

REPUBLIC OF KENYA

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD**

APPLICATION NO. 49/2007 OF 23RD AUGUST, 2007

BETWEEN

H. YOUNG & COMPANY (E.A) LIMITED, APPLICANT

AND

KENYA AIRPORTS AUTHORITY, PROCURING ENTITY

Appeal against the decision of the Tender Committee of Kenya Airports Authority in the matter of Tender for Expansion of Cargo Apron and Associated Access Road/ Car Parks at Jomo Kenyatta International Airport.

BOARD MEMBERS PRESENT

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

APOLOGIES

Eng. D. W. Njora	-	Member
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IN ATTENDANCE

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

PRESENT BY INVITATION FOR APPLICATION NO. 49/2007

Applicant, H. Young & Company (E.A) Limited

- | | | |
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| Mr. Dan Ameyo | - | Advocate, Ameyo, Guto & Co
Advocates |
| Mr. Meshack Guto | - | Advocate, Ameyo, Guto & Co
Advocates |
| Mr. Paul Murage | - | Administrator |
| Mr. Paul Kariuki | - | Quantity Surveyor |

Procuring Entity, Kenya Airports Authority

- | | | |
|----------------------|---|--|
| Mr. Kioko Kilukumi | - | Advocate, instructed by Tobiko,
Njoroge and Company Advocates for
the Procuring Entity |
| Mr. Maiyani Sankale | - | Advocate, Tobiko Njoroge & Co.
Advocates |
| Mr. Allan Muturi | - | Manager Procurement and Logistics |
| Mr. Mwangi H. Kiarie | - | Consultant |
| Mr. George Kamau | - | Legal assistant |
| Mr. Hobadiah Orora | - | Senior Procurement Officer |
| Mr. Sinkiyan Yobiko | - | Lawyer, Tobiko, Njoroge and
Company Advocates |

Interested Candidate, China Wu Yi Company Limited

- | | | |
|--------------------|---|------------------------------|
| Mr. C. N. Kihara | - | C. N. Kihara & Co. Advocates |
| Mr. Wan Dory Shay | - | Chairman |
| Mr. Wang Qiao | - | Administrator |
| Mr. Paul Mwangangi | - | Deputy Project Manager |

BOARD'S DECISION

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

BACKGROUND

This was an open tender advertised in the local dailies on 22nd May, 2007. The Tender No. KAA/ES/JKIA/517/C was for Expansion of Cargo Apron and Associated Access Road/ Car Parks at Jomo Kenyatta International Airport.

The tender closing/opening date was 26th June, 2007. Nine (9) firms bought the tender documents. The tender was opened on the due date and attracted the following bidders: -

1. China Wu Yi Company Limited.
2. H. Young & Company (E.A) Limited

Evaluation of the Tender

The tenders of the above bidders were examined based on the following requirements: -

1. Submission Form;
2. Confidential Business questionnaire;
3. Form of Power of Attorney;
4. Certificate of tenderers Visit to Site;
5. Basic rates of specified materials and bona fide quotations;
6. Schedule of major items of plant;
7. Schedule of Key Personnel;
8. Schedule of experience in works of similar nature satisfactory completed;
9. Schedule of on going projects;
10. Schedule of local labour rates;
11. Programme of works;
12. Work Methodology; and
13. Tender notices.

Following the above examination, both bidders were found to have met the requirements and qualified for further evaluation.

The two firms were further evaluated based on the following parameters:-

1. Eligibility;
2. Historical Contract non-performance;
3. Financial Situation;
4. Experience;
5. Current Commitments;
6. Site Staff; and
7. Schedule of the major items of plant to be used on the proposed contract.

Based on the above requirements both firms were found to be technically responsive and qualified for financial evaluation.

On 16th July, 2007 the financial bids were opened and read out. The bidders quoted as follows:-

- | | |
|-------------------------------------|---------------------------|
| 1. China Wu Yi Co. Limited | Kshs. 1, 582, 416, 402.00 |
| 2. H. Young & Company (E.A) Limited | Kshs. 1, 902, 949, 415.00 |

The Evaluation Committee recommended that the Tender No. KAA/ES/JKIA/517/C for Expansion of Cargo Apron and associated Access Road/Car Parks be awarded to China Wu Yi Company Limited at Kshs. 1, 582, 416, 402.00 inclusive of the provisional sums and 7.5% Variation of Price (VOP)/contingency and 16% VAT.

