

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 6/2009 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 National Oil Corporation of Kenya 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
Ms. J. Guserwa - Member
Eng. C. Ogut - Member
Amb. C. Amira - Member
Ms. N. Mutai - Member

IN ATTENDANCE

Mr. C. R. Amoth - Board Secretary
Mr. P. Wangai - Secretariat

PRESENT BY INVITATION

Applicant, Petroleum & Industrial Services Limited

Mr. Geoffrey Imende - Advocate, Mohammed Muigai
Advocates
Mr. Boniface Ngunjiri - Managing Director
Mr. James Kamau - Technical Services Manager

PROCURING ENTITY, NATIONAL OIL CORPORATION OF KENYA

Mr. Mwaniki Gachuba - Procurement Manager

INTERESTED CANDIDATE, PREMIER AGENCIES LTD

Mr. Varun Sharma - Marketing Director

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

This tender was advertised by the Procuring Entity on 29th October, 2008. It was for Supply of Suction Pumps, Fuel Dispensers & Submersible Pumps. The tender closed/opened on 19th November, 2008. Five bidders submitted their bids before the closing of the tender. These were as follows:

1. Prowalco Kenya Ltd
2. Yilmaz Company Ltd
3. Petroleum and Industrial Limited
4. Unicorn Sales and Services Ltd

5. Premier Agencies Limited

EVALUATION

The Evaluation was carried out by a committee chaired by Mr. Joseph Kihiu. It was based on following the criteria:

Item	Tender Technical Requirement	Max score
1	Proof of legal status (VAT, PIN, Tax compliance, Certificate of incorporation)	3
2 (i)	Specific experience in supply of dispensers and submersible pumps in industry experience required is more than 3yrs with a list of references	2
2 (ii)	Firms general experience in Industry- required is 5 yrs and above, with a list of references	5
3	Dispenser, sunction pumps & submersible pump specifications adherence	5
4	Proof of dealership or agency, manufacturing	10
5	Dispensers Weights & Measures stamped pattern approval.	20
6	Dispenser & submersible pump supplied by the Company and in use by more than 4 major oil companies. Provide references of such local companies.	10
7	Ability to give a guarantee after award	5
8	Financial Capability to undertake the project	10
9	Availability of trained personnel or technicians, provide proof of certification by weights and measures	10
10	Proposed purchasing and installation work plan and methodology	5
11	Willingness to give a test pump or Sponsor National Oil staff to visit sites manufacturing or where pumps have been in use.	10
12	Warranty cover of at least 1 year.	5
	Total score	100

After technical evaluation, only two tenderers, the Applicant and Premier Agencies Ltd qualified for financial evaluation after attaining the cut-off mark of 80 %.

FINANCIAL EVALUATION

Financial Proposals were opened on 7th January, 2009. The technical and financial scores were combined using the weights of 0.8 and 0.2 respectively. The combined scores were as follows:

Bidder	Technical Scores	Financial Scores	Combined Scores
Petroleum & Industrial Services Ltd	72.6	20.0	92.6
Premier Agencies Ltd	65.8	11.6	76.96

Arising from the above information, the Evaluation Committee recommended the award of the tender to Premier Agencies Ltd at Kshs. 28, 168, 280.00.

In its meeting held on 20th January, 2009, the tender committee awarded the tender to Premier Agencies Ltd as recommended by the Evaluation Committee.

Notifications of award letters to the successful and unsuccessful tenderers are dated 2nd February, 2009.

THE APPEAL

This Appeal was lodged on the 17th day of February, 2009 by Petroleum & Industrial Services Limited against the decision of the Tender Committee of National Oil Corporation of Kenya dated 2nd February, 2009, in the matter of Tender No.NOCK/T/10/2008-2009 for Supply of Suction Pumps, Dispenser and Submersible Pumps.

The Applicant was represented by Mr. Geoffrey Imende, Advocate, while the Procuring Entity was represented Mr. Mwaniki Gachuba, its Procurement Manager. The successful candidate was represented by its Marketing Manager, Mr. Varun Sharma.

The Applicant in its Request for Review has raised twelve (12) grounds of appeal. The Board deals with them as follows:-

Grounds 1, 2, 3, 4, 5

These are mere statements which are not backed by any breach of the Act or Regulations.

Grounds 6, 8, 9, 10, 12 - Breach of Section 66(4) of the Act and Regulation 50

These grounds have been consolidated because they raise similar issues.

