

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO.31/2009 OF 17<sup>TH</sup> AUGUST, 2009**

**BETWEEN**

**CATHY INTERNATIONAL LTD.....APPLICANT**

**AND**

**OFFICE OF THE PRESIDENT,**

**POLICE DEPARTMENT.....PROCURING ENTITY**

Review against the decision of the Procuring Entity dated 10<sup>th</sup> August, 2009 in the Matter of tender No.Comms(6) 2009-2010 for Supply, Delivery and Installation of Wind and Solar Hybrid Renewable Power Supply System

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Mrs. Loise G. Ruhiu	-	Member
Mr. Sospeter K. Munguti	-	Member
Amb. Charles Amira	-	Member
Mr. Akich Okola	-	Member

### **IN ATTENDANCE**

- Mr. P. M. Wangai - Holding Brief for Board Secretary  
Ms. Kerina Rota - Secretariat

### **PRESENT BY INVITATION**

#### **Applicant, Cathy International Ltd**

- Mr. D. Owang - Advocate, Kirundi & Co. Advocates

#### **Procuring Entity, Office of the President, Police Department**

- Mr. James Obongo - Procurement Officer  
Mr. S. K. Bitok - ASI (F)  
Mr. A. M. Nyamwamu - Chief Procurement Officer  
Mr. C. Nyang'au - Procurement Officer

### **Interested Candidates**

- Mr. Kenneth Langat - Advocates for Winafrique  
Technologies Ltd  
Ms. Caroline Kimathi - Electrical Engineer Winafrique  
Technologies Ltd  
Mr. Melvin Kariuki - Technical Manager, Amiran (K) Ltd

## **BOARD'S DECISION**

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

## **BACKGROUND**

This tender was advertised by the Procuring Entity on 7<sup>th</sup> July, 2009. The tender was for Supply, Delivery and Installation of Wind and Solar Hybrid Renewable Power Supply System. The initial tender closing/ opening date was on 11<sup>th</sup> August, 2009. However, the closing/opening date was brought forward to 10<sup>th</sup> August, 2009 by tender notices dated 9<sup>th</sup>, 14<sup>th</sup>, 22<sup>nd</sup>, 23<sup>rd</sup> and 30<sup>th</sup> July, 2009. Tenders were opened on 10<sup>th</sup> August, 2009 in the presence of the bidders' representatives.

Out of the twenty bidders who bought the tender documents, only six bidders submitted their bids before the closing date of the tender as follows:

1. Equip Agencies Ltd
2. Go-Solar System
3. Amiran (K) Ltd
4. Unique Supplies
5. Winafrique Technologies Ltd
6. Wilken Solar Technologies.

Upon the opening of the tenders, the Applicant filed this Request for Review. The notification of appeal was communicated to the Procuring Entity by the Board Secretary on 17<sup>th</sup> August, 2009 instructing it to stop the

procurement process pending the hearing and determination of the matter by the Board.

## **THE REVIEW**

This Request for Review was lodged by Cathy International Limited on 17<sup>th</sup> August, 2009 against the decision of the Procuring Entity in the matter of tender No. Comms (6) 2009-2010 for Supply, Delivery and Installation of Wind and Solar Hybrid Renewable Power Supply System.

At the hearing, the Applicant was represented by Mr. D. Owang, Advocate while the Procuring Entity was represented by Mr. James Obongo, Procurement Officer. Winafrique Technologies Ltd and Amiran (K) Ltd, Interested Candidates, were represented by Mr. Kenneth Langat, Advocate and Mr. Melvin Kariuki, Technical Manager, respectively.

The Applicant raised seven grounds of review and urged the Board to make the following orders:

- “1. The procuring proceedings in regard to Tender No **COMMS (6) 2009-2010** be suspended awaiting the decision of the Board;
2. The Chief Procurement Officer of the Kenya Police Department be compelled and ordered to accept the Tenderer’s tender documents in regard to the said tender No. **COMMS (6) 2009-2010**; and
3. A nullification of the tender No. **COMMS (6) 2009-2010**”.

