

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW

BOARD

REVIEW NO. 43/2009 OF 27TH OCTOBER, 2009

BETWEEN

POSTMASTER CORPORATION.....APPLICANT

AND

POSTAL CORPORATION OF KENYA.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Postal Corporation of Kenya, the Procuring Entity dated 30th September, 2009 in the Matter of tender No. TB/PROC/03/2009-2010 for Manufacture, Supply and Delivery of Private Letter Boxes

BOARD MEMBERS

Mr. P. M. Gachoka	-	Chairman
Mr. Joshua W. Wambua	-	Member
Mrs. L. G. Ruhiu	-	Member
Amb. Charles Amira	-	Member
Eng. C. A. Ogut	-	Member

IN ATTENDANCE

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

Ms. Kerina Rota - Secretariat

PRESENT BY INVITATION

Applicant, Postmaster Corporation

Mrs. Gloria Khafafa - Advocate, Kipkenda. Lilan &
Koech Advocates

Procuring Entity, Posta Corporation of Kenya

Mr. Alloys Kwengu - Advocate, Kwengu & Co.
Advocates

Mr. John Suter - Ag. Procurement Manager

Ms. Veronica Kiiru - Ag. Assistant Manager

Interested Candidates

Mr. John Simiyu - Senior Marketing Officer, Gilgil
Telecommunications Industries
Ltd

Mr. Rasik Shar - Director, Ashut Engineering Co.
Ltd

Mr. Nelson Mibei - Salesman, Ashut Engineering Co.
Ltd

Mr. K. William - Employee, Nomic Agencies Ltd

BOARD'S DECISION

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

BACKGROUND OF AWARD

This Expression of Interest (EOI) was advertised by the Procuring Entity on 3rd April, 2008. It was for Manufacturing, Supply and Delivery of Private Letter Boxes. Six bidders responded to the tender notice before the closing of the tender on 17th April, 2008. They were as follows:

1. Ashut Engineering Ltd
2. Gilgil Telecommunications Industries Ltd
3. Nomic Agency Ltd
4. Postmaster Corporation of Canada
5. Thriftec Ltd
6. Mazoea General Agencies

The prequalified firms were invited to tender on 20th August, 2008. However, the procurement process was terminated after all the bidders were declared non-responsive. The process was re-started on 3rd November, 2008 where the same bidders were invited and they submitted their bids before the deadline for submission of bids which was 18th December, 2008. This process was also terminated on 12th May, 2009 after the lapsing of the tender validity period. Fresh invitations were issued to the same bidders on 29th June, 2009.

Expression of Interests were opened on 20th August, 2009. Bids were received from the following four bidders:

1. Ashut Engineering Ltd
2. Gilgil Telecommunications Industries Ltd
3. Nomic Agency Ltd
4. Postmaster Corporation of Canada

Technical Evaluation

Technical evaluation was conducted by a committee chaired by Ms. Augusta Njagi and the results were as follows:

1. Ashut Engineering Ltd	-	84%
2. Postmaster Corporation	-	81%
3. Gilgil Telecommunications Industries Ltd	-	77%
4. Nomic Agencies Ltd	-	73%

Based on the above information all the four bidders qualified for financial evaluation stage after scoring above 60% which was the cut-off mark.

Financial Evaluation

Financial proposals were opened on 30th January, 2009 and the prices quoted by the bidders were as follows:

1. Nomic Agencies Ltd	-	Kshs. 27, 860, 000.00
2. Gilgil Telecommunications		

Industries Ltd	-	Kshs. 34, 050, 000.00
3. Ashut Engineering Ltd	-	Kshs. 26, 600, 000.00
4. Postmaster Corporation	-	Kshs. 28, 924, 480.00

Financial scores were calculated using the following formulae:

$$\frac{\text{Lowest bid}}{\text{Bid under consideration}} \times 20$$

The results of the financial evaluation were as follows:

