

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO.6/2008 OF 17TH FEBRUARY, 2009

BETWEEN

PETROLEUM & INDUSTRIAL SERVICES LTD.....APPLICANT

AND

NATIONAL OIL

CORPORATION OF KENYA.....PROCURING ENTITY

Review against the decision of the Tender Committee of the National Oil Corporation of Kenya, the Procuring Entity dated 2nd February, 2009 in the matter of tender No.NOCK/T/10/2008-2009 for Supply of Suction Pumps, Dispenser and Submersible Pumps.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	-	Chairman
Amb. C.M Amira	-	Member
Ms. Natasha Mutai	-	Member
Ms. Judith Guserwa	-	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.6/2009

Applicant, Petroleum & Industrial Services Ltd

- Mr. G. Imende - Advocate, Mohammed Muigai
Advocates
- Mr. M. Khaseke - Advocate, Mohammed Muigai
Advocates
- Mr. Boniface Ngunjiri - Managing Director

Procuring Entity, National Oil Corporation of Kenya

- Mr. Mwaniki Gachuba - Procurement Manager

Interested Candidates

- Mr. Varun Sharma - Marketing Director, Premier
Agencies Ltd
- Mr. Danson Muchemi - Assistant Director, Yilmaz
Company
- Mr. Vinod Shah - Director, Unicorn Sales & Services
Ltd

RULING ON PRELIMINARY OBJECTION

At the commencement of the hearing the Board noted that the Procuring Entity had filed a Preliminary Objection raising the following grounds:-

- 1. "That the Applicant has no right of audience and cannot be heard by the Public Procurement Administrative Review Board as it has not filed any Request for Review as Memorandum of Appeal does not comply with the mandatory provisions of Section 93(1) of the Public Procurement and Disposal Act, 2005 (the Act) as read together with Regulation 73(1) and the Forth Schedule of the Public Procurement and Disposal Regulations, 2006.**
- 2. That the Applicant has no right of audience and cannot be heard by the Public Procurement Administrative Review as the Memorandum of Appeal does not comply with the mandatory requirements under Regulation 73(2)(c)(i) and/or (ii) of the Public Procurement and Disposal Regulations, 2006".**

The Procuring Entity submitted that the Applicant had no right of audience for failure to comply with the mandatory requirements of the Act.

It argued that the Request for Review is time barred for failure to comply with Regulation 73(2) (c)(i) of the Public Procurement and

Disposal Regulations, 2006 (hereinafter referred to as the "Regulations"). It stated that since the Applicant was complaining about the evaluation process took more than thirty days contrary to Regulation 46, the Request for Review ought to have been filed within 14 days of the occurrence of that breach.

The Procuring Entity informed the Board that the Applicant was invited for the opening of the financial bids and therefore it was aware that the evaluation process was not completed within thirty days as required by the Regulations.

The Procuring Entity further argued that the Memorandum of Appeal was filed out of time contrary to the express provisions of Regulation 73(2) (c)(i). It stated that since the Applicant was notified by a letter dated 2nd February, 2009, the fourteen days Appeal window expired on 16th February, 2009. It pointed out the Memorandum of Appeal was filed by the Applicant on 17th February, 2009 outside the stipulated appeals window.

The Procuring Entity further submitted that the Applicant breached the mandatory provisions of Section 93(1) of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as the Act) and Regulation 73(1). It stated that the document filed before the Board is titled "Memorandum of Appeal". It pointed out that such kind of document is not contemplated by the Act or the Regulations. To the Procuring Entity, an Applicant must file a Request for Review in

accordance with Regulation 73(1). The said Regulation clearly states that a Request for Review must be filed and shall be made in Form RB1 which is set out in the Fourth Schedule to the Regulations. It stated that the Applicant did not file a Request for Review in accordance with the Regulations and therefore the appeal filed and titled Memorandum of Appeal should be struck out.

Finally, the Procuring Entity submitted that the Memorandum of Appeal is fatally defective and it should be dismissed.

In response, the Applicant stated that a preliminary objection should be a pure point of law where the facts are not in dispute.

The Applicant stated that the letter of notification was received on 6th February, 2009. Therefore, the days started running for purposes of the Appeal on that day. To the Applicant, it was the Procuring Entity which had the burden to prove when it posted the letters of notification. It argued that the Applicant failed to tender any evidence on the mode of dispatch of the letters of notification. It was therefore clear that there was a dispute on facts and the preliminary objection on this ground had no merit.

On the issue of the documents, filed with the Board, being titled "Memorandum of Appeal", the Applicant argued that this defect was not fatal. It pointed out that the concept of an appeal is captured by the Act and the Regulations. It pointed out that Section 93(2) (d)

states that the Board has no jurisdiction when an Appeal is frivolous. This was evidence that use of the word appeal is not alien to the Act. It also pointed out that Form RB1 in the forth schedule also uses the word Memorandum.

