

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 29/2009 OF 6th AUGUST, 2009

BETWEEN

MBARAK PIT CONTRACTORS (APPLICANT)

AND

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

Review against the decision of the Tender Committee of the Kenya Power and Lighting Ltd dated the 17th day of July, 2009 in the matter of Tender No. KPLC4/5D/SQ/024/09 for Provision of Exhauster Services - Coast Region

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Ms. Loise Ruhiu	-	Member
Ms. J. A. Guserwa	-	Member
Ms. Natasha Mutai	-	Member
Mr. Akich Okola	-	Member

IN ATTENDANCE

Ms. P. K. Ouma	-	Holding brief for Secretary
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PRESENT BY INVITATION

Applicant, Mbarak Pit Contractors

Mr. Ali Mbarak Ali - Managing Director

Procuring Entity, Kenya Power and Lighting Company Ltd

Mr. William Wameyo - Advocate, Musinga & Co Advocates

Mr. Owiti Awuor - Legal Officer

Interested Candidates

Mr. Gilbert Onyango - Advocate, Victoria Cleaning Services

Ms. Caroline Agengo - Advocate, Victoria Cleaning Services

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 the provision of exhaust services for the Procuring Entity's Coast Region was processed vide the Request for Quotation method. The Procuring Entity requested its Tender Committee in May 2008 to grant authority to use a list of bidders in the procurement of services from Mombasa Exhauster Service Providers. The authority was granted on 16th May, 2008

Closing/Opening:

The Quotations were opened on 8th April, 2009. Five bidders from the following firms responded:-

1. Diwani & Company Drainage

2. Victoria Cleaning Services
3. Mbarak Pit Contractors
4. Kiziwi General Services
5. Timimi Building Contractors

EVALUATION

The evaluation was done based on the following criteria:-

1. Compliance to mandatory requirement as spelt out in the tender document
2. Checking equipment and machinery capabilities
3. Checking response time
4. Checking validity of tender prices
5. Acceptance to offered terms of payment
6. Compliance to statutory requirements (NEMA and Local Authority approvals)
7. Submission of the filled-out business questionnaire

The bids were evaluated for responsiveness to the mandatory requirements the results were as follows:

No.	Vendors	Quoted on official letter head & Rubber Stamped	Stated response time	Currency	Quotation validity	Terms of payment	Submission of business questionnaire	Compliance
1.	Diwani & Co Drainage	Yes. Rubber stamped	none	Kshs.	Not stated	Not stated	none	Not recommended
2.	Kiziwi General Services	Yes. Rubber stamped	2 days	Kshs.	90 days	30 days	Yes	Recommended
3.	Victoria Cleaning Services	Yes. Company seal	Immediately	Kshs.	90 days	60 days	Yes	Recommended
4.	Mbarak pit contractors	Yes. rubber stamped	1day	Kshs.	Not stated	30 days	Yes	Recommended
5.	Timimi Building Contractors	Yes. Rubber stamped	None	Kshs.	Note stated	Not stated	None	recommended

The committee further evaluated the bids on technical requirements on a field visit. The evaluation was done using the following parameters:-

- Equipment Type
- Equipment capability for the job (features) - comments
- Own evidence of Ownership (Logbook etc)
- Waste disposal
- Approval to Municipal dumping site
- NEMA licence
- Reconfirmation of payment terms/Quotation validity

From the field visit, M/s Diwani & Co. Drainage was not evaluated as its office location was unknown and it did not submit a telephone contact. M/s Kiziwi General Services was not involved in waste & sewerage disposal business and was declared non responsive, M/s Victoria Cleaning Services was not visited as it was based in Meru and did not have an office in the Coast Region. M/s Timimi Building Contractors was not visited as it could not be located and the telephone contact given was not correct. M/s Mbarak Pit Contractors was declared responsive.

The financial evaluation consisted of the comparison of prices for the various sites. The bidders' prices which were VAT exclusive are summarized below:-

	Soak Pit	Septic Tank	Total
Victoria Cleaning Services	448,100	272,700	720, 800
Mbarak Pit	499,989	374,999	874,988
Kiziwi	-	-	1, 413, 046.70
Timimi	750,000.9	500,000.6	1,250,001.5

The evaluation report stated that M/s Diwani & Co. Drainage gave a quote which was not feasible to work out unit costs while M/s Timimi did not indicate prices VAT status. M/s Kiziwi combined the total cost for soakage pit and septic tank.

The Evaluation Committee recommended M/s Mbarak Pit Contractors for the award of the tender.

