

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 33/2011 OF 18th JULY, 2011

BETWEEN

MFI LEASING LIMITED.....APPLICANT

AND

KENYA PORTS AUTHORITY.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Kenya Ports Authority dated 1st July, 2011 in the matter of Tender No. KPA/166/2010-2011 for Provision of Lease for Multi-Functional Products (Photocopying, Printing and Scanning).

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

Mrs. Pamela K. Ouma	-	Holding brief for the Secretary
Ms. Maurine Namadi	-	Secretariat

PRESENT BY INVITATION

Applicant, MFI Leasing Ltd

- Ms. Kethi Kilonzo - Advocate, Kilonzo & Company Advocates
Ms. Cecilia Ndanu - Paralegal, Kilonzo & Company Advocates
Ms. Mercyline Lubia - Paralegal, Kilonzo & Company Advocates
Mr. Collins Ouma - Billing and Customer Relations

Procuring Entity, Kenya Ports Authority

- Mr. Michael Sangoro - Principal Legal Officer
Mr. Johnson Gachanja - Principal Procurement Officer

Interested Candidate, Express Automation

- Mr. Archith Rao - Director
Mr. Michael Abere - Sales Manager

BOARD'S DECISION

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

BACKGROUND

Advertisement

The tender for Provision of Lease for Multi Functional Products - Photocopying, Printing and Scanning, was advertised by the Kenya Ports Authority on 10th May, 2011 in the Daily Nation and Standard Newspapers.

Closing/Opening:

The tender closed/opened on 7th June, 2011 in the presence of the bidders representatives who chose to attend. Four bids were opened and checked for the presence of Tender Security; Business Questionnaire & Declaration Form; and Manufacturer's Authorization. The Bids were opened from the following firms:-

No.	Bidder	Tender Security amount (Kshs.)	Bank providing tender security	Tender security validity period	Business Questionnaire	Declaration Form	Manufacturer's Authorization Form
1.	Office Technology Ltd	200,000	Eco Bank	150 days up to 5/11/2011	Provided	Provided	By Cannon
2.	Express Automation	200,000	I & M Bank	120 days up to 4/10/2011	Provided	provided	By Sonika
3.	MFI Leasing Limited	200,000	Diamond Trust Bank	90 days up to 5/9/2011	Provided	Provided	By Kiocera
4.	The Copy Cat	200,000	Prime Bank	148 days Upto 3/11/2011	Provided	Provided	By Sonika

EVALUATION

Preliminary Evaluation:

The bids were evaluated to check on the mandatory adherence to the tender requirements as provided for in Clause 2.15.1 of the Tender document. The results were as tabulated below:-

Clause	Particulars	Office Technologies Ltd	Express Automation	MFI Leasing	Copy Cat Ltd
2.15.1 (i)	Particulars of tender company i.e. Background, Certificate of Incorporation	√	√	√	√
Clause 2.15.1 (ii)	Manufacturer's Authorization in the format provided	√	√	√	√
Clause 2.15.1 (iii)	Tender Security of 200,000 in form of Bank Guarantee in the format provided	√	√	x	√
Clause 2.15.1 (iv)	Duly filled and completed confidential business questionnaire and anticorruption declaration/pledge form	√	√	√	√
REMARKS		PASS	PASS	FAIL	PASS

The committee noted that three of the bidders namely Office Technology, Express Automation, and Copy Cat Ltd had submitted copies of their tender security and not originals.

The Evaluation Committee noted that M/s MFI Leasing Limited's tender security bond was to remain valid for a period of 90 days contrary to the requirement that it is 30 days beyond the 90 days tender validity period. The bidder was therefore declared non-responsive.

The three remaining bidders namely Office Technology Ltd, Express Automation Ltd, and Copy Cat Ltd passed the preliminary evaluation for having met the mandatory requirements and their bids proceeded to the technical evaluation stage.

Technical Evaluation Stage:-

The technical evaluation criteria were as stipulated under Clause 2.22.1 and the summary results were as tabulated:-

No.	Evaluation Criteria	Expected Marks	Office Technologies Ltd	Express Automation Ltd	Copycat Ltd
1.	Tenders Audited financial accounts for 2007, 2008 and 2009 (or 2010 where available)	15	15	15	15
2.	Evidence of services of a similar nature and value over the last three years	20	20	20	20
3.	Adherence to technical specifications of the Multi Functional Products- (candidates are required to score at least 35/40 in this item)	40	33	36	35
4.	After sales support plan	15	5	10	10
5.	CV's of at least two key technical staff charged with maintenance of the products	10	10	5	10
TOTAL SCORE		100	83	86	90

The Evaluation Committed noted that although Office Technologies Ltd scored 83% which was above the minimum 75% for technical evaluation, it had scored 33 marks out of 40 under the adherence to technical specifications of the Multi Functional Products which was below the required 35 marks. The bidder was therefore declared technically non-responsive.

