

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 38 / 2011 OF 17TH OCTOBER, 2011

BETWEEN

TWIGA CHEMICAL INDUSTRIES LIMITED.....APPLICANT

AND

KENYA SEED COMPANY LIMITED.....PROCURING ENTITY

Review against the decision of the Tender Committee of Kenya Seed Company Limited dated 28th September, 2011 in the matter of Tender No. KSC/P/DC/2011/2012 for Supply of Seed Dressing Chemicals and Dyes.

BOARD MEMBERS PRESENT

Mr. Joshua W. Wambua	-	Member, (in the Chair)
Mr. Sospeter Kioko	-	Member
Mr. Akich Okola	-	Member
Eng. Christine Ogut	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Ms. Pauline Opiyo	-	Secretariat
Ms. Shelmith Miano	-	Secretariat
Ms. Virginia Nzioka	-	Legal Officer, PPOA

PRESENT BY INVITATION:

Procuring Entity - Kenya Seed Company Limited

- Ms. Ng'etich Millicent - Legal Officer
Mr. Nyangweso L.O. - Chief Officer Procurement

Applicant- Twiga Chemical Industries Limited

- Mr. L. Muraya Njenga - Advocate,
Ms. Eddah Kiai - Legal Officer
Mr. H. M. Macharia - Director

Interested Parties:

- Mr. Kiragu Kimani - Advocate, Cooper-K Brands
Mr. Thomas Abira - Advocate, Cooper-K Brands
Mr. James Tugee - Advocate, Cooper-K Brands
Mr. Mucai Kunyiha - Managing Director, Cooper K-Brands
Ms. Stella Muendo - Advocate, Bell Industries
Mr. Jean Njiru - Sales Manager, Bell Industries
Mr. John Wananda - Advocate, Rotam Ltd
Mr. E. B. Kubebea - Advocate, Rotam Ltd
Mr. Michael Macharia - Manager, Rotam Ltd

BOARD'S DECISION

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

BACKGROUND

Advertisement:

The Procuring Entity invited five prequalified firms to participate in a tender for supply of seed dressing chemicals and dyes with the closing date given as 8th September, 2011.

Closing/Opening:

At the time of tender closing/opening, the five (5) firms had responded. The particulars recorded at the opening were as follows:

No.	Bidder	Bid Bond (Kshs)	Tender (Kshs.)	Sum
1	Chemtura Proprietary Ltd	2,600,000.00	130,000,000.00	
2	Bayer East Africa Ltd	2,000,000.00	100,000,000.00	
3	Twiga Chemical Industries Ltd	6,935,000.00	328,475,000.00	
4	Coopers K-Brands	2,204,000.00	110,200,000.00	
5	Bell Industries	2,270,400.00	113,520,000.00	

EVALUATION:

The tenders received were subjected to three stages of evaluation namely; Preliminary Evaluation, Detailed Technical Evaluation and Financial Evaluation.

Preliminary Evaluation:

Tenderers were evaluated against the following requirements as outlined in the tender documents:

1. Bid Bond equivalent to 2% of the total tender sum and valid for 120 days from the opening date.
2. PCPB registration certificate for products offered.
3. Manufacturer's authorization
4. 90 days tender validity period.

A summary of the results of Preliminary Evaluation were as follows:

Requirement	Chemtura Proprietary	Bayer E.A	Twiga Chemicals	Cooper K-Brand	Bell Industries
Bid Bond 2%	Yes Ecobank Kshs.2,600,000	Yes Barclays Kshs. 2,000,000	Yes Barclays Kshs. 6,935,000	Yes CFC-Stanbic Kshs.2,204,000	Yes Middle East Bank Kshs. 2,270,000
PCPB Registration	Yes	Yes	Yes	Yes	Yes
Manufacturer's authorization	Yes	Yes	Yes except for Potreat	Yes	Yes
90 days tender validity period	Yes	Yes	Yes	Yes	Yes
Remarks	NR	R	R	R	R

Key:

R- Responsive,

NR- None Responsive,

Yes - Met requirement

One tenderer, namely, Twiga Chemical Industries Ltd was disqualified at the Preliminary Stage for not meeting all the mandatory requirements. The tenderer submitted a manufacturer's authorization for the product protreat dated 25th August 2010 for tender number

KSC/P/DC/G.19/2010/2011 whereas the tender under evaluation was KSC/P/DC/2011/2012.