THE TENDER COMMITTEE DECISION

The Company Tender Committee in its meeting held on 17th July, 2009 awarded the contract to provide exhauster services to M/s Victoria Cleaning Services at their quoted tender prices per unit. The minutes state that the Procurement Unit did not give reasons for disqualifying the lowest quoted bidder. The successful bidder was notified vide a letter dated 23rd July, 2009 while the unsuccessful bidders were notified by letters dated 21st July, 2009

THE REVIEW

The Request for Review was lodged on 6th August, 2009 by Mbarak Pit Contractors Ltd against the decision of the Kenya Power and Lighting Company in the matter of Tender No. KPLC 4/5D/SQ/024/09 for the proposed Exhauster Services for Coast Region. The Applicant was represented by its Managing Director Mr. Ali Mbarak Ali. The Procuring Entity was represented by Mr. William Wameyo, Advocate, Musinga & Co Advocates and Mr. Owiti Awuor, Legal Officer. The Interested Candidate present, Victoria Cleaning Services Ltd was represented by Mr. Gilbert Onyango, Advocate and Ms. Caroline Agengo, Advocate

The Applicant raised five grounds of Review and urged the Board to make the following orders:-

- 1) That, the successful tender be declared unresponsive for failure to comply with the mandatory requirements of the tender documents and the bidder be disqualified from participating in any future KPLC Tenders for their conduct in compromising the Evaluation Committee
- 2) That, the Procuring Entity's decision be annulled.
- 3) That, the Procuring Entity Evaluation Committee who carried out the evaluation of the tender be disqualified and relieved from their duties for misleading the Tender Committee to Award the tender to the undeserving Company.
- 4) That, the Board orders for the re-advertisement of the tender.
- 5) That, the Board orders the Procuring Entity to pay the Applicant's Costs of the proceedings and any other relief's deemed necessary.

At the commencement of the hearing the Board noted that the Procuring Entity filed a Preliminary Objection raising a number of issues. By consent, it was agreed that the Procuring Entity would argue those issues together with the reply.

The Board will deal with these issues accordingly as follows.

Ground 1: Breach of Section 31 of the Act

The Applicant submitted that the Procuring Entity had breached Section 31 of the Public Procurement and Disposal Act, 2005 herein after referred to as "the Act" by awarding the tender to a person who was not qualified to perform the contract. It further submitted that Section 31 sets out minimum qualifications which a person must satisfy before being awarded a tender. It argued that the tender in question was for specialized works which could only be performed by a person who was technically qualified.

It further argued that in order for such a bidder to be qualified it must have the necessary licences from the Ministry of Environment through the National Environmental Management Agency (NEMA), the Municipality of Mombasa and the Mombasa Water and Sewerage Company. It submitted that the Successful bidder had not fulfilled these requirements and should not therefore have been awarded the tender.

In response, the Procuring Entity submitted that it had used the procedures and criteria set out in the tender document to evaluate and compare the tenders. It argued that qualifications must be gauged according to the criteria disclosed in the tender documents, which in this case included: checking equipment and machinery capabilities; checking response time; checking validity of tender prices; offered terms of payment; completeness of documents submitted; submission of filled out business questionnaire and; any other commercial and technical details as deemed necessary. In its view, reference by the Applicant to such other qualifications as licensing requirements amounted to introduction of new criteria which was not in the tender document.

The Procuring Entity further submitted that the decision by the Tender Committee to award the tender to the Successful Bidder and not to the Applicant as recommended by the Evaluation Committee was made in conformity with Regulation 11(1). It argued in this regard that the Regulation is framed in discretionary terms, according to which the Tender Committee 'may', rather than 'shall', do any of the things set out therein. In its view, therefore, by awarding the tender to the Successful Bidder, it was exercising this discretion. It further argued that in so acting the Procuring Entity had not modified the decision by the Evaluation Committee, which would have been a breach of Regulation 11(2) (a).

Having examined the documents presented before it, the Board notes that the tenders were evaluated in two stages, namely, technical and financial. The Board further notes that the Procuring Entity carried out preliminary evaluation of the bids with a view to determine whether each was responsive in terms of the mandatory requirements set out in the tender document. This entailed examination of whether a tender was typewritten and on the letterhead of a bidder; statement of response time; verification that the bid was denominated in Kenya shillings and whether it included or excluded VAT and; the validity period of the tender, which needed to be for a period of 90 days from the date of opening.

The Board notes that at the preliminary evaluation stage Diwani & Co. Drainage was found not to be responsive, apparently because it failed to; indicate response time, quotation validity, and terms of payment. It also failed to submit a business questionnaire. The Board further notes that two other bidders namely Mbarak Pit Contractors, the Applicant and Timimi Building Contractors, also failed to meet some of the mandatory

requirements but were not disqualified. In the case of the Applicant it failed to indicate the validity period of its bid, whereas in the case of Timimi Building Contractors, there was no statement as to response time, no indication of the validity period, no disclosure of payment terms, and failure to complete the business questionnaire form.