The remaining two firms, Copy Cat Ltd and Express Automation Ltd met the required requirements and recommended that their financial bids be opened.

Financial Evaluation:-

The Financial bids were opened on 20th June, 2011 before the presence of the bidders representative. The prices quoted were as follows:

Firm	Description	Rate Per Page Kshs. Exclusive of VAT	Rate per page Inclusive of VAT
Express Automation	Cost per page	0.90	1.04
The Copy Cat Ltd	Cost per page	1.50	1.74

The committee recommended M/s Express Automation to be awarded tender for provision of Lease for Multi Functional Products (Photocopying, Printing and Scanning) at their quoted rates of Kshs. 0.90 per page exclusive of VAT for being lowest evaluated bidder.

THE TENDER COMMITTEE DECISION

The Company Tender Committee in its meeting held on 30th June, 2011 considered the recommendation of the Evaluation Committee and upon deliberation approved the award of the contract for provision of lease for multi-functional products (Photocopying, printing and scanning) to M/s Express Automation at their quoted price of Kshs.1.04 per page inclusive of VAT for a period of three years.

Bidders were notified the outcome of the tender vide letters dated 1st July, 2011.

THE REVIEW

The Applicant lodged the Request for Review on 18th July, 2011 in the matter of tender No. KPA/166/2010-2011 for Provision of Lease for Multi Functional Products (Photocopying, Printing and Scanning). The Applicant was represented by Ms. Kethi Kilonzo, Advocate while the Procuring Entity was represented by Mr. Michael Sangoro. The Interested Candidate Express Automation was represented by Mr. Archith Rao.

The Applicant requested the Board for the following orders:-

- a. "To cancel or set aside the award of Tender to the Successful Tenderer and award the Tender to the Applicant.*
- b. In the Alternative, the Procurement proceedings be annulled in their entirety.*
- c. Directing the Respondent to provide a summary of the evaluation in comparison of Tender to the Applicant as required under Section 45 (3) of the Act.*
- d. Costs of the Request for Review."*

PRELIMINARY OBJECTION

The Procuring Entity raised a Preliminary Objection dated 22nd July, 2011 against the hearing of the Request for Review.

It submitted that "Under Sections 3(1), 93 (1) and 96 of the Public Procurement and Disposal Act 2005 and Rule 73 (1) 9 (c) and 77 (1) of the Public Procurement and Disposal Regulations, 2006 (Herein referred to the Act and Regulation respectively), the Application for review is incompetent and

fatally defective. It further submitted that the application for review was filed after expiry of fourteen (14) days.”

It stated that Section 3(1) of the Act defines a Candidate as a person who has submitted a tender to the Procuring Entity while Section 93 (1) of the Act allows 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 Regulation to seek administrative review as in such manner as may be prescribed. The Procuring Entity submitted that according to the memorandum of Request for Review before the Board the Applicant is MFI Office solution Ltd who did not qualify to be a candidate as per Section 3(1) of the Act. It further submitted that the company which was indeed the candidate was MFI Leasing Ltd. It urged the Board to note the various documents of a company known as MFI Leasing Ltd that were to be found in the Applicant's bundle of documents. It argued that the Request for Review was null and void since it had been filed by a party that did not submit any bid and therefore urged the Board to dismiss it.

The Procuring Entity abandoned the second limb of the Preliminary Objection when it realised that it had addressed the notification letter to MFI Office Solution Ltd and not to MFI Leasing Ltd.

In response, the Applicant submitted that the notification letter dated 1st July 2011 that the Procuring Entity had sent to it was addressed to MFI Office Solution Ltd and not to MFI Leasing Ltd. It further submitted that the said letter was in regard to tender No. KPA/166/2010-11/PSM for provision of lease of multi-functional products and that this was the same tender now the subject of review. It stated that both itself and the Procuring Entity had

understood the letter to be in reference to the tender that was submitted by MFI Leasing Ltd even though it was erroneously addressed to MFI Office Solution Ltd.