S/No.	Bidder	Financial Score
1.	Nomic Agencies Ltd	19.1
2.	Gilgil Telecommunications Ind. Ltd	15.6
3.	Ashut Engineering Ltd	20
4.	Postmaster Corporation	18.4

Combined Score

The technical and financial scores were combined using the weight of 80% for technical score and 20 % for financial scores. The combined scores were as follows:

Bidder	Tech. Scores	Financial Score	Total	Ranking
Nomic Agencies Ltd	58.4	19.1	77.5	3
Gilgil Telecommunications Ind. Ltd	61.6	15.6	77.2	4

Ashut Engineering Ltd	67.2	20	87.2	1
Postmaster Corporation	64.8	18.4	83.2	2

In view of the above information, the evaluation committee recommended the award of the tender to Ashut Engineering Ltd at its tender sum of Kshs. 26, 600, 000. 00.

In its meeting No.15 held on 2nd October, 2009, at Min.165/2009, the Corporation Tender Committee concurred with the recommendation of the Evaluation Committee and awarded the tender to Ashut Engineering Ltd.

Letters of notification of award to the successful and unsuccessful bidders are dated 30th September, 2009.

THE REVIEW

This Request for Review was lodged on 27nd October, 2009 by Postmaster Corporation against the decision of the Tender Committee of the Postal Corporation of Kenya, the Procuring Entity dated 30th September, 2009 in the matter of tender No.TB/PROC/03/2009/2010 for Manufacture, Supply and Delivery of Private Letter Boxes.

The Applicant was represented by Mrs. Gloria Khafafa while the Procuring Entity was represented by Mr. Alloys Apell Kwengu, both Advocates.

The Applicant had raised ten grounds of appeal and urged the Board to make the following orders:

- (a) "The procuring Entity's award in respect of **Tender Number TB/PROC/03/2009-2010: Manufacture, Supply and Delivery of Private Letter Boxes** be set aside ;
- (b) The Procuring Entity be ordered to award **Tender Number TB/PROC/03/2009-2010: Manufacture, Supply and Delivery of Private Letter Boxes** to the applicant;
- (c) Without Prejudice to Prayers (a) and (b) above, nullify the decision of the procuring entity and order The Procuring Entity to re-tender in respect of **Tender Number TB/PROC/03/2009-2010: Manufacture, Supply and Delivery of Private Letter Boxes**;
- (d) Give any other or further orders that may deem just and expedient in the circumstances.
- (e) Award the cost of the proceedings to the Applicant against the Procuring Entity".

PRELIMINARY OBJECTION BY THE PROCURING ENTITY

At the commencement of the hearing, the Procuring Entity raised a Preliminary Objection as follows:

1. That the Request for Review was not filed within 14 days as provided for under Regulation 73(2)(c) ; and
2. That the Board had no jurisdiction to entertain the Request for Review pursuant to Section 93(2)(c) of the Act as there existed a contract between the Procuring Entity and Ashut Engineering Ltd, the successful bidder;

The Procuring Entity stated that the tender was awarded on 30th September, 2009. It further stated that although the minutes of the Tender Committee were dated 2nd October, 2009, the meeting was actually held on 30th September, 2009. It submitted that the notification letters were sent to the bidders on 30th September, 2009 and therefore the appeal window for filing a Request for Review expired on 15th October, 2009. It pointed out that the Request for Review was filed on 27th October, 2009 which was outside the appeal window as stipulated under Regulation 73(2)(c)(ii).

In addition, the Procuring Entity submitted that it signed a contract with the Successful Bidder on 27th October, 2009. It argued that the contract was signed in accordance with Section 68 of the Act and therefore the Board's jurisdiction had been ousted pursuant to Section 93(2) (c) of the Act.

In response, the Applicant submitted that it was not aware of the outcome of the tender until 15th October, 2009 when its representative from Canada was issued with a copy of the notification letter by the

Procuring Entity. It stated that it had made several enquiries from the Procuring Entity about the outcome of the tender prior to that date without success. It further submitted that time started running from 16th October, 2009 and therefore it had up to 30th October, 2009 to file the request for review.

