

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 21/2009 OF 10<sup>TH</sup> JUNE, 2009**

**TUDOR SERVICES LTD (APPLICANT)**

**AND**

**NATIONAL OIL CORPORATION (PROCURING ENTITY)**

Review against the decision of the Tender Committee of the National Oil Corporation of Kenya dated 12<sup>th</sup> May 2009 in the matter of Tender No. NOCK/PRC/03 (4) for Provision of Truck Loading and Offloading Services.

**BOARD MEMBERS PRESENT**

Mr. Sospeter M. Kioko	-	Member (in the chair)
Ms. Loise Ruhiu	-	Member
Amb. C. M. Amira	-	Member
Eng. Christine Ogut	-	Member

**IN ATTENDANCE**

Mr. C. R. Amoth	-	Board Secretary
Ms. Kerina Rota	-	Secretariat
Mr. Gilbert Kimaiyo	-	Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Tudor Services Ltd**

Mr. Andrew Ombwayo, - Odawa Ombwayo & Ochich  
Advocates Advocates

### **Procuring Entity, National Oil Corporation of Kenya**

Mr. Mwaniki Gachuba - Procurement Manager

### **Interested Candidates**

Ms. Ann Mumbi - Advocate, Safeline Ltd  
Mr. Michael Ndungu - General Manager, Safeline Ltd  
Mr. Robert Obeiko - Operation Manager, Safeline Ltd  
Mr. Francis Kigen - Director, Gas & Diesel Ltd

## **BOARD'S DECISION**

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

## **BACKGROUND**

The tender was advertised by the Procuring Entity, National Oil Corporation of Kenya on 27<sup>th</sup> February, 2009. It was for the Provision of Loading and Offloading Services for KenGen. The tender was closed/opened on 13<sup>th</sup> March, 2009.

The following firms were invited to tender:-

1. Shakers Investments Ltd
2. Cyka system
3. Filling System
4. Gas and Diesel
5. Tudor Services
6. Tropical Focus
7. Safeline Services Ltd

Out of the seven (7) firms only four submitted their sealed tender documents before the closing time i.e. 12.00 noon same day. These were:-

1. Safeline Services Ltd
2. Gas and Diesel Ltd
3. Tudor Services Ltd
4. Tropical Focus Ltd

## **EVALUATION**

The Evaluation of the tenders was done in three stages that is; Preliminary, Technical and Financial stages.

## **PRELIMINARY EVALUATION**

At the time of opening the tenders, M/s Tropical Focus Ltd was considered non responsive for having submitted it's tender with an expired Tax Compliance Certificate.

The evaluation committee carried out a preliminary evaluation to check compliance with the mandatory requirements for the tender and the results were as follows:-

The No.	Preliminary Evaluation	Gas & Diesel Ltd	Safeline Ltd	Tudor Services	Comments
1.	Amount of Tender Security shall be in the sum of Kshs.50,000/=	Submitted	Submitted	Submitted	All submitted
2.	Tender has been submitted in the right format	Right Format	Right Format	Right Format	All in the Right Format
	Tender has been signed by the person lawfully authorised to do so	Condition met	Condition met	Condition met	All condition met
3.	The required number of copies of the tender have been submitted	2 copies	2 copies	2 copies	All met
	The tender is valid for the period required	Not met	Not met	Not met	To be confirmed in the Financials
4.	All required documents & information have been submitted				Subject to evaluation of Financials

At this stage all the three candidates qualified and were allowed to proceed to the next stage of Technical Evaluation. The detailed technical evaluation was conducted based on the following criteria:-

## TECHNICAL EVALUATION

Staff Experience	Score	
<b>(i) Specific Experience</b>		<b>50</b>
Similar experience in the Petroleum Sector	25	
Technical Proposal Questionnaire	<b>25</b>	
<b>(ii) Operation Strategy &amp; Organization</b>		<b>20</b>
Operation Strategy	10	
Organization & Staffing	5	
Responsiveness of Terms of Reference	5	
<b>(iii) Qualification &amp; Competence of key staff for Assignment</b>		<b>30</b>
<b>Team Leader/Manager</b>		
- Experience/Competency	<b>10</b>	
- Qualification	<b>10</b>	
<b>Other Staff</b>		
- Experience/Competency	5	
- Qualifications	5	
<b>Total Points</b>		<b>100</b>
<b>Minimum Technical Score Required 70%</b>		

After the technical evaluation, the following candidates were considered responsive after scoring 70% and above:-

1. M/S Safeline Ltd
2. Gas and Diesel Ltd
3. Tudor Services Ltd

The Evaluation Committee further recommended that their Financial Proposal envelopes to be opened for evaluation.

