

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 40/2008 OF 24th NOVEMBER, 2008

BETWEEN

KEMA INVESTMENTS LTD..... APPLICANT

AND

**KENYA POWER AND LIGHTING COMPANY LTD
(PROCURING ENTITY)**

Review against the decision of the Tender Committee of The Kenya Power and Lighting Co. Ltd dated the 29th October, 2008 in the matter of Tender No. KPLC1/1C/3/40/08 for Supply of Fibre Glass Operating Rods and Linesmen Safety Belts

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Ms. J. A. Guserwa	-	Member
Ms. Natasha Mutai	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Ms. P. K. Ouma	-	Secretariat

PRESENT BY INVITATION

Applicant, Kema Investment Ltd

Mr. Mohammed Nyaoga	-	Advocate, Mohammed Muigai Advocates
Mr. Guto Mogere	-	Advocate, Mohammed Muigai Advocates
Mr. Manson O. Nyamweya	-	Managing Director
Mr. Shem M. Maingo	-	General Manager
Mr. Kenedy Ang'asa	-	Marketing Executive

Procuring Entity, Kenya Power and Lighting Ltd

Mr. Fred Okeyo	-	Advocate, Otieno Okeyo & Co. Advocates
Ms. Melanie Ochieng	-	Advocate, Otieno Okeyo & Co. Advocates
Mr. Owiti Awour	-	Legal Officer

Interested Candidates

Mr. Naaman Dilo	-	Landies Ltd
Mr. J. M. Mungai	-	Paitek Trading Co. Ltd

BOARD'S DECISION

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

BACKGROUND

The tender for Fibre Glass Operating Rods and Linesman Safety Belts was advertised on 14th August, 2008 and 23 firms bought the tender documents. The tender closed/opened on 18th September, 2008 and ten bids were returned from the following firms;

1. BES Europe Ltd
2. Electric Link (EA) Ltd
3. Sebille Fameca Ltd
4. Electric Link Ltd
5. Kema Investment Ltd
6. Paitek Trading Co. Ltd
7. Suburban Agencies Ltd
8. Landis Ltd
9. Carabelli SRL
10. Canaam Africa Trading Co. Ltd

EVALUATION

The Evaluation was carried out in three stages namely the preliminary, technical and the financial stage.

Preliminary Evaluation stage:

The Evaluation team considered whether the bidders had complied with the requirements of the tender on the following parameters:

1. Tender Security submitted - bank located in Kenya
2. Tender Security validity - 120 days
3. Tender Security sufficiency - 1% of bid
4. Tender Form and Price schedule - Delivery Duty Paid (DDP)
5. Confidential Business Questionnaire
6. Copy of registration/incorporation certificate
7. Tender validity - 90 days
8. Catalogues and or brochures/technical data

The following bidders were declared none responsive at this stage:-

1. Kema Investments Ltd
2. Paitek Trading Co. Ltd
3. Carabelli SRL
4. Seville Fameca Ltd

Technical Evaluation

The Applicant had tendered for the supply of linesman safety belts and not the Fibre Glass Operating Rods. The technical evaluation for the Linesman Safety Belts was carried out amongst the following firms that had submitted a bid and passed the preliminary evaluation:-

- M/s Landis ltd;
- Suburban agencies;
- Neo Electric;and
- BES Group.

The bids were evaluated on the following parameters:-

- ISO certification where applicable
- Type test certificates availability
- Copies of tests certified by recognized body
- Manufacturer's authorization
- Manufacturer's warranty
- Catalogues and brochures (English language)
- Statement of compliance to technical particulars
- Tested to BS EN 358 15 kN
- Connectors comply with BS EN 362

- Country of origin
- Waist Belt - attachment elements /integral lanyard
- Waist belt - 43 mm or more adjustable
- Back support with sponge
- Back support 50 mm longer than ½ belt circumferences
- Waist belt circumference 1200mm
- Involuntary release not possible

Two firms were found not responsive these were Neo Electric and BES Group. The two technically compliant firms were evaluated for financial responsiveness. The evaluation committee considered the delivered unit cost, delivered unit cost in currency of bid inclusive of VAT, exchange rate, delivered unit cost in Kshs. Inclusive of 16% VAT, quantity required, terms of payment, delivered period and the bid bond provided.

The evaluation committee recommended M/s Landis Ltd at the Delivered price VAT exclusive of Kshs. 11,000,000.00 for 2000 pieces of the Linesman.

THE TENDER COMMITTEE DECISION

The Kenya Power and Lighting Tender Committee in its meeting held on 29th October, 2008 deliberated on the recommendation of the evaluation committee and awarded the contract for the supply of fibre glass operating rods and linesman safety belts to the lowest evaluated bidder M/s Landis at a total delivered duty paid cost of Kshs. 55, 000, 000 VAT exclusive.

THE REVIEW

The Applicant was represented by Mr. Mohammed Nyaoga, Advocate while the Procuring entity was represented by Mr. Fred Okeyo, Advocate.

Grounds 1 And 2

These two grounds have been consolidated as they were the same issue.

The only issue for determination is whether the Applicant was properly disqualified from further evaluation on account of the missing documents in the two copies of the tender documents submitted to the Procuring Entity.

The Applicant argued that the Instructions to Tenderers required the bidders to submit one original tender and two copies. The applicant stated that it submitted a complete original tender and two copies marked 1 and 2 in accordance with clause 3.19 of the Tender documents.

The Applicant further argued that its tender documents and the copies were complete at the time of submission and that the allegation that the copies were incomplete was not raised at the time of the tender opening. It argued that the original tender was complete. In addition, the Applicant submitted that it was improperly evaluated and subsequently disqualified by the Procuring Entity in contravention of sections 63 and 66 of the Public Procurement and Disposals Act, 2005 (hereinafter referred to as the Act).