In these grounds, the Applicant submitted that its technical bid was successful and the Procuring Entity invited it for the opening of the financial bids on 7th January, 2009. It stated that upon opening the financial bids, it was established that its financial proposal for its second option, Hyong Yong C series pump was the lowest bid. It argued that the second option was 58% lower than the successful tenderer's financial bid. The Applicant further submitted that it was informed by the Procuring Entity through a letter dated

2nd February, 2009, that it was unsuccessful but no reasons were given for the decision.

The Applicant alleged that by not awarding it the tender, the Procuring Entity must have taken into consideration extraneous matters not contemplated in the tender criteria. It further alleged that the Procuring Entity ignored to consider its financial bid for the Hyong Yong C series pump notwithstanding that its technical bid had qualified.

The Applicant argued that the Procuring Entity's decision not to award it the tender was arbitrary and biased as it disregarded and/or ignored to take into consideration the tender criteria providing that the tender shall be awarded to the lowest responsive bidder. This was in breach of Section 66(4) of the Act and Regulation 50.

In response, the Procuring Entity stated that the evaluation had been done within the criteria specified in the tender document. It further stated that the Applicant's technical bids for the Tokheim pump (option 1) and Hyong Yong C series pump (option 2), were both evaluated. It submitted that whereas option 1 met the specified technical requirements and thus qualified for financial evaluation, option 2 did not have the Dispensers Weights & Measures stamped pattern approval and that the Applicant failed to submit references from local companies where these pumps were in use. As a result, the Applicant scored below the minimum of 80%, for option 2 which was required for a tenderer to pass the technical evaluation stage. Subsequently, its second option was not subjected to financial evaluation.

The Board has carefully examined the documents submitted before it and the parties' submissions and makes the following findings on the tender evaluation process.

The Board has noted that the evaluation criteria was provided under Section E of the tender documents. This Section provided for the tenders to be evaluated in two stages, with the technical evaluation being completed prior to the opening and evaluation of the financial proposals. Only tenderers whose technical proposals scored at least 80% were to be considered responsive. The responsive bidders were to be invited for the opening of the financial proposals.

The Board has further noted that Clause 5.4 of Section E, *Public Opening and Evaluation of Financial Proposals*, stated that after technical proposal evaluation, the Procuring Entity was to notify those tenderers whose proposals did not meet the minimum qualifying mark or were considered non-responsive. Further, the Procuring Entity was to simultaneously notify the tenderers who had secured the minimum qualifying mark. The Clause further stated that at the public opening of the financial proposals, the name of the tenderer, the technical scores and the proposed prices were to be read aloud and recorded.

The Board notes from the copies of the notification letters submitted by the Procuring Entity, that after technical proposal evaluation, no notification was made to the Applicant that its tender for option 2 did not meet the minimum qualifying mark. From the documents submitted by the Procuring Entity, the Board finds no record of the tender opening minutes to confirm that at the public opening of the financial proposals, the name of the tenderer, the

technical scores and the proposed prices were read aloud and recorded. Consequently, the Board finds that the absence of these minutes is contrary to Section 60(8) of the Act which requires the tender opening committee to prepare tender opening minutes. It was also contrary to Regulation 16(10) which requires that a report on the analysis of the tenders includes minutes of the opening of the tenders or proposals be made. By failing to follow the correct procedure of opening the financial proposals, the Procuring Entity failed to promote transparency in the procurement proceeding. **Reading aloud and recording of the technical scores eliminates the possibility of manipulation of the technical scores after opening of the financial proposals.**

Upon perusal of the Tender Evaluation Report, titled Analysis for Supply of Suction Pumps, Dispenser and Submersible Pumps, the Board notes the following:-

- i) that the Applicant and Successful bidder qualified to proceed to the financial evaluation stage. The Board finds no specific mention in clause 5 of the Analysis Report which of the two types of pumps offered by the Applicant passed or for that matter failed the technical evaluation; and
- ii) that the financial proposals were opened on 7th January, 2009. The Board notes that the tender prices for both options tendered for by the Applicant were recorded in the financial evaluation summary. However, only the first option and not the second was considered in the computation of the combined technical and

financial score. This raises the question why option two prices were presented in the Cost Summary table at financial evaluation.

The Board finds that the Procuring Entity, upon opening of the tenders, first carried out a technical evaluation of the tenders, which is contrary to Regulation 47 which requires that upon opening of the tenders, a preliminary evaluation be carried out first. The Board also finds that some of the evaluation criteria, such as requirements for tax compliance certificates, VAT and PIN certificates etc., included in the tender document under technical evaluation criteria should have formed part of the preliminary evaluation criteria rather than technical evaluation criteria.

