

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.37/2010 OF 22ND JUNE, 2010

BETWEEN

HOLMAN BROTHERS (EA) LIMITED.....APPLICANT

AND

MUNICIPALCOUNCIL OF THIKA.....PROCURING ENTITY

Review against the decision of the Municipal Council of Thika dated the 26th day of May 2010 in the matter of Tender No. MCT/ME/LAS/V/3/2010 for Supply and Delivery of a Grader.

BOARD MEMBERS PRESENT:

1. Mr. P. M. Gachoka - Chairman
2. Mr. J. W. Wambua - Member
3. Mr. Akich Okola - Member
4. Eng. C. A. Ogut - Member
5. Mrs. L. G. Ruhiu - Member

SECRETARIAT MEMBERS PRESENT:

1. Mr. C. R. Amoth - Board Secretary
2. Ms. K. A. Rota - Secretariat
3. Ms. J. Wambulwa - Secretariat
4. Mr. M. Mwololo - Secretariat (Intern)

PRESENT BY INVITATION:

PROCURING ENTITY - THE MUNICIPAL COUNCIL OF THIKA

1. Mr. E. S. Mbiuki - Town Clerk
2. Mr. David Njenga - Ag. Municipal Treasurer
3. Mr. Henry M. Waweru - Procurement Officer
4. Eng. M. Mugo - Municipal Engineer
5. Ms. Elizabeth Muinde - Procurement Officer II

APPLICANT: HOLMAN BROTHERS (EA) LIMITED

1. Mr. Peter Kimani - Sales & Marketing Engineer
2. Mr. Deepark S. Badde - Sales & Marketing Manager

INTERESTED PARTIES: ACHELIS KENYA LIMITED

1. Mr. Andrew Wandabwa - Advocate
2. Mr. Munyasa Khasiani - Advocate
3. Ms. Victoria Kariithi - Advocate
4. Ms. Faith Nekesa - Advocate
5. Mr. Nicholas Kithinji - Sales

BACKGROUND OF AWARD

Advertisement

The Council invited tenders through a National Open Tender for the supply of a Grader on 2nd February 2010 in the Daily Nation and the Star Newspapers.

Closing/Opening of Tenders

The tender Closing/Opening date was on 10th March 2010 at 12.00 noon.

The following firms had submitted their bids:

1. M/s Holman Brothers (EA) Ltd,
2. Auto Sueco (EA) Ltd,
3. Panafrican Trucks and Equipment Kenya Ltd,
4. Farm Engineering Industries Ltd,
5. Mantrac Kenya Ltd and
6. Achelis Material Handling Ltd

EVALUATION

The evaluation was carried out by a committee chaired by the Municipal Engineer.

Preliminary Evaluation

Table I

S/No	NAME OF BIDDER	IS DOCUMENT FILLED	GRADER MODEL	DELIVERY PERIOD(WKS)	RESPOSIVESNESS
1	Holman Brothers(EA) Ltd	YES	SANY PQ190CA CHINA	12-16(IF NOT IN STOCK 3-4 MONTHS)	Y
2	Auto Sueco(EA) Ltd	YES	VOLVO G930 USA,BRAZIL	14-16	Y
3	Panafrican Trucks and Equipment Kenya Ltd	YES	KOMATSU GD623A-I(WITH TURBO) JAPAN	AVAILABLE EX-STOCK	Y
4	Farm Engineering Industries Ltd	YES	BELL 670G USA	8-12	Y
5	Mantrac Kenya Ltd	YES	CAT 140H CHINA	AVAILABLE EX-STOCK	Y
6	Achelis Material Handling Ltd	YES	NEW HOLLAND F200 BRAZIL	AVAILABLE EX-STOCK	Y

All bidders that filled the BoQ appropriately were subjected to further evaluation.

Technical Evaluation

Table II

Bids were evaluated on technical basis as follows:

S/No	NAME OF BIDDER	VEHICLE MODEL/ ORIGIN	LITERATURE	DIMENSIONS AND WEIGHTS	ENGINE	TRANSMISSION	BRAKES/ TYRES	SUSPENSION / STEERING	CAB/CHASSIS
1	Holman Brothers(EA) Ltd	SANY PQ190CA CHINA	PROVIDED AND OK	PROVIDED AND OK	CUMMINS,6B T5.9-C200,UK,7200 cc, TURBO, 200HP,270LTS , 17LT/HR	AUTOMATIC, HYDRAULIC, ELECTRONIC 5F 5R	17.5X25 PR12	HYDRULIC POWER STEERING, 7.9M RADIUS	6YRS WARRANTY AGAINST CORROSSION, YELLOW COLOUR

