

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 43/2011 OF 10TH NOVEMBER 2011

BETWEEN

MARTIN OTIENO OKWACH &
CHARLES ONGONDO WERE
T/A VICTORIA CLEANING SERVICES.....APPLICANT

AND

KENYA POST OFFICE SAVINGS BANK PROCURING ENTITY

Review against the decision of the Tender Committee of Kenya Post Office Savings Bank dated 21st October, 2011 in the matter of Tender No KPOSB/P&S/35/2011 for provision of cleaning and messengerial services at Kenya Post Office Savings Bank Headquarters and Karura Training school.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka - Chairman
Amb. C. Amira - Member
Mr. J.W. Wambua - Member
Mrs. L. Ruhiu - Member

IN ATTENDANCE

Mr. N. Soita - Holding Brief for the Secretary

Mr. L. Otieno - Secretariat

PRESENT BY INVITATION

Applicant, Victoria Cleaning Services

Mr. Dismas Odhiambo - Advocate, Odhiambo & Weda Advocates

Procuring Entity, Kenya Post Office Savings Bank

Mr. J. Louis Onguto - Advocate, J. Louis Onguto Advocates

Mr C. M Karani - Postbank

Mrs. M.W. Mbijiwe - Postbank

Interested Candidates;

Mrs. Lilian Ogwora - Advocate, Rouze Suppliers & Procurement

Mrs. Roze. K. Ooga - Director, Rouze Suppliers & Procurement

Mrs. Ruth Ambasu - Manager, Rouze Suppliers & Procurement

Mr. Charles Siko - Manager, Rouze Suppliers & Procurement

Mr. Michael Rotich - Director, Robu Cleaning Services

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 OF AWARD**Advertisement**

Kenya Post Office Savings Bank made a Request for Quotation for Tender No. KPOSB/P & S/35/2011 for the provision of cleaning services and messengerial services at Post Bank Headquarters and Karura Training School on 1st September 2011 vide a Request for Quotation.

Closing/Opening:

The Quotations/Tender was opened on 14th September 2011. The following four (4) bids were opened;

NO	FIRM'S NAME	ADDRESS	REMARKS
1	Robu cleaning services		1,171,759
2	Metro cleaning services		407,000 p/month
3	Chronicle Environmental services ltd		625 000/=
4	Victoria cleaners services		340,720/=

Evaluation

The evaluation of the above quotations was done by a committee chaired by J. Omwoyo, on the basis of the analysis on the responses that were received from the listed firms as follows;

Table 1

NO	FIRM NAME	TOTAL COST PER YEAR	REMARKS
1	Victoria cleaning services	4,088,640.00	1 (non-responsive)
2	Chronicle Environmental services	7,446,000.00	3(2 nd Lowest Evaluated Bidder)
3	Robu cleaning services	14,061,108.00	4(3 rd Lowest Evaluated Bidder)
4	Metro cleaners & Renovators	4,884,000	2(lowest evaluated bidder)

Table 2

NO	FIRM NAME	CARPET PER SQ FT(KSH)	SOFA SET (KSH)	SEATS (KSH)
1	Victoria cleaning services	9.00	580.00	174.00
2	Chronical Environmental services	30.00	1500.00	250.00
3	Robu cleaning services	28.00	3185.00	325.00
4	Metro cleaners & Renovators	6.96	2500.00	464.00

The Evaluation Committee in its findings ranked Metro cleaners and Renovators as the Lowest Evaluated Bidder, Chronicle Environmental Services as the 2nd lowest evaluated bidder, Robu cleaning services as the 3rd lowest evaluated bidders while Victoria cleaning Services was found to be non-responsive and was therefore disqualified.

The Evaluation Committee observed that Victoria Cleaning Services Ltd was disqualified due to non performance of the existing contract. That the firm failed to provide adequate equipment and materials for execution of the contract. Also the firm failed to provide uniforms to their staff.

