

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW**

**BOARD**

**REVIEW NO. 41/2009 OF 22<sup>ND</sup> OCTOBER, 2009**

**BETWEEN**

**MIDLANDS LIMITED.....APPLICANT**

**AND**

**MINISTRY OF STATE FOR DEFENCE..... PROCURING ENTITY**

Review against the decision of the Ministerial Tender Committee of the Ministry of State for Defence, the Procuring Entity dated 15<sup>th</sup> September, 2009 in the Matter of tender No.MOD/423(072)2009-2010 for Supply of Fresh Vegetables, Fruits and Potatoes

**BOARD MEMBERS**

Ms. Judith Guserwa	-	Member, In the Chair
Mrs. Loise G. Ruhiu	-	Member
Amb. Charles M. Amira	-	Member
Mr. Joshua W. Wambua	-	Member

**IN ATTENDANCE**

Mr. C. R. Amoth	-	Board Secretary
Mr. P. M. Wangai	-	Secretariat
Ms. Kerina Rota	-	Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Midlands Limited**

- Mr. Peter Kioni - Advocate, Odongo Okeyo & Co.  
Advocates
- Mr. Julius Mukono - Sales and Marketing Manager

### **Procuring Entity, Ministry of State for Defence**

- Mr. Z. G. Ogendi - Chief Procurement Officer

### **Interested Candidate, Trendy Cars Ltd**

- Dr. Zablon R. Minyonga - Director

## **BOARD'S DECISION**

Upon hearing the representations of the parties and interested candidate herein, 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 21<sup>st</sup> May, 2009. The tender was for Supply of Fresh Vegetables, Fruits and Potatoes to Nairobi Units. The tender opened on 10<sup>th</sup> June, 2009 in the presence of the bidders' representatives. Nineteen bidders who submitted their bids were as follows:

1. Tzarina Enterprises Ltd
2. Tarbat Supplies Ltd
3. Terrrapin Company
4. Frecan Agencies
5. Master Commodities Ltd
6. Utawala By-Pass Butchery
7. Bruce Farms Ltd
8. Wam Contractors Ltd
9. The Meadows Caterers
10. Umeme Enterprises Ltd
11. Trendy Cars
12. Aenod Allied Systems
13. Kiwaka General Merchants
14. Pisu & Co. Ltd
15. Betkam Exotics Ltd
16. Grajos Supplies
17. Midland Limited
18. Greenland-Agro producers Ltd
19. Cares Catering & Supplies Ltd

### **Evaluation**

A preliminary evaluation was conducted to determine the responsiveness of the tenders to the tender documents. This was based on submission of the following documents:

- Bid Bond
- Trade License

- Certificate of Incorporation/Registration
- Tax Compliance Certificate

All the nineteen bidders were found responsive and therefore qualified for the next stage of the evaluation which was based on the following parameters:

1. Line of Business	<u>Marks</u>
(i) Existence of Business	- 10
(ii) Standard of Cleanliness	- 10
(iii) Accessibility	- 5
(iv) Experience	- 5
(v) Storage Facilities	- 5
2. Transport	
(i) 1 -2 vehicles	- 5
(ii) Over 3 vehicles	- 15
<b>TOTAL</b>	<b>- 55 points</b>

A summary of the evaluation report was as indicated here below:

S/No.	Tenderer's Name	Existence	Cleanliness	Accessibility	Experience	Storage	Transport	Total	Recommendation
1.	Trendy Cars	10	0	5	0	0	0	15	N

2.	Kiwaka General Merchants	10	5	5	5	0	15	40	R
3.	Betkam Co. Ltd	10	10	5	0	5	5	45	R
4.	Grajos Supplies	10	3	0	0	0	0	13	N
5.	Midlands Limited	10	10	0	5	5	15	45	R
6.	Greenland Agroproducers	10	10	5	0	5	15	45	R
7.	Care Caterers & Suppliers Ltd	10	10	5	0	2	15	42	R
8.	Tzarina Enterprises Ltd	10	10	5	3	0	5	33	R
9.	Tarbat Supplies	10	5	5	5	0	5	30	R
10.	Terrapin Company	10	3	5	2	0	0	0	N
11.	Frecam Agencies	10	3	5	0	0	5	23	N
12.	Master Commodities	10	10	5	5	5	15	50	R
13.	Aenod Alliance Ltd	10	3	2	0	0	10	25	N
14.	Pisu & Co. Ltd	10	10	5	0	5	15	45	R
15.	Wam Contractors	10	5	0	0	0	5	20	N
16.	Meadows Caterers	10	5	5	0	0	0	20	N
17.	Utawala By-Pass Butchery	10	3	3	0	0	5	21	N
18.	Bruce Farms	10	5	5	0	0	0	20	N
19.	Umeme Enterprises Ltd	10	5	5	5	0	0	25	N

**KEY:** N - None-Responsive

R - Responsive

Arising from the above information, nine bidders were found responsive after attaining the cut-off mark of 30 points. Hence they qualified for Commercial evaluation.