2	Auto Sueco(EA) Ltd	VOLVO G930 USA,BRAZIL	PROVIDED	PROVIDED AND OK	VOLVO,D7E, SWEDEN, TURBO,7200cc, 195HP,80L TANK 17LT/HR MED	POWERSHIFT, HYDRAULIC, ELECTRONIC 8F 4R	14.00X24,G-2	HYDRULIC POWER STEERING, 7.26M RADIUS	WARRANTY AGAINST CORROSSION, YELLOW COLOUR
3	Panafrican Trucks and Equipment Kenya Ltd	KOMATSU GD623A-I(WITH TURBO) JAPAN	PROVIDED	PROVIDED AND OK	KOMATSU S60125 JAPAN,TURBO 11200cc,180HP, 12.6-17.4 LT/HR, 285LT	HYDROSHIFT, HYDRAULIC, 6F 6R	14.00X24	POWER STEERING, 6.9M RADIUS	6YRS WARRANTY AGAINST CORROSSION, YELLOW COLOUR
4	Farm Engineering Industries Ltd	BELL 670G USA	PROVIDED	PROVIDED AND OK	JOHN DEERE POWER TECH, USA 6068 ,9000cc,416.4 LT TURBO,185HP	HYDROSHIFT, HYDRAULIC, 8F 8R	17.5X25	POWER STEERING, 7.21M RADIUS	6YRS WARRANTY AGAINST CORROSSION, YELLOW COLOUR
5	Mantrac Kenya Ltd	CAT 140H CHINA	PROVIDED	PROVIDED AND OK	CAT 3306 BELGIUM,104 50cc, 199HP,9-15-19LT/H, 284LT	AUTOMATIC, HYDRAULIC, ELECTRONIC 8F 6R	14.00X24	HYDRULIC POWER STEERING, 7.4M RADIUS	6YRS WARRANTY AGAINST CORROSSION, YELLOW COLOUR
6	Achelis Material Handling Ltd	NEW HOLLAND F200 BRAZIL	PROVIDED	PROVIDED AND OK	CUMMINS 6CTAA BRAZIL,8300cc , TURBO,29-37 LT/HR,200HP	AUTOMATIC, HYDRAULIC, ELECTRONIC 8F 4R	20.5X25 (12RR)	HYDRULIC POWER STEERING, 7.3M RADIUS	6YRS WARRANTY AGAINST CORROSSION, YELLOW

Table III

S/ No	NAME OF BIDDER	ELECTRICAL SYSTEM	EQUIPMENT	PAINTING	WARRANTY	MANUALS	OTHER REQUIREMENTS	FIRMS STATUS	SPARES AVAILABILITY
1	Holman Brothers(EA) Ltd	2X12V,120 Ah	TRIANGULAR SIGNS, SCARIFIER RIPPER PROVIDED	PROVIDED AS PER SPECS. AND OK	2000 HRS OR ONE YEAR	PARTS CATALOGUE PROVIDED	GREEN PLATES, INSPECTION TO BE DONE	FRANCHISE HOLDER	ALWAYS AVAILABLE
2	Auto Sueco(EA) Ltd	2X12V,96Ah	TRIANGULAR SIGNS, SCARIFIER RIPPER PROVIDED	PROVIDED AS PER SPECS. AND OK	2500 HRS OR ONE YEAR	PARTS CATALOGUE PROVIDED	GREEN PLATES, INSPECTION TO BE DONE, NO GOVERNOR	FRANCHISE HOLDER	ALWAYS AVAILABLE
3	Panafrican Trucks and Equipment Kenya Ltd	2X12V,140 Ah	TRIANGULAR SIGNS, SCARIFIER RIPPER PROVIDED	PROVIDED AS PER SPECS. AND OK	ONE YEAR	PARTS CATALOGUE PROVIDED	GREEN PLATES, INSPECTION TO BE DONE	FRANCHISE HOLDER	ALWAYS AVAILABLE
4	Farm Engineering Industries Ltd	2X12V,100 Ah	TRIANGULAR SIGNS, SCARIFIER RIPPER PROVIDED	PROVIDED AS PER SPECS. AND OK	2500 HRS OR ONE YEAR	PARTS CATALOGUE PROVIDED	GREEN PLATES, INSPECTION TO BE DONE	FRANCHISE HOLDER	ALWAYS AVAILABLE
5	Mantrac Kenya Ltd	2X12V,100 Ah	TRIANGULAR SIGNS, SCARIFIER RIPPER	PROVIDED AS PER SPECS. AND OK	ONE YEAR	PARTS CATALOGUE PROVIDED	GREEN PLATES, INSPECTION TO BE DONE	FRANCHISE HOLDER	ALWAYS AVAILABLE

			PROVIDED						
6	Achelis Material Handling Ltd	2X12V,100 Ah	TRIANGULAR SIGNS, SCARIFIER RIPPER PROVIDED	PROVIDED AS PER SPECS. AND OK	2000 HRS OR ONE YEAR	PARTS CATALOGUE PROVIDED	GREEN PLATES, INSPECTION TO BE DONE	FRANCHISE HOLDER	ALWAYS AVAILABLE