The Board deals with the grounds as follows:

## **GROUND 1, 2, 3 and 4**

The Board has noted that these are mere statements giving the factual background of the tenders. Therefore, the Board need not make any findings on them.

## **GROUND 5 AND 6 - BREACH OF SECTION 53 OF THE ACT**

These grounds have been consolidated as they raise similar issues with regard to the time and the date for submission of the tenders.

The Applicant submitted that it bought the documents in respect of tender number COMMS(6) 2009-2010 which is the subject of this Request for Review on 28<sup>th</sup> July 2008. It stated that it also bought documents for tenders numbers COMMS (1) 2009-2010 and COMMS (4) 2009-2010 on the same date, 28<sup>th</sup> July 2009.

The Applicant further submitted that the tender documents for Tender number COMMS (6) 2009-2010 indicated that the tender closing/opening date was 11<sup>th</sup> August 2009 at 10.00 O'clock. It further submitted that the closing /opening date for Tenders Numbers COMMS (1) and COMMS (4) 2009-2010 was 10<sup>th</sup> August 2009 at 10.00am.

The Applicant stated that on 10<sup>th</sup> August 2009 its representative arrived at the offices of the Procuring Entity at about 9.55 a.m. and attempted to submit its tender documents for tender numbers COMM(1) 2009-2009 and COMM(4) 2009-2010. The Applicant argued that it failed to submit the tender documents for tender COMMS No.(1) and (4) 2009-2010 as the officers of the Procuring Entity, who were standing next to the tender box, indicated that the deadline for submission of tenders had passed. The Applicant further argued that it arrived at the offices of the Procuring Entity before 10.00 O'clock and therefore the decision to stop it from submitting its tender documents was wrong.

The Applicant submitted that while it was still in the offices of the Procuring Entity it learnt with that the deadline for submission of Tender No.COMM(6) 2009-2010 was also 10<sup>th</sup> August 2009 at 10.00 O'clock.

The Applicant argued that the tender documents clearly indicated that the deadline for submission of Tender No.COMMS(6) 2009-2010 was 11<sup>th</sup> August 2009 at 10.00 O'clock. It stated that upon enquiry, its representative was advised by the Procuring Entity's Chief Procurement Officer that the tender closing/opening date was 10<sup>th</sup> August 2009 at 10.00 a.m. and not 11<sup>th</sup> August 2009.

Finally, the Applicant argued that although the change of the date for submission of the tender was advertised in the daily newspapers, the Procuring Entity had a duty to inform it in writing about the change. It argued that Section 53 (3) of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Act") provide that if a Procuring Entity modifies a tender document, it must give every person who bought the tender documents a copy of the modifications. To the Applicant, the change of the tender closing date was a modification of the tender document and therefore the Procuring Entity breached Section 53(3) of the Act by failing to communicate in writing the change of date of submission of the tenders. The Applicant urged the Board to hold that it was a candidate within the meaning of Section 3 of the Act as it had already bought tenders document and failed to submit them due to the change of the date by the Procuring Entity.

In response, the Procuring Entity submitted that the tender was first advertised on 7<sup>th</sup> July 2009, in the Kenya Times daily newspaper. The advertisement as carried by the said newspaper on 7<sup>th</sup> July, 2009 had a

typographical error and as a result a re-advertisement was done free of charge on 9<sup>th</sup> July, 2009.

The Procuring Entity stated that it changed the tender closing/opening date for Tender No.COMMS (6) 2009-2010 from 11<sup>th</sup> August, 2009 to 10<sup>th</sup> August, 2009 at 10.00 a.m. It argued that this was done so that the tenders Category C in the advertisement notice which included tender No. COMMS (6) 2009-2010 could be opened at the same time and that the change of the deadline for submission of the tender was advertised severally in the daily newspapers as follows;

- i) Standard newspaper - 14<sup>th</sup> July 2009;
- ii) People daily - 22<sup>nd</sup> July 2009;
- iii) Nairobi Star - 23<sup>rd</sup> July 2009; and
- iv) Standard newspaper - 30<sup>th</sup> July 2009.