The Evaluation Committee then recommended that the contract be awarded to the second lowest Metro Cleaners & Renovators Ltd at a sum of Kenya Shillings Four Million Eight Hundred and Eighty Four Thousand only (Ksh 4,884,000.00).

The committee further recommended that carpets, cleaning of seats and sofa sets also be awarded to Metro cleaners since the work is done on as when there is need.

TENDER COMMITTEE'S DECISION

The Tender Committee in its meeting held on 21st October 2011 under Minute No. 137/TC/2011 approved the Evaluation Committee's recommendation and awarded the tenders to Metro cleaners & Renovators Ltd at a total cost of Ksh 4 884 000 VAT inclusive for a period of one year being the lowest evaluated bidder.

The Tender Committee further awarded the Tender for the cleaning of carpet, sofa set and seats to Chronicle Environmental Services Ltd at a cost of Ksh. 30/= per sq ft, Ksh. 1,500/= and Ksh. 250/= respectively all for a period of one year.

The successful bidder(Metro cleaners & Renovators ltd) was notified of the award vide a letter dated 24th October 2011 while the unsuccessful bidder, including Victoria cleaning services were notified of the outcome of the decision vide a letter dated 31st October 2011.

THE REVIEW

The Applicant Martin Otieno Okwach and Charles Ongondo Were T/A Victoria Cleaning Services lodged the Request for Review on 10th November, 2011 against the award of Tender No. KSOPB/P&S/35/2011 for the provision of cleaning and messengerial services upon Request for Quotation by Kenya Post Office Savings Bank, who are the Respondents herein.

The Applicant requests the Board for the following orders;

- a.) The decision of the procuring entity is illegal and the same be annulled in whole.
- b.) The Board be pleased to award the entire contract or a substantial part thereof to the applicant.
- c.) The procuring entity be condemned to pay costs of the Review to the

Applicant.

Preliminary Issue

At the commencement of the hearing, the Procuring Entity raised an issue with regard to the documents that had been filed by the Applicant. It submitted that the Board should reject a document that had been filed by the Applicant under the name "Applicants Response to the Procurement Entity's Memorandum of Response to Request for Review". It argued that this document, which had been served to it on 2nd December, 2011, should be expunged from the documents before the Board as it had been filed contrary to the provisions of the Public Procurement and Disposal Act, 2005 (herein after "the Act") and the Public Procurement and Disposal Regulations, 2006 (herein after "the Regulations").

In response, the Applicant submitted that the document was just a response to the new information that the Procuring Entity's Memorandum of Response had disclosed. It further submitted that at the time of filing the Request for Review, it had not known the reason as to why its bid had not succeeded even when it had quoted the lowest price. It argued that having read the Procuring Entity's Memorandum of Response, which gave the reason as to why its bid had been found to be unresponsive, then, in all fairness, it was justified to give its side of the story. It further argued that it had not introduced any new grounds but had only responded to the Procuring Entity's own response.

In any event, it concluded, it was within its constitutional rights to use all the information necessary in furtherance of justice.

On its part, the Successful Candidate, Metro Cleaning Services Limited, submitted that the Applicant should have written to the Procuring Entity prior to filing a Request for Review, asking to be given the reasons as to why its bid had been found to be nonresponsive. It urged the Board therefore, to expunge the said document.

The Board has considered the representation of the parties and perused the said documents.

The Board notes that with or without a written submission, the Applicant is at liberty to interrogate the response of the Procuring Entity and to use any information thereof for furtherance of its case. The Board further notes that the Applicant has the right of reply.

In conclusion, the Board holds that the said document be accepted as part of the documents validly before it but with a caveat that the document should not introduce any new grounds.

Grounds For Review

The Applicant raises seven grounds of review and the Board deals with them as follows:

Grounds 1,2 and 4 - Breach of Sections 31(3) and 89(4) of the Act

These grounds have been combined as they raise a similar issue on the Successful Quotation.

The Applicant submitted that it had been duly pre-qualified by the Procuring Entity to tender for the provision of the various categories of services in the said tender No. KPOSB/P&S/35/2011. It further submitted that the Procuring Entity had subsequently invited all the pre-qualified bidders to submit financial quotations with respect to the various categories for which they had been pre-qualified.

