticipated profit, which the Applicant would have made if it were awarded the tender. Clause 1.2 of General Information on Standard Tender Documents stated that “the tenderer shall bear all costs associated with the preparation and submission of his tender and the Procuring Entity will not be responsible or liable for those costs, regardless of the conduct or outcome of the tendering process.”

In open competitive bidding there is no guarantee that a particular tender will be accepted and just like any other tenderer, the Applicant took a commercial risk when it entered into the tendering process. In view of the foregoing, it cannot claim the cost or damages associated with the tendering process, which resulted in the award of the tender to another bidder.

The Board has noted from the documents before it that the Technical Evaluation Team recommended Hurlingham Butchery for the award of tenders Nos. MOD/423/254/2006-2007 and MOD/423/256/2006-2007 at KShs.129.50 delivered having had the highest combined scores of 100 and 97.11 points respectively. The Tender Committee however awarded the tender to the Kenya Meat Commission which was the second lowest bidder. No reasons were given for these awards which are contrary to Regulations 11(1) (b) and 11(2) (b) of Public Procurement Regulations 2006.

Taking into account all the above matters, the appeals No. 24/2007 and 25/2007 for tenders No. MOD 423(254)2006-2007 and MOD 423(256)/2006/2007 respectively, succeed. Accordingly the award of these tenders is hereby annulled and the Procuring Entity is ordered to award the tenders in accordance with the recommendations of the evaluation committee and pursuant to Regulations 11 of Public Procurement Regulations 2006.

APPEAL NO. 26/2007

Ground 1 - Breach of Section 64 Read together with Regulation 47.

The Applicant alleged that the Procuring Entity refused to evaluate and compare the responsive tenders in accordance with the criteria set forth in the tender documents. The Applicant argued that although it was responsive in tender MOD/423(255) 2006/2007 based on the tender requirements, the Procuring Entity failed to award the tender to it thus defeating the object of the Regulations. The Procuring Entity had treated the Applicant unfairly and discriminatively and hence breached Regulation 47.

Finally, the Applicant argued that since it had met the technical requirements and its price was among the lowest, it was the best placed to be awarded the tenders MOD/423(255) 2006/2007.

In response, the Procuring Entity stated that it evaluated all the bids as required and as stipulated in the tender documents. The evaluation was conducted in a transparent and non-discriminatory manner. Further, the Procuring Entity argued that Kenya Meat Commission was a renowned Government organization and the award of the tender to it was done in a fair and transparent manner since the combined technical and commercial evaluation scores resulted in the company being the lowest evaluated tenderer.

The Board has examined the tender documents and noted that the tender evaluation was carried out in accordance with the criteria set out in the tender documents and that the Kenya Meat Commission was the lowest evaluated tender at a price of 130/= per kg. delivered. The KMC had the highest combined score of 123.0 points as compared to the Applicant's combined score of 122.3.

The Ministerial Tender Committee concurred with the recommendations of the Evaluation Team and awarded the tender to the lowest evaluated tender.

Accordingly, this ground fails.

Ground 2 - Breach of Section 66 Read together with Regulations 49-50.

The Applicant alleged that the Tender Committee breached Section 66 of the Act and Regulations 49 and 50 by not awarding the tender to it having been the lowest priced tender as per the commercial valuation and yet the Applicant had met all the technical requirements.

The Procuring Entity responded that tender awards are not necessarily made to the lowest priced tender but to the tender with the lowest evaluated price pursuant to Section 66(4) of Public Procurement and Disposal Act 2005.

We have observed that the Applicant was evaluated and ranked second in this tender while the successful bidder, i.e the Kenya Meat Commission, was ranked first.

The Tender Committee awarded the tender in accordance with the evaluation report and as per the Regulations.

Accordingly, this ground fails.

Ground 3 - Breach of Section 66 (2) & (3) read together with Regulation 52(1).

The Applicant alleged that the Tender Committee failed and/or refused to consider the Applicant's past performance as required under the Special Conditions in the tender documents. The Applicant had supplied the Ministry of Defence in the past without problems and this fact ought to have been taken into account during the tender evaluation. The Applicant further argued that the Procuring Entity had improperly conducted a partial evaluation and comparison of the tenders contrary to the stipulations of Section 66(2) of the Act and the Special Conditions in the tender documents.

In response, the Procuring Entity stated that it did not breach Section 66(2) and (3) of the Act and Regulation 52(1) and that the evaluation was carried out properly and in accordance to the contend set out in the tender documents. The Procuring Entity further stated that the past performance of the Applicant to various units of the Procuring Entity has been wanting as evidenced by the written complaints received from various consumer units.

The Applicant reiterated that it had not received any letters from the Procuring Entity Complaining of its performance. The only letter received by the Applicant in connection with its performance was a request to commence supply of meat after expiry of a contract. If there were any complaints on its past performance, then the Applicant should have been disqualified at the opening of tenders or as per Regulation 45(2) and (3) and should not have passed the technical evaluation.

The Board has carefully considered the representations of the parties and the documents before it. It has observed that the evaluation committee conducted the tender evaluation in accordance to the criteria set in the tender documents and made recommendations in favour of the the Kenya Meat Commission. The Tender Committee endorsed the recommendations and awarded the tender to the recommended bidder.

Accordingly, this ground also fails.

Ground 4 - Loss suffered

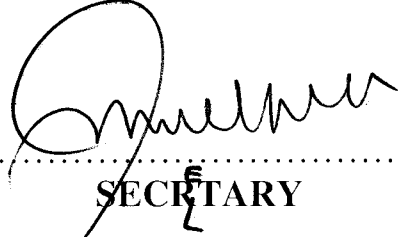
This is a statement of perceived losses/ damages arising from anticipated profit, which the Applicant would have made if it were awarded the tender. Clause 1.2 of General Information on Standard Tender Documents state that “the tenderer shall bear all costs associated with the preparation and submission of his tender and the Procuring Entity will not be responsible or liable for those costs, regardless of the conduct or outcome of the tendering process.”

In open competitive bidding there is no guarantee that a particular tender will be accepted and just like any other tenderer, the Applicant took a commercial risk when it entered into the tendering process. In view of the foregoing, it cannot claim the cost or damages associated with the tendering process, which resulted in the award of the tender to another bidder.

Taking into account all the above matters, this appeal fails. The award of the Tender Committee to the Kenya Meat Commission is hereby upheld and the procurement process may proceed.

Dated at Nairobi this 18th day of May, 2007.


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CHAIRMAN


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SECRETARY