### **Commercial Evaluation**

This was based on the prices quoted by the bidders and it accounted for 50 points. The formula used for commercial evaluation was as follows as stipulated in the tender document:

$$\frac{\text{Low Price}}{\text{Quoted Price}} \times 50$$

After the evaluation, the Evaluation Committee recommended the award of the following items to the Applicant:

<b>S/N</b>	<b>Item Description</b>	<b>U/Acc</b>	<b>Cost (Kshs)</b>
<b>1.</b>	Cabbage	kgs	10.00
	Carrots	kgs	14.00
	Tomatoes	kgs	30.00
	Onions	kgs	30.00
<b>2.</b>	Pineapples	kgs	26.00
	Oranges	kgs	30.00
	Mangoes	kgs	24.00

In addition, Master Commodities Ltd, the successful tenderer was recommended for the award of only one item namely potatoes at Kshs. 1, 600.00 per 82 Kgs.

In its meeting held on 1<sup>st</sup> September, 2009, the Ministerial Tender Committee differed with the recommendations of the Evaluation Committee and awarded the tender to Master Commodities Ltd as follows:

S/No.	Item	Price per Kg (Kshs)
1.	Cabbages	15.00
2.	Carrots	22.00
3.	Tomatoes	35.00
4.	Onion	30.00
5.	Pineapples	35.00
6.	Oranges	30.00
7.	Mangoes	25.00
8.	Potatoes	1, 600.00

Notification letters to the successful and unsuccessful tenderers are dated 15<sup>th</sup> September, 2009.

### **THE REVIEW**

This Request for Review was lodged on 22<sup>nd</sup> October, 2009 by Midlands Limited, against the decision of the Ministry of State for Defence, Procuring Entity in the matter of tender No.MOD/423(072) 2009-2010 for Supply of Fresh Vegetables, Fruits and Potatoes to Nairobi Units. The Applicant was represented by Mr. Peter Kioni, Advocate, while the Procuring Entity was represented by Mr. Z.G.

Ogendi, Chief Procurement Officer. Trendy Cars Ltd, an Interested Candidate was represented by Dr. Zablon R. Minyonga, Director.

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

1. Direct the Ministry of State for Defence to re-award the entire tender to Midlands Limited;
2. Payment of costs to the Applicant.

### **PRELIMINARY ISSUE**

At the commencement of hearing, the Procuring Entity raised a Preliminary Objection. It stated that the Request for Review was filed outside the stipulated time and indeed after the signing of the contract between the successful tenderer and the Procuring Entity. The Procuring Entity submitted that the notification letter was faxed to the Applicant on 15<sup>th</sup> September, 2009. It further submitted that it had since signed a contract with the successful bidder on October, 13<sup>th</sup> 2009. It therefore urged the Board to make a finding that it did not have jurisdiction on the matter pursuant to Section 93(2) (c ) of the Public Procurement and Disposal Act, 2005.

In response, the Applicant stated that it was not notified of the outcome of the award, contrary to Section 67(2) of the Act. It argued that it only got to know of the outcome of the tender on or about 19<sup>th</sup> October, 2009, when its representative visited one of the Defence Units in Nairobi, namely Embakasi, while in the process of invoicing



the Procuring Entity on other goods it had supplied earlier. It stated that, it was at this point in time that it was informed by an Officer at the said unit that the tender for supply of fruits and vegetables for the year 2009/2010 had been awarded to another bidder. It stated that, it was at this stage that it was shown a copy of the Letter of Notification to the successful bidder, Master Commodities Limited. It submitted that, it then decided to file a Request for Review with the Board, notwithstanding the fact that it had not received a notification letter. It averred that as at the time of the hearing of the case by the Board, it had not received any communication from the Procuring Entity, regarding the outcome of the award. In the circumstances, it requested the Board to make a finding that its Request for Review was within time and that the Board has jurisdiction over the matter.

On his part, Dr. Rashid for Trendy Cars, an Interested Candidate submitted that they had received their Letter of Notification on 26<sup>th</sup> October 2009, through post, informing it that, it had been unsuccessful on the tender.

The Board has carefully considered the submissions of the parties and examined the documents presented before it.