The Applicant stated that it had provided its financial quotations for each category of the services in strict compliance with the criteria and requirements set out in the tender documents for the tender contract period of one year as follows:-

- a) The Provision of Cleaning and Messengerial Services at Post Bank Headquarters and Karura Training School.....**Kshs.4,088,640**
- b) The Provision of Cleaning Services and Other Basic Requirements.....**Kshs.2,604,960**
- c) The Provision of Cleaning, Tea and Messengerial Services and Other Basic Requirements.....**Kshs.5,737,680**

The Applicant averred that at the opening of the said financial quotations, its prices in all the three categories were the lowest.

The Applicant stated that the Procuring Entity breached the provisions of **Section 89(4)** of the Act. It averred that the Procuring Entity failed to declare its quotation as the successful one notwithstanding the fact that it was the lowest priced and met all the requirements set out in the Request for Quotations.

The Applicant argued that it was illegal for the Procuring Entity to use non-performance in a previous contract as a basis for declaring its bid as non-responsive. It further argued that such an act by the Procuring Entity amounted to a debarment and that only the Director General, Public Procurement Oversight Authority (PPOA) could legally debar any bidder from future participation in public procurement.

The Applicant stated that the matter of past performance ought to have been dealt with during the relevant contract and not within the current tender. It argued that, had the Procuring Entity been genuinely dissatisfied by the Applicant's performance, it would not have pre-qualified it and subsequently invited it for the current financial quotation. On this matter, it therefore concluded that the use of past performance amounted to introduction of new criteria which was in breach of section 31(3) of the Act. The Applicant also pointed out that the Procurement Entity further acted unlawfully by discriminating against it in that it failed to subject all other bidders who had served previous contracts with it to the same criteria of assessing their previous performance record.

In its response, the Procuring Entity stated that it had satisfied all the relevant provisions of the Act and the Regulations thereof in inviting the various prequalified bidders to quote for the specific services. The Procuring Entity further stated that it did not breach Section 89(4) of the Act as it had expressly reserved the right not to accept the lowest quotation.

The Procuring Entity argued that the Applicant was disqualified for poor past performance, a fact that had been pointed out to it severally.

The Procuring Entity explained that it had prequalified the Applicant together with other bidders who were to provide it with the cleaning and other related services for the two years November 2010 to October 2012, and that the quotations were to be done on a yearly basis. It further explained that the Applicant and also the Successful Bidder had been awarded the work for the year November 2010 to October 2011, during which the Applicant had performed poorly. The Procuring Entity argued that although it still had to allow all the prequalified bidders to quote for the second year, November 2011 to October 2012, it nevertheless could not ignore the Applicant's past poor performance in the first year when it came to the evaluation and award of the quotations.

On its part, one of the Successful Candidates, Rouze Suppliers and Procurement, stated that the Procuring Entity was within its rights to decide whether or not to extend the contract to any bidder from one year to another.

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

The Board notes that in 2009, the Procuring Entity prequalified nine bidders for the provision of cleaning and messengerial services for the two year period November 2010 to October 2012 namely:

1. Metro Cleaning Limited.
2. Robu Cleaning Services.
3. Chronicle Environmental Services Limited.
4. Victoria Cleaning Services.
5. Rouze Procurement & Suppliers Limited.
6. Sunkin Catering Services.
7. Vic Falls Supplies.
8. Barbers Oasis (K) Restaurant.
9. Real Expectations.

The Board further notes that the cleaning services for the first year November 2010 to October 2011 had been offered by 3 bidders namely Bens & Jens Services Ltd, Metro Cleaners & Renovators Ltd and the Applicant.

The Board also notes that on 30th August, 2011 the Procuring Entity invited the above Pre-qualified bidders, including the Applicant, to submit their financial bids or quotations for the supply of cleaning and messengerial services.