Table IV

S/No	NAME OF BIDDER	ADDRESSES	PRICE VALIDITY	DELIVERY PERIOD	REMARKS
1	Holman Brothers(EA) Ltd	42044-00100 NBI	120 DAYS	12-16(IF NOT IN STOCK 3-4 MONTHS)	MOST INFORMATION PROVIDED ,GRADER POWERFUL AS SPECIFIED,FRONT DOZER EXTRA (GRADER AT YARD HAD DIFFERENT ENGINE THAN SPECIFIED AND HAD NO FRONT DOZER)
2	Auto Sueco(EA) Ltd	18101-00500 NBI	90 DAYS IRREVOCABLE LETTER OF CREDIT/KSH 2M UP FRONT BAL AFTER 45 DAYS IF NOT SELL MACHINE AND KEEP ADV PAYMENT	14-16	MOST INFORMATION PROVIDED OK. GOVERNOR NOT PROVIDED
3	Panafrican Trucks and Equipment Kenya Ltd	44927-00100 NBI	120 DAYS ,100% PAYMENT WITH ORDER	AVAILABLE EX-STOCK	MOST INFORMATION PROVIDED OK GOVERNOR NOT PROVIDED, POWER LESS THAN SPECS
4	Farm Engineering Industries Ltd	1326-40100 KSM	NOT SPECIFIED	8-12	MOST INFORMATION PROVIDED OK GOVERNOR NOT PROVIDED,POWER LESS THAN SPECS
5	Mantrac Kenya Ltd	30067-00100 NBI	90 DAYS	AVAILABLE EX-STOCK	MOST INFORMATION PROVIDED OK
6	Achelis Material Handling Ltd	30378-00100 NBI	120 DAYS	AVAILABLE EX-STOCK	MOST INFORMATION PROVIDED OK,

From the Table I-IV above, all suppliers complied substantially with the requirements. Panafrican Trucks and Equipment Kenya Ltd and Farm Engineering Industries Ltd graders had power less than specified.

Financial Evaluation

Financial evaluation was carried out as follows:

Table V

S/No	NAME OF BIDDER	AMOUNT IN BOQ	PRICE VALIDITY	DELIVERY PERIOD(WKS)	RANKING
1	Holman Brothers(EA) Ltd	17,980,000	120 DAYS	12-16(IF NOT IN STOCK 3-4 MONTHS)	1
2	Auto Sueco(EA) Ltd	20,880,000	90 DAYS	14-16	2
3	Panafrican Trucks and Equipment Kenya Ltd	22,968,000	120 DAYS	AVAILABLE EX-STOCK	4
4	Farm Engineering Industries Ltd	24,162,800	NOT SPECIFIED	8-12	6
5	Mantrac Kenya Ltd	23,424,924	90 DAYS	AVAILABLE EX-STOCK	5
6	Achelis Material Handling Ltd	22,600,000	120 DAYS	AVAILABLE EX-STOCK	3

It can be observed that Holman Brothers(EA) Ltd has provided the lowest price and delivery period for delivery of SANY PQ190CA 200hp.

Detailed Financial Evaluation and consideration of Other Issues:

1. The lowest bid is M/s Holman Brothers (EA) Ltd. The following details should be considered for award:

- (i) He has provided cheapest price of Kshs. 17,980,000 VAT inclusive.

(ii) The supplier is a franchise holder which means spares availability and after sales service should not be a problem.

(iii) The delivery period is 12-16 weeks (IF NOT IN STOCK 3-4 MONTHS).

(iv) The supplier contractor as a result of the above reasons is recommended.

2. The second lowest valid was M/s. Auto Sueco (EA) Ltd. The following details should be considered for award:

(v) He has provided second cheapest price of Kshs 20,880,000VAT inclusive

(vi) The delivery period is 14-16 weeks.

3. The third lowest valid was M/s Achelis Material Handling Ltd. The following details should be considered for award:

(vii) He has provided third cheapest price of Kshs 22,600,000VAT inclusive.

(viii) The delivery period is Available Ex-Stock.

(ix) Fuel consumption of grader relatively high

5 Recommendations

Based on the above evaluation, it was recommended that **Quotation No. MCT/ME/LAS/V/3/2010 (Supply and Delivery of Grader)** be awarded to **M/s. Holman Brothers(EA) Ltd.** for a **SANY PQ190CA 200hp** at the **Tender Amount of Kenya Shillings Seventeen Million Nine Hundred and Eighty Thousand (KShs. 17,980,000.)** only and at a delivery period of **12-16 weeks(IF NOT IN STOCK 3-4 MONTHS)**

Tender Committee's Decision

After deliberations, in its meeting held on 21st April, 2010, the tender committee resolved that the tender for the Supply and Delivery of Grader be awarded to Hollman Brother (E.A) Ltd for supply of a Sany PQ 190CA 200hp at the quoted amount of Kenya Shillings Seventeen Million Nine Hundred and Eight Thousand (Ksh. 17,980,000) only and delivery period of twelve (12) weeks.

Notification of award was communicated to the Successful Bidder and Unsuccessful Bidders vide letters dated 24th and 26th April, 2010 respectively.

In its meeting held on 12th May, 2010, the tender committee annulled the award of the tender to the Applicant on the ground that it had received negative report from Municipal Council of Mavoko on the performance of

the type Grader to be supplied by the Applicant. The tender committee directed for a further evaluation of the tenders by the Chief Mechanical Engineer.

