

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.26/2008 OF 29TH JULY, 2008

BETWEEN

SANITAM SERVICES (E.A) LTD.....APPLICANT

AND

KENYATTA UNIVERSITY.....PROCURING ENTITY

Appeal against the decision of the Tender Committee Kenyatta University, the Procuring Entity dated 16th July, 2008 in the matter of Tender No.KU/TNDR/S/3/SDB/2008-2009 for Provision of Sanitary Disposal Bins Services.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	-	Chairman
Mr. Joshua W. Wambua	-	Member
Mrs. L. G. Ruhiu	-	Member
Mr. Akich Okola	-	Member
Eng. C. A. Ogut	-	Member

IN ATTENDANCE

Mr. P. M. Wangai	-	Holding Brief for Secretary
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PRESENT BY INVITATION FOR APPLICATION NO.26/2008

Applicant, Sanitam Services (E.A) Ltd

Mr. B. M. Wamalwa	-	Advocate
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- Mr. S. M. Kamau Ng'ang'a - Director
 Mr. Wainaina Ng'ng'a - Director

Procuring Entity, Kenyatta University

- Mr. D. Mereka - Mereka & Co. Advocates
 Ms. I. W. Gichobi - Advocate, Mereka & Co. Advocates
 Prof. D.N. Mugendi - Deputy Vice Chancellor, Finance, Planning & Development
 Prof. G. M. Moluvi - Deputy Vice Chancellor
 Dr. N. M. Karagu - Registrar
 Mr. Aaron Tanui - Legal Officer
 Mr. Tirus Mburu - Employee, Kenyatta University

Interested Candidates

- Mr. Moses Kurgat - Advocate for Bins (Nairobi) Services Ltd
 Ms. Evalyne M. Khabala - Employee, Bins (Nairobi) Services Ltd
 Mr. Jack Opawa - Accounts Manager, Rodentkil Cleaning Co. Ltd
 Mr. Patrick Ndaga - Managing Director, Rentokil Initial (K) Ltd
 Ms. Anna V. Chepkonga - Director, Cockrid (K) Ltd
 Mr. Robert Kamau - Director, Pinpoint Hygiene Services Ltd

BOARDS DECISION

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

BACKGROUND OF AWARD

This tender was advertised by the Procuring Entity on 5th May, 2008. It was for Provision of Sanitary Disposal Bins Services. Tenders were opened on 27th May, 2008 in the presence of bidders' representatives. The seven bidders who returned their bids were as follows:

1. Sanitam Services (E.A) Ltd
2. Bins (Nairobi) Services Ltd
3. Rodent Kill Cleaning Ltd
4. Pinpoint Hygiene Services Ltd
5. Rentokill Initial Kenya Ltd
6. Nairobi Pest Control Services
7. Cockrid Kenya Ltd

Preliminary Evaluation

This was conducted to determine the responsiveness of the tenders to the mandatory tender requirements and was based on the submission of following documents:

1. Pin Number
2. Tax Compliance
3. Current Business Permit
4. Certificate of Incorporation/Business Registration
5. Physical Location of Business premises

Only bidders 2, 4, 5 and 7 were found responsive having complied with all the above mandatory requirements. Hence they proceeded to the technical evaluation stage. This was based on the following parameters:

1. General requirements
2. Company/Business profile
3. Business Address
4. Maximum volume of business handled in the last 2 years
5. Credit Period

All the four bidders qualified for financial evaluation after scoring more than 70 % which was the cut-off mark.

Financial Evaluation

This involved price comparison of the price quoted by the bidders. The results of the financial evaluation were as tabulated in the next page:

No.	Areas	Unit	Estimated Quantity	Name of the Firm/Company			
				Nairobi Bins (Unit price)	Pinpoint Hygiene (Unit price)	Rentokil Initial (Unit price)	Cockrid (K) Ltd (Unit price)
1.	Main Campus	Nos.	505	290	190	464	290
2.	Ruiru Campus	Nos.	55	290	190	464	290
3.	Parklands Campus	Nos.	7	290	190	464	290
4.	Mombasa Campus	Nos.	-	-	-	-	-
5.	Kitui Campus	Nos.	-	-	-	-	-

NB: Unit price are in Kshs. per bin per change.

Arising from the above information, the evaluation committee recommended the award of the tender to Pinpoint Hygiene Services Ltd at its unit price of Kshs. 190 per bin per change.

In its meeting held on 4th July, 2008, the Tender Committee concurred with the recommendations of the Evaluation Committee and awarded the tender to Pinpoint Hygiene Services Ltd.

Letters of notification of award to the successful and the unsuccessful bidders are dated 16th July, 2008.