The Board further notes that although m/s Diwani and Company Contractor's bid had been considered to be non-responsive, it was nevertheless subjected to technical evaluation. According to the report compiled by the Evaluation Committee all the bidders, except Mbarak Pit Contractors, were found to be technically not qualified to perform the work. In the case of the Successful Bidder, Victoria Cleaning Services, the Evaluation Committee found that there was no evidence as to the type of equipment they had; there was no evidence in the form of log books as whether they owned any equipment at all; and it did not own any equipment in the Coastal Region. Accordingly, the Evaluation Committee recommended to the Tender Committee that the award be made to Mbarak Pit Contractors.

Finally the Board notes that the Tender Committee awarded the contract to Victoria Cleaning Services.

The question for determination by the Board under this ground is whether the award of the tender by the Procuring Entity to the Successful Bidder was made in accordance with the Act, the Regulations and the Tender Documents.

The Board notes that Section 31 of the Act is clear as to who may be awarded a tender. Section 31(1) (b) states:-

'...the necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured.'

The Procuring Entity must itself have been aware of the need to enter into a contract with a bidder who had the necessary qualifications and equipment to do the work. It is for this reason that it chose to provide possession of equipment and machinery capability as one criterion for assessing the ability of a bidder to perform the contract. According to the Evaluation Report, Victoria Cleaning Services did not have equipment to carry out the services; nor did it have the necessary licences from both the Municipal and Environmental Authorities to handle and dispose of the waste. The Board finds that to have the *'..necessary qualifications...to provide what is being procured'* implies that, at the very least, the bidder claiming to be qualified must be subjected to some objective test as to its qualification.

The Board finds that the Procuring Entity breached Section 31(1) (b) and the Tender Document by awarding the tender to a bidder who was not qualified to perform the work.

Turning to the decision by the Tender Committee to award the tender to a bidder who was not recommended by the Evaluation Committee, the Board notes the provision of Regulation 11 on the role of Tender Committee.

Regulation 11 provides as follows:-

"11 (1) In approving submissions made by the procuring unit 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 respect;

(b) reject any submission without justifiable and objective reason."

It is clear that the role of a Tender Committee does not include substituting its own award for that recommended by an Evaluation Committee. Its role is restricted to approving the recommendation in its entirety; rejecting it in its entirety or approving it subject to minor clarification by an Evaluation Committee. The Board finds that the Tender Committee acted beyond its powers by making an award to a tenderer who was not recommended by the Evaluation Committee.

The Board further finds that the Procuring Entity breached Regulation 48 by failing to reject the tenders by Timimi Building Contractors and Mbarak Pit Contractors on the ground that they were non-responsive.

In view of the above none of the bidders was responsive. Accordingly this ground succeeds.

Ground 2: Breach of Section 36(2), (4), & (7)

The Applicant stated that that the Procuring Entity had breached the Act by terminating previous contracts, namely, KPLC1/5DA/ST1/08 and KPLC4/5D/SQ/08 without notifying bidders who had been unsuccessful, and further that the Public Procurement Oversight Authority had not been notified of such cancellations.

In response, the Procuring Entity submitted that the cancellation of the previous tenders was not the subject of review in the current proceedings.

The Board notes that the two tenders that have been quoted by the Applicant are not the subject matter of this Review. The Board is of the view that it has no mandate to deal with the conduct of parties or disputes arising from such tenders. The Board's mandate is limited to dealing only with disputes which arise from proceedings brought before it within the statutory period set out in the Act.

Accordingly, this ground of appeal fails.

Ground 3- Breach of Section 60(3) & (5)

The Applicant submitted that the Procuring Entity had breached Section 60(3) and (5) of the Act by its failure to invite bidders to the tender closing/opening. As a consequence, the tenders were processed in secrecy. The Applicant further stated that on the day of closing/opening it visited the premises of the Procuring Entity to attend the closing/opening of the tenders but was turned away.

In response, the Procuring Entity argued that it had fully complied with Section 60 of the Act in that it had, in compliance with Section 52, made a statement of the period when the tenders would remain open; explained when and where tenders would be submitted and; stated that those submitting tenders or their representatives may attend the opening of the tenders. The Procuring Entity further argued that choice of procurement methods cannot be subject to review by the Board as per Section 93(2) (b) of the Act. In this regard, it chose the Request for Quotation method which did not require mandatory invitation of tenders.

The Board notes that the Procuring Entity processed this tender as a Request for Quotations within the purview of Section 88. Request for Quotations is a procurement method which is designed to deal with the acquisition of goods that are readily available and for which there is an established market.

The Board finds that there is no requirement either in the Act or the Regulations for a Procuring Entity which uses the Request for Quotations method of procurement to invite bidders to attend the closing/opening of Quotations.

Accordingly, this ground of Appeal fails.

