

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.28/2008 OF 13TH AUGUST, 2008

BETWEEN

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

AND

KENYA POLYTECHNIC

UNIVERSITY COLLEGEPROCURING ENTITY

Appeal against the decision of the Tender Committee of Kenya Polytechnic University College, the Procuring Entity dated 31st July, 2008 in the matter of Tender No.KPUC/T7/2008-2009 for Provision of Sanitary 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. C. R. Amoth	-	Board Secretary
Mr. P. M. Wangai	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO.28/2008

Applicant, Sanitam Services (E.A) Ltd

Mr. S. M. Kamau Ng'ang'a	-	Director
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Mr. Wainaina Ng'ang'a - Director

Procuring Entity, Kenya Polytechnic University College

Ms. Catherine Tongoi - Advocate, Tongoi & Co.
Advocates
Ms. Sarah Mwangi - Advocate, Tohadi & Co.
Advocates
Mr. Cleophas Ondieki - Chairman, Tender Committee
Mrs. Catherine Wainaina - Member, Tender Committee
Ms. Sarah W. Kibugi - Member, Tender Committee
Mr. J. M. Kanambiu - Member, Tender Committee
Mr. Maurice F. Okungu - Member, Tender Committee
Mr. Francis M. Mwangi - Member, Tender Committee
Mr. Ogutu D. Owira - Member, Tender Committee
Mr. Patrick F. N. Waihiga - Supplies Officer
Mr. Ngeny Tingos - Procurement Assistant
Ms. Agnes Gachau - SPC

Interested Candidate, Rodentkil Cleaning Co. Ltd

Mr. Dickens M. Ouma - Advocate, Okwach & Co.
Advocates
Mr. Jack Opana - Accounts Manager
Mr. Steve Biko - Sales Representative

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 10th May, 2008. The tender was for Provision of Sanitary Services. Three tenderers

responded to the tender notice before the closing of the submission of bids on 3rd June, 2008. These were:

1. Sanitam Services (E.A) Ltd
2. Rodent Kill Cleaning Ltd
3. Cockrid Kenya Ltd

Evaluation

This was based on the following parameters:

S/No.	Description	Max. Score
1.	Registration	1
2.	Registration No.	1
3.	Year of registration (2 yrs and below)	2
4.	Registered office address	3
5.	Telephone No.	
	i) Landline	1
	ii) Mobile	1
6.	Fax No.	1
7.	Relevant core line of business	4
8.	Latest audited accounts	5
9.	Letter of credit worthiness	2
10.	Company not insolvent or receivership	1
11.	Proof of tax payment:	
	i) NSSF	1
	ii) PIN	1
	iii) VAT	1
	iv) Tax compliance	2
12.	Corruption/fraudulent free	1
13.	Bid bond (2% of tender sum)	10
14.	Document completed, signed and stamped	2
15.	TOTAL	40

A summary of the technical scores were as follows:

S/No.	Supplier's Name	Score	Max. Scores
1.	Cockrid Kenya Ltd	39	40
2.	Rodentkil Cleaning Co. Ltd	27	40
3.	Sanitam Services	26	40

Financial Evaluation

This involved comparison of the unit prices per change per bin quoted by the three bidders. The results were as follows:

No.	Item description	Bidder's Name		
		Rodentkil Cleaning Co. Ltd	Cockrid (K) Ltd	Sanitam Services (E.A) Ltd
1.	Main Campus	232	290	500
2.	Women's Hostel	232	290	500
3.	South "B" Hostel	232	290	500
4.	Grand Total	696	870	1500

After the evaluation and recommendations thereof, the tender was awarded to Rodentkil Cleaning Co. Ltd at its quoted unit price of Kshs.232 per bin per change.

Letters of notification of award to the successful bidder is dated 3rd July, 2008. The notification letter to the Applicant is dated 31st August, 2008 while that of the Cockrid Kenya Ltd, unsuccessful bidder, is dated 5th August, 2008.

REQUEST FOR REVIEW

This Request for Review was lodged by Sanitam Services (E.A) Ltd on 13th August, 2008 against the decision of the Kenya Polytechnic University College; the Procuring Entity dated 31st July, 2008 in the matter of Tender No.KPUC/T7/2008-2009 for Provision of Sanitary Services. The Applicant was represented by Mr. Wainaina Ng'ang'a , Director while the Procuring Entity was represented by Ms. Catherine Tongoi, Advocate. Rodentkil Cleaning Co. Ltd, the successful candidate, was represented by Mr. Dickens M. Ouma, Advocate.