The issue for the Board to determine is whether the Applicant was notified of the Award, and if so, when and further determine whether the Request for Review was filed on time.

The Board has noted that the copies of the notification letters in the custody of the Procuring Entity, to all bidders were dated 15<sup>th</sup> September, 2009.

The Board further notes that the Applicant denies having received the Letter of Notification. The Procuring Entity, when asked to prove the method by which it notified the bidders, it stated that it usually faxes the letters to the bidders. In this case, the Procuring Entity did not show any evidence to the effect that it either faxed or posted the letter to the bidders. In the circumstances, the Board is left to rely on the date (19<sup>th</sup> October, 2009) that the Applicant got to know about the outcome of the tender as the date of notification for the purposes of filing the Request for Review. Further, the Board notes that the Interested Candidate, Trendy Cars, received its letter of notification through the Post Office on 26<sup>th</sup> October, 2009 which is much later after the date when the Applicant got to know about the Award. Taking the notification date as 19<sup>th</sup> October, 2009 the 14 days appeal window would close on 2<sup>nd</sup> November, 2009. In the circumstances, the Board finds that, the Request for Review by the Applicant filed on 22<sup>nd</sup> October 2009 is within time, in line with the requirements of the Act.

On the issue of the contract signed by the Procuring Entity and the successful bidder, the Board finds that the same was not signed in accordance with the provisions of Section 68(2) of the Act.

In view of the foregoing, the Preliminary Objection fails and is hereby dismissed. Accordingly, the Board will hear the matter on merits.

**Ground One: Breach of Section 66(4) of the Act**

The Applicant submitted that the Procuring Entity breached Section 66(4) of the Public Procurement & Disposal Act, 2005 by failing to award the tender to the Applicant, despite it being the lowest bidder. It stated that during the tender opening/closing, the prices it had quoted were lower than those of the successful bidder, as read out loudly. It stated that since it had complied with all the other tender requirements, as set out in the tender document, it ought to have emerged as the lowest evaluated bidder. Further, it submitted that it had been servicing a similar tender with the Procuring Entity and hence it met all the tender requirements, which were essentially almost the same to the tender it had been servicing.

In response, the Procuring Entity submitted that it had complied with Section 66(4) of the Act and thus the Applicant had no justifiable reason for feeling prejudiced. It argued that Section 66(4) of the Act provides that the successful tender shall be the tender with the lowest evaluated price but not of necessity the lowest bidder. It submitted that the Evaluation Committee had carried out evaluation of the bids in line with the requirements of the tender documents. It referred the Board to the detailed evaluation report on how the tender was evaluated and ultimately awarded.

The Board has considered the submission of the parties and perused the documents before it. The Board notes that Clause 2.22 of the Instruction to Tenderers required the Procuring Entity to conduct a preliminary examination of the tenders to determine their responsiveness to the tender requirements. The Board further notes that this was to be followed by a detailed evaluation as provided for under Clause 2.24 of the Instructions to Tenderers. Further, the Board has noted that the Appendix to the Instructions to Tenderers provided for the evaluation criteria and other requirements that tenderers were required to comply with. Such requirements included submission of a valid business permit, certificate of incorporation/ registration and a bid bond.

The Board has perused the copy of the evaluation report submitted by the Procuring Entity and noted that after the opening of the tender on 10<sup>th</sup> June, 2009, the Procuring Entity appointed an evaluation committee which conducted a physical evaluation on each of the business premises of the tenderers. The evaluation was based on the line of business which comprised of the following parameters:

1. Existence of the business	-	10 points
2. Standard of cleanliness	-	10 points
3. Accessibility	-	5 points
4. Experience	-	5 points
5. Storage facilities	-	5 points
6. Transport	-	<u>20 points</u>
<b>Total</b>		<b><u>55 points</u></b>

The Board further notes that thereafter, the evaluation committee conducted financial evaluation by comparing the prices quoted by the tenderers. In addition, the Board has noted the contents of the inter office memo Ref: MOD/423(072)2009-2010 dated 18<sup>th</sup> August, 2009 emanating from the evaluation committee, indicating that the Applicant was recommended for the award of the following items at the prices shown here below;

S/N	Item Description	U/ Acc	Cost (Kshs)
1.	Cabbage	kgs	10.00
	Carrots	kgs	14.00
	Tomatoes	kgs	30.00
	Onions	kgs	30.00
2.	Pineapples	kgs	26.00
	Oranges	kgs	30.00
	Mangoes	kgs	24.00

It is also noted that the successful tenderer was recommended for award of one item, namely potatoes, at a price of Kshs. 1, 600 per 82 kgs. This evident from the communication through the memo addressed to the secretary of the tender committee by which he was required to table it before the tender committee.