It argued that the Request for Review was filed on 27th October, 2009 which was within the appeal window. Citing the Board's ruling in **Application No.30/2009 of 7th August, 2009 between Kenya Shield Security Ltd and Kenya Pipeline Company Ltd**, the Applicant argued that the duty to inform the Applicant the outcome of the tender lied on the Procuring Entity.

With regard to the contract between the successful bidder and the Procuring Entity, the Applicant submitted that the contract was hurriedly signed by the parties with a view to circumvent the Request for Review. It argued that the contract was not signed in accordance with Sections 67 and 68 of the Act and hence it could not oust the jurisdiction of the Board. It therefore urged the Board to dismiss the Preliminary Objection and hear the Request for Review on merits.

The Board has carefully considered the arguments of the parties and the interested candidates herein.

The Board notes the Preliminary Objection was based on two grounds that the Request for Review was filed outside the fourteen

days appeal window provided for under Regulation 73(2)(c)(ii) and that the Board had no jurisdiction on the matter as there existed a contract between the Successful Bidder and the Procuring Entity.

The Board notes that the key issue to determine is when the letters of notification were sent to the bidders. The Board has perused the minutes of the Tender Committee which indicate that the meeting was held on 2nd October, 2009 whereas the notification letters are dated 30th September, 2009. In view of this contradiction it is important for the Procuring Entity to provide evidence to prove when the notification letters were dispatched.

The Board further notes that the Preliminary Objection was filed together with the Memorandum of Response on 13th November, 2009. The Procuring Entity had been notified of this Request for Review by the Board's secretariat by a letter dated 27th October, 2009 which was served on the Procuring Entity on 28th October, 2009. Therefore, the Procuring Entity had enough time to get all the evidence it required to prove when it dispatched the letters of notification. The Procuring Entity submitted that the notification letters were dispatched by registered mail on 30th September, 2009 but failed to produce any evidence to that effect.

The Board has held severally that the burden of proof on the issue of notification lies on the Procuring Entity which has a duty under Section 67 of the Act to notify bidders. In view of the above, the Board holds that time started running on the 15th October, 2009 when

the Applicant's representative collected a notification letter from the Procuring Entity.

The Board further holds that having failed to proof that notification letters were dispatched on 30th September, 2009, the Procuring Entity could not demonstrate that the contract between it and the Successful Bidder was signed in accordance with section 68 of the Act. The Board holds that its jurisdiction could only be ousted where a contract was signed in accordance with Section 68 of the Act.

In view of the foregoing, the Board finds that the purported contract was not signed in accordance with Section 68 of the Act and is therefore void for all purposes and cannot oust Board's jurisdiction. Accordingly, the Preliminary Objection fails and is hereby dismissed. The Board will hear the Request for Review on merits.

THE HEARING

The Applicant raised ten grounds of Review and the Board deals with them as follows:-

Ground 1, 3 and 6: Breach of Sections 31(1) (a); 31(3); 31(6) 47(1); 39 (1) of the Act

The Applicant submitted that the Procuring Entity breached Section 66(2) of the Act by evaluating the tenders using criteria that were not

set out in the tender documents. It argued that the Procuring Entity awarded the tender to a bidder who did not have the necessary qualifications, capability, experience, resources, equipment and facilities as required under Section 31(1) (a) of the Act. It further argued that it was discriminated against by the Procuring Entity due to the use of criteria that were not set out in the tender documents and thus the Procuring Entity breached Section 39(1) of the Act.

The Applicant further argued that the Procuring Entity also breached Section 31(3) of the Act in that it arbitrarily and unfairly changed the tender requirements from what was originally contained in the Expression of Interest, and thereby placed the Applicant at a disadvantaged position compared with the other bidders

Further, the Applicant claimed that the Procuring Entity breached Section 55(1) as read together with Regulation 36 in that it failed to give the Applicant sufficient time to prepare and submit its tender documents and sample. It argued that it had only sixteen days to prepare its sample, a period that was not sufficient for one to prepare a huge sample of 100 pigeons. It contended that the Procuring Entity breached Section 56(1) of the Act by failing to provide copies of the tender documents expeditiously to the Applicant.