The Applicant made alternative submissions to the effect that even if the copies were incomplete, that was an error that did not go to the substance of

the tender and was curable. It argued that Section 64(2) of the Act allowed for minor deviations and it was open to the Procuring Entity to seek clarification.

In conclusion, the Applicant submitted that the main objective of the Act as defined in Section 2 is to promote fair competition, transparency, integrity and fairness in the procurement process. It argued that it was unfair for the Procuring Entity to disqualify the Applicant on grounds that did not affect the responsiveness of the tender.

● In response, the Procuring Entity denied that it breached Sections 63 and 64 of the Act as alleged by the applicant. It submitted that Section 63 dealt with correction of arithmetical errors and was not relevant to this Request for Review.

The Procuring Entity further submitted that clauses 3.19 to 3.21 of the Tender Document clearly provided in strict and mandatory terms that the bidders were to submit three complete sets of the Tender Documents. The three ● documents were to comprise of one original and two copies which were to be a replica of the original.

The Procuring Entity argued that at the tender opening on 18th September 2008, it was noted that the two copies submitted by the Applicant were incomplete. It stated that this fact was witnessed by one Shem Maingo, an official of the Applicant. The Procuring Entity further argued that failure to comply with the mandatory terms of the Tender Document by failing to submit two copies of the Tender Documents, made the Applicant's bid unresponsive. Consequently, the Applicant was disqualified at the preliminary stage of evaluation.

In addition, the Procuring Entity stated that the Applicant's bid was properly evaluated in compliance with section 66 of the Act. It submitted that the tender by the Applicant was rejected pursuant to Regulation 47(1) and (2) of the Public Procurement and Disposals Regulations, 2006. (Hereinafter referred to as the 'Regulations')

The Procuring Entity further submitted that it complied in full with the Act, Regulations and criteria set in the Tender Documents. It referred the Board to a document titled "Tender Opening Comments and Observations on Tender No. KPLC/ IC/5/3/ 40/2008". It pointed out that the document witnessed and signed by a Mr. Shem Maingo on behalf of the Applicant. It pointed out that the said document clearly states that copy 2 of the Applicant's bid document was incomplete. However, the Procuring Entity concluded that it did not prepare minutes of the tender opening meeting.

In conclusion, the Procuring Entity urged the Board to dismiss the Request for Review.

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

Upon examination of the tender documents the Board has noted that:

The Applicant submitted three sets of tender documents marked original, copy 1 and copy 2. There is a covering letter on all the three tender documents in the tender. It is also noted that certain documents are missing from the tender documents marked copy 1 and copy 2. The Board has noted

that the Applicant stated that it had submitted complete set of documents. On the other hand, the Procuring Entity submitted that the copies were incomplete and this was noted at tender opening.

The Board has to decide which party is right. To decide the issue, the Board has noted that the Procuring Entity alleged that the issue of incompleteness of the tender documents marked copy 1 and 2 was noted at the tender opening. However, the Procuring Entity conceded that it did not prepare the minutes of the tender opening meeting. This is the only record that would have assisted the Board to determine what transpired at the tender opening. Indeed, the preparation of the minutes of the tender opening is a mandatory requirement under **Section 60(8)** which provides as follows;

.....
.....

(8) The tender opening committee shall prepare tender opening minutes which shall set out -

- a) A record of the procedure followed in opening the tenders;
and***
- b) The particulars of those persons submitting tenders, or their representatives, who attended the opening of the tenders.'***

The Board has further noted that the form titled: "Tender Opening Comments and Observation" has two parts. The first part has some comments on the bid documents. In observation number two it states ***"Kema investments copy Two of the tender bid documents was not complete and their representative confirmed the same."***

Part two of the said document was on samples submitted by the Bidders. This is the part signed by Mr. Maingo on behalf of the Applicant. The Board has further noted that the document is not witnessed by any officer of the Procuring Entity.

The Board has further noted that the form titled "Tender opening comments and observations" only had comments on 'copy two' of the tender document. However, the letter of notification to the Applicant dated 11th November 2008 stated that the Applicant was not successful because....

'Copy 1 and 2 of your bid documents were incomplete. Brochures, Technical data and Price schedule were not attached.'

The Board has noted that the tender opening form that the Procuring Entity relied on did not contain any comments on 'copy 1' of the tender document.

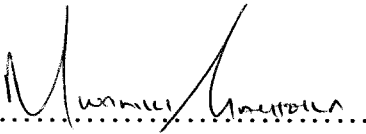
In view of the inconsistent factual issues as recorded by the Procuring Entity and in the absence of minutes of the tender opening meeting, the benefit of doubt must lie in favour of the Applicant.

The Board finds that though Regulation 47 is framed in mandatory terms, the circumstances under which the Applicant was disqualified were not clear, as the mandatory requirements under Section 60(8) of the Act were not complied with. Consequently, the Board finds that the Applicant was improperly disqualified at the preliminary stage of evaluation. It is therefore not necessary to make a finding on the alternative argument by

the Applicant. Suffice to say that Regulation 47 is clear that a bidder who fails to submit the required number of copies should be disqualified.

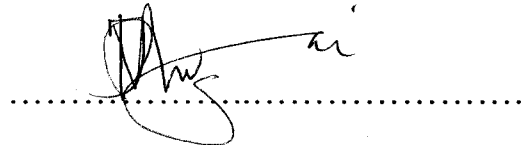
In the premises, the Request for Review succeeds. The award of the tender to the successful bidder is hereby nullified and the Procuring Entity is hereby directed to re-evaluate the tenders including that of the Applicant in accordance with the Act, Regulations and Tender Documents and award the tender accordingly.

Dated at Nairobi on this 23rd day of December, 2008



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Signed Chairman



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Signed Secretary

