

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 20/2008 OF 30TH JUNE, 2008

BETWEEN

**CHINA NATIONAL AERO – TECHNOLOGY IMPORT & EXPORT
CORPORATION (APPLICANT)**

AND

MINISTRY OF STATE FOR DEFENCE (PROCURING ENTITY)

Appeal against the decision of the Ministerial Tender Committee of the Ministry of State for Defence in the matter of Tender No. DOD/SYS/007/2007-2008 for Supply of Heavy Lift Vehicles.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. S. K. Munguti	-	Member
Ms. J. A. Guserwa	-	Member
Ms. L. G. Ruhiu	-	Member
Eng. C. A. Ogut	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Mr. I. K. Kigen	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO. 20/2008

Applicant, China National Aero-Technology Import & Export Corporation

Mr. N. W. Amolo	-	Advocate, Amolo & Kibanya Company Advocates
Mr. Patrick Mutuli	-	Advocate, Amolo & Kibanya Company Advocates
Mr. Ogeta Felix	-	Amolo & Kibanya Company Advocates
Mr. Tong Kang	-	Representative
Mr. Si Yankuan	-	Representative

Procuring Entity, Ministry of State for Defence

Brigadier J. H. Mutungi	-	Chief of Systems
Brigadier K. O Dindi	-	Legal Officer
Mr. Z. G. Ogendi	-	Chief Procurement Officer

Interested Candidate, Poly Technologies Inc.

Mr. Thomas Maosa	-	Advocate, Maosa & Company Advocates
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BOARD'S DECISION

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

BACKGROUND

The tender was advertised by way of expression of interest on 13th august, 2007. The bidders who responded were invited to participate in the tender dated 24th October, 2007. The Restricted Tender No. DOD/SYS/007/2007-2008 was for Supply of Heavy Lift Vehicles.

The tender opening /closing date was 29th November, 2007 but was extended to 6th December, 2007. Thirteen firms were given tender documents but only six firms submitted their bids. The tender was opened on the due date and attracted the following bidders: -

1. Ukrspets Exports;

2. ACMAT Company;
3. IVECO Defence Vehicles;
4. CATIC;
5. Poly Technologies; and
6. Russ Motors.

THE EVALUATION

The above bidders' tender documents were scrutinized and checked for documentation and brochures. The documentation included Copy of Business Registration, Certificate of Incorporation in the country of operation, Manufacturer's Authorization Form/Certificate certified by the equivalent Ministry of Trade and Industry/Ministry of Defence in the Country of origin.

After preliminary evaluation, China Aero Technology Import and Export Corporation (CATIC) and poly technologies were responsive on requirements of the tender while the rest failed to present licenses and or Authority by Manufacturer's certified by the relevant government ministries. Accordingly, CATIC and Poly proceed for technical evaluation.

In the technical evaluation, tenders were evaluated based on the parameters set out in the tender document.

The evaluation committee recommended award to Poly Technologies of China which was the best evaluated package.

However, Tender Committee approved award of Supply of Heavy Lift Vehicles to both Poly Technologies (69%) and China National Aero Technology Import and Export (31%).

THE APPEAL

This appeal was lodged on 30th June, 2008 by China National Aero-Technology Import & Export Corporation against the decision of the Tender Committee of Ministry of State for Defence in the matter of Restricted Tender No. DOD/SYS/007/2007-2008 for Supply of Heavy Lift Vehicles. The appeal is against the award of 69% of the aforesaid tender to the Interested Party namely Poly Technologies Ltd.

The Applicant was represented by Mr. N. W. Amolo and Mr. Patrick Mutuli, Advocates while the Procuring Entity was represented Brigadier J. H. Mtungi and Brigadier K.O Dindi. The Interested Party was represented by Mr. Thomas Maosa, Advocate.

The Applicant in its Request for Review has raised sixteen grounds of appeal.

The Board deals with them as follows:-

Grounds 1, 2, 3, 4, 5, 6, 11, 12, 14, 15 and 16

The Board finds that these are not grounds of appeal but mere statements not backed by any allegation of breach of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as the Act) or the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as the Regulations). Therefore, no finding is required.