## **FINANCIAL EVALUATION**

M/S Gas and Diesel Ltd bid was disqualified due to non-compliance with the prescribed pricing format as it was charging a fixed rate per month contrary to the requirements of the tender documents.

The financial bids of the remaining two bidders were as follows:-

<b>Vendor</b>	<b>Truck Loading at NNT shs/m<sup>3</sup> inclusive of VAT</b>	<b>Truck loading at Embakasi Kshs/m<sup>3</sup></b>	<b>Truck Loading at Eldoret Power Plant Ksh/m<sup>3</sup></b>	<b>Total</b>
Safeline Services Ltd	75.4	75.4	23.2	174.00
Tudor Service Ltd	40.6	23.2	40.6	104.40

## **RECOMMENDATION**

The Evaluation Committee noted that the tenders by the two remaining candidates, Tudor Services Ltd and Safeline Services Ltd required further clarification on technical issues. It noted that the tenders required clarification on the issue of validity period and price. It therefore, recommended that the matter be referred to the Tender Committee for further guidance.

The Tender Committee in its Meeting No.54 held on 8<sup>th</sup> April 2009 terminated the tender. It directed the Procurement Manager to send out fresh requests for Proposals to the three tenderers who had qualified to

proceed to the Financial Evaluation Stage. It further directed that the three tenderers should re-submit their financial bids in the new format to be provided by the Operations Department.

The Procurement Entity in its letter dated 27<sup>th</sup> April, 2009, requested the three tenderers namely: M/s Safeline Services Ltd, Gas and Diesel Ltd and Tudor Services Ltd to re-submit their financial proposals as per the format attached to the letter. The letter stated that the financial proposals were to be returned by 28<sup>th</sup> April 2009.

The three bidders submitted fresh financial proposals.

The Evaluation Committee in a report dated 28<sup>th</sup> April, 2009 recommended the award of the tender to M/s Safeline Services Ltd for having quoted the most competitive rates. The Tender Committee in its Meeting No.57 held on 7<sup>th</sup> May 2009 awarded the tender to M/s Safeline Services Ltd.

On 12<sup>th</sup> May, 2009, the Procuring Entity notified both the successful and the unsuccessful bidders.

## **THE REVIEW**

This Request for Review was lodged by Tudor Services Ltd on 2<sup>nd</sup> June, 2009 against the decision of the Tender Committee of Kenya National Corporation in the matter of Tender No.NOCK/PRC/03(4) for provision of Truck loading and Offloading Services. The Applicant was represented by Mr. Andrew Ombwayo of Odawa Ombwayo & Ochich Advocates while the

Procuring Entity was represented by Mr. Mwaniki Gachuba, the Procurement Manager.

The Applicant in its Request for Review raised nine grounds of Review. The Board has considered the submissions by the parties and the documents presented before it and decide as follows:

**Preliminary Issue on Jurisdiction of the Board**

The Procuring Entity submitted that it had terminated the procurement proceedings and changed the procurement procedure from a Request for Proposal to a Request for Quotation. It argued that the termination of the procurement was final and therefore no claim could arise from the procurement proceedings that had been terminated.

It further submitted that the award being challenged by the Applicant was made under the Request for Quotation and not under the Request for Proposal procedure which had been terminated.

The Procuring Entity referred the Board to Section 88 of the Act which states as follows:-

***"A Procuring Entity may use a request for quotations for procurement if-***

- (a) The procurement is for goods that are readily available and for which there is established market and;***



**(b) The estimated value of the goods being procured is less than or equal to the prescribed maximum value for using Requests for Quotations. The Procuring Entity further referred the Board to Section 3 Sub-section (1) of the Act at page 54, definition of "goods" which reads: "goods" includes raw materials, things in liquid or gas form, electricity and services that are incidental to the supply of the goods."**

It stated that the Applicant was aware that the Procuring Entity was buying services in liquid form at Embakasi, Nairobi and Eldoret. It referred the Board to definition of "services" in the Act which reads as follows:-

***"Services" means any objects of procurement or disposal other than works and goods and includes professional, non professional and commercial types of services as well as goods and works which incidental are to but not exceeding the value of those services.***

The Procuring Entity stated that termination of the Request for Proposal was done by the Tender Committee on 8<sup>th</sup> April, 2009 and notification of the termination was sent to all candidates by a letter dated 27<sup>th</sup> April, 2009. It further stated that it terminated the tender in accordance with Section 36 (1) of the Act.