The Procuring Entity issued new specifications to the three bidders namely, Auto Sueco (EA) Ltd, Achellis Materials Handling Ltd and the Applicant. After evaluation, the evaluation committee recommended the award of the tender to Achellis Materials Handling Ltd at its tender sum of Kshs. 22, 600, 000 inclusive of VAT.

The tender committee, in its meeting held on 25th May, 2010, awarded the tender to Achellis Materials Handling Ltd at Kshs. 22, 600, 000.00.

Notification letters are dated 26th May, 2010.

THE REVIEW

This Request for Review was lodged on 22nd June 2010 by Holman Brothers (EA) Limited. The Review is against the Decision of the Municipal Council of Thika in the matter of Tender No. MCT/ME/LAS/V/3/2010 for Supply and Delivery of a Grader.

The Applicant seeks for the following orders from the Board:

- 1) No order should be written or given out until the matter is sorted out.
- 2) No machine (Motor Grader) should be supplied until such a time that the dispute is resolved.
- 3) The award given to Holman Brothers (EA) Ltd should be re-instated.

The Applicant raises eight grounds which we deal with them as follows:

Grounds: 1, 4, 5 and 6- breach of Sections 52(1) (2) and 47(1) (a)-(g).

These grounds have been consolidated since they raise similar issues.

The Applicant submitted that it was the lowest evaluated bidder and should have been awarded the contract in accordance with the letter to that effect from the Procuring Entity, which is dated April 24th, 2010. It stated that it participated in the tender in response to the tender notice. It further submitted that it had met the necessary requirements and was then awarded the tender, which award, the Procuring Entity subsequently cancelled vide its letter dated April 29th, 2010. It argued that the decision by the Procuring Entity to cancel the award after the evaluation was completed and notification of award done. It argued that the decision by the Procuring Entity to cancel the award after evaluation and notification of award was done was in breach of the Act as it introduced a new evaluation criteria. It further argued that the decision to subject the bidders to physical and technical inspection after the cancellation of award was a breach of the Act and Regulations.

In response, the Procuring Entity submitted that its decision to award the tender to the Applicant was an error as it needed to confirm the qualification of the Applicant first before it could make the award. It argued that while it was true that the Applicant met the necessary

prequalification requirements in terms of Section 47(1) of the Act, the Procuring Entity still needed the chief Mechanical Engineer, Ministry of Roads, to carry out mechanical inspection of the Graders offered by each bidder before it could make an award. It stated that upon realizing that mechanical inspection of the Graders by the Chief Mechanical Engineer was necessary, it decided to cancel the award to the Applicant in accordance with Section 68(1) of the Act, as no contract had been concluded between the two parties. The Procuring Entity further argued that its decision was based on Section 52(1) of the Act which permits a Procuring Entity to confirm the qualification of a bidder before it is awarded a contract. The Procuring Entity therefore urged the Board to dismiss the Request for Review.

The Board has carefully considered the submissions of the parties and perused the documents presented before it.

The Board notes that although the Tender Opening/Closing took place on 10th March, 2010 as indicated in the notice. Six bidders, namely, Holman Brothers (EA) Ltd, the Applicant, Auto Seuco (EA) Ltd, Panafrican Trucks and Equipment Kenya Ltd, Farm Engineering Industries Ltd., Mantrac Kenya Ltd, and Achelis Material Handling Ltd., responded to the notice, and were evaluated, and found to be technically responsive. Accordingly, they were all subjected to financial evaluation. As a result of this the evaluation committee of the Procuring Entity in its report dated 6th April

2010, recommended to the tender committee that the tender be awarded to Holman Brothers (EA) Limited.

The Board further notes that, at its meeting of April 21st, 2010, the tender committee of the Procuring Entity concurred with the recommendation of the evaluation committee, and awarded the tender to the Applicant at their quoted price of Kenya Shillings Seventeen Million, Nine Hundred and Fifty Thousand (17,950,000.00). The decision of award was communicated to the Applicant by the Procuring Entity vide a letter dated 24th April, 2010. The Board further notes that by letters dated 26th April, 2010, the Procuring Entity informed the other five bidders that their bids were not successful.

In addition, the Board notes that through a letter dated 27th April, 2010 the Applicant confirmed acceptance of the award. However, by a letter dated 29th April 2010, the Procuring Entity cancelled the award citing “... **pending further physical and technical inspection to be done.**” By a further letter dated May 3rd, 2010, the Procuring Entity informed the Applicant that...

“Please note that offer letter was cancelled by our letter ref. MCT5/6/3/209 DATED 29th April 2010.

We noted that there was an error in the first evaluation which is being looked at. You will be advised accordingly.”