The Board notes that the bids were received and opened on 14th September 2011 and that for the three categories in which the Applicant had quoted the prices were analysed as follows:

CATEGORY A

NO	FIRM NAME	TOTAL COST PER YEAR (KSH)	REMARKS
1	Metro Cleaners & Renovators Ltd	4,884,000.00	Lowest Evaluated
2	Chronicle Environmental Services Ltd	7,446,000.00	2nd Lowest Evaluated Bidder
3	Robu Cleaning Services	14,061,108.00	3rd Lowest Evaluated
4	Victoria Cleaning Services Ltd.	4,068,640.00	Non-responsive

CATEGORY B

NO	FIRM NAME	TOTAL COST PER YEAR (KSH)	REMARKS
1	Metro Cleaners & Renovators Ltd	4,362,643.20	Lowest Evaluated Bidder
2	Robu Cleaning Services	5,024,892.00	2nd Lowest Evaluated Bidder
3	Chronicle Environmental Services Ltd	4,786,248.00	3rd Lowest Evaluated Bidder
4	Victoria Cleaning Services Ltd.	2,604,960.00	Non-responsive

CATEGORY C

NO	FIRM	TOTAL COST PER MONTH (KSHS)	TOTAL COST PER YEAR (KSHS)	REMARKS
1	Rouze Procurement and Suppliers Ltd	489,482	5,873,784	Lowest Evaluated Bidder
2	Sunkin Catering Services	733,190	8,798,280	2nd Lowest Evaluated
3	Chronicle Environmental Services Ltd	844,362	10,132,344	3rd Lowest Evaluated Bidder
4	Robu Cleaning Services	1,031,033	12,380,760	4th Lowest Evaluated
5	Metro Cleaners & Renovators Ltd	1,080,033	12,960,396	5th Lowest Evaluated
6	Vic Falls Suppliers	1,372,969	16,475,628	6th Lowest Evaluated
7	Berbers Oasis (K) Restaurant		-	Non-responsive
8	Real expectations		-	Non-responsive
9	Victoria Cleaning Services Ltd.		5,737,680	Non-responsive

The Board notes that in all the three categories that the Applicant quoted, its price was the lowest but that in each case, the Applicant was disqualified as being non-responsive. From the minutes of the Procuring Entity's Evaluation

Committee, the Board notes the reasons given for the Applicant's non-responsiveness as follows:

1. Non-performance of the existing cleaning contract
2. Failure to provide sufficient cleaning equipments and materials. Also the firm failed to provide uniforms to their staff.

The Board further notes that for each of the three categories, the award was made to the second lowest quoted bid as follows:

- (i) Category (a) and (b) to Metro Cleaners & Renovators Ltd.
- (ii) Category (c) to Rouze Procurement and Suppliers Limited.

The Board also notes that tenders by way of Request for quotation are governed by Section 89 of the Act which states in part as follows;

Section 89

- (1) *"This Section sets out the procedure for a procurement using a request for quotations.*
- (2) *The procuring entity shall prepare a request for quotations that sets out the following-*
 - a) The name and address of the procuring entity;*
 - b) The specific requirements prepared under section 34 relating to the goods being procured;*
 - c) An explanation of where and when quotations must be submitted;*
and

- d) Anything else required under this Act or the regulations to be set out in the request for quotations.*
- (3) The procuring entity shall deal with the request for quotations in accordance with the following-*
- a) The procuring entity shall give the request to such persons as the procuring entity determines;*
 - b) The request must be given to as many persons as necessary to ensure effective competition and must be given to at least three persons, unless that is not possible; and*
 - c) The procuring entity shall give the request to each person early enough so that the person has adequate time to prepare for quotations.*
- (4) The successful quotation shall be the quotation with the lowest price that meets the requirements set out in the request for quotations”.*

The Board notes that Section 89(2)(b) clearly calls for the Procuring Entity to prepare a request for quotation that sets out the specific requirements related to the goods or services being procured. That the Request for quotation threshold as provided by the Regulations for provision of services is Kenya Shillings One Million maximum beyond which Open tender method of procurement would be used. That the Procuring Entity having used prequalification process, the method of procurement it could have opted to use was Restricted tendering and not Request for quotation.