Finally, the Procuring Entity submitted that having terminated the tender in accordance with Section 36 (1) of the Act, the Board did not have jurisdiction

to determine the Request for Review. It therefore urged the Board to dismiss the Request for Review and allow the procurement process to continue.

In response, the Applicant stated that it appreciated the right of the Procuring Entity to terminate procurement proceedings; but argued that this should be done in accordance with the provisions of the Act. It further stated that the termination should have been communicated promptly to all bidders, as stipulated in Section 36 (2) of the Act.

The Applicant argued that the Procuring Entity's letter dated 27<sup>th</sup> April, 2009 attached in the Request for Review document was not a Request for Quotations but a continuation of the Request for Proposals. Therefore, it argued that there was no termination of the procuring proceedings as argued by the Procuring Entity and the Board had the jurisdiction to hear and determine the Review.

Finally, the Applicant argued that the use of Request for Quotations was an abuse of the procurement proceedings as the Procuring Entity was trying to split the tender into two contrary to Section 30 (1) of the Act.

The successful candidate, Safeline Services Ltd associated itself with the submissions of the Procuring Entity. However, it observed in its Affidavit that the Procuring Entity did not specify the quantity of volumes to be handled on a monthly basis at each depot and therefore it was not possible to make comparison on the unit costs. The winning bidder further stated that it was because of this fact that its earlier financial bid was based on less

volume and had to reduce the rate applicable per cubic meter (m<sup>3</sup>) due to economies of scale to be derived from servicing a higher volume which was explained later in the second financial proposal sent on 27<sup>th</sup> April 2009.

The second interested party, Gas & Diesel Limited agreed with the Successful Candidate that the Procuring Entity did not indicate the volumes. It further stated that it was later surprised to be given one day to re-submit financial bid.

The Board has carefully considered the submissions of the parties and examined the documents that were submitted.

The Board notes that Section 36 (1) of the Act allows a Procuring Entity to terminate procurement proceedings without entering into contract.

The Board further notes that Section 29 (1) and (2) empowers a Procuring Entity to choose the procurement procedure it will use.

The questions that arise for determination are:

- (a) Whether the termination of the procurement procedure was carried out in accordance with Section 36 of the Act; and
- (b) Whether the Procuring Entity followed the procedure in changing from Request for Proposals (RFP) pursuant to Section 76 of the Act to Request for Quotations procurement procedure, (RFQ) pursuant to Section 88 of the Act.

On the question of termination, the Board has noted that the Procuring Entity wrote to the bidders by a letter dated 27<sup>th</sup> April 2009 as follows:-

***“Reference is made to the above tender in which you participated and qualified in the technical criteria. You are kindly requested to re-submit your financial proposal as per the attached format. The same should be received by close of business on Tuesday, 28th April, 2009”.***

It is clear that the letter dated 27<sup>th</sup> April 2009 did not terminate the procurement process as argued by the Procuring Entity. That letter only required the bidders to resubmit their financial proposals. The Board notes that when a tender is terminated, a Procuring Entity has to notify all bidders who participated and start procurement process afresh. In the instant case, the Procuring Entity did not terminate the procurement process. It retained the technical evaluation report and disregarded the financial aspect of the tender. The letter of 27<sup>th</sup> April, 2009 required the bidders to resubmit a financial proposal. The Board holds that this did not amount to a termination of the tender.

The Board further notes that Section 36 (7) of the Act requires a Procurement Entity that terminates procurement proceedings to give a written report on the termination to the Public Procurement Oversight Authority. The Procuring Entity admitted at the hearing that no report was given but it argued that this was a minor mistake.