The Board further notes that by letters dated April 29th, 2010, the Procuring Entity informed the other five bidders to **“Treat the letter as cancelled since further physical and technical evaluation will be conducted.”**

The Board further notes that although all the bidders were notified of the cancellation and the need for further evaluation, only **three** of them, namely, Auto Seuco (EA) Limited, Achelis Material Handling Limited and the Applicant, were subsequently provided with forms for "*a mechanical inspection report*," to complete and return to the Procuring Entity. This was done vide a letter to them dated 15th May, 2010.

The Board further notes that by a letter dated 17th May, 2010, the Procuring Entity wrote to the Chief Mechanical and Transport Engineer, Ministry of Roads, attaching the filled grader data forms from the three bidders requesting the engineer to "**...undertake the necessary analysis and advice us accordingly.**" By a letter dated 19th May, 2010, the Chief Mechanical Engineer wrote to the Procuring Entity, forwarding his evaluation report of the three bidders, and informing it to note that "**...all the graders bidded for are in our current term contract for supply of equipment to Government Ministries, Departments, Parastatals , Local Authorities and Institutions for the period ending June, 2010.**"

The Board further notes that following this communication, the tender committee of the Procuring Entity met on May 25th, 2010, and decided to award the tender to Achelis Material Handling Ltd, for the quoted price of Kenya Shillings Twenty Two Million Six Hundred Thousand (Ksh. 22,600,000.00). The Successful Bidder was informed of this fact vide a letter dated 26th May, 2010. The other bidders, including the Applicant, together with those whose bids were not submitted to the Chief Mechanical

Engineer, for evaluation, were advised of their fate by a letter of the same date.

The Board further notes that the Successful Bidder, Achelis, wrote to the Procuring Entity on 27th May, 2010, confirming its acceptance of the award. According to the evidence tendered by the Procuring Entity during the hearing of the Application, an initial payment in favour of the Successful Bidder in the amount of Kshs. Nine Million, Seven Hundred Forty One, Three Hundred and Seventy Nine (Ksh. 9,741,379) was made on 2nd June, 2010, whereas the Successful Bidder did not deliver the equipment in question to the Procuring Entity until 6th June, 2010.

It is against this background that the Applicant has prayed to the Board that:

1. No order should be written or given out until the matter is sorted out.
2. No machine (Motor Grader) should be supplied until such a time that the dispute is resolved.
3. The award given to Holman Brothers (EA) Ltd should be reinstated.

The first primary question to consider is whether the Procuring Entity acted in accordance with the provisions of the Act and the Regulations in the management of the tender process. There is no dispute that the tender

in question was an open tender, for which the law requires that there be an invitation to tender that sets out certain basic details, including such things as the name of the procuring entity and its address, a brief description of what is to be procured, an explanation of where to obtain the tender documents and when and where the tenders will be opened. These requirements are clearly set out in section 51 of the Act. It is clear that the Procuring Entity was well informed of the law, which is why it advertised its requirement by publishing the notice in the Daily Nation issue of February 9th, 2010.

The notice in question invited those interested to obtain bid documents from the office of the Municipal Treasurer's Department, as is clear from paragraph 4 of the notice. The word "bid", though not used in the Act or Regulations, is commonly used interchangeably with the word "tender", and thus its reference in the tender notice must be understood in this context.

Section 52(1) of the Act makes it mandatory that the **"procuring entity shall prepare tender documents in accordance with this section and the regulations."** It is thus clear that tender documents are not optional: they are mandatory.

In order to ensure that there is transparency in the procurement proceedings and process, section 29(4) makes it mandatory that a procuring entity must use such standard tender documents as may be prescribed. Regulation 29(1) is instructive in this respect. It provides that:-

“The standard tender document for purposes of section 29(4) of the Act shall be as set out in the Third Schedule to these Regulations.”

The Public Procurement and Oversight Authority has prepared and made available to Procuring Entities these standard tender documents, including those that relate to procurement of goods, as was the case in this specific procurement. These pro forma standard documents are supposed to be tailored by each procuring entity to suit a particular procurement situation, and be used in every procurement proceeding without fail, in compliance with section 29(4) of the Act. It is apparent that the Procuring Entity chose not to use standard tender documents although it is a mandatory requirement as provided in Section 29(4) of the Act cited above.

The contents of tender documents are set out in section 52(3) of the Act, which states that the tender document shall set out the following, among other things:

“(a) the specific requirements prepared under section 34 relating to the goods, works or services being procured and the time limit for delivery or completion;

(b).....

(c) the general and specific conditions to which the contract will be subject, including any requirement that performance security be provided before the contract is entered into;

(d).....

(e) instructions for the preparation and submission of tenders;

(f).....

(g).....

(h).....

(i) the procedures and criteria to be used to evaluate and compare the tenders;

(j) a statement that the procuring entity may, at any time, terminate the procurement proceedings without entering into a contract”.

In this particular case, when the bidders went to obtain the tender documents from the Procuring Entity as indicated in the notice, the documents that they got did not include the following Sections which must be contained in the standard tender documents:

- (a) Instructions to the tenderers as to how to prepare and submit the tenders;
- (b) Procedures and criteria to be used to evaluate and compare the tenders;
- (c) A statement that the Procuring Entity could terminate the proceedings at any time without entering into a contract;
- (d) The general and specific conditions of the resultant contract.