In its meeting held on 13th August, 2007, the Corporation's Tender Committee concurred with the evaluation committee, and approved award for Tender No. KAA/ES/JKIA/517/C for Expansion of Cargo Apron and associated Access Road/Car Parks to China Wu Yi Company Limited at Kshs. 1, 582, 416, 402.00 inclusive of the provisional sums and 7.5% VOP/contingency and 16% VAT.

THE APPEAL

This appeal was lodged on 23rd August, 2007 by H. Young & Company (E.A) Limited against the decision of the Tender Committee of Kenya Airports Authority in the matter of Tender No. KAA/ES/JKIA/517/C for Expansion of Cargo Apron and Associated Access Road/Car Parks at Jomo Kenyatta International Airport.

The Applicant requested the Board to set aside the tender award to China Wu Yi Company Limited, and declare the whole process a nullity. Further, it requested that fresh tenders for the project be invited and costs for the review be awarded to the Applicant.

Mr. Dan Ameyo, Advocate, represented the Applicant while Mr. Kioko Kilukumi, Advocate, represented the Procuring Entity. Mr. C. N. Kihara, Advocate, represented the Interested Candidate, China Wu Yi Company Limited.

The Board hereby deals with the grounds of appeal as follows:-

Ground 2.1(a-c) – Section 64 of the Act

The Applicant submitted that the tender documents had two conflicting tender validity periods. It stated that the tender advertisement notice had indicated that the tender validity period was 90 days from the date of tender opening. However, the Bid Document at Section 2 Instructions to Tenderers Clause 12 provided that the tender validity period was 60 days. As a result of the conflicting provisions on the tender validity period, both bidders interpreted the validity period differently. To the Applicant, the tender validity period was 90 days, whereas to the successful bidder, the validity period was 60 days.

In view of the conflicting provisions on the validity period, the Applicant argued that the Procuring Entity had a legal duty under Section 62(1) of the Public Procurement and Disposal Act, 2005, to seek for clarification.

It argued that the Procuring Entity was in breach of Section 62(1) aforesaid, as it failed to request for a clarification with the bidders before doing the evaluation.

The Applicant further submitted that the tender advertisement notice clearly indicated that bidders had to provide VAT compliance certificate. Although the tender document did not have a requirement for submission of VAT compliance certificate, the tender notice was one of the tender documents. Consequently, it was mandatory for the tenderers to provide the tax compliance certificate. However, the Applicant admitted that both it and the

successful tenderer, failed to provide a tax compliance certificate, and their tenders therefore ought to have been declared non-responsive.

Finally, the Applicant submitted that the successful candidate did not issue a bid security by a bank which was either registered in Kenya or affiliated to a Kenyan Bank. It stated that the purpose of a bid security is to ensure that the Procuring Entity is secured and could easily enforce the security in case of default by a tenderer. The successful bidder submitted a bid security issued by the Bank of China. According to the Applicant, this was not a proper bid security as it was not easily or conveniently enforceable. Therefore, the Procuring Entity breached Section 64 of the Act.

In response, the Procuring Entity stated that the tender document was superior to the tender advertisement notice or any other document issued in respect of the tender. It stated that Section 12 of the tender document clearly provided that the tender validity period was 60 days. It further submitted that the tender notice, as published, was for five different tenders. The multiple tender covered in the advertisement notice had different tender validity periods. Consequently, it was within each tender document that the relevant tender validity period was specifically stipulated. In this particular tender, the validity was stated to be 60 days and there was no ambiguity. In any event, if there was any ambiguity, Clause 6 of the Instructions to Tenders in the tender document allowed for a bidder to seek for clarification. It stated that the Applicant sought no less than four clarifications, but none was on the question of tender validity period. It argued that it was not under any statutory obligation to seek clarification under Section 62(1) of the Act.

The Procuring Entity further submitted that the tender document had no requirement for a tax compliance certificate. It stated that the scope of this tender was such that it would attract international bidders who would not be governed by the Kenyan tax regime. The requirement in the tender advertisement notice for VAT compliance was intended for the other tenders which were also in that notice. Further, where the tax compliance certificate was required, there was a clear stipulation in the tender document. The Procuring Entity argued that, in any event, the Applicant had not submitted a tax compliance certificate and its complaint on this issue at this stage was an afterthought.