In answer to the question on the procedure to be used in procurement, the Board holds that once a Procuring Entity has adopted a certain procedure, it follow it up to the conclusion of the procurement process unless a termination is done in accordance with Section 36 of the Act. The Board notes that the argument by the Procuring Entity that it changed the procedure from a Request for Proposal to a Request for Quotation was wrong. The letter dated 27<sup>th</sup> April, 2009 only requested Bidders to resubmit their financial bids and the Board holds that there was no termination of the Request for Proposal.

Taking the above matters into consideration, the Board holds that it has jurisdiction to hear and determine this Request for Review on merit.

Accordingly, the Preliminary Objection fails.

The Board now deals with the Grounds in the Request for Review as follows:-

**Grounds 1, 2, 3 and 4**

These Grounds were withdrawn by the Applicant.

**Grounds 5 and 6: Breach of section 82 and 81 (2) (e) of the Act**

These two grounds have been consolidated as they raise similar issues.

The Applicant submitted that the Procuring Entity breached Section 82 of the Act by failing to evaluate its Request for Proposals in the manner set out in the tender documents.

The Applicant further submitted that the Procuring Entity failed to indicate in the tender document the procedure and criteria for evaluating the technical and financial proposals.

The Applicant argued that the entire procurement process was done using Request for Proposal procedure and that the argument by the Procuring Entity that it used Request for Quotation procedure was an afterthought. It stated that the letter by the Procuring Entity dated 12<sup>th</sup> May 2009 informed it that it had not succeeded in the tender after the technical and financial evaluation. It argued that a Request for Quotation procedure pursuant Section 80 of the Act does not have technical and financial evaluation stages. Therefore it was clear that the Procuring Entity used the Request for Proposal method.

It further argued that the Procuring Entity breached Section 81 and 82 of the Act as the tender document did not indicate the procedure and criteria for evaluating both the technical and financial proposals.

Finally, the Applicant submitted that the Procuring Entity did not refer to a Request for Proposal in its letter to the bidders.

In response, the Procuring Entity denied that it breached Sections 81(2) and 82 of the Act and argued that it conducted an evaluation for a Request for Quotation and therefore Section 82 of the Act did not apply.

The Procuring Entity further argued that having terminated the Request for Proposal it was not possible to breach Section 81 (2) of the Act and reiterated it only evaluated and awarded a Request for Quotation.

The Board has examined the documents submitted to it and considered the submissions of the parties, and notes the following:-

- (a) By the Procuring Entity's own admission, the Tender Committee at its 54<sup>th</sup> meeting held on 8<sup>th</sup> April, 2009 terminated the procurement proceedings based on the Request for Proposals. The Tender committee further directed that financial Proposals be re-submitted afresh in a format to be provided by the Operations Department of the Procuring Entity. The Procuring Entity subsequently sent to the tenderers a financial proposal attached to a letter dated 29<sup>th</sup> April, 2009. The Board has noted that the Financial Proposal that was sent to the bidders was not titled "Request for Quotation" as argued by the Procuring Entity.
- (b) The letter dated 27<sup>th</sup> April 2009 requested the bidders to resubmit their financial proposals as per the attached format by close of business on 28<sup>th</sup> April 2009. The Board has examined the said letter and the format for the financial proposal and notes that this did not amount to a Request for Quotation within the meaning of Section 89 of the Act which provides as follows:-

".....

**(1) This Section sets out the procedure for a procurement using a request for quotations.**

**(2) The Procuring Entity shall prepare a request for quotations that sets out the following-**

**(a) the name and address of the Procuring Entity**

**(b) the specific requirements prepared under section 34 relating to the goods being procured;**

**(c) an explanation of where and when quotations must be submitted; and**

**(d) anything else required under this Act or the regulations to be set out in the request for quotations.**

**(3) The Procuring Entity shall deal with the request for quotations in accordance with the following-**

**(a) the Procuring Entity shall give the request to such persons as the Procuring Entity determines;**

**(b) the request must be given to as many persons as necessary to ensure effective competition and must be**



*given to at least three persons, unless that is not possible; and*

*(c) the Procuring Entity shall give the request to each person each person early enough so that the person has adequate time to prepare a quotation.*

*(4) The successful quotation shall be the quotation with the Quotation with the lowest price that meets the requirements set out in the request for quotation.*

*(5)....."*

(c) There is no indication whether notice of the termination was sent to the bidders and a report of termination was given to the Public Procurement Oversight Authority as required by Section 36 (2) and Section 36 (7) of the Act respectively.

