

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.27/2007 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 the Ministry of State for Defence of 5th April, 2007 rejecting the Applicant's tender in the matter of tenders No. MOD/423(208) 2006/2007 for Supply of meat (Beef) on Bone to Nanyuki Based Units

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 Application No. 27/2007

Applicant,	-	Hurlingham Butchery Limited
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Procuring Entity, - Ministry of State for Defence

Interested Candidate, - Jackwright (1982) Ltd

BOARD'S DECISION

BACKGROUND

This was an open tender advertised in the local dailies during the months of October/November, 2006. Tender opening/closing date was 2nd November, 2006. Two (2) firms bought and returned their bids duly completed. The tenders for the two firms were opened as follows:-

1. Jackwright 1982 Ltd
2. Hurlingham Butchery Ltd

After the tender opening the tender documents were examined as per Clause 2 of Section D of the special conditions of Contract/Tender.”

Both tenderers were found responsive at this stage and passed on for the technical (physical) evaluation and commercial evaluation as follows:-

Technical/Physical Evaluation

Firm	Physical Location	Line of Business	Capacity to supply 1000 kg per day	Transport Assets	Total
M/s Hurlingham Butchery Ltd	Located 250 kms from consumption /Supply point.	15 points	35 points	15 points	65
M/s Jackwright 1982 Ltd	Located 4km from consumption/ Supply point	25 points	35 points	15 points	75

Commercial Evaluation

FIRM	SCORE
Jackwright (1982) Ltd	20.88
Hurlingham Butchery Ltd	25

Combined Technical and Commercial Evaluation

Firm	Technical	Commercial	Total
Jackwright (1982) Ltd	75	20.80	95.88
Hurlingham Butchery Ltd	65	25	90

The Appeal

The Appeal was lodged on 27th April 2007 by Hurlingham Butchery Limited against the decision of the Tender Committee of the Ministry of State for Defence sitting on 5th April, 2007 in the matter of tender No MOD/423(208)2006/2007 for supply of the meat (Beef) on bone to Nanyuki units.

The Applicant requested the Board for the following:-

1. Annul the whole 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.
4. Recommend to the relevant authorities to delete the punitive clause of preference to geographical proximity to the point of supply.

At the hearing, the Applicant was represented by Mr. J. W. Wanjohi Advocate. The Procuring Entity was represented by Mr. Z. G. Ogendi Chief Procurement Officer.

The Applicant in its Memorandum of Appeal raised 4 grounds which we deal with as follows:-

Ground 1

The Counsel for the Applicant stated that the Procuring Entity breached Regulation 30(1)-(5) by failing or refusing to evaluate and compare the responsive tenders in accordance with the criteria set forth in the tender documents.

The Procuring Entity failed to award the tender to the lowest responsive tenderer, the applicant. Such an action was unfair and discriminating and defeated the object of the Regulations.

The Procuring Entity argued that the tender was advertised and processed in compliance with the Exchequer and Audit (Public Procurement), Regulations, 2001. It had acted in an open, fair, transparent and non-discriminating manner. The successful bidder was the current supplier, based 4 km from the supply point. The Applicant was based more than 200km and would not respond promptly to unforeseen demands for supply that may occur from time to time. Such situations were to be catered for by the Procuring Entity under Clause 15 of the Special conditions of contract/tender, which gave an added advantage to firms based in Nanyuki and its environs. Due to the nature of demand and the commodity, timely delivery was paramount.

The Board has considered the parties' arguments and scrutinized all the documents. A preliminary examination of the bid documents was carried out, followed by a detailed technical evaluation that included physical verification of specified aspects and scores were given. The two responsive tenders passed for a commercial evaluation where scores were also given. The total combined score for the successful bidder was 95.88 while that of the applicant was 90.

The Ministerial Tender Committee in its meeting held on 5th April, 2006, awarded to the most responsive tenderer with the highest combined score. We note that the applicant's bid, after evaluation, became the second lowest responsive bid and thus failed to capture the award.