It argued that the Procuring Entity had made an error of discretion by addressing the notification letter to MFI Office Solution Ltd who by the Procuring Entity's own admission was not a Candidate. It urged the Board to note that to date, the Procuring Entity had not legally notified MFI Leasing Ltd that its bid was unsuccessful. It called on the Procuring Entity to own up to the fact that it had also erroneously used the two names interchangeably though it knew that the Candidate it intended to address was MFI Leasing Ltd.

In conclusion, the Applicant admitted that it had also erred in that the name of the Applicant in the Request for Review was MFI Office Solution Ltd whereas the correct Applicant should have been MFI Leasing Ltd. It prayed that the Board would invoke its discretion under Section 98 and allow it to amend the name of the Applicant on the Request for Review. The Applicant also called upon the Board to rely on Article 159 of the Constitution which provided that in meeting its objective the court should not pay undue regard to technicalities when delivering justice where the error is not one of substance.

In reply, the Procuring Entity submitted that a Request for Review by a party that was not a Candidate amounted to an error of substance and that the same is not curable by a mere amendment. It further submitted that it was erroneous for the Applicant to claim that the Board had powers under Section 98 to amend or substitute the name of an Applicant. It stated that the powers of the Review Board under Section 98 are only available to it upon completing

a review and not at the commencement of the hearing. It further stated that the Constitution, at Article 159, was not meant to defeat legal requirements and that any entity which wishes to derive benefits under the Constitution must first approach it in the manner that the Law prescribes.

The Procuring Entity however conceded that it had erred in that it had notified MFI Office Solutions Ltd and not MFI Leasing Ltd, being the correct Bidder and hence Candidate in this matter. On further deliberation the Procuring Entity consented that the Applicant's name be amended by substitution to read MFI Leasing Ltd so long as the same treatment was accorded to the notification letter.

As both parties were in agreement, the Procuring Entity withdrew its Preliminary Objection and the matter proceeded to be heard on merit.

The Applicant raised 25 grounds of review and sited generally that the Procuring Entity breached Sections 2, 34, 52, 57, 60, 93, 94, 95, 96 97 and 45 (3) of the Public Procurement and Disposal Act, 2005 and Regulations 47 of the Regulations, 2006 (herein referred to as the Act and Regulations respectively).

The Board deals with these grounds as follows:

Grounds 1 - 6

These are not grounds for review but the Applicant's background statements on having participated in the tender and the Board need not make a finding on them.

Grounds 7 - 22

These grounds have been consolidated as they raise similar issues on the Applicant's tender security.

The Applicant submitted that it was disqualified on the basis of a criterion that was not provided for in the tender document. It further submitted that its tender was erroneously disqualified for not having a valid tender security. It alleged that the Procuring Entity made a determination during the tender opening to the effect that its tender had all the mandatory documents including the tender security.

The Applicant stated that its tender security was valid for 90 days and that this was in line with the requirements of the tender documents. The Applicant further stated that the tender documents were materially defective and in contravention of the Act and the Regulations. It alleged that the tender documents did not clearly, correctly and or completely give a description of the period of the validity of the tender security. It averred that the tender document did not contain enough information on the period of tender validity to allow for fair competition.

It submitted that the Tender Documents at Clause 1.6 required the tenderers to submit a tender security amounting to Kshs.200, 000 in the form of banker's guarantee in the format provided in the tender document but did not make any provision for the period of the tender security. The Applicant further submitted that clause 2.12 merely provided that the tenderers should furnish a tender security for the amount and form specified in the invitation to tender and again there was no provision for the period of that tender security.

The Applicant averred that the Procuring Entity had failed to meet its obligation under Section 61 by failing to ensure that the bidders were aware that Regulation 41 required them to submit a tender security which was valid for a period of at least 30 days after the expiry of the tender validity period. It further averred that the burden of complying with the Law under the Public Procurement and Disposal Act is based on the Procuring Entity and not on the Applicant.

The Applicant submitted that though the tender document had included a format for tender security, it only set out the question of form and amount but it did not set out the question of period since a person looking at the tender security form would simply see that it was a bank guarantee without paying attention to what period is stated out in that form.

The Applicant submitted that its tender was not eliminated at the Preliminary Evaluation but had proceeded to the Technical Evaluation where it had received the highest score. It added that immediately after the Technical Evaluation, the Procuring Entity had carried out a second Preliminary Evaluation and that it was at this stage that its bid was disqualified. It asserted that the second Preliminary Evaluation, coming after the Technical Evaluation had already taken place, was improper and in disregard to the evaluation criteria.