Technical Evaluation:

Four tenderers namely; Chemtura Proprietary Ltd, Bayer East Africa Ltd, Coopers K-Brands and Bell Industries met all the mandatory requirements and proceeded to the Technical Evaluation stage. At this stage, the following requirements were considered:

1. Efficacy and formulation of the product
2. The dosage or Application rates per kilo of seed
3. The ideal use as per the user's intended purpose
4. Cost of treating a kg of seed

RECOMMENDATION

After detailed evaluation of each individual chemical, the Evaluation Committee recommended the following chemicals for specific use at the quoted prices:

Product	Product cost/ ltr or kg	Suppliers	Cost of treating a kg of seed (Ksh)	Quantity Required (litres/kg)	Total Cost (Ksh)
Gaicho 350 FS	3,075.00	Bayer E.A	18.48	8,000	24,600,000
Protreat 350 FS	3,800.00	Cooper K-Brand	7.6	19,000	72,200,000
Cruiser 350 FS	9,700.00	Twiga Chemical Industries	14.55	-	-

TENDER COMMITTEE DECISION

The Company Tender Committee in its 6th meeting held on Wednesday, 21st September, 2011 adopted the Evaluation Committee's

recommendation and approved award of tender for Supply of seed dressing chemicals and dyes (Protreat 350 FS) to Cooper K-Brands at a total cost of Kshs. 72,200,000.00.

The bidders were notified of the Tender Committee decision vide letters dated 28th September, 2011.

THE REVIEW

The Applicant, Twiga Chemical Industries Limited filed a request for review on 17th October 2011 against the award of Tender No. KSC/P/DC/2011/2012 for the supply of seed dressing chemicals and dyes to Cooper K-Brands Limited. The Applicant was represented by Mr. L. Muraya Njenga, Advocate while the Procuring Entity was represented by Mr. Nyangweso L.O., Chief Officer Procurement. The Successful Bidder was represented by Mr. Kimani Kiragu, Advocate and Mr. Mucai Kunyiha, Managing Director. Other interested parties present included Bell Industries represented by Ms. Stella Muendo, Advocate and Rotam Limited represented by Mr. E. B. Kubebea, Advocate.

By its memorandum, the Applicant requested the Board for orders that:

1. *"The award of Tender No. KSC/P/DC/2011/2012 for the supply of seed dressing chemicals and dyes to the 2nd Respondent be annulled.*
2. *The procurement proceedings for award of Tender No. KSC/P/DC/2011/2012 for the supply of seed dressing chemicals and dyes be annulled in their entirety.*
3. *Costs of this suit be borne by the Respondents."*

At the commencement of the hearing, an interested party Rotam Limited, applied for leave to make submissions to the Board. Upon hearing the application, the Board ruled that it was not a party to the review, pursuant to Section 96 of the Act.

The Applicant raised three (3) grounds of review which the Board deals with as follows:-

Grounds 1, and 2: Breach of Section 31(1) (b)

The two grounds have been consolidated since they both relate to qualification of the Successful bidder.

The Applicant submitted that the subject matter of the tender awarded to the Successful Bidder, namely the product Protreat, is among other products, the subject matter of HCCC 135 of 2011, in which there is an order of the High Court barring the appointment of the Successful Bidder or any third party as distributor of the product in Kenya. It stated that the award of the tender to the successful bidder is in breach of Section 31 (1) (b) of the Public Procurement and Disposal Act, 2005 as the Successful Bidder lacks the legal capacity to enter into a contract for the supply of the said product.

The Applicant averred that it is the registered holder of the trademark of the product Protreat and has not authorized the successful bidder to distribute the said product under that trademark. The Applicant stated that it stands to lose millions of shillings in lost earnings considering the investment it has made in establishing a market for the product if the

successful bidder is allowed to supply the product. In this regard, it requested the Board to make the findings that the successful bidder has no capacity to supply the product Protreat and annul the tender.