THE REQUEST

This Request for Review was lodged by Sanitam Services (E.A) Ltd on 29th July, 2008 against the decision of the Tender Committee of Kenyatta University, the Procuring Entity dated 16th July, 2008 in the matter of Tender No.KU/TNDR/S/3/SDB/2008-2009 for Provision of Sanitary Disposal Bins Services.

The Applicant was represented by Mr. B. M. Wamalwa, Advocate while the Procuring Entity was represented by Mr. D. Mereka, Advocate. Bins (Nairobi) Services and Pinpoint Hygiene Services Ltd, Interested Candidates, were represented by Mr. Moses Kurgat, Advocate and Mr. Robert Kamau respectively.

The Applicant has raised eleven grounds of appeal and urged the Board to make the following orders:

1. **THAT** the Tender for provision of Sanitary Disposal Bin services by the procuring entity be awarded to Sanitam Services Limited.
2. **THAT** any other award of such services be cancelled forthwith and the same be awarded to Sanitam Services Limited.
3. **THAT** costs thereof be awarded to Sanitam Services Limited.

At the hearing, the Applicant did not advance any arguments but urged the Board to adopt the grounds as stated in the Request for Review. It also urged the Board to consider the documents annexed to the Request for Review.

In response, the Procuring Entity submitted that the Request for Review was frivolous and had no merit. The Procuring stated that it complied with the Public Procurement and Disposal, Act, 2005 and

Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as the Act and Regulations, respectively).

The Procuring Entity submitted that the tender was advertised as required by the Act. It stated that the tender document stipulated the technical and financial requirements that were to be met by the bidders. It argued that patent was not a technical requirement. It further argued that Section 34 (4) of the Act provides that technical requirements should not refer to a particular trademark, name, patent, design, type, product, service provider or a specific origin.

The Procuring Entity further submitted that the issue of patent was not within the domain of the Board. It argued that the matter can only be raised before the Industrial Property Tribunal, a body established under the Industrial Property Act, Act No.3 of 2001.

Finally, the Procuring Entity submitted that the Applicant was disqualified at the preliminary evaluation stage for failure to submit a registration certificate. The disqualification was done in accordance with Section 31(5) of the Act as the Applicant had submitted an incomplete tender. It invited the Board to note that the Applicant had not made any statement that there were any errors in the procurement process.

The successful candidate, Pinpoint Hygiene Services Ltd. submitted that it complied with all the tender requirements. It argued that its tender was responsive and therefore there was no breach of the Act or Regulations as argued by the Applicant.

Bins (Nairobi) Services, an interested candidate submitted that the Applicant had not demonstrated the provisions of the Act or Regulations that were breached. It submitted that the grounds of Appeal were based on the issue of patent. It argued that the Applicant was alleging that it had a patent in respect of sanitary bins and therefore all the other tenderers ought to have been disqualified. It pointed out that such an argument was wrong as all the tenderers including the Applicant are not manufacturers of sanitary bins.

Further, the Applicant had not shown how the issue of patent affected the tender.

Finally, the interested candidate argued that patent law was irrelevant to this tender. It argued that if the Applicant had any claims for breach of its patent, the dispute ought to be referred to the Industrial Property Tribunal.

The Board has considered the submissions by the parties and examined the documents submitted before it.

As the Applicant did not advance any arguments, but requested the Board to adopt the entire Request for Review, it is necessary to set out the grounds of Appeal as follows:

1. **THAT** *we are the registered patent holders of Patent No. AP 773 issued in the name of Sanitam Services Limited and we had annexed to our tender documents our Certificate as issued to ourselves as proof thereof.*
2. **THAT** *our patent has so been confirmed by the Court of Appeal of Kenya in Civil Appeal No. 228 of 2004 the effect of which is that we are the only lawful and legal owners of the said patent. Therefore any other person(s) so using the same can only do so through our permission, authority or license otherwise any such use will be an infringement on our patent which is punishable by law.*
3. **THAT** *therefore our rights as owners of a patent are enshrined and are to be found at section 54(1) of the Industrial Property Act, 2001.*
4. **THAT** *the procuring entity (Kenyatta University) sought for tenders for foot operated sanitary bins and it is this product for which we hold a patent on as hereinabove shown.*