The Applicant alleged that it was the only bidder that had submitted an original tender security at the tender opening meeting. It further alleged that all the other bidders had submitted only copies of the tender security documents as was clearly noted in the Evaluation Report. It claimed that it

had obtained the evaluation documents anonymously from persons who did not identify themselves.

In conclusion, the Applicant claimed that it had met all the requirements of the tender and that it had the lowest competitive price and that the Procuring Entity was not transparent, fair, open and accountable in the process of evaluating and comparing the tenders.

In response, the Procuring Entity denied that it carried out any Preliminary Evaluation during the tender opening on 7th June, 2011. It stated that at the tender opening, it had only announced the documents that each bidder had submitted. It further stated that all the bidders had submitted tender securities and not just the Applicant contrary to what was being claimed by the Applicant.

The Procuring Entity stated that whereas the tender was to remain valid for 90 days, the tender security had to be in force up to 30 days after the period of the tender validity. It further stated that the validity period for the tender security had been clearly set out in the tender format and all that the Applicant needed was to photocopy and deliver to its bank which could then have been held accountable. The Procuring Entity denied the Applicant's allegation that the duty to educate bidders on legal requirements is upon the Procuring Entity. It argued that ignorance of the Law is not a defence whether for Procuring Entity or for a bidder.

It added that Regulation 41(4) clearly stated that no tender security shall be accepted under the Act unless such security is valid for a period at least 30

days after the expiry of the tender validity period, and hence this is a legal requirement not a creation of the Procuring Entity.

On the issue of the second Preliminary Evaluation, the Procuring Entity stated that the Evaluation Committee had made a mistake which was noted and recalled by the Secretariat. It added that the document showing that the Applicant had passed was faulty and not the final report. The Procuring Entity stated that the final report showed that the Applicant was eliminated at the Preliminary Evaluation stage. The Procuring Entity further stated that the information as to what transpired in the course of the evaluation stage was confidential and should not have been in the hands of the Applicant. The Procuring Entity informed the Board that there was an ongoing Police investigation to establish how the Applicant got information regarding the evaluation. It added that this information in the possession of the Applicant demonstrated serious canvassing and attempts by the Applicant to influence the tender process which was contrary to the law.

In conclusion, the Procuring Entity stated that it gave all the candidates the format and references of all the requirements of the tender security and that it had used the standard tender document approved by the Public Procurement Oversight Authority.

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

The Board notes that at the opening of the bids, the Procuring Entity read out and noted the presence of the following documents:

- Tender Security – name of bank, validity period

- Business Questionnaire & Declaration Form
- Manufacturer's Authorization

The Board also notes that at the tender opening, it was noted that the Applicant's tender security was valid up to 5th September, 2011. The Board further notes that the Evaluation Committee evaluated all the four bids and the Applicant's bid was declared responsive at both the Preliminary and Technical stages.

The Board takes note of the e-mail correspondences of 15th June 2011 between the secretary of the Evaluation Committee and the Procurement department where it was noted by the Principal Procurement Officer that the Applicant's tender validity was not sufficient and that its bid should have been disqualified at the Preliminary Evaluation stage.

The Board notes that following the said communication the Evaluation Committee re-did the evaluation from the Preliminary Stage and the Applicant was declared non-responsive for having a tender security that fell short of the required tender validity period.

The Board takes note of the tender document at the invitation to tender Clause 1.6, and at Instructions to Tenderers Clauses 2.12.1 and 2.12.4 which stated as follows:-

Clause 1.6

"Tenderers shall be required to submit a Tender Security amounting to Kshs. 200,000.00 in the form of a Banker's guarantee in the format provided in the tender document."

Clause 2.12.1

The Tenderer shall furnish, as part of its tender, a tender security for the amount and form specified in the invitation to tender.

Clause 2.12.4

“Any tender not secured in accordance with paragraph 2.12.1 and 2.12.3 will be rejected by the Procuring Entity as non responsive, pursuant to paragraph 2.20”

The Board further notes that the Appendix to the Instructions to Tenderers stated that the tender security shall be Kshs. 200,000.00 in form of a bank guarantee and in the format provided in the tender document. The Board also notes the last paragraph on the Tender Security format which stated as follows:

“This guarantee will remain in force up to and including thirty (30) days after the period of tender validity, and any demand in respect thereof should reach the Bank not later than the above date.”