The Board further notes that a Procuring Entity is free to use any requirement including that of past performance but that such a requirement must be set out in the tender document as part of the criteria for evaluation and award of tender.

The Board also notes that Section 89(4) clearly states that the successful quotation shall be the quotation with the lowest price that meets the requirements that are set out in the Request for Quotations.

○ After perusing the Request for Quotation documents issued by the Procuring Entity, the Board finds that past performance was not set out as one of the criteria for evaluation, and that therefore, the Procuring Entity is precluded from using it against the Applicant or any other bidder.

○ The Board also finds that the Applicant met all the criteria that had been set for the tender and it was prequalified and subsequently invited to submit its quotation. Once a Procuring Entity has used the way of prequalification then all those prequalified and invited to quote are deemed to be responsive and subsequently only the price can be used to differentiate the winner from the losers. The Procuring Entity is therefore not left with any discretion other than to award to the lowest quotation.

The Board further notes that even if the issue of past performance had been set out as criteria then it should not have been used exclusively against the

Applicant but ought to have been applied fairly to all the existing and past service providers.

From the minutes that were availed to the Board, there is no evidence that Metro Cleaners & Renovators Ltd was also subjected to this criteria and the Board cannot rule out the Applicant's claim that the criteria was used in a manner that was discriminative.

Taking into account all the above matters, these grounds of review succeed.

Ground 3- Breach of Regulation 59(2) (c)

This ground raises an issue of fairness and equity in rotation among tenderers.

The Applicant alleged that the Procuring Entity acted in breach of Regulation 59(2)(c) by failing to ensure a fair and equal rotation amongst the bidders who were prequalified and as a consequence the Applicant was unfairly treated, and discriminated against. It further alleged that its bid was singled out and subjected to past performance in a bid to discriminate against it.

In response, the Procuring Entity stated that it did not breach Regulation 59(2)(c) as alleged by the Applicant and contended that it had invited all the prequalified bidders competitively and fairly without discrimination.

The Board notes that all the prequalified bidders were invited to participate and therefore the allegation that there was no equal rotation has no basis, however, as the Board has already noted, the use of poor performance was applied in a discriminatory manner, and therefore this ground also succeeds.

Ground 5

The Applicant alleged that it had rendered similar services to the Procuring Entity for a period of ten (10) years during which it had strictly adhered to and observed the contract requirements to the satisfaction of the Procuring Entity and that therefore its disqualification or elimination from the tender was without basis, unjustified, wrongful and unlawful.

In response, the Procuring Entity contended that the Applicant was disqualified for past poor performance of the previous existing contracts with the Procuring Entity and argued that it, on several occasions, drew this fact to the attention of the Applicant.

The Board observes from the documents supplied to it that indeed the Procuring Entity did on several occasions tender its displeasure by way of letters to the Applicant wherein it had cited substandard services. However, as the Board has already found herein before, this was a new criteria for evaluation which had not been provided for in the Tender Document. If the Procuring Entity intended to use past performance as an evaluation criteria it should have set it out as a requirement and provided an objective manner of evaluating the bids.

Grounds 6 and 7

These grounds have been combined as they both raise the issue of the potential loss that both the Applicant and the public are bound to suffer as a result of the Procuring Entity's decision.


The Board has on several occasions in the past held that costs incurred by tenderers at the time of tendering are commercial risks borne by persons in business and therefore each bidder carries its own costs.

Taking into account all the foregoing, this request for review succeeds.

The Board orders pursuant to section 98 that the awards to the Successful bidders in the three categories that are subject to this request for review be and are hereby annulled. The Procuring Entity may retender using the appropriate method, considering the thresholds as provided under the Regulations.

Dated at Nairobi on this 13th day of December, 2011

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CHAIRMAN
PPARB

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SECRETARY
PPARB