Ground 4 - Breach of Section 61 (1) & (2) and Section 67

The Applicant submitted that the Procuring Entity breached Section 61 (1) and (2) by awarding the tender outside the tender validity period. It stated that the Procuring Entity did not request or give any extension of the tender validity period as stipulated in Section 61 of the Act. It argued that the award

of the tender should have been done before the expiry of the tender validity period, which was 6th July, 2009.

In response, the Procuring Entity denied breach of Section 61 (1) and (2) and stated that it did not extend the tender validity period. It further stated that the tender was to be valid for 90 days from 8th April, 2009. It added that the allegation that it awarded the tender outside the tender validity period had no basis.

The Board notes that the mandatory requirements as stipulated in the tender document indicated that the validity period of the tender would be 90 days from the date of tender opening. The tenders were opened on 8th April, 2009. Counting from that date the 90 days expired on 7th July, 2009. The Tender Committee awarded the tender on 17th July, 2009 and the Successful Bidder was notified on 23rd July, 2009. The Procuring Entity has admitted that it did not extend the tender validity period. Section 67 of the Act on notification of award provides for notification to be done before the expiry of the tender validity period.

The Board has held in a number of cases and in accordance with the provision of Section 67 of the Act, that once the period of validity of a tender has expired, there is no tender to award. It is clear in this case that both the award and the notification thereof were done well outside the tender validity period. There was therefore no tender to be awarded after 7th July, 2009.

Accordingly, this ground of appeal succeeds.

Ground 5 - Breach of Section 39 (1)

The Applicant submitted that the Procuring Entity discriminated against it. It further submitted that the Procuring Entity was unjust and discriminated against the Coastal people by practicing nepotism and depriving the indigenous Coast residents of the opportunity to create employment and wealth in their region.

In response, the Procuring Entity denied breach of Section 39 (1) and reiterated that its decision in the procurement proceedings was in conformity and full compliance with all the relevant provisions of the Act. It added that the Applicant's bid was not successful as it was not the lowest compliant bidder.

The Board notes that Section 39 (1) stipulates that candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with the Act and the Regulations. The tender under review was open to the list of bidders approved by the Procuring Entity's Tender Committee in compliance with the provisions of the Regulations.

The Applicant participated in the tender proceedings and was evaluated together with the other four bidders who responded. Its bid was found to be responsive, although it should not have for the reasons stated earlier. In any event, the tender documents had not indicated that the bidders should be indigenous Coastal residents. If this was the case it would have contravened Section 2 (b) of the Act on promoting competition and fair treatment of bidders.

Accordingly this ground of appeal fails.

Finally, the Board has noted that the Procuring Entity has entered into a contract with the Successful Bidder. The contract is dated 12th August, 2009 but was signed by the Successful Bidder on 30th July, 2009. The question which arises is the effect of this action by the Procuring Entity in whether the Board has jurisdiction to hear this Application having regard to Section 93(2) (c), which provides that:

"The following matters shall not be subject to the review under subsection (1)-

(c) where a contract is signed in accordance to section 68."

The Board notes that Section 68(2) states that:-

"the written contract shall be entered into within the period specified in the notification under section 67(1) but not until at least fourteen days have elapsed following the giving of that notice."

Further, Section 67(1) requires a Procuring Entity to notify the successful bidder that its tender has been successful *during the validity period of the tender*. Section 67(2) provides that:

"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."

Having set out the applicable provisions it is now necessary to examine the sequence of events that led to the signing of the contract between the Procuring Entity and the Successful Bidder. As mentioned above the

Procuring Entity made the decision to award the contract to the Successful Bidder on 17th July 2009. On August 6th 2009, the Applicant filed the Request for Review.

The Board further notes that the Secretary to the Board served the notice of Request for Review on the Procuring Entity on 7th August, 2009 as required under Section 94 of the Act. According to this Section the procurement proceedings are suspended. The Procuring Entity was therefore aware that an application for review of its decision had been filed.

It is clear from the series of events described above that on the date the Procuring Entity was signing the purported contract it was aware that an application for review had been filed. Further, it was aware that in accordance with the provision of Section 94, the procurement proceedings were suspended. Accordingly, its decision to sign the purported contract was done in breach of Section 94 of the Act.

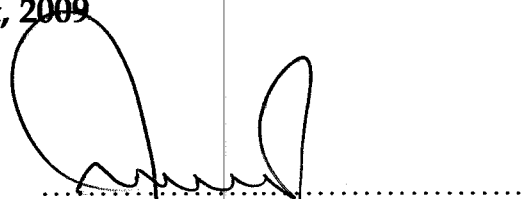
Accordingly the Board finds that the contract purportedly entered into by the Procuring Entity and the Successful Bidder is a nullity.

Taking all the above matters into consideration the Request for Review Succeeds and the award of the tender to the successful bidder is hereby annulled. The Procuring Entity may re-tender.

Dated at Nairobi on this 31st day of August, 2009



Signed Chairman
PPARB



Signed Secretary
PPARB