5. **THAT** by a letter dated 16th July 2008 the procuring entity informed us that our bid for the aforesaid provision had not been successful and no further or other reasons thereto were adduced for the said lack of success.
6. **THAT** at Clause 3.5 of the Tender documents the procuring entity sought an indemnification against all third-party claims on infringement of patent, trademark or industrial design that might arise from the use of the services under contract.
7. **THAT** we are of the overwhelming belief that no other party could have complied with this mandatory and strict condition for the reason that:
 - (i) We had not allowed any other party the use of our patent by way of giving a licence, permission or authority to use which would have in turn enabled such other party to give any guarantees and/or indemnities as so sought; and
 - (ii) That clause 3.5 is in law void ab initio as it is a fundamental principle in law that parties cannot contract to oust the law. And the law of Patents is a substantive law.
8. **THAT** therefore it actually flows that given the above statements, then any other party so awarded this tender by the procuring entity is in breach of clause 2.28.2 and 2.28.3 of the tender document.
9. **THAT** it is further our position that this tender offends as against the mandatory provisions of Section 64(1) of the Public Procurement and Disposal Act, 2005.
10. **THAT** the procuring entity should have in the circumstances invoked sections 73 and 74 of the Public Procurement and Disposal Act, 2005 and which they did not do, failed to do so and deliberately chose not to do so.
11. **THAT** in sum total therefore this entire tendering process must of necessity fail.

It is clear that all the grounds raised by the Applicant revolve around the issue of patent. The Applicant alleges that it is the registered holder of patent No. AP 773 with respect to foot operated sanitary bins which are being procured by the Procuring Entity.

The Applicant argued that since it is the patent owner, no other person can provide such sanitary bins without its permission, authority or license. The Board notes that the Applicant did not attach a copy of the certificate of the patent to its Request for Review. The Applicant did not also submit a copy of the decision in Civil Appeal No.228 of 2004 which it has cited in its Request for Review.

The Board has noted that the tender was duly advertised in accordance with the Act. The tender notice and the tender documents gave a description of the item being procured.

The tender notice and clause 4.3.10 of Section IV of the Tender Documents stated that the tender was for 'provision of sanitary bins services'. Clause 4.3.10 stated as follows:-

"The Bins

- *Must be pedal*
- *Provisions of more than 100 bins*
- *Replacement of bin on weekly basis*
- *Bidders will be required to bring samples".*

The Board finds that the said clause 4.3.10 is framed in general terms and does not refer to trademark or a patent.

Further, the Board has noted that a Procuring Entity is prohibited by Section 34(4) of the Act from giving a technical requirement which refers to a trade mark, name, patent, design or type. The technical specifications in the tender documents did not refer to a trademark,

name, patent, design or type of the sanitary bins as argued by the applicant.

Therefore, if the Applicant has any claim that any of the bidders has infringed on its patent, it ought to lodge its claim with the right statutory body. The mandate of this Board is set in Section 93(1) of the Act. The said provision states as follows:

“ Subject to the provisions of this Part , any candidate who claims to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed”.

It is clear from the above provision of the Act, that for any party to be properly before the Board, it has to demonstrate breach of a duty imposed on a Procuring Entity by the Act or Regulations. As can easily be determined from the grounds of Appeal, the Applicant is complaining of a breach of its patent rights by other bidders. Whether such a patent exists; whether such a patent has been breached by any bidder is not an issue that can be dealt with by the Board. As submitted by the procuring Entity and the Interested Candidate, such a claim should be lodged with the Industrial Property Tribunal.

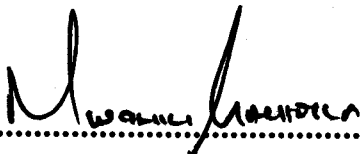
The Board has also noted that the Applicant has submitted that the Procuring Entity should have invoked Section 73 and 74 of the Act. The said Sections deal with alternative Procurement methods, namely restricted tendering and direct procurement methods respectively. By submitting that the Procuring Entity should have invoked the said procurement methods in this tender, the Applicant is objecting to the Procurement method used by the Procuring Entity. This submission flies in the face of Section 93(2) (a) which provides that a Procuring Entity's choice of procurement procedure is not subject to review.

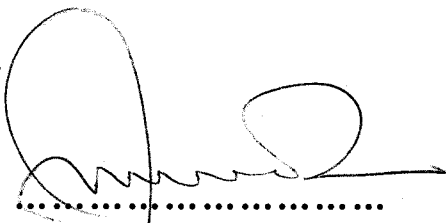
Finally, the Board has noted that the Applicant was disqualified at the preliminary evaluation stage for failure to submit a certificate of registration or incorporation. This was a requirement that was set out in clause 4.3.10 of the tender documents. The Board has also noted that the Applicant had submitted with its bid a tax compliance certificate that was valid up to 18th November 2006 and was therefore invalid at the time of tendering. The totality of all this is that the Applicant has not demonstrated that the tender process was not done in accordance with the Act.

Taking into account all the foregoing matters, the Board finds that this Request for Review has no merit.

Accordingly, the Request for Review fails and is hereby dismissed. The procurement process may proceed.

Dated at Nairobi this 28th day of August, 2008.


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CHAIRMAN
PPARB


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SECRETARY
PPARB