Instead, they were provided with a document with specific technical requirements only.

It is not clear how, in the absence of tender documents which set out procedures and criteria to be used to evaluate and compare the tenders, the Procuring Entity was able to evaluate the submissions of the six bidders in order to arrive at the conclusion that the tender by the Applicant was the lowest evaluated tender in accordance with Section 66(4) of the Act.

From the foregoing, the Board further finds that the Procuring Entity breached Section 52(1) by failing to prepare and provide tender documents. The Board further finds that the Procuring Entity failed to prepare and provide tender documents, in breach of Section 52(3) of the Act.

As noted earlier, after the initial evaluation which resulted in the Applicant being awarded the tender, the Procuring Entity cancelled the award on the ground that there was need for further physical and mechanical inspection. On this premise, the Procuring Entity referred the matter to the Chief Mechanical Engineer for re-evaluation of three of the six bidders, including the Successful Bidder and the Applicant. The information provided to the Board through documentary and oral evidence indicates that the Chief Mechanical Engineer based his evaluation on criteria which were not contained in the tender documents, as indeed there were no standard tender documents as envisaged under Section 52 of the Act.

The question which therefore arises is whether this action by the Chief Mechanical Engineer has any basis in the procurement law. The issue as to

what should be taken into account in the evaluation of tenders is set out in section 66(2) of the Act. This section makes it clear that evaluation of tenders must be based on criteria which are set out in the tender documents. The section provides that:-

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall apply."

The Board finds that the evaluation by the Chief Mechanical Engineer is in breach of section 66(2) of the Act as it was based on criteria which were not set out in the purported tender documents.

As noted hereinbefore, the Procuring Entity cancelled the award to the Applicant citing the need for further evaluation of the tenders. This cancellation was done after the tenders had been closed/opened, and evaluated. It thereafter proceeded to send to three of the six original bidders further forms, which were not part of the documentation given to bidders who had responded to the tender notice. In the view of the Board, this action raised two issues as to its legality. First is the question as to whether or not the Procuring Entity could properly carry out post award determination of the Applicant's qualifications to perform the contract. On this issue, the Procuring Entity maintained that it was entitled to stop the proceedings in order to determine the Applicant's qualifications to perform the contract. In support of its position, it cited Section 31(1) of the Act arguing that that it was in order for it to confirm the qualifications of the

Applicant before the award could be confirmed. Section 31(1) provides as follows:

"A person is qualified to be awarded a contract for procurement only if the person satisfies the following criteria."

The Board notes that Section 31(3) and (4) are instructive in terms of where qualifications should be set out. Section 31(3) states that:-

"The criteria under subsection (1) and any requirements under subsection (2) shall be set out in the tender documents....."

Subsection 31(4) further makes it clear that determination as to whether a person is qualified "... shall be done using criteria and requirements set out in the tender documents described in subsection (3)."

It is a matter of record that the Procuring Entity did not have tender documents which met the requirements of the Act. In light of this fact, the Board finds that the Procuring Entity breached section 31 of the Act.

The second question for the Board to determine is whether the cancellation of the tender by the Procuring Entity was done within law pursuant to Section 68(3) of the Act which states that:

"No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into."

The Board finds that by cancelling the award and subsequently issuing further documents to bidders, the Procuring Entity breached section 59(3) of the Act, as these documents introduced new requirements after the tender closing/opening.

The Board is alive to the fact that a Procuring Entity is perfectly within its rights to amend tender documents at any time before the deadline for submission of tenders in accordance with the provisions of section 53(1), which states that:

“A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum.”

However, this was not the case in this tender as the documents in question were issued on 6th May, 2010, whereas the tender closing/opening took place 10th March, 2010.

In addition to the above findings, the Board observes that the letter of award to the Applicant was dated 24th April, 2010, whereas those to the unsuccessful bidders were dated April 26th, 2010. Section 67(2) provides that:

“At the same time as the person submitting the successful tender is notified, the procuring entity shall notify all the persons submitting tenders that their tenders were not successful.”

The Board finds that the Procuring Entity breached section 67(2) of the Act by sending the notices to the unsuccessful bidders in respect to the first evaluations on different dates from those of the Applicant.

According to the documents tendered before the Board and the submissions made during the hearing, the Procuring Entity notified all the six bidders whose tenders had been found to be responsive of the cancellation of the award to the Applicant. This was done by letters dated April 29th, 2010. However, the Board notes that only three of the bidders were sent forms for further evaluation by the Chief Mechanical Engineer. The Procuring Entity explained this anomaly by stating that the three bidders who were left out of the list had been found non-responsive at the technical evaluation stage. However, the Board notes that there was no evidence tendered by the Procuring Entity to the Board to support this claim. By failing to send the documents to all the bidders who had been found responsive, and instead sending them only to three of the bidders, the Procuring Entity acted in a discriminatory way. This prejudiced the chances of some of the bidders from winning the bid. This was contrary to Section 39(1) of which prohibits a Procuring Entity from discriminating against bidders who are otherwise qualified.