In response, the Procuring Entity averred that the evaluation of the tenders was conducted in accordance with the criteria set out in the tender documents. It submitted that Ashut Engineering Limited

emerged the lowest evaluated bidder in line with Section 66(4) of the Act as read together with Regulation 50(3).

The Procuring Entity stated further that the invitation to tenderers were sent to all bidders at the same time on 29th June, 2009 and the tender opening was done on 20th August, 2009. The tender was therefore open for more than 30 days as stipulated by Regulation 36 and the Applicant had ample time to prepare its tender.

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

The Board notes that Section V of the tender documents set out the technical specifications for evaluation. The Board further notes that the evaluation committee developed evaluation criteria which had a weight of 80%. The financial evaluation which had a weighting of 20% was to be done after the technical evaluation. The Board further notes that the technical evaluation criteria were applied and the bidders awarded scores. Thereafter, the financial evaluation was carried out using the following formula:

$$\frac{\text{Lowest bid} \times 20}{\text{Bid under consideration}}$$

The technical and financial scores were combined as detailed below:

Bidder's Name	Technical Scores	Financial Score	Combined Scores	Ranking
Ashut Engineering Ltd	67.2	20	87.2	1
Postmaster Corporation	64.8	18.4	83.2	2
Nomic Agencies Ltd	58.4	19.1	77.5	3
Gilgil Telecommunications Ltd	61.6	15.6	77.2	4

The Board further notes that Clause 5.2G of Section V on Evaluation Criteria states that *"the firm that satisfies all the technical specifications and quotes the lowest total price will be judged as the lowest evaluated bidder and awarded the tender"*

The Board has noted that there were several correspondences, by e-mail, between the Procuring Entity and the Applicant regarding the issue of tender documents. By an e-mail dated 29th July, 2009, the Applicant enquired from the Procuring Entity when the tender documents were to be ready. The Procuring Entity responded and informed the Applicant that the tender documents were to be ready the following day.

The Board further notes that the Applicant submitted its tender documents and the sample on time. It is also noted that the Applicant did not seek extension of time for purposes of preparation of its tender and the samples thereof.

In this regard, the Board finds that all bidders were given adequate time to prepare their bids and the samples. Indeed, all bidders submitted their tender documents within time and no prejudice was suffered as they were evaluated and passed the technical evaluation.

In the circumstances, these grounds of appeal fail.

Ground 2 - Breach of Section 67(2)

The Applicant submitted that the Procuring Entity breached Section 67(2) by failing to notify the Applicant of the results of the Tender simultaneously with the Successful Bidder. It argued that its representative obtained a copy of the notification letter on 15th October, 2009 from the Procuring Entity informing it that their tender was not successful. It argued that the Procuring Entity did not notify all bidders simultaneously and thus breached Section 67(2) of the Act.

In response, the Procuring Entity averred that it duly notified the Applicant that its bid was not successful on 30th September, 2009 the same day that the Successful Bidder was notified of the award. It argued that all the letters of notification were sent as registered mail to the bidders simultaneously.

The Board has carefully examined the documents submitted before it and the parties' submissions.

As observed by the Board in its ruling on the Preliminary Objection, the Procuring Entity did not produce evidence to prove when the letters of notification were sent to the bidders. However, the Board notes that the Applicant was able to file its Request for Review on time after it obtained the notification letter on 15th October, 2005.

Therefore, the Applicant has not suffered any prejudice.

Ground 4: Breach of Section 45(1) and (3) of the Act

The Applicant stated that the Procuring Entity breached Section 45(1) (c) and 45(3) of the Act by failing to provide a summary of the evaluation report and the reasons for the rejection of its tender. It argued that the failure to do so was an attempt to block it from filing its Request for Review on time.