The Procuring Entity submitted that it incurred a substantial amount of money in advertising the change of the date of submission of the tenders. This was done so that it could reach all the bidders who had bought the tender documents and to notify them of the change in the tender closing/opening date.

The Procuring Entity further submitted that the Applicant attempted to submit its tender documents on 10<sup>th</sup> August 2009 after 10.00a.m. It argued that the tender documents could not be accepted as the deadline had already passed. It pointed out that the Applicant's representative arrived late and the opening of the tender box, which was witnessed by other bidders' representatives, had already taken place.

Finally, the Procuring Entity stated that all the bidders were notified of the change of the closing/opening date through the various newspaper advertisements. Therefore, failure by the Applicant to submit its tender documents on time was not excusable. It denied that it had breached Section 53(3) of the Act as argued by the Applicant and urged the Board to dismiss the Request for Review.

An interested Candidate, Winafrique Technologies Ltd, stated that the change of the deadline for submission of the tenders was advertised severally in the daily newspapers. It argued that Section 53(3) of the Act was not applicable in this tender as there was no modification of the tender documents. The Procuring Entity only changed the date for submission of the tenders and due notice was given in the daily newspapers.

Finally, the Interested Candidate argued that the Applicant was not a candidate as envisaged by Section 93 (1) of the Act, as it did not submit its tender documents.

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

The issues that arise for determination in this Request for Review are as follows;

1. Whether the Procuring Entity modified the tender documents;
2. Whether the Procuring Entity effectively communicated the change of the tender closing/opening date to the Applicant; and



3. Whether the Applicant is a Candidate within the meaning of Section 3 (1) of the Act.

The Board will deal with the three issues together as they are intertwined.

It is common ground that this tender was advertised on 7<sup>th</sup> July, 2009, and that the Tender Documents provided in Clause 4 of Section A that the tender closing/opening date was 11<sup>th</sup> August, 2009 at 10.00a.m.

It is also not in dispute that the Procuring Entity changed the date for submission of the tender to 10<sup>th</sup> August, 2009 at 10.00 a.m. The point of departure between the parties is whether the change of date was communicated to the Applicant.

The Board has noted that as per the Register for the selling of the tender documents, the Applicant bought its tender documents on 20<sup>th</sup> July, 2009. The Board has noted that the advertisements of the tender appeared in the newspapers as follows;

<b>DATE</b>	<b>NEWSPAPER</b>	<b>CLOSING/OPENING DATE AS PER ADVERTISEMENT</b>
(i) 7.7.2009	Kenya Times	11 <sup>th</sup> August 2009
(ii) 9.7.2009	Kenya Times	10 <sup>th</sup> August 2009
(iii) 14.7.2009	The Standard	10 <sup>th</sup> August 2009
(iv) 22.7.2009	The People Daily	10 <sup>th</sup> August 2009
(v) 23.7.2009	Nairobi Star	10 <sup>th</sup> August 2009
(vi) 30.7.2009	The Standard	10 <sup>th</sup> August 2009

As can be noted from the above advertisements, the Procuring Entity notified all the potential tenderers that the date of the submission of the

tenders had been changed from 11<sup>th</sup> August 2009 to 10<sup>th</sup> August 2009 at 10.00a.m.

It is clear that there was a change of the tender closing/opening date and advertisements to that effect were made even before the Applicant bought the tender documents. The Applicant bought its tender documents on 20<sup>th</sup> July, 2009 and by that time the Procuring Entity had already made two advertisements in the daily newspapers on the change of the closing/opening dates.