The Board therefore finds that the Procuring Entity breached Section 39(1) by excluding the other three bidders from further participation in the subsequent process involving the evaluation by the Chief Mechanical Engineer.

Ground 2- breach of Section 93(1)

The Applicant submitted that as a result of the decision by the Procuring Entity to award the tender to another bidder it had suffered loss as it had already ordered and committed itself to supply grader on the strength of the letter of award.

In response, the Procuring Entity submitted that as no contract had been entered into with the Applicant in accordance with section 68(3) of the Act it could not claim to have suffered any loss due to the cancellation of the letter of award. It further submitted that, in any event, it had already entered into a contract with the Successful Bidder, and the grader had been supplied and delivered, and that the matter should therefore not be a subject of review in light of the provisions of section 93(2) (c) of the Act.

The Board notes that the Procuring Entity stated that the contract between itself and the Successful Bidder had been signed, although it was not produced before the Board, notwithstanding the request made by the Secretary to the Board in his letter to the Procuring Entity for production of all the documents concerning this tender. The Procuring Entity undertook to forward the signed contract to the Secretary to the Board by 16th July, 2010. The Procuring Entity subsequently wrote to the Board vide its letter dated July 17th, informing it that no contract had been signed, contrary to its earlier claim to that effect, during the hearing.

The Board notes that Section 93(2) (c) of the Act ousts a tendering process from review where a contract has been signed. However, the Board also

notes that Section 68(2) of the Act requires that a written contract should not be entered into until at least 14 days have elapsed following award notification. In this case, the Board notes that the second letters of notification were sent on the 26th May, 2010 and on 27th Ma, 2010 the Successful Bidder accepted the award. On the 6th June, 2010 the Successful Bidder supplied the tendered item leading to the conclusion of the tender. The period within which the delivery of the grader was done was 11 days after the notifications, which was less than the statutory period of 14 days after which a contract should be entered into.

The Board finds that no contract has been signed between the parties as is evidenced by the letter to the Board by the Procuring Entity is dated 17th July, 2010.

Ground 3- breach of Section 73 (2) (b)

The Applicant argued that the Procuring Entity acted in bad faith by cancelling the original award.

In response the Procuring Entity stated that this allegation was not true since it was the custodian of public funds and that it had a duty to ensure that the equipment it procured met the highest standard of operations.

On its part, the Successful Bidder, Achelis Material Handling Ltd, while acknowledging that that there might have been breaches of the Act and Regulations, submitted that the Applicant should have brought an application for review when the Procuring Entity decided to cancel the

original award to it in the first instance. It argued that having continued to participate in the process after the cancellation, it could not raise the issue at this stage. It further argued that since the Successful Bidder had already supplied the equipment in question, and had been paid for it by the Procuring Entity, the order for cancellation of the award, which the Applicant sought, would be in vain.

The Board finds that the Procuring Entity's action to cancel the award of the tender to the Applicant was not justifiable as it did not provide sufficient grounds for its action. In response, it submitted that its decision to cancel the award to the Applicant was based on the fact that it had sought information about the performance of the grader from Mavoko Municipal Council which was found to be negative and that it had found that the same equipment was sold to Mavoko Municipal Council at a cost of Kshs. 13 million whereas the same was being sold to them at Kshs. 17.9 million. The Board notes that Section 62 provides an opportunity for a Procuring Entity to seek clarifications on a tender and that the clarification should not change the substance of the tender. Furthermore, the excuse of the Procuring Entity that the item had been sold to them at a higher price makes no sense since it awarded the tender to a bidder with a higher price than that of the Applicant's.

Accordingly this ground of appeal succeeds.

Ground 7

The Applicant submitted that the Procuring Entity wrote a letter dated 26th June 2010 informing it that it was not successful. It claimed that it received this letter on 18th June 2010 and that the letter had been posted at Thika post office on 16th June 2010. It also claimed that the town clerk had not signed the letter as was the case for previous correspondence.

In response, the Procuring Entity stated that the letter was dated 26th May 2010 and that the Applicant was trying to mis-inform the Board. It submitted that all the letters to the Successful and Unsuccessful Bidders were written on the 26th May, 2010. It regretted the delay caused in the delivery of the letters which it stated was not done with any ill intention. It further submitted that all regret letters were normally signed by the Procurement Officer on behalf of the Town Clerk.

The Board finds that the Applicant has not suffered any prejudice as a result of the action by the Procuring Entity as it was able to file its application in time.

This ground of the Review therefore fails.

Ground 8

This ground is not considered since it is a mere general statement.

Observations by the Board

Apart from the series of breaches of the Act set out hereinabove, the decision by the Procuring Entity to subject the three tenders to further evaluation by the Chief Mechanical Engineer, and the resultant decision to award the tender to the Successful Bidder, raises serious doubts as to the true intentions of the Procuring Entity.