The Board further notes that tender validity period for this tender was 90 days as stipulated in the Invitation to Tenderers Clause 1.8 and Instructions to Tenderers Clause 2.13.1. which reads as follows:

Clause 1.8

“Prices quoted should be net inclusive of all taxes and delivery must be in Kenya Shillings or any other freely convertible currency and shall remain valid for 90 days from the closing date of the tender”

Clause 2.13.1

"Tenders shall remain valid for 90 days or as specified in the invitation to tender after date of tender opening prescribed by the Procuring entity, pursuant to paragraph 2.18. A tender valid for a shorter period shall be rejected by the Procuring entity as non-responsive."

The Board also notes the provisions of Sections 57(1) & (2) and Regulation 41 (4) as follows:

Section 57(1) "A procuring entity may require that tender security be provided with tenders. (2) The procuring entity may determine the form and amount of the tender security, subject to such requirements or limits as may be prescribed."

Regulation 41(4) states "No tender security shall be accepted under the Act unless such security is valid for a period of at least thirty days after the expiry of the tender validity period"

The Board notes that the Applicant's tender security was valid for 90 days instead of 120 days as was clearly set out on the form of tender and under Regulation 41(4).

The Board notes that the Standard Tender Documents had clearly set out the period of tender security. The Board holds that every bidder is expected to familiarise itself with the contents of the tender documents and also to the requirements of the Act and Regulation to enable it complete its bid. The Board finds no merit with the Applicant's claim that the duty of interpreting the law lies only with the Procuring Entity. The Board however notes that the Applicant is free to seek for clarification on any part of the tender document

within the period allowed for tender completion. The Board notes that in the current tender the Applicant did not ask for any clarification.

Taking into account the foregoing, the Board finds that the bidders were furnished with all the necessary information in regard to the period for tender security and therefore this limb of the appeal fails.

On the issue of the 2nd Technical Evaluation, the Board notes that the Procuring Unit noted the anomaly and referred the matter to the Evaluation Committee to rectify it before the opening of the financial bids. The Board further notes that the Procuring Unit is mandated to co-ordinate the evaluation of tenders and act as the secretariat to the Tender Committee. The Board also notes that the Applicant does not dispute that its tender security was for 90 days and not the required 120 days. The Board notes that the mistake in the evaluation report was noted well before the opening of the financial bids and that no prejudice was suffered by the Applicant in this regard.

The Board finds that the Evaluation Committee rightly corrected its own mistake and that no prejudice was suffered by the Applicant and therefore this limb of the appeal also fails.

Grounds 23 and 24

The Applicant stated that it had requested the Procuring Entity through its letter dated 11th July, 2011 for reasons as to why its tender was not successful and a summary of the evaluation and comparison of tenders pursuant to Section 45 (3) of the Act. It further stated that the Procuring Entity failed,

refused and or neglected to supply the summary evaluation in comparison of tenders.

In response, the Procuring Entity stated that the Applicant's lawyer before formal notification of appointment wrote to it on 11th July, 2011 and the Procuring Entity responded on 13th July, 2011.

The Board notes that the Applicant's lawyer M/s Kilonzo & Company Advocates wrote to the Procuring Entity on 11th July, 2011 requesting for the summary evaluation report and that the Procuring Entity replied to M/s Kilonzo & Company Advocates that their request for de-briefing under Section 45 (3) of the Act could not be given to them as they were not candidates in the tender.

The Board further notes that on 18th July, 2011 the Applicant wrote to the Procuring Entity requesting for a de-briefing report and instructed the Procuring Entity to copy the same report to its legal firm, Kilonzo & Company Advocates and that the Procuring Entity responded on 19th July, 2011 giving a summary as to why the Applicant's tender was declared non-responsive. The Applicant's representative picked the response on 20th July, 2011 which was two days after lodging this Request for Review.

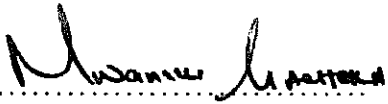
Ground 25

This is a general statement that the Procuring Entity did not meet and that it contravened the requirements of the Act and the Regulations.

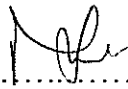
Taking into consideration all the foregoing matters, the Request for Review fails and is hereby dismissed.

The Board orders pursuant to Section 98 of the Act, that the procurement process may continue.

Dated at Nairobi on this 16th day of August, 2011


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**CHAIRMAN
PPARB**


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**SECRETARY
PPARB**