Accordingly, this ground fails.

Ground 2

This was a complaint that the Tender Committee breached Regulation 30(7)(8). The Applicant argued that the Procuring Entity awarded to a tenderer who was not the lowest as per the financial evaluation results, yet the applicant had also met all the technical requirements. It had quoted KShs.124 per kg. while the successful bidder quoted 149/= per kg. Besides, the Applicant had supplied to the same unit (Nanyuki) before and other outside stations like Gilgil and Lanet Units. The Counsel pointed out that the aspect of distance should not be used to bar the applicant from being awarded the contract to supply meat.

In response, the Procuring Entity stated that it did not breach the said Regulations. It averred that it awarded the tender to the lowest evaluated tenderer taking into consideration both commercial and physical evaluation.

The interested candidate who was represented by Mr. Sajjad Butt stated that the supply was supposed to be for fresh meat on daily routine before 9.00 a.m all year the round. It was the current supplier.

Further, Clause 12 of the tender document's special conditions of contract/tender referred to the successful tenderer as one who was the lowest technically evaluated and had satisfied criteria set in tender document. Price was not the sole determinant of the award.

The Board has carefully considered the representations of the applicant, the Procuring Entity, and the interested candidate. It has scrutinized both the tender document and the evaluation process report. The award was made in accordance with the conditions and requirements set out in the tender documents.

Accordingly this ground of appeal fails.

Ground 3

The applicant alleged that the Procuring Entity deliberately failed to notify them of the tender results in breach of Regulation 33(1)

In response the Procuring Entity stated that it had notified both successful and unsuccessful tenderers simultaneously, and therefore it did not breach the Regulations. The notification was earlier faxed, then physically posted.

The Board has noted that notification letters to both the Applicant and the successful bidder were dated 20th March, 2007. At the hearing the Procuring Entity produced fax copies of the initial notification faxed to the Applicant. To this the applicant attested that the address was indeed theirs. The appeal was lodged within the appeal window period and as such the supplier had not suffered any prejudice.

Accordingly, this ground of appeal fails.

Ground 4

This was a complaint that the Procuring Entity breached Regulation 4. the counsel for the applicant in support of this ground referred to Clause 15 Section D of the special conditions of contract/tender which gave provision for a preferential consideration to firms based in Nanyuki and its environs. This was a discriminative clause. Despite the fact that it had quoted the lowest price and qualified in responsiveness, it could not be awarded the tender due to its geographical location. The Counsel further argued that such a Tender condition created monopoly and subjected the tax payer to higher payments for goods. The issue of distance did not add up to make the existing difference in the price rates of the two tenderers.

The Procuring Entity responded by stating that the commodity was a sensitive one for the end users and perishable in nature. The two factors unique to the commodity called for a serious consideration of proximity to the supply point.

The Board has considered the representations of he counsel and the position taken by the Procuring Entity. The contentious Clause 15 in the Tender Document states.

“Preferential Consideration

In respect of this tender only firms based in Nanyuki and its environs will have an added advantage.”

The tender document’s Clause 5 “Clarification of Documents”, sub-section 5.1, read together with Clause 6 sub section 6.1 gave a provision for a dissatisfied prospective tenderer to seek for an amendment.

The applicant did not explore their opening as provided for but submitted its tender on the basis stipulated in the tender document and awaited the results of the tender award. Contesting the presence of Clause 15 in the Tender document now, was locking the gate after the horse has bolted. The Procuring Entity gave conditions in the tender tailored to specific requirements, yet, this was open to challenge by prospective tenderers at the time and in the manner provided.

Accordingly, this ground of appeal fails.

Ground 5

Loss and damage


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 foregoing matters, this appeal fails and the Procuring Entity may proceed with the procurement process.

Delivered at Nairobi on this 18th day of May, 2007.


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CHAIRMAN


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SECRETARY