It is noted that, in its meeting No. 07/09/10 held on 1<sup>st</sup> September, 2009, the tender committee disregarded the recommendation of the evaluation committee to award part of the tender to the Applicant and the other part to the successful bidder and instead awarded the whole tender to the successful bidder, Master Commodities Ltd as follows:

<b>S/N</b>	<b>Item Description</b>	<b>U/Acc</b>	<b>Cost (Kshs)</b>
<b>1.</b>	Cabbages	kgs	15.00
	Carrots	kgs	22
	Tomatoes	kgs	35.00
	Onions	kgs	30.00
<b>2.</b>	Pineapples	kgs	35.00
	Oranges	kgs	30.00
	Mangoes	kgs	25.00
<b>3.</b>	Potatoes	82 kgs	1, 600.00

The Board notes the provisions of Regulation 11, which states as follows:

**11. (1) In considering the submissions by the procurement committee or evaluation committees, the tender committee may-**

- (a) Approve a submission; or**
- (b) Reject a submission with reasons; or**
- (c) Approve a submission, subject to minor clarifications by the procurement unit or evaluation committee.**

**(2)The tender committee shall not-**

- (a) Modify any submission with respect to the recommendations for a contract award or in any other aspect:**
- (b)Reject any submission without justifiable and objective reasons;**

**(3) Where the tender committee rejects the recommendation of the**

*evaluation committee, the decision shall be reported to the head of the accounting officer or to the accounting officer.*

In this case the Tender Committee in its rejection of the recommendations by the Evaluation Committee did not follow the provisions of the Act. It did not send back the recommendations of the Evaluation Committee with remarks for action as required under regulation 11. The Board notes that instead the tender committee awarded the tender without due regard to the recommendations by the Evaluation Committee.

In conclusion, the Board finds that the Tender Committee decision's was irregular and contrary to the provisions of the Act and the Regulations.

Accordingly, this ground of the Request for Review succeeds.

Before concluding, the Board hereby makes observations on the tender process as follows:

1. That the Evaluation Committee comprised of two members namely, Maj. D. M. Barrow and Capt. S. S. Koinari instead of at least three members as required by Regulation 16(3).
2. That the Tender Committee in its meeting held on 1<sup>st</sup> September, 2009 awarded the tender for Supply of Potatoes at Kshs. 1, 600.00 per 82 kgs to the successful bidder namely,

Master Commodities Ltd. However, on perusing the contract document entered into between the Procuring Entity and the successful bidder, the Board notes that the said contract document indicated that the successful tenderer was to supply potatoes at a price of Kshs. 2, 500.00 per 82 kgs weight which was above its bid price of Kshs. 1, 600.00 as indicated in its price schedule.

Upon enquiry from the representative of the Procuring Entity by the Board to explain the discrepancy, the representative confirmed that the contract price for the potatoes ought to have been Kshs. 1, 600.00 per 82 kgs and not Kshs. 2, 500.00 per 82 kgs as indicated in the contract document. He conceded that this was a mistake.

The Board finds that this contract was not entered into in line with the provisions of Section 68(1) of the Act which states as follows:

***“the person submitting the successful tender and the procuring entity shall enter into a written contract based on the tender documents, the successful tender, any clarifications under section 62 and any corrections under section 63”.***

In this case the contract price was not the price offered by the tenderer, neither was it the price at which the Tender Committee awarded the tender for the potatoes.

Taking into consideration all the above matters;

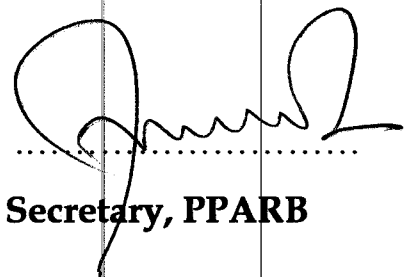


1. The Request for Review succeeds and the award of the tender to the successful bidder is hereby annulled.
2. The Board, pursuant to Section 98(b) and (c) of the Act, orders that the contract between the Procuring Entity and the successful bidder be set aside. The Board further orders that the recommendations of the Evaluation Committee that the awards be split between Midlands Limited and Master Commodities Ltd be upheld.
3. The Board further directs the Procuring Entity to award the tender to Midlands Limited at its quoted prices.

**Dated at Nairobi on this 13<sup>th</sup> day of November, 2009**

  
.....

**Chairman, PPARB**

  
.....

**Secretary, PPARB**