Grounds Nos. 7, 8 and 9 (Breach of Sections 38, 58 and 64 of the Act read together with Regulations 47 & 48

The Applicant stated that the Procuring Entity in its Instructions to Tenderers required certain minimum specifications to be supplied by way of bid documents as clearly set out in the Tender Documents at Clause 2.12.3 which provides as follows:-

“The documentary evidence of the tenderers qualifications to perform the contract if its tender is accepted shall be established to the Procuring entity’s satisfaction;

(a) that, in case of a tenderer offering to supply goods under the contract which the tenderer did not manufacture or otherwise produce, the tenderer has been duly authorized by the good’s manufacturer or producer to supply the goods.

(b)

(c)”

The Applicant submitted that bidders who were neither manufacturers nor producers were required to submit a manufacturer’s authorization form/certificate certified by equivalent Ministry of Trade and Industry/Ministry of Defence in the country of origin. It further stated that from the contents of a letter dated 28th February, 2007 (8) which is addressed by the Interested Candidate to the Procuring Entity. It was obvious that the interested candidate had forwarded certain documents after the tender had closed/opened on 6th December, 2008. These documents were supplied after the special Evaluation team had visited the bidders in China in January, 2008 and had apparently requested for them. The Applicant contended that the evaluation team had no mandate to seek for the said documents. It went on to argue that the Interested Candidate did not supply these vital documents with its bid as required.

The Applicant further argued that it had furnished all the documents as required by the tender and was therefore the most responsive. It stated that the Interested Candidate was non-responsive as it failed to supply the documents required with the bid. Therefore, it was improper for the Procuring Entity to have awarded the Interested Candidate 69% of the tender when they were non-responsive.

It further submitted that the Procuring Entity had an obligation to verify the documents submitted by the bidders at the opening of the tenders and to keep a register and an inventory of such documents. The Applicant stated that the letter, the evaluation report and the minutes of the Ministerial Tender Committee were sent to it by an unknown person. It urged the Board to be guided by the spirit and intention of Sections 2,5, and 44(2) of the Act. It cited the case of **KURUMA S/O KANIU -VS- REGINAM - C.A. NO. 35 OF 1954** in which the Privy Council of England held that the test to be applied in considering whether evidence is admissible is whether it is relevant to the matter in issue. **The court should not be concerned with how the evidence was obtained.** This test applies to both criminal and civil cases.

The Applicant further argued that the Procuring Entity had breached Regulation 45 as the Interested Candidate ought to have failed at preliminary evaluation stage since it did not supply all the required documents. Therefore, its tender was not responsive pursuant to Section 64 of the Act.

Finally, the Applicant argued that its award of 31% of the tender by the Procuring Entity was unjustified and unfair as the Instructions to Tenderers did not provide for a split in the award of the tender. The tender was for Supply of 120 Heavy Lift Vehicles and could not be awarded on item by item. Therefore, the Procuring Entity must have considered extraneous factors or criteria in splitting the tender which factors and criteria were not specified in the instructions to tenderers. It argued that the letter of 28th February, 2007 (8) addressed to the Chief of systems Brigadier Mutungi must have been considered in the evaluation of the tenders and hence the split of the tender between the Applicant and the Interested Candidate.

In conclusion, the Applicant argued that the Procuring Entity did not give reasons as to why it was unsuccessful on the 69% portion of its bid.

In response the Procuring Entity submitted that the letter of 28th February, 2007 (8) was not considered during the evaluation process as the Interested Candidate had already supplied all the required documents with its original bid. It referred the Board to the requirements of Regulation 47(1) on

preliminary evaluation of open tenders. It stressed that at the tender opening stage, the tenderers who had submitted their bids attended and signed the register. The Applicant's representatives who attended the meeting did not raise any objections. It further argued that whereas it was aware that non-responsive tenderers ought to be disqualified, the Interested Candidate was responsive after the Cost Benefit Analysis was carried out.