It is important to set out the facts as the Board has established them from the whole proceedings. It is not in dispute that following this action the Procuring Entity carried out a second evaluation, which included the filling of forms on further technical specifications advanced to some of the bidders. This evaluation led to the recommendation of Achelis Material Handling Limited for the award at a price of Kshs. 22,600,000. Notification of the award to the Achelis Materials Handling Ltd and to the other two bidders who were considered in this second evaluation process, were all dated May 26th, 2010.

According to the Procuring Entity, these letters were mailed on May 26th, 2010. It is curious that a letter mailed on the 26th May, 2010 in Thika was received by the Successful Bidder in Nairobi on 27th May, 2010. Evidence given by the Successful Bidder was conflicting as to whether the letter was received via post office or was emailed to it. Whichever way it received the communication, it is clear from the evidence adduced by the Applicant that in its case, the letter arrived by post. The date of its arrival is, however, in dispute as the Applicant claimed that although the letter was dated May 26th, it received it on June 18th and it appeared to have been post-marked

June 16th, 2010. The Applicant suspects that the letter was dated May 26th, with the intention of making the appeal time barred.

In any event, the Successful Bidder responded by accepting the award vide a letter dated 27th May, 2010. Even more curious is the fact that on 28th May, 2010, the Successful Bidder dispatched an invoice to the Procuring Entity for the equipment. This invoice was processed by the Procuring Entity on 2nd June, 2010, as evidenced by the withholding VAT Certificate No. 0546649. It is further evidenced by a payment certificate Number 1006-0003, which shows that the payment was processed on 31st May, 2010, and payment made on 2nd June, 2010. The payment is in the sum of Kenya Shillings 9,741, 379.00. There are two further withholding VAT certificates numbers 0546684 and 0546685, respectively, both dated 16th June, 2010, which refer to payment reference numbers 84 and 80 respectively. The Board did not have sight of the payment certificates. However, the withholding VAT certificates refer to the supplier as Achelis Material Handling Ltd.

Although the Procuring Entity had informed the Board that it had concluded a contract with the successful bidder, it has subsequently written a letter to the Board stating that:

“RE: TENDER CONTRACT: TENDER NO. MCT/ME/LAS/N//3/2010:

“Refer to our discussion yesterday when we appeared before the Board over case No. 37/2010 on the above tender. We have confirmed that the contract documents were never signed with the supplier.”

It is clear to the Board, from this turn of events that the Procuring Entity was aware that a contract had not been signed with the Successful Bidder, but chose to deliberately mislead the Board. This is a serious matter. The Board is a quasi-judicial body and as such, evidence adduced before it must be truthful, failing which, appropriate judicial actions must be taken against those responsible.

As a result of the actions of the Procuring Entity, the situation as it now stands that:

1. The Procuring Entity hurriedly entered into a supply arrangement with the Successful Bidder before the elapse of the statutory period of the appeal window of fourteen days as set out in Section 68(2) of the Act.
2. There is no valid contract between the parties in terms of Section 68(2), which section states that "No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into."
3. In light of the fact that there is no signed contract the Procuring Entity has exposed the public to the fact that should there be any defects with the equipment, there is no recourse as the general conditions and specific conditions of contract provided for under section 52(3)(c), which would cater for warranty, were not made part of the tender documents;

4. All payments under the supply arrangement appear to have been made thus exposing the Procuring Entity to the possibility that if the equipment fails, it would not have spare parts without having to go and buy them at whatever price the supplier might decide.

All these omissions on the part of the Procuring Entity appear to be the result of more than mere negligence. The Procuring Entity is not a novice in procurement as set out in the Act and the Regulations. It admitted as much, and if there was any doubt about its competence, it has admitted to being a beneficiary of capacity building programmes offered by the Public Procurement and Oversight Authority.

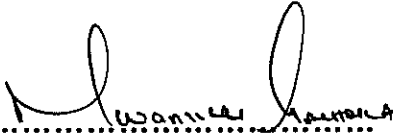
The Board is more than convinced that these breaches of the law, and failures to safeguard public funds, were deliberate. However, as the Board has no investigative powers that, if invoked, might enable it to get to the bottom of the matter, it directs to the investigative arms of the Government, including the Public Procurement Oversight Authority, to carry out the necessary investigations, in this matter.

In view of the above findings, the Board directs pursuant to Section 98 of the Act as follows:

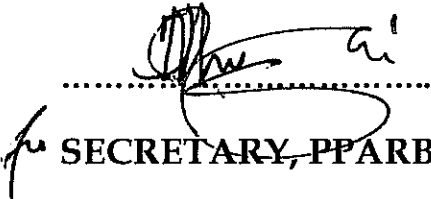
1. The award of the tender to the Successful Bidder, Achellis Materials Handling Ltd was illegal and was done in total breach of the Act and the Regulations. The award is hereby nullified.

2. As delivery and payment has already been done, the Director General of the Public Procurement Oversight Authority is hereby directed to investigate the matter and take the appropriate action. If necessary the Director General should refer the matter to other investigative arms of Government for further action.

Dated at Nairobi on this 20th day of July, 2010


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CHAIRMAN, PPARB


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SECRETARY, PPARB