

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 40/2011 OF 9th NOVEMBER, 2011

BETWEEN

GEKINS EXPORTERS AND IMPORTERS LTD.....APPLICANT

AND

MINISTRY OF STATE FOR DEFENCE.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Ministry of State for Defence dated 19th October, 2011 in the matter of Tender No. MOSD/423(138)2011/2012 for Fresh Vegetables, Fruits and Potatoes to Nairobi Units.

BOARD MEMBERS PRESENT

Mr. Joshua W. Wambua	-	Member, (in the Chair)
Eng. C. A. Ogut	-	Member
Ms. J. A. Guserwa	-	Member
Ms. Natasha Mutai	-	Member
Mr. Akich Okola	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Ms. Shelmith Miano	-	Secretariat

PRESENT BY INVITATION

Applicant, Gekins Exporters and Importers Ltd

Mr. Stanley Wandaka - Advocate
Mr. Geoffrey Kingai - Managing Director

Procuring Entity, Ministry of State for Defence

Mr. Z. G. Ogendi - Assistant Director, Supply Chain
Management Services

Interested Candidate

Mr. P. Musembi - Director, Kijani Orchards Ltd

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 the supply of Fresh Vegetables, Fruits & Potatoes to Nairobi Based Units was advertised on 23rd June, 2011.

Closing/Opening:

The tender closed/opened on 14th July, 2011 and eleven bidders submitted their bids. The bids opened were as follows:-

No	Firm	Bid Bond Amount	Bank/Insurance Guarantee	Certified Copies Of Valid Business Permit	Certified Copy Of Cert Of Incorporation	Cabbages	Carrots	Tomatoes	Onions	Pineapple	Oranges	Mango	potatoes
1.	Rehoboth Thee Enterprises	X	X	X		90	4650	6000	130	100	45	60	6000
2.	Tarbat Supplies Ltd	300,000	Amaco	Not certified	Not certified	20	60	45	80	50	60	35	2700
3.	Sister 'N' Sister Enterprises	300,000	Equity	√ Not certified	√ Not certified	25	40	45	78	50	55	45	3200
4.	Tawakal Ltd	300,000	Equity	√Not certified	√ Not certified	35	89	80	130	30	35	40	2500
5.	Gekins Exports & Imports Ltd	300,000	Equity	√	√	15	60	60	80	30	35	35	2600
6.	Kiwaka General Merchants	300,000	Equity	√ Not certified	√ Not certified	25	30	40	40	40	40	45	35
7.	Kijani Orchards	300,000	Itra Africa	√	√ Not certified	20	50	55	80	50	55	40	40
8.	Utawala by pass site butchery	200,000	National Bank	X	√ not certified	20	38	50	50	28	55	15	3480
9.	Franca Agencies	300,000	Equity	√ Not certified	√ Not certified	16	20	38	36	25	35	32	2400
10.	Trendy Investment	300,000	Amaco	√	√	50	65	69	78	80	68	69	45
11.	Rostepho Green Groceries	300,000	NIC	√ Not certified	√ Not certified	15	28	49	70	60	60	50	2500

The Tender Opening Committee made the following observations

- a. **Rehoboth Thee Enterprises** - did not attach any of the required documents
- b. **Utawala By Pass Butchery**- did not attach a valid business council permit
- c. **Tawakal Ltd;Kiwaka General Merchants; Fraca Agencies; and Rostepho Green Groceries** - attached copies of council business permits that were not certified or notarized
- d. **Tawakal Ltd; Kiwaka General Merchants; Kijani Orchards; Utawala Bypass Butchery; Fraca Agencies; and Rostepho Green Groceries** -

attached copies of certificate of incorporation/registration that were not certified or notarized.

EVALUATION

The documentation evaluation was carried out by the Tender Opening Committee as indicated above.

Physical Evaluation:

The Evaluation was conducted by a committee chaired by Maj. I M Amin. The evaluation criteria were as follows:-

- i) Line of business – 35 points
 - a. Existence of business premises dealing with supply of fresh fruits and potatoes
 - b. Storage facilities available
- ii) Transport – 15 points
 - a. The evidence to be in form of copies of log books in the names of the tenderer.