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 it.
2. **THAT** any other award of such services be cancelled forthwith and the same be awarded to the Applicant.
3. **THAT** costs thereof be awarded to the Applicant.

At the hearing, the Applicant argued all the grounds together, stating that the issues revolved around Clause 3.6.1 of the Tender Document and Sections 31, 64(1), 73 and 74 of the Public Procurement and Disposal Act, 2005 (*hereinafter referred to as the Act*).

The Applicant commenced its arguments by stating that Clause 3.6.1, of the tender document stated as follows "*The tenderer shall indemnify the Procuring Entity against all third-party claims of infringement of patent, trademark, or industrial design rights arising from the use of goods or any part thereof in the procuring entity's country*"

It stated that the Procuring Entity did not deny that the Applicant was the registered owner of Patent No. AP 773 issued in the name of

Sanitam Services Limited, which information it had submitted to the Procuring Entity together with its bid. The Applicant stated that it was a requirement, under the tender documents, that bidders were to submit samples together with their bids, and it did provide a sample.

The Applicant argued that, Section 57 of the Act, provides that a Procuring Entity may require that tender security be provided with tenders. It submitted that this requirement is meant to secure an indemnity for the Procuring Entity, should a tenderer fail to keep to its obligation. It argued that during the evaluation process, the Procuring Entity ought to have taken note of the fact that the samples provided by the tenderers, for sanitary services, were patented, as they were all "foot operated sanitary bins." It stated that at this point, the Procuring Entity should have sought from the owner of the patent the description of the patent, in order to make an appropriate decision. Further, it argued that the Procuring Entity should have sought the opinion of an expert on the matter, even if this required an extension of the tender validity period in order to satisfy itself and act appropriately.

Further, the Applicant argued that in terms of Clause 3.6.1 of the tender document, the Procuring Entity ought to have required the tenderers to provide it with an indemnity to cushion it against third party claims. Failing to do so was exposing the public to a risk, if infringements of patent rights occurred.

Finally, it stated that no other tenderer, except itself, would have complied with the mandatory requirements of Clause 3.6.1 for the reasons that:-

- (i) Being the patent owner, it had not allowed the use of the patent by way of licence, permission or authority to any other party, who would in turn be enabled to give a guarantee and/or indemnity as sought under Clause 3.6.1.

(ii) Clause 3.6.1 is in law void ab initio, as it is a fundamental principle in law that parties cannot contract to oust the law, and in this case, the law of Patents is substantive and hence cannot be ousted by this Clause.

In this regard, the Applicant stated that the tenderers were not responsive as required under Section 64(1) of the Act. It argued that it was the only tenderer who could supply the sanitary bins without breaking the law on patents, and therefore the Procuring Entity ought to have resorted to Restricted Tendering under Section 73 of the Act or Direct Procurement method as provided for under Section 74 of the Act.

The Applicant therefore, requested the Board to nullify the award, and order the Procuring Entity to award the tender to it. Further it requested the Board to award it the costs of the Request for Review.

In response, the Procuring Entity stated that Clause 3.6.1 was part of the tender document which had other requirements to be met. It argued that the Tender Document is a standard document. It submitted that according to Clause 3.6.1 a tenderer was expected to cushion the Procuring Entity against any future liabilities arising from infringement of patents, trademarks and copy rights. Therefore, the clause was necessary. It argued that, by signing the Form of Tender, the tenderer created an undertaking to cushion the Procuring Entity against claims on patents, trademarks and copy rights. It further argued that the Procuring Entity was satisfied with the signing of the Form of Tender, as this was adequate to cushion it against the claims that may arise from any infringements. It stated that, the indemnity was adequate and no cash was required to satisfy the requirements of Clause 3.6.1.

The Procuring Entity further argued that the issue of patent did not arise in this tender. It argued that if it was an issue, the Procuring Entity would have opted for Restricted or Direct Procurement method pursuant to Section 73 and 74 of the Act, respectively. It argued that Clause 3.6.1 was not meant to deal with patent issues, but rather sought for indemnification in case of any infringement. The Procuring Entity stated that the tendering process was not flawed as argued by the Applicant as it had processed the bids and ultimately made the award in accordance with the tender requirements, in the Act and the Regulations.

The Procuring Entity stated that Section 64(1) of the Act did not apply on this Request for Review.

It further argued that the Applicant had brought the case to the wrong forum. It argued that matters on infringement of patent rights should be taken elsewhere, but not to the Public Procurement Administrative Review Board, as it lacked jurisdiction on such issues.