In response, the Procuring Entity stated that it requested for bids from its Prequalified Suppliers namely; Twiga Chemical Industries, Bell Industries Ltd, Chemtura Proprietary Ltd, Bayer East Africa and Coopers K-Brands Limited who all responded.

The Procuring Entity further stated that upon receipt of bids from the five bidders, an evaluation was carried out. It submitted that the Tender Evaluation Committee conducted a preliminary evaluation and noted that four bidders were responsive except the Applicant who did not provide a valid Manufacturer's Authorization for the product Protreat only. It stated that the Applicant's bid could therefore not be evaluated further in respect of this product.

The Procuring Entity stated that in awarding the tender, the Tender Committee was guided by the provisions of the Public Procurement and Disposal Act. It averred that having received all the necessary documentation to support the capacity of Cooper-K. Brands Ltd to supply the product required for dressing of seeds, it proceeded to award tender No. KSC/P/DC/2011/2012 to the Successful Bidder. It further stated that in the procurement of the product referred in the name and/or style "protreat" the Procuring Entity was guided by the active ingredients/components contained in the chemical for seed dressing and not the name "protreat". Accordingly, the Procuring Entity urged the Board to dismiss the application for lack of merit.

On its part, the Successful Bidder submitted that the Applicant, having been aware of the successful bidder's alleged lack of legal capacity as early as 13th September 2011, failed to file a request for review within 14 days from the date of the alleged breach as required by Regulation 73 (2) (c) (i) which states that;

" A request referred to in paragraph 73 (1) shall be made within 14 days of -

i. the occurrence of the breach complained of where the request is made before the making of an award; "

In support of its submissions, it relied on previous decisions by the Board namely Application No. 51/2009 (Intersecurity Services Ltd v. Kenya Electricity Generating Company Ltd), Application No. 55/2009 (Voith Hydro GmbH v. Kenya Electricity Generating Company) and Application No. 46/2007 (Lockhart International Ltd v. Kenya Revenue Authority).

It argued that this Request for Review having been filed on 17th October, 2011 was therefore time barred and therefore the Board lacks jurisdiction to entertain it. It further argued that the Board has no jurisdiction to hear the application as it involves a case pending before the High Court.

Bell Industries Ltd, an interested party, associated itself fully with the submissions of the Procuring Entity and further argued as follows:

i. "The product tendered for under category 1 by the Successful bidder is different from the product under category 2 tendered for and awarded to this other interested party.

- ii. The product under category 2 is not a subject of the dispute by the parties to the review proceedings and therefore, there is no justification for the annulment of the entire tender.*
- iii. It further stated that it stood to suffer irreparable loss if the tender is annulled.*
- iv. Finally, it submitted that the dispute between the applicant and the Successful bidder is a trademark issue and the Board is the wrong forum for the determination of a trademark dispute."*

Accordingly, it urged the Board to dismiss the Request for Review with costs and to allow the procurement process to continue.

Another interested party, Chemtura Agro Solutions / Chemtura Proprietary Ltd submitted that the tender was conducted procedurally and that they did not have any complaints. It argued that the application was fundamentally anchored on a trademark issue and contractual dispute between the Applicant and the successful bidder and hence the dispute is a matter for the Commercial Court. It further argued that the application to annul Tender No. KSC/P/DC/2011/2012 in its entirety is an application for a miscarriage of justice. Accordingly, it urged the Board to find that the Request for Review had no merit and should therefore be dismissed.

The Board has carefully considered the submissions of the parties and the documents presented before it. The issue for the Board to determine is whether the Procuring Entity carried the evaluation in accordance with the Act and the Tender Documents.

The Board notes that the tender under review was processed using the Restricted Tender method of procurement in accordance with Section 73 (2) (a) of the Act. The Board further notes that the bids received were evaluated in three stages namely; Preliminary Evaluation, Detailed Technical Evaluation and Financial Evaluation.