The results of the Physical Evaluation was as tabulated:-

FIRMS	Existence of Business (10 points)	Cleanliness (10 Points)	Accessibility (5 Points)	Experience (5 Points)	Storage Facility (5 Points)	Transport (15 points)	Total Points	Ranking
Tarbat Supplies Ltd	8	5	5	5	5	15	43	4
Sister 'N' Sister Enterprises	10	0	5	5	5	15	40	5
Tawakal Merchants (K) Ltd	10	7	5	5	5	15	47	3
Gekins Exporters & Importers Ltd	10	10	5	5	5	15	50	1
Kiwaka General Stores	8	0	5	5	0	15	33	9
Kijani Orchards	10	8	5	5	5	15	48	2
Fraza Agencies	10	7	5	0	0	15	37	7
Trendy Investment Co. Ltd	10	0	5	5	0	15	35	8
Rostepho Green Groceries	10	0	5	5	4	15	39	6

The Evaluation Committee then recommended that all the firms were credible and able to supply fresh vegetables, fruits and potatoes to the Nairobi Units.

A market survey was conducted and the result was as tabulated below:-

Item	Unit	Firms				Average (Kshs)
		City Market	Uchumi	Tuskys	Nakumat	
Fresh vegetables	1kg	25	24	20	20	22
Potatoes	1kg	39	45	40	39	41
Pineapple	1kg	50	50	54	54	52
Bananas	1kg	60	65	54	60	60
Mangoes	1 kg	50	83	123	123	95
Oranges	1 kg	50	58	79	83	68
Carrots	1kg	35	50	50	50	46
Cabbages	2kg	35	30	39	35	35
Onions	1 kg	45	80	110	100	84

The Branch /Logistics department then prepared a memo to the Secretary, Ministerial Tender Committee and recommended that since M/s Kijani Orchards Ltd quoted prices that were closer to the current market price and that it was the current supplier of the same products should be awarded the tender at the following prices on as when required:-

No.	Item description	Unit	Price (Kshs)
1.	Vegetables		
	a. Cabbages	Kgs	20.00
	b. Carrots	Kgs	50.00
	c. Tomatoes	Kgs	55.00
	d. Onion	Kgs	80.00
2.	Fruits		
	a. Pineapples	Kgs	55.00
	b. Oranges	Kgs	55.00
	c. Mangoes	Kgs	40.00
3.	a. Potatoes	82 kg	3,500.00

The contract was to be with effect from 1st October, 2011

THE TENDER COMMITTEE DECISION

The Ministerial Tender Committee in its meeting no. 11/11/12 held on 7th October, 2011 deliberated on the recommendation of the Branch /Log HQS and awarded M/s Kijani Orchards Ltd as listed above. The reason given was that the firm was recommended by the evaluation team and that it was the current supplier with no adverse report on performance and has offered the nearest to the market prices.

The notifications letters to the bidders are dated 19th October, 2011.

THE REVIEW

The Applicant Gekins Exporters and Importers Ltd lodged this Request for Review on 9th November, 2011 against the decision of the Ministry of Defence in tender No. MOSD/423(138)2011/2012 for Supply of Fresh Vegetables,

Fruits and Potatoes to the Nairobi Units. The Applicant was represented by Mr. Stanely Wandaka, Advocate while the Procuring Entity was represented by Mr. Z. G. Ogendi. The Interested Candidate present was M/s Kijani Orchards Ltd represented by Mr. P. Musembi.

The Applicant requests the Board for the following orders:-

- a) *“Annul the procurement process and order the procuring entity to re-advertise the tender.*

- b) *Order the procuring entity to extend the use of the previous contract for the supply of the goods in question before putting in place a new contract in accordance with the provisions of the Public Procurement and Disposal Act, 2005.”*

At the commencement of the hearing, the Board on its own motion informed the parties that it had noted that there was a Preliminary Objection raised by the Procuring Entity in its response to the Request for Review filed on 9th November, 2011 by the Applicant. The Board informed the parties that it needed to determine whether it had jurisdiction to hear the Request for Review based on whether the Request for Review was filed out of time as alleged by the Procuring Entity in its pleadings. Accordingly the parties were invited by the Board to make submissions on the issue of the Board's jurisdiction.