With regard to the argument that the Procuring Entity ought to have invoked Section 73 or 74 of the Act, the Procuring Entity submitted that this did not apply. It referred the Board to the Tender Committee Minutes, to satisfy itself on how the decision of the Award was arrived at and to find that issues of patent did not arise. It stated that the award was made to the lowest evaluated tenderer.

The Procuring Entity cited the Board's decision in Application No.26/2008 of July 29, 2008, between Sanitam Services (EA) Ltd and Kenyatta University. In that case the Board ruled that the issues of whether a patent had been breached by any bidder or not, was not a matter that could be dealt with by the Board. It submitted that the facts of that case were similar to this Application and urged the Board to rule that the Applicant was in the wrong forum. In

conclusion, it requested the Board to dismiss the Request for Review and award it costs.

On its part, the Successful Tenderer, Rodentkil Cleaning Company Ltd, associated itself with the submissions of the Procuring Entity. It further stated that the Applicant was merely being vexatious. It argued that issues of patent were outside the jurisdiction of the Board.

Further, it stated that Section 34(4) of the Act bars a Procuring Entity from making reference to a patent. It argued that the description of the item to be procured by the Procuring Entity conformed to the requirements of Section 34(4) of the Act which states that "*The technical requirements shall not refer to a particular trademark, name, patent, design, type, producer or service producer or to a specific origin*". In the circumstances, the successful candidate urged the Board to dismiss the Request for Review.

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

The Board observes that the grounds raised by the Applicant revolve around the issue of patent.

The Board has examined Clause 3.6.1 in Section III of the tender document. The Board notes that this Clause did not require cash deposits to be made with the Procuring Entity, but rather, an undertaking to be made. The Board agrees with the argument of the Procuring Entity that by signing the Form of Tender, the tenderers met this requirement on indemnity. In the circumstances, the Board holds that the requirements of the tender were met by the signing of the Form of Tender.

With regard to the submission by the Applicant that no other tenderer could satisfy the requirements of Clause 3.6.1 except itself, the Board observes that the Procuring Entity advertised the tender, seeking to procure "Provision of Sanitary Services". Three bidders namely, Cockrid Kenya Ltd, Rodentkil Cleaning Ltd and Sanitam Services Ltd responded to the tender and were evaluated accordingly. From the Minutes of the Evaluation Committee and the Tender Committee, the Board finds that the issue of patents did not arise in the evaluation process. The Board notes that the provisions of Section 34(4) of the Act, prohibits Procuring Entities from giving a technical requirement which refers to a trademark, name, patent, design or type. The Procuring Entity did not in its advertisement refer to the goods to be procured as "Foot Operated Bins" which is the purported Patent owned by the Applicant.

In the circumstances the Board holds that the argument that no other tenderer could meet the requirements of Clause 3.6.1 cannot be sustained.

On the argument that the Procuring Entity should have resorted to Restricted Tendering or Direct Tendering methods, under Section 73 and 74 of the Act, respectively, the Board notes that two Sections of the Act deal with alternative procurement methods, namely Restricted Tendering and Direct Procurement methods, respectively. By arguing that the Procuring Entity ought to have invoked the said procurement methods in this tender, the Applicant is challenging 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.

The Board reiterates its decision in Application No.26/2008, between Sanitam Services (EA) Ltd and Kenyatta University of July 29, 2008 in which it held that according to Section 93(1) of the Act, for any

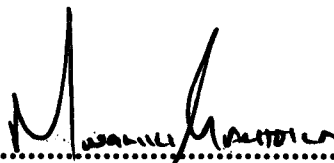
party to be properly before the Board, such a party must clearly demonstrate a breach of duty imposed by the Act and the Regulations on the Procuring Entity. From the grounds detailed above, the Request for Review is based on alleged breach of patent rights. It is not the duty of this Board to deal with complaints on breaches on patents, regardless of whether such rights exist and have been confirmed. In the premises, the Board agrees with the submissions by the Procuring Entity and the Successful Candidate that this kind of a claim should be lodged in the Industrial Property Tribunal.

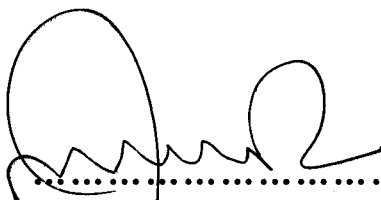
Taking into account all the above matters all the grounds of Appeal have no merit and must fail.

In the circumstances, the Request for Review has no merit and is hereby dismissed.

The procurement process may proceed.

Dated at Nairobi this 12th day of September, 2008.


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CHAIRMAN
PPARB


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SECRETARY
PPARB