Finally, the Procuring Entity submitted that Clause 13 of the tender document was clear on the issue of the tender security. It stated that it was

not a requirement of the Act, the Regulations or the tender documents that the tender security should be given by a local bank. It argued that the tender security by the Chinese Bank was binding and enforceable. In addition, it stated that whereas the process of enforcing it would be lengthy and tedious, the security given by the Bank of China was valid, and the Procuring Entity's rights were not diminished or prejudiced in any way.

The Board has carefully considered the parties' submissions and examined the documents presented before it. It was common ground that the tender advertisement notice indicated that the tender validity period was 90 days, and the Instructions to Tenderers in the tender document at Clause 12 indicated that the tender validity period was 60 days.

The Board has read the tender notice, and noted that it was for five different tenders. The notice required bidders to purchase tender documents. Under Section 52 of the Act, tender documents are required to be prepared in accordance with certain conditions. These included the requirement to prepare them in such a way as to allow fair competition.

The Instructions to Tenderers at Clause 5 of the tender documents describes "Tender Documents" as follows:-

"5.1 the tender documents comprise the documents listed here below and should be read with any addenda

- a.
 - b.
 - c.
 - d. Form of Invitation to tenderers
 - e. Instructions to Tenderers
-"

The "Form" of Invitation for Tenders is contained at page 55 whilst the Instructions to Tenderers is contained at Page 10 of the tender document.

The question is whether, in this case, the tender advertisement contained the authoritative statutory information for purposes of instructing the bidder on the tender requirements.

Section 54(1) of the Act provides as follows:-

‘The Procuring Entity shall take such steps as are reasonable to bring the invitation to tender to the attention of those who may wish to submit tenders.’

The time durations for the advertisement are then specified in the Regulations. Clearly, the statutory object of the advertisement is to bring the invitation to tender to the attention of those who may wish to submit tenders. It makes the invitation, so that those generally or specially interested in the nature type or scope of the tender may participate in the process by purchasing the tender. The advertisement notice is not required by the Act or Regulations to contain specific instructions for tendering.

On the other hand, the Invitation to Tender is provided for under Section 51 of the Act which provides as follows:

‘The Procuring Entity shall prepare an invitation to tender that sets out the following:

- a) The name and address of the Procuring Entity;
- b) The tender number assigned to the procurement proceedings by the Procuring Entity;
- c) A brief description of the goods works or services being procured and the time limit for delivery or completion;
- d) An explanation of how to obtain the tender documents including the amount of any fees;
- e) An explanation of where and when tenders must be submitted and when the tenders will be opened;
- f) A statement that those submitting tenders or their representatives may attend the opening of tenders.’

Nowhere in that section does the law require the tender validity period to be stated in the invitation to tender. The provision of law that creates the statutory obligation for expression of the tender validity period is Section 52(3)(h). This provision states:

‘The tender documents shall set out the following:

A statement of the period during which tenders must remain valid....’

One must therefore first look at the Instructions to Tenderers within the tender documents, to determine what is required of tenderers, and not the advertisement notice or the invitation to tenderers.

In this case, Clause 12 of the Instructions to Tenderers clearly required the bidders to ensure that the tender validity was for a period of sixty days. The Board has further noted that whereas the Applicant treated the validity period as 90 days, its tender was evaluated and it was found to be technically responsive. It was not prejudiced at all by the alleged confusion on tender validity. It had the advantage of a long tender validity. Indeed, the Applicant has not alleged that it suffered loss, damage or prejudice on account of having provided a longer tender validity period nor has it alleged that it suffered or was likely to suffer any prejudice. It is also noteworthy that although the Applicant sought clarification on four occasions, it never sought any clarification on the issue of tender validity period.

Therefore, the materiality of the validity period to the complaint has no merit, and was an afterthought. Accordingly, the Procuring Entity did not breach Section 62(1) as argued by the Applicant on extension of bid validity period of the provisions of the invitation to tender or advertisement.