The Board further finds that the Minutes of the Tender Committee Meeting No.49/08-09 held on 20th January, 2009, indicate that Ms. Margaret Muthui was the Secretary of the Procuring Entity's Tender Committee and also a member of its Evaluation Committee. This is contrary to Regulation 16(4) which states that no person shall be appointed as a member of the evaluation committee if such a person is a member of the tender committee of the Procuring Entity.

The Board has noted that the Tender Evaluation Report was signed by persons who were not members of the Evaluation Committee.

In view of the foregoing, the Board finds that it is clear that the evaluation process was flawed. As such the Procuring Entity cannot be deemed to have awarded the tender to the lowest evaluated bidder as required to under Section 66(4) of the Act and Regulation 50.

Accordingly, these grounds of appeal succeed.

Ground 7 - that the Procuring Entity ignored the directive issued by the Director of Weights and Measures to the effect that computers for pumps entering the market/country after 2nd May, 2008, must be of 5 digits or more

The Applicant alleged that the Procuring Entity ignored the directive issued by the Director of Weights and Measures to the effect that computers for pumps entering the country after 2nd May, 2008, must be of 5 digits or more, by awarding the tender to the successful bidder who allegedly did not satisfy this requirement.

In its response, the Procuring Entity stated that the successful bidder's pumps were in conformity with the specifications in the tender documents of unit pricing of 5 digits.

The Successful Candidate, Premier Agencies, supported the submissions of the Procuring Entity. It stated that its Wayne pumps have been in use in Kenya for over 10 years and had been approved by the Weights and Measures Department having conformed to the unit pricing of 5 digits or more.

The Board has carefully examined the documents submitted before it and the parties' submissions and finds that the Applicant has failed to prove its allegation that the successful bidder's pumps do not conform to the unit pricing of 5 digits or more.

Ground 11 - Breach of Section 66(6) of the Act read together with Regulation 46

The Applicant alleged that the Procuring Entity breached the said Section and Regulation by failing to evaluate the tenders within a period of 30 days after opening of the tenders. It submitted that the tenders were opened on 19th November, 2008, and that the decision was rendered on 2nd February, 2009, which was long after the 30 days had lapsed.

● In its response, the Procuring Entity stated that the evaluation had been completed in good time. It argued that it was the award of the tender that was communicated to the bidders vide a letter dated 2nd February, 2009, and not the conclusion of the evaluation of the tenders.

The Board has carefully examined the documents submitted before it and the parties' submissions and notes the following relevant dates/events in this matter:

- i) Tender closed/opened on 19th November, 2008;
- ii) Section 66(6) and Regulation 46 requires that the tenders be evaluated within a period of 30 days after opening of the tenders, therefore the evaluation should have been concluded by 18th December, 2008;
- iii) From the evaluation committee's hand written individual evaluation sheets for technical evaluation, the dates of analysis indicated on these evaluation sheets vary with the earliest evaluation date being 31st December, 2008, and the last date being 5th January, 2009;

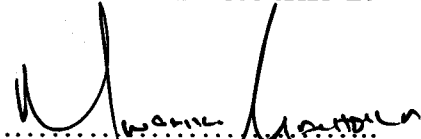
iv) Financial proposals were opened on 7th January, 2009.

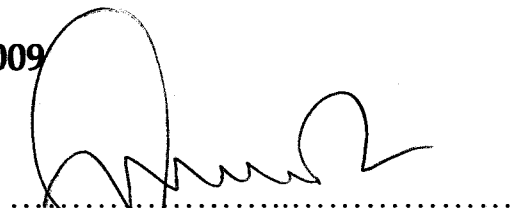
Subsequently, the Board finds that the evaluation of the bids was not done within a period of 30 days from the opening of the tenders.

Finally, the Board has noted that the Procuring Entity did not use the appropriate Standard Tender Document. This is contrary to Section 29(4) of the Act.

In view of the foregoing, the appeal succeeds and the Board orders, pursuant to Section 98 of the Act, that the decision to award the tender to the successful tenderer, Premier Agencies Ltd is nullified. The Procuring Entity may re-tender using restricted tendering method and the appropriate Standard Tender Document for this procedure.

Dated at Nairobi on this 19th day of March, 2009


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Chairman, PPARB


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Secretary, PPARB