In response, the Procuring Entity denied that it breached the said Sections of the Act as alleged by the Applicant. It argued that by a letter dated 22nd October, 2009, the Applicant requested for a summary of the evaluation. It further argued that pursuant to Regulation 66(2), it was required to give the summary upon request within fourteen days. In this case, it stated it received a letter from the Applicant on 22nd October, 2009 requesting for a summary, while the Review was filed on the 27th October, 2009. Therefore, it did not breach Section 45(1) and (3) as alleged by the Applicant.

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

The Board notes that by a letter dated 22nd October, 2009, the Advocates, Kipkenda, Lillian & Koech for the Applicant requested the Procuring Entity to provide them with a summary of the tender evaluation process.

The Board further notes that though the parties argued on the breach of Section 45(1) and (3), their arguments relate to Section 45(2) (c) as they are based on provision of a summary of the evaluation report to the Applicant. The Board notes that Section 45(2) (c) provides as follows;

2) The records for procurement must include-

(a)

(b).....

(c)

(d).....

(e) a summary of the evaluation and comparison of tenders, proposals or quotations, including the evaluation criteria used;

The Board also notes that Regulation 66(2) provides as follows:

“Where so requested by an unsuccessful tenderer, a procuring entity shall, within fourteen days after a

request, provide written reasons as to why the tender, proposal or application to be pre-qualified was unsuccessful”.

The Board notes the Request for Review was filed five days after the Procuring Entity had received Applicant’s letter requesting for the summary of the evaluation. Therefore the Board finds that the fourteen days allowed by the Regulation 66(2) had not lapsed.

Accordingly, this ground of appeal fails

Ground 5 - Breach of Section 26(5) of the Act

The Applicant claimed that the Procuring Entity breached Section 26(5) of the Act 2005 by calling for Expression of interest based on certain requirements, then later cancelling the resultant tenders and scaling down and/or changing the requirements. It submitted that it had written several letters to the Procuring Entity seeking information without getting a response from the Procuring Entity.

In response, the Procuring Entity argued that the cancellation of the tender was done in accordance with Section 36 of the Act and it affected all bidders.

The Board has carefully considered the submissions of the parties and examined the documentary evidence submitted before it.

The Board notes that Section 26(5) of the Act was wrongly quoted by the Applicant. The said Section provides as follows:

"A tender committee or a body established under subsection (4) shall be established in accordance with the regulations and shall-

(a) consist of not less than five members;

(b) have as its secretary, the procurement professional in charge of procurement unit.

Nevertheless the complaint by the Applicant is scaling down or changing the requirements in the Expression of Interest.

The Board has noted that that the tender documents had clear specifications and that the Applicant did not seek any clarification on the specifications before submitting its tender. Therefore, this argument was an afterthought.

Accordingly, this ground of appeal also fails.

Grounds 6 and 9: Breach of Sections 2 (a)-(e) and 27(1) and (2) of the Act 2005

The Applicant stated that the Procuring Entity breached Section 2(a)-(e) and 27(1) and (2) of the Act 2005 by failing to ensure that the provisions of the Act were followed. It argued that the decision of the Procuring Entity was unfair, arbitrary, unjust and contrary to the spirit and purpose of the Act as set out at Section 2 of the Act. It pointed out that the tendering process was not cost effective in that it had been terminated severally. In addition, the Applicant argued that the tendering process failed to promote competition as it was not transparent and fair to the bidders. To the Applicant, the tendering process lacked integrity and public confidence due to the manner in which bidders were treated by the Procuring Entity in the entire tendering process.

In response, the Procuring Entity denied that it breached Sections 2 and 27(1) and (2) of the Act as alleged by the Applicant. It argued that the whole procurement process was carried in accordance with the Act and the Regulations. It further argued that all bidders were given equal opportunity and none of them was discriminated against. It contended that the Applicant did not demonstrate how the said sections of the Act were breached.