The Board notes that the advertisement on the change of the closing/opening date was to all potential bidders. A tender notice is an invitation to tender and a tenderer who wishes to participate is under a duty to read the tender notice and comply with its requirements

The Board has also noted that even after the Applicant bought the tender documents, advertisements on the change of closing/opening date were made on 22<sup>nd</sup>, 23<sup>rd</sup> and 30<sup>th</sup> July, 2009. It is therefore clear that the Applicant was not diligent and it can only blame itself for failing to read the tender notices that were carried in the daily newspapers on six occasions.

It is not in dispute that a Procuring Entity has a duty to take such steps that are reasonable to bring the invitation to tender to the attention of those who wish to submit tenders. Under Section 54 (2) of the Act , a Procuring Entity is required to advertise a tender at least twice in a newspaper of nationwide circulation which has been regularly published for at least two years before the date of issue of the advertisement. As already noted, the change of the date of the submission of tenders was done five times, in at

least four different newspapers. Any serious tenderer could not have failed to read at least one of them.

The Board has also noted that the Applicant stated that it learnt of the change of the date of the submission of the tenders on 10<sup>th</sup> August 2009, when it went to the offices of the Procuring Entity to submit two other tenders. It is noteworthy, that the Applicant was late in submitting those two tenders. The allegation that it arrived at the premises of the Procuring Entity at least ten minutes before the 10.00 a.m. deadline was made in the submissions of the Counsel for the Applicant and the Applicant did not file any affidavit or statement in support of this statement. Although those two tenders are not a subject to this Request for Review, the fact that the Applicant was late in submitting the other two tenders demonstrates that the Applicant did not treat the submission of the tenders with the seriousness it deserves. As the Board has stated severally, tendering process is a competitive race. A Bidder who participates in a tender process must read the tender notice and the tender documents clearly and if need arises, seek a clarification from the Procuring Entity. Further, a bidder can only enter the race by returning the Tender Documents before the set deadline for doing so. The Board therefore finds that the Applicant was not a candidate within the meaning of Sections 3(1) and 93(1) of the Act. The said Sections provide as follows:

**Section 3(1)**

**“In this Act unless the context otherwise requires;**

**“Candidate” means a person who submitted a tender to a procuring Entity”**

## Section 93(1)

**“(1) Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.**

It is clear that Section 93(1) of the Act provides that it is only a person who has submitted a tender can seek Administrative Review. In the case of **Synnerton Kwendo Nazoi T/A Lyle and Presscott International -vs- Kenya Meteorological Department**, the Board stated as follows;

*“A Procurement Process is a race governed by rules set out in the Act, Regulations and Tender Documents. A bidder enters the race by buying the tender documents and submitting the tender documents before the set deadline. It is only a bidder who has entered the race, in accordance with the rules and required format, who can lodge a complaint. A complaint by any person standing on the sidelines cannot be properly lodged before the Board. The Board is creature of statute and it can only exercise the powers donated by the Act and Regulations.*

*The Applicant may well have genuine grievances but it failed to return its tender documents therefore locking itself from the race”.*

As the Board has noted, the Applicant did not submit tender documents and is therefore not a candidate.

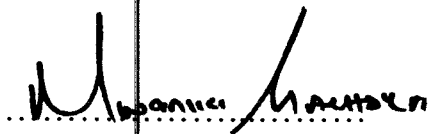
**Ground 7**

This is not ground for Review but a statement of loss/damages that the Applicant is likely to suffer as a result of alleged breach of duty by the Procuring Entity. The Board notes that the tender which is the subject of this Review was an open tender duly advertised by the Procuring Entity. Accordingly, the costs that the Applicant could have suffered are normal business risks which are normally borne by tenderers.


Taking all the above matters into consideration, these grounds of appeal fail. Accordingly, this Request for Review is hereby dismissed.

Therefore, the procurement process may proceed.

**Dated at Nairobi on this 16<sup>th</sup> day of September, 2009**

  
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**Chairman, PPARB**

  
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**for Secretary, PPARB**