On the question of Kenya Revenue Authority Tax Compliance Certificate, it is not in dispute that the tender notice had such a requirement. As already observed, the tender notice was for five different tenders. Those tenders were for different procurements and had their own tender documents. Accordingly, the tenderers were to follow the instructions as stipulated in the tender documents. In this particular tender, the tender document did not have a requirement for a Kenya Revenue Tax Compliance Certificate. Further, the Procuring Entity did not use this parameter at any stage of the evaluation. Therefore, no prejudice was suffered by either the Applicant or the successful candidate, since both of them were evaluated and declared technically responsive.

On the issue of tender security, Clause 13 of the Instructions to Tenderers provides as follows:-

“The tenderer shall furnish as part of his tender, a tender security in the amount and form stated in Appendix to instructions to Tenderers.”

Tenderers were expected to furnish a tender security of 2% of the tender sum. The tender document had not specified whether the tender security should be from a local bank only. Further the Appendix to Instructions to Tenderers, specified the requirement as 'Bank Guarantee only'. In addition, all the bidders submitted valid tender securities. The Applicant submitted a Bank Guarantee from Equatorial Commercial Bank Limited, while the successful candidate submitted a Bank Guarantee from Bank of China Limited – Fujian Branch. Whereas it is prudent for a Procuring Entity to require that a tender security be issued by a local bank or a bank affiliated to local bank for ease of enforceability, there was no breach of Section 57, as argued by the Applicant.

Accordingly, all limbs of this ground of appeal, hereby fail.

Ground 2.2(a-b) – Section 66 of the Act

The Applicant alleged that since none of the tenderers complied with Section 64, the Procuring Entity was under a duty under Section 65 to notify the tenderers that none of the tenders was responsive in terms of the tender documents. Further, Section 66(1) of the Act, could not be invoked since the tenders failed to meet the requirements of Section 64. Therefore the purported evaluation was illegal and rendered the process fatal.

Finally, the Applicant argued that the tender evaluation was not completed within thirty days in accordance with Regulation 46.

The Procuring Entity in its response stated that both tenders were responsive in terms of the tender documents. There were no issues arising that warranted the Procuring Entity to seek clarification under Section 62(1) of the Act. Therefore, there was no breach of Section 64 of the Act as alleged by the Applicant, and thus Section 66(1) of the Act, was properly invoked.

The Procuring Entity further stated that the technical bid was opened on 26th June, 2007 and the financial bid opened on 16th July, 2007. The evaluation which was completed by 25th July, 2007, was therefore within the statutory period. The tender validity period was sixty (60) days and the Procuring Entity notified both the successful and unsuccessful bidders of the results of the tender process on 14th August, 2007. Accordingly, there was no breach of Section 66(6) of the Act, or Regulation 46 of the Regulations, as alleged.

Finally, the Procuring Entity argued that the prayers sought by the Applicant showed that all that the Applicant wanted was for the tender to be annulled, so that it could get a second chance to tender.

On its part, the successful candidate associated itself with the submissions of the Procuring Entity and stated that the appeal had no merit and should be dismissed.

The Board has noted that Section 65 of the Act provides that the Procuring Entity should notify tenderers where none of them was responsive in accordance with the tender documents.


As already observed in the previous ground, both tenderers underwent both preliminary and detailed evaluation and were declared responsive. Thereafter, the two bidders' financial bids were evaluated and the successful candidate was declared as the lowest evaluated bidder. The evaluations were not shown to have been in breach of the tender requirements. Accordingly, the allegation that the Procuring Entity breached Section 65 of the Act has no merit.

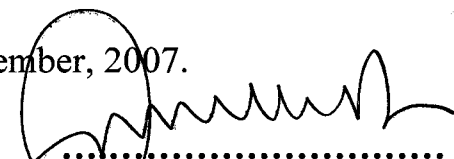
As regards, Section 66(1) of the Act and Regulation 46 which require that the evaluation be done within thirty days from tender opening, the Board has noted that the tenders were opened on 26th June, 2007 and the technical and financial evaluations were completed on 25th July, 2007 as evidenced by the technical evaluation report. Thirty days would have expired on 26th July, 2007. Further, both bidders were notified on 14th August, 2007 which was within the 60 days tender validity period.

Accordingly, there was no breach of the Act and the Regulations as alleged by the Applicant, and this ground also fails.

Taking into account all the above matters, the Appeal fails and is hereby dismissed. The procurement process may proceed.

Dated at Nairobi on this 14th day of September, 2007.


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CHAIRMAN
PPARB


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SECRETARY
PPARB