The Board notes that Section 2 of the Act sets the objectives of the Act while Section 27(1) and (2) requires the Procuring Entity to ensure compliance of the Act. The Board holds that there is no evidence that the Procuring Entity acted unfairly, arbitrary and unjustly as argued by the Applicant. There is no evidence to prove that the actions of the

Procuring Entity did not meet the objectives of the Act as set out in Section 2 of the Act.

Therefore, this ground of appeal fails.

Ground 7 and 8: Breach of Sections 53(2) of the Act read together with Regulation 43(1) of 2006.

The Applicant stated that the Procuring Entity breached Section 53(2) of the Act 2005 read together with Regulation 43(1) of 2006 by failing to respond to its enquiry. It submitted that it was given false and misleading information by the Procuring Entity as to the status of the tender with a view to defeating the Applicant's right to question the decisions of the Procuring Entity.

Section 53(2) of the Act 2005 relate to modifications to tender documents and states as follows:

"An amendment may be made on the Procuring entity's own initiative or in response to an inquiry"

Regulation 43(1) of 2006 states as follows:-

"Where a tenderer makes an inquiry relating to tender documents under Section 53(2) of the Act, the Procuring Entity shall promptly reply in writing"

The Applicant further submitted that the Procuring Entity required the bidders to submit a sample of 100 pigeon clusters together with their tender documents. It stated that the Procuring Entity had in fact sent its representatives to Montreal to look at the factories and assess the technical capabilities of the Applicant. It further submitted that the Procuring Entity's request to produce such a huge sample of 100 pigeon clusters was a deliberate attempt to frustrate the Applicant. It further submitted that the provision of samples was a mandatory provision in the tender documents.

Finally, the Applicant argued that the Procuring Entity breached Regulation 47 by failing to use the samples in the evaluation.

In response, the Procuring Entity averred that the submission of samples was not part of the evaluation criteria and thus the Applicant together with all other bidders were not prejudiced or disadvantaged in any way. It reiterated that technical and financial evaluation was done fairly as shown in the evaluation report and Ashut Engineering Limited was ranked the best, and had the lowest price.

The Board has carefully examined the document submitted by the parties and considered the parties submissions.

The Board notes that bidders were required to submit a sample set of 100 pigeon clusters.

The Board has examined the tender documents and evaluation report and finds that the Procuring Entity carried out an evaluation of Private Letter Boxes on the 17th September, 2009 on the four bidders namely; Nomic Agency Ltd; Gilgil Telecommunications Industry Ltd; Ashut Engineering Ltd; and M/S Postmaster Corporation. The Board notes that it is only the successful bidder who had submitted the required samples of cluster set of 100 and set of 50. The rest of the bidders submitted a set of 10 pigeons each.

In view of the foregoing, the Board finds that the Procuring Entity carried out evaluation using the criteria set out in the tender documents..

Accordingly, this ground of appeal fails.

Ground 10: Loss and Damages

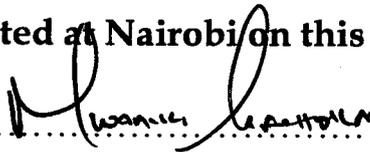
This is not a ground of Appeal but a statement of loss and damages that the Applicant is likely to suffer if the Review for Review is not allowed.

The Board notes that this was an open tender that was duly advertised by the Procuring Entity and there was no guarantee that the applicant would be awarded the tender. By participating in the procurement process, the Applicant undertook a commercial risk just like any other bidder. In Board's view, the only costs that the

Applicant could have incurred are related to preparation and submission of its tenders. Such costs are normal business risks which should be borne by the tenderers. Indeed, Clause 2.3.21 of Section II of the tender document was clear that bidders would bear all costs associated with preparation and submission of their tenders regardless of the outcome of the tendering process.

Taking into consideration all the above matters, the Request for Review fails and is hereby dismissed. The procurement process may proceed.

Dated at Nairobi on this 25th day of November, 2009


.....

Chairman, PPARB


.....

Secretary, PPARB