It is clear that the Procuring Entity used the Request for Proposals procedure until the 8<sup>th</sup> April, 2009. On that date the tender committee directed that the tenders be terminated and bidders be requested to resubmit fresh financial proposals. The Board notes that this procedure of termination and requesting the bidders to submit fresh financial proposals is not provided for within the Act. If the Procuring Entity wished to adopt the Request for Quotation method it should have terminated the Request for Proposal procedure in accordance with Section 36 of the Act. Thereafter, it would have used the Request for Quotation procedure in the manner set out in Section 89 of the Act.

Accordingly, these two grounds succeed.

**Ground 7: Procuring Entity's use of Clause 5.1 of the Tender documents in violation of Section 83 of the Act.**

The Applicant alleged that Clause 5.1 of the tender document contravened Section 83 of the Act by providing that the Procuring Entity would notify the unsuccessful bidder after negotiation and signing of a contract with the successful bidder.

In response, the Procuring Entity denied that it breached Section 83 of the Act. It argued that Clause 5.1 was not applied and therefore the argument by the Applicant was merely academic.

The Board has noted that Clause 5.1 of the Tender documents states that:-

***"The contract will be awarded after negotiations are completed when National Oil Corporation will promptly notify other bidders that they are unsuccessful".***

The Board has further noted that Section 83 (1) of the Act states that:-

***"At the same time the person who submitted the successful proposal is notified, the procuring entity shall notify all other persons who submitted proposals that their proposals were not successful"***

It is clear that the provision of clause 5.1 of the tender document contradicts the provisions of Section 83 (1) of the Act.

Consequently, Clause 5.1 of tender documents on notification to the successful and unsuccessful bidders is contrary to the clear Provisions of Section 83(1) of the Act.

Accordingly, this ground of Appeal succeeds.

**Ground 8: Breach of Section 66 (4) of the Act.**

The Applicant alleged that the Procuring Entity breached Section 66 (4) of the Act by failing to award it the tender whereas it had the lowest evaluated price.

In response, the Procuring Entity denied that it breached Section 66(4) of the Act. It argued that it was only obliged to award the tender to the lowest evaluated tenderer and not the tenderer with the lowest price. It stated that even if the Request for Proposal had not been terminated, the Applicant's financial proposal had been declared non-responsive by the Evaluation Committee and was certainly not the lowest evaluated price.

The Board notes that Section 66 (4) of the Act states that:-

***"The successful tender shall be the tender with lowest evaluated price"***

It is clear that Section 66 (4) of the Act applies to the open tender procedure and is therefore not applicable in the circumstances.

Accordingly, this ground fails.

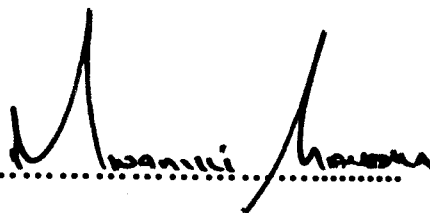
**Ground 9: Statement of perceived Losses.**

The Applicant has made a statement of perceived losses and damages or profit had it been awarded the tender.

The Board notes that the tendering process is a competition open to all bidders. Any party joining the tendering process does so at its own risk and should be ready to bear the risks involved. Any cost, loss or damages incurred in the process would be borne by the tenderer itself.

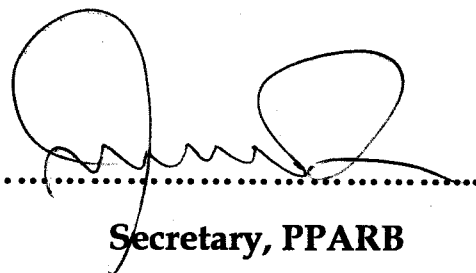
Taking into consideration the foregoing, the Request for Review succeeds. The award of the tender to the Successful Candidate is hereby annulled. The Procuring Entity may re-tender a fresh using an appropriate tendering method with clear specifications and evaluation criteria.

**Dated at Nairobi on this 1<sup>st</sup> day of July, 2009**



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**Chairman, PPARB**



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**Secretary, PPARB**