The Procuring Entity submitted that the Request for Review filed on 9th November, 2011 by the Applicant was out of time. It stated that it had notified the Applicant on 19th October, 2011. It argued that based on its analysis, 9th November, 2011 was outside the 14 days appeal window. It requested the

Board to examine copies of the "Post mail Registered and Unregistered track monitor" attached to its pleadings, which indicated the letter of notification was dispatched to M/s Gekins Exporters and Importers Ltd on 26th October, 2011. It further stated that it had not received any rejected mail; hence the Applicant must have received it. It urged the Board to dismiss the Request for Review.

In response, the Applicant submitted contrary to the claim that the notification letter was allegedly posted on 26th October, 2011, there was no proof adduced by the Procuring Entity that it had dispatched the letter to the Applicant. It stated that it had collected a copy of the notification letter on 4th November, 2011 and filed this Request for Review on 9th November, 2011. It further stated that it had not received its letter of notification to date. It argued that the 14 day Appeal window could not run from 19th October, 2011 when the notification letters were dispatched on 26th October, 2011. Accordingly, it urged the Board to dismiss the application that the Request for Review was filed out of time.

On its part, the Successful bidder submitted that it received its letter of notification through registered mail before the end of October, 2011.

The Board has carefully considered the submissions of the parties & examined the documents presented before it.

The Board notes that the letters of notification to the Successful Bidder and the unsuccessful bidders were dated 19th October, 2011. The Board further notes that, the Procuring Entity's mail register shows that letters of notification to bidders were recorded for dispatch on 26th October, 2011. The Board also notes

that the Applicant was able to obtain a copy of the notification letter on 4th November, 2011. In addition, the Board notes that the Applicant filed its request for review on 9th November, 2011.

The Board finds that the Procuring Entity failed to submit evidence of when the notification letters were dispatched. The Board further finds that even if 26th October, 2011 is considered to be the date of dispatch, time for the purposes of the appeal window started running on 27th October, 2011. Therefore the last day the Applicant could have filed the Request for Review was 9th November, 2011.

In view of the foregoing, the Board has jurisdiction to hear and determine this matter on merit as the Request for Review was filed on time. Accordingly the Preliminary Objection is hereby dismissed.

Having found out the Board has jurisdiction on the matter, the Board proceeds to deal with three grounds of review raised by the Applicant as follows:

Ground 1- Breach of Section 67 (1) and (2) of the Act

The Applicant submitted that the Procuring Entity failed to notify it in accordance with section 67 (1) & (2) of the Public Procurement and Disposal Act, 2005 (hereinafter "the Act"). It stated that it collected its letter of notification on 4th November, 2011. It further stated that it had withdrawn the submission that the Successful bidder had commenced to supply the items.

In response the Procuring Entity denied breach of Section 67 (1) & (2) of the Act. It averred that it had simultaneously notified both the successful and unsuccessful bidders within the tender validity period. The Procuring Entity

further averred that the winning bidder had not commenced supply as the contract had not been signed.

The Board has considered the submissions of the parties and examined the documents before it and decides as follows:

The Board notes that the tender was awarded on 7th October, 2011. The Board further notes that the letters of notification are all dated 19th October, 2011. The Procuring Entity submitted a copy of its 'Postmail Registered and Unregistered Letters' for DHQ Contracts which indicates that the letters dated 19th October, 2011 were received by its Registry clerk on 26th October, 2011.

The Board notes that Section 67(2) of the Act provides that;

"At the same time as the person submitting the successful tender is notified, the Procuring Entity shall notify all persons submitting tenders that their tenders were not successful."

In the absence of the Procuring Entity's evidence of actual date as when the notification letters were dispatched, the Board finds that the Procuring Entity breached section 67(2) of the Act.

Taking into account all the above matters, this ground of review succeeds.