The Applicant further submitted that the alleged defect did not go to the substance of the issues but was only a defect on the form which was not fatal. It cited Section 72 of Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya which provides as follows:-

"DEVIATION FROM FORMS

Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead".

As regards the objection based on Regulation 73(2) (c)(ii), the Applicant argued that the issue of the evaluation period was not the only ground it had raised. Further, it submitted that the Procuring Entity was trying to rely on a breach it had committed and it was wrong for a party to benefit from its own breach.

Finally, the Applicant submitted, on without prejudice and in the alternative that it should be granted leave to amend the Memorandum of Appeal to read "Request for Review".

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

The Board has noted that three issues arise for determination as follows:-

1. Is the Application time barred within the meaning of Regulation 73(2) (c) (I)?
2. Is the Application filed outside time contrary to the provisions of Regulation 73(2) (c) (ii)?
3. Is the Memorandum of Appeal fatally defective for failure to comply with the requirements set out in Form RB1 in the Fourth Schedule of the Regulations?

The Board will deal with the first two questions together as they raise a similar issue of the appeal window.

The Board has noted that Regulation 73(2) (c)(i) and (ii) provide as follows:-

73(2) "The request referred to in paragraph (1) shall:-

(a)

(b)

- (c) Be made within fourteen days of**
- (i) the occurrence of the breach complained of where the request is made before the making of an award:-**
 - (ii) the notification under sections 67 or 83 of Act”.**

As regards Regulation 73(2) (c)(i) it is clear that this Regulation is applicable when the Request for Review is made before the making of an award. The Regulation allows an aggrieved bidder to approach the Board before an award is made. In such a scenario, the Applicant has to file its Request for Review within fourteen days of the occurrence of the breach.

In the present application, the Procuring Entity has already made an award and the Request for Review was filed thereafter. The said Regulation is therefore not applicable to the circumstances of this matter. In any event, the Board has noted that the issue of the evaluation period is not the only issue raised by the Applicant.

As regards Regulation 73(2) (c) (ii), it is clear that an Applicant must file the Request for Review within fourteen days of the notification of award under Section 67 or 83 of the Act. The applicable Section for the purposes of this Application is Section 67 which provides as follows:-

67(1) "Before the expiry of the period during which tenders must remain valid, the Procuring Entity shall notify the person submitting the successful tender that his tender has been accepted.

(2) At the same time as the person submitting the successful tender is notified, the Procuring Entity shall notify all other persons submitting tenders that their tenders were not successful.

(3) For greater certainty, a notification under subsection (2) does not reduce the validity period for a tender or tender security".

Under Section 67, the Procuring Entity has a duty to notify both the successful and the unsuccessful tenderers of the outcome of the award. The Board has noted that Procuring Entity notified the parties by a letter dated 2nd February, 2009. The point of departure between the parties is when the letters were dispatched. The Procuring Entity stated that the letters of notification were posted on 2nd February, 2009 by ordinary post.

The Procuring Entity did not produce any evidence on the date it dispatched the letters of notification. As the Board has stated severally on this issue, it is upon the Procuring Entity to show when and how it dispatched the letters of notification. Upon doing so, it will not be responsible if an Applicant is late in collecting the letter

from the post office. Further, what is important is not only the date of the letter but the actual date of dispatch.

In this case, having failed to prove when it posted the letter, which is the basis of this limb of preliminary objection, the argument that the Applicant is time barred has no merit.

Accordingly, this two limbs of the preliminary objection fail.

The final issue for determination is whether the title of the Application as a "Memorandum of Appeal" is fatal.

The Board notes that Section 93(1) and Regulation 73(1) are clear that a candidate in a tender who wishes to seek administrative review must file a request for Review in Form RB1 set out in the schedule to the Regulations.

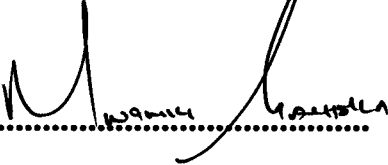
The Board has carefully considered the document filed by the Applicant. Apart from the heading "Memorandum of Appeal" the entire document meets all the requirements set out in Form RB1. It contains the parties, the decision of the Procuring Entity being challenged, the tender number, the grounds and the orders being sought.

It is the considered opinion of the Board that it would be draconian and not in the interest of justice to strike out the application merely on the ground that the heading is wrong. The Board has noted that the Procuring Entity filed a response and the wrong heading has caused no prejudice.

Accordingly, the Board holds that the deviation by the Applicant is merely on form and no substantive issue is raised. The Board directs that the heading be amended to read Request for Review instead of Memorandum of Appeal.

Taking into consideration all the above, the preliminary objection is dismissed. The matter shall proceed to full hearing on merit.

DATED at Nairobi this 13th day of March, 2009



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**CHAIRMAN
PPARB**



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**SECRETARY
PPARB**