The Procuring Entity urged the Board to find that the Applicant had breached Clause 2.26.1 of the Instructions to tenderers in that they had obtained confidential documents, namely the evaluation report, the Ministerial Tender Committee minutes from undisclosed sources thereby interfering with the tender process. The Procuring Entity submitted that the Applicant had therefore come to the Board with tainted hands as they had been trying to influence the tenders contrary to the Provisions of Section 38(1) (a) and (b) of the Act.

In response to the issue of the admissibility of the letter of 28th February, 2007 (8) the Procuring Entity stated that the cited case of Kuruma s/o Kaniu -Vs- Reginum as cited by the Applicant applied to criminal cases and had no relevance to the present proceedings.

With regard to the split in the award of the tender, the Procuring Entity stated that the same was properly done as neither the Applicant nor the Interested Candidate was the manufacturer of the vehicles being tendered for. The split in the tender was based on the Cost Benefit Analysis which placed the Interested Candidate in a favourable position compared to the Applicant. The Procuring Entity further argued that if the whole tender was awarded to the Applicant, the government stood to lose about Kshs. 126 Million. The justification for the criteria of Cost Benefit Analysis was based on the Provisions of Section 66 (3) (b) of the Act.

The Procuring Entity submitted that the Applicant was not the lowest evaluated bidder. The award was given based on the price and quality in comparison with the performance of the vehicles. The difference between the Applicant and Interested Candidate's bid was based on the cost and performance factors. Both firms were supplied by the same manufacturer, hence the engines, chassis and cabins were the same. The only difference was the prices that were offered. In case of specialized vehicles, the Applicant offered better vehicles than the Interested Candidate and hence the basis for the split of the tender.

Finally, the Procuring Entity maintained that it had not breached any provisions of the Act or Regulations. The Provisions of Clause 2.27.4 of the tender document were applied to all tenderers to determine their

responsiveness. They argued that the Act allows for split of tenders in certain cases as was the case in the instant tender.

On its part, the Interested Candidate associated itself with the submissions of the Procuring Entity. It further submitted that the important issue which the Procuring Entity considered in the evaluation of the tender was the technical and financial requirements. It submitted that it was the best evaluated tenderer. It argued that the Applicant had not convinced the Board that the Interested Candidate had not passed the technical and financial evaluation. The Interested Candidate had supplied all the required documents and was therefore responsive. It maintained that the letter of 28th February, 2007 (8) was in response to a request that was made by the special Technical Evaluation Committee in February 2008.

In reply to the submissions by the Procuring Entity and Interested Candidate, the Applicant stated that the purported loss of Kshs. 126 million by the Procuring Entity if it awarded the whole award to the Applicant was not supported by any evidence.

It further submitted that the letter of 28th February, 2007 (8) was sent by the Interested Candidate to influence the evaluation of the tender. This amounted to consideration of extraneous matters. It urged the board to consider responsiveness as the most important aspect of the process.

The Board has considered the submissions of the parties and examined the documents that were submitted.

The Board has noted that this tender closed/opened on 6th December, 2007. During the process of evaluation, a special technical evaluation team visited the bidders in their country of origin. In the case of the Applicant and the Interested Candidate, the visits were made from 6th January to 13th January, 2008.

The Board has further noted that a letter dated 28th February, 2007 (amended by hand to read 2008) was written by the Interested Candidate to the Chief of Systems of the Procuring Entity. The said letter stated as follows:-

*"To: Brig. J.H Mutungi
Chief of System
Ministry of Finance State for Defence
P.O Box 40668-00100
Nairobi, Kenya*

Date Feb. 28, 2007(8)

Dear Sir,

*Qualification Documents for Heavy Lift Vehicles, Tender No.
MOD/SYS/007/2007-2008*

First of all, please allow us to extend our highest compliment and regards to you. It was our great honour to receive your evaluation team for the above mentioned tender from Jan 6th to 13th. During their stay in China, we arranged the visit to the relate manufacturers and facilities and evaluated all the biding vehicles carefully together. We highly appreciated their hard work and profession.