Ground 2- Breach of Section 66 of the Act

The Applicant submitted that it offered the lowest prices for cabbages, pineapples, oranges, mangoes and potatoes and should have been awarded the tender based on its past performance and being responsive at the

preliminary evaluation. It further submitted that it had been supplying the Procuring Entity for the last five years.

The Applicant stated that the Procuring Entity had breached Section 66 of the Act by applying an evaluation criterion that was not objective and quantifiable. It alleged that the evaluation criteria stipulated in paragraph 2.24 of the Appendix to Instruction to Tenderers on cleanliness and accessibility could not be applied objectively or quantifiably. It further alleged that the Procuring Entity used an arbitrary formula for the commercial evaluation which could not determine the lowest evaluated bidder. It submitted that the criterion was subjective and open to abuse. It further submitted that the formula was not clear on whether it would be applied to a single item i.e. cabbages or the total price of all the items. It asserted that the formula was normally used in the procurement of consultancies.

The Applicant further submitted that the criterion of the market survey was not set out in the tender document and accordingly should not have been used by the Procuring Entity to evaluate the tenders. Its use by the Procuring Entity was accordingly in breach of Section 66(2) of the Act.

In response, the Procuring Entity stated that it did not breach Section 66 of the Act. It submitted that both the Applicant and Successful bidder had provided all the documents and proceeded to all stages of Evaluation. It stated that the requirement on certification/ notarization was waived since it was not provided for in law. It further stated that some bidders were disqualified during the evaluation.

It submitted that it did not award the tender to the lowest priced tender but awarded to the lowest evaluated. It further submitted that the Successful bidder's price was nearest to the market prices unlike the Applicant's prices that were deemed to be too low and quite unrealistic.

The Board has carefully examined the documents submitted to it and notes that the tender was evaluated in three stages namely Preliminary Evaluation and Physical Evaluation and the Branch evaluation/recommendation. The Board observes that the Preliminary Evaluation/ documentation were conducted at the tender opening. The Board also notes that the Physical evaluation was then conducted by a Committee chaired by Maj. I M Amin. The Board further notes that the Evaluation Committee visited the premises of the bidders between 15th and 25th August, 2011 and awarded points in accordance to the criteria set forth in the tender document. The Applicant was ranked the highest with 50 points. The Evaluation committee recommended that all the firms evaluated were credible and able to supply.

The Board notes that on 27th September, 2011, the DHQ LOGS issued an inter-office memo to the Secretary of the Ministerial Tender Committee (MTC) stating that the tender was advertised in the month of June, 2011, closed/opened on 14th June, 2011. The memo stated that HQ KAF was tasked to conduct physical evaluation, and a market survey on 8th August, 2011 and presented its report on 15th September, 2011. The Board further notes that the memo contains the Branch Comment which states that the M/s Kijani Orchards Ltd quoted prices that are closer to the current market prices and being the current contract holder with no adverse report it recommended that it should be awarded the contract. The Tender Committee went on to award the tender to M/s Kijani Orchards Ltd as recommended.

On examination of original tender documents of all bidders and the evaluation report, the Board observes that despite some bidders not having met the mandatory requirements at the preliminary evaluation/documentation, they were evaluated further in the Physical Evaluation and awarded scores. This included M/s Rehoboth Thee Enterprises who had not attached any of the required documents; Utawala By Pass Butchery which had not attached a valid business council permit and attached copy of certificate of incorporation that was not certified; Tawakal Ltd, Kiwaka General Merchants, Fraza Agencies and Rostepho Green Groceries who had attached copies of council business permits and certificates of Incorporation that were not certified or notarized. M/s Kijani Orchards the Successful Bidder attached copies of certificate of incorporation/registration that were neither certified nor notarized as required under clause 3 of the Appendix to Instructions to Tenderers in the Tender document. The Board further observes that only two bidders namely the Applicant and M/s Trendy Investments Ltd qualified to be evaluated.