Upon perusing the Tender documents, the Board has found as follows:

- 1) That the Procuring Entity requested for bids from prequalified suppliers who included Twiga Chemical Industries Ltd (the Applicant), Bell Industries Ltd, Chemtura Proprietary Ltd, Bayer East Africa and Cooper K-Brands Ltd.
- 2) That upon submission of bids by the five bidders, the Procuring Entity proceeded to carry out evaluation of the tenders in three stages as set out in the Tender Documents.

The Board notes that at the Preliminary Evaluation stage, four bidders were found to be responsive except the Applicant who failed to provide a valid Manufacturer's Authorization in respect of one of the products namely the product Protreat.

From the Evaluation Report, the Board notes that the Applicant was disqualified at the Preliminary Evaluation stage for the product Protreat, for having submitted a Manufacturer's Authorization for the product Protreat dated 26th August, 2010 for Tender No. KSC/P/G.19/2010/2011 whereas the tender under evaluation was Tender No. KSC/P/DC/2011/2012.

The Board finds that the minutes of the Evaluation Committee further stated as follows:

“..... A Manufacturer’s Authorization form requires that an agent is authorized to submit a tender and subsequently negotiate and sign the contract with the Entity against specific tender no. KSC/P/DC/2011/2012”

The Board finds that the Procuring Entity properly disqualified the Applicant for failing to submit a valid Manufacturer’s Authorization.

With regard to the issue of the trademark on the product Protreat, the Board notes that there is an application at the High Court under HCCC 135 of 2011 and that a court injunction was issued by the High Court running from 11th April 2011 for a period of 14 days. However, the Board notes that there is no evidence adduced by the Applicant on whether the said court injunction was extended or otherwise. Be as it may, the Board makes the following findings;

- i. That on 13th of September 2011, the Applicant instructed its advocates to demand from one Rotam Ltd to stop infringing on its trademark. It is apparent that, at this point in time, the Applicant was aware of the alleged breach. Purely on the basis of Regulation 73(1) of the Public Procurement and Disposal Regulations, 2006, it should have filed its Request for Review within 14 days from that date.
- ii. Nevertheless, even if the matter was brought to the Board within time, as long as the issue in dispute was the trademark, the Board would

invoke Section 93 (1) of the Public Procurement and Disposal Act with regard to its mandate. The said provision states as follows;

“subject to the Provisions of this part, any candidate who claims to have suffered or to risk suffering, loss or damage due to a breach of a duty imposed on a Procuring Entity by this Act or the Regulations, may seek administrative review as in such manner as may be prescribed.”

From the above provision of the Act, it is clear that for any party to be properly before the Board, it has to demonstrate breach of a duty imposed on a Procuring Entity by the Act or Regulations. From the Request for Review, one of the grounds that the Applicant is complaining about is a breach of its trademark rights by one of the successful bidders, an issue which is pending for determination at the High Court. In this regard, the Board finds that the issue of determination on trademark matters does not fall within the mandate of the Board pursuant to Section 93(1) of the Act.

Ground 3

This is a general statement not backed by any breach of the Act or the Regulations and as stipulated in Regulation 73(2) (a), the Board need not make any findings on it.

Costs

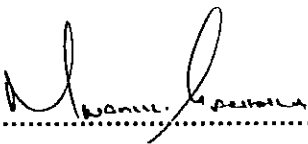
With regard to costs, the Board has held severally that tendering costs are commercial business risks taken by the parties in the course of doing business. Further, the Tender Documents under the General Information and Conditions of Tender, Clause 3.1 stipulates that *“The tenderer shall bear all costs associated with the preparation and submission of its*

tender and the Procuring Entity will in no case be responsible for those costs, regardless of the conduct or outcome of the tendering process."

Taking into account all the foregoing matters, the Board finds that this Request for Review has no merit.

Accordingly, the Request for Review fails and is hereby dismissed. The Procurement process may proceed.

Dated at Nairobi on this 16th day of November, 2011.



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CHAIRMAN
PPARB



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For: SECRETARY
PPARB