As per the requirement of the team, now we would like to present you attached two files, which explicitly certify that Poly Technologies Inc. has been authorized by OEM and Ministry of Commerce and Chinese PLA will support us in the project. One is the manufacturer's authorization certified by China Chamber of International Commerce (CCIC), which is an authorized organization of Ministry of Commerce of China. The other is a letter from Bureau of Military Equipment & Technology Cooperation (BOMETEC), which is a foreign cooperation department of PLA, China. We hope these two documents will be helpful to your side.

If you have any question, please feel free to let us know. Thank you for your kind cooperation.

With Best Regards.

*Col. ® Wang
Vice President."*

The said letter of 28th February, 2007 (8) by the Interested Candidate was obviously written during the evaluation process and after the site visit. Such a letter could be construed to be an attempt to influence the evaluation and comparison of the tenders.

The successful candidate did not give a reasonable explanation as to why it had to supply documents after tender opening. If such documents had been supplied, during the submission of the tender such letter was not necessary. Therefore, the Interested Candidate could not be considered to have been responsive in accordance with Section 64 of the Act which provides as follows:-

"After the deadline for the submission of tenders, proposals or quotations:

- (a) no person who submitted a tender, proposal or quotation shall make any unsolicited communications to the procuring entity or any person involved in the procurement proceedings that might*

reasonably be construed as an attempt to influence the evaluation and comparison of tenders, proposals or quotations; and

- (b) *no person who is not officially involved in the evaluation and comparison of tenders, proposals or quotations shall attempt, in any way, to influence that evaluation and comparison."*

On the issue of splitting the tender award, the Board finds that this was not provided for in the Instructions to Bidders neither was this done in line with the requirements of Clauses 10(a) and (b) and 2.27.4 of the Tender Documents which provides as follows:-

Clause 10(a) and (b) provides as follows:-

"Pursuant to Paragraph 2.27, Award of Contract;

(a) *The points earned in the evaluations shall be added up and the tenderer scoring the highest marks and having complied with all stipulated tender conditions will be deemed the successful tenderer.*

(b) *Award shall be based on the consolidated price offered by the tenderer."*

Clause 2.27.4 provides as follows:-

"The Procuring Entity will award the contract to the successful tenderer(s) whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily."

Therefore the Procuring Entity's decision to split the tender was irregular.

Further, the Board has noted that the Applicant has in its possession confidential documents including the Evaluation Report and the Minutes of the Ministerial Tender Committee which were not obtained lawfully. The Board views the matter seriously and directs parties to abide by the requirements of Provisions of Section 44 (1) (c) of the Act when dealing with procurement matters. The said Section provides as follows:-

“During or after procurement proceedings, no Procuring Entity and no employee or agent of the Procuring Entity or member of a board or committee of the Procuring Entity shall disclose the following:- Information relating to the evaluation, comparison or clarification of tenders, proposals or quotations.”

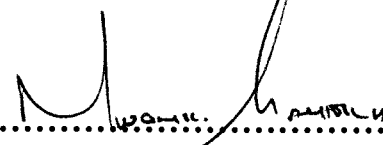
Taking into account the above matters, the appeal succeeds.

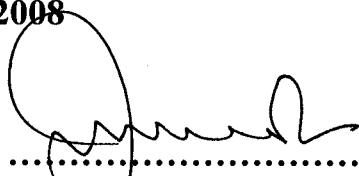
Finally, the Board has noted that strenuous representation were made concerning the importance of this tender to the Government and the public in terms of the possible loss of public funds. It is not lost on the Board that this is a tender of great significance to the country. However, it is important for the Procuring Entity to handle such a tender with care and attention that it deserves including strict adherence to the Regulations. A bad precedent on an important procurement could well lead to a backsliding in adherence to procedures in procurements of lesser importance.

The Board has also noted the submissions by the Applicant that only 69% of the tender that was awarded to Interested Candidate should be nullified. As the Board has already observed, the tender evaluation process was flawed. The splitting of the tender was irregular.

Accordingly, the Board orders that the entire award be, and is hereby nullified. The Procuring Entity may re-tender.

Dated at Nairobi on this 28th day of July, 2008


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CHAIRMAN
PPARB


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SECRETARY
PPARB