The Board notes that Clause 9 of the Appendix to Instructions to Tenderers (herein after "ITT") stipulated that commercial evaluation will be carried out on the bidders who met all the evaluation criteria. The commercial evaluation was to attract a total score of 50 points. The formula to arrive at this score was as follows:-

Lowest price x 50

Quoted price

The lowest quoted price among the responsive bidders was to earn the maximum points. The Board notes although this formula for commercial

evaluation was set out in the tender document, it was not used by the Procuring Entity in carrying out the evaluation of the tender.

The Board further notes that the tender document had stipulated at clause 14 of the Appendix to the ITT that the successful tenderer shall be the tenderer who scores the highest marks and has complied with all the stipulated tender conditions.

On the issue of whether the criteria used were objective and quantifiable, the Board finds that these criteria were set out in the tender document and the Procuring Entity carried out physical evaluation of the premises of all bidders and awarded marks accordingly. In view of this, the Board finds that the criteria were objective.

Regarding the question on whether the use of the criterion on market survey by the Procuring Entity was in breach of Section 66(2) of the Act, the Board finds that this criterion was not set out in the tender document. Therefore it could not be used by the Procuring Entity to evaluate bidders.

In this regard, the Board holds that the Procuring Entity breached Section 66(2) which provides as follows:

“The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.”

The Board finds that the failure to adhere to provisions of the Act cited above renders the entire process flawed.

In the circumstances, this ground of review also succeeds.

Ground 3 – Breach of Regulation 16 (5) of the Regulations

The Applicant alleged that the Procuring Entity failed to evaluate the tender within thirty days as stipulated in Regulation 16 (5) of the Public Procurement and Disposal Regulations (hereinafter referred to as “the Regulations”).

In response, the Procuring Entity stated that it conducted the evaluation in accordance to the procurement law and that it did not breach Regulation 16 (5) of the Regulations. It averred that the Applicant was evaluated in mid-August while the tenders opened in mid-July, 2011.

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

The Board notes that the tenders were opened on 14th July, 2011 and the Physical Evaluation report is dated 8th August, 2011. The internal memo dated 27th September, 2011 from the department to the Secretary of the MTC indicates that the evaluation reports were presented on 15th September, 2011. The Procuring Entity ought to have completed its preliminary and physical evaluation by the 14th August, 2011. However, counting from 15th July, 2011 to 15th September, 2011, the Board finds that the evaluation took sixty-two (62) days to be completed. The Board holds that the Procuring Entity breached Regulation 16(5) (b) and 16(7) (b) which provides as follows:

16(5) A technical evaluation committee established in accordance with paragraph (2) (a) shall be responsible for-

.....

(b) Performing the evaluation with all due diligence and within period of thirty days after opening of the tenders.

.....

16(7)A financial evaluation committee established in accordance with paragraph (2) (a) shall be responsible for-

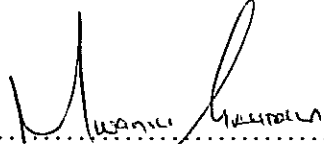
.....
(b) Performing the evaluation with all due diligence and within period of five days after completion of the technical evaluation.

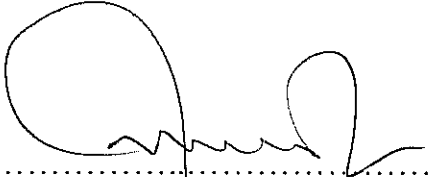
Accordingly this ground of Review also succeeds.

Taking all the above matters into consideration, the Board finds that the tender process was flawed and therefore this request for review succeeds and the Board pursuant to provisions of Section 98 of the Act directs as follows:-

1. The award of the tender to the successful Bidder is hereby annulled.
2. In view of the sensitivity of the subject tender involving perishables, the Board directs that the Procuring Entity proceeds to put in place measures in accordance with options set out at Section 74 of the Act for supply of the product for 90 days within which the procurement process should be completed.
3. The Procuring Entity to engage in restricted tendering and invite all the bidders who participated in the tender.
4. There will be no order to costs.

Dated at Nairobi on this 7th day of December, 2011


.....
CHAIRMAN
PPARB


.....
SECRETARY
PPARB