

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 8/2011 OF 4th MARCH, 2011

BETWEEN

BUILDING FIRE CONSULTANT LTD.....APPLICANT

AND

**KENYA ELECTRICITY GENERATING COMPANY.....PROCURING
ENTITY**

Review against the decision of the Tender Committee of the Kenya Electricity Generating Company dated 14th March, 2011 in the matter of Tender No. KGN SONDU 03 2010 for Design, Installation and Commissioning of a Fire Protection System at Sondu Miriu Power Station

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Ms. Natasha Mutai	-	Member
Mr. Akich Okola	-	Member
Mr. Sospeter Kioko	-	Member
Mr. Joshua W. Wambua	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Ms. Pamela K. Ouma	-	Secretariat
Ms. Maureen Namadi	-	Secretariat

PRESENT BY INVITATION

Applicant, Building Fire Consultant Ltd

- Mr. Alex Masika - Advocate, Masika & Koross Advocates
Mr. Richard Karinge - Project Engineer

Procuring Entity, Kenya Electricity Generating Company Ltd

- Mr. Karanja Njenga - Advocate, Karanja Njenga & Advocates
Mr. Paul Kinyanjui - Advocate, Karanja Njenga & Advocates
Mr. Anderson Mwiti - Advocate, Karanja Njenga & Advocates
Mr. Dennis Onwonga - Advocate

Interested Candidates

- Mr. David Kiteri - Director, Mather & Platt (K) Ltd
Mr. Isaac Owuor - Advocate Ass, Kenya Fire Appliances Ltd
Mr. John Njoroge - Sales, Kenya Fire Appliances Ltd
Mr. Fred Muya - Sales, Kenya Fire Appliances Ltd
Mr. Charles Kangara - Manager, Jolemac Enterprise

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

The tender for the design, Installation and Commissioning of a Fire Protection System at Sondu Miriu Power Station was advertised by the Kenya Electricity

Generating Company on 19th and 26th October, 2010 in the Daily Nation Newspaper.

Closing/Opening:

The tenders closed and opened on 17th November, 2010 in the presence of bidders representative who chose to attend. Five bids were received from the following bidders:

BIDDER	-	BID PRICE
(i) Building Fire Consulting	-	18,675,384
(ii) Kenya Fire Appliances Limited	-	19,998,638.87
(iii) Mather & Platt	-	19,591,310.00
(iv) Jolemac Enterprise	-	29,835,202.32
(v) Uday Patel & Co Ltd	-	37,719,140.00

EVALUATION

The evaluation was conducted by a committee chaired by Eng. Stephene D. Ochieng. The evaluation was done in three stages namely completeness of the bid submitted; Compliance to the Technical Specifications; and Price Competitiveness.

a) Preliminary stage: - Completeness of bids

The result of this stage was as tabulated below:

No.	Item	Kenya Fire Appliance Ltd	Uday Patel	Building Fire Consulting Ltd	Mather & Platt	Jolemac Fire Protection Ltd
1.	Equipment country of origin	UK	UK/Spain/Austria	UK	UK & USA	UK & Spain
2.	Invitation to tender	Compliant	Compliant	Compliant	Compliant	Compliant
3.	Bid Bond (2% bid price)	Not Compliant	Compliant	Compliant	Compliant	Compliant

4.	Manufacturers Authority	Compliant	Compliant	Not Compliant	Compliant	Compliant
5.	Standards for Products	Compliant	Compliant	Not Compliant	Compliant	Compliant
6.	Delivery Period	12 Weeks	8 Weeks	12 Weeks	18 Weeks	8 Weeks
7.	Site Visit	Compliant	Compliant	Compliant	Compliant	Compliant
	Evaluation Result	Not Compliant	Compliant	Not Compliant	Compliant	Compliant

Two firms namely, Kenya Fire Appliances Ltd and Building Fire Consultants Ltd were declared non responsive at this stage. Kenya Fire Appliances Ltd was declared non responsive for not providing a sufficient bid bond while Building Fire Consultants Ltd the Applicant herein had not provided a Manufacturer's Authorization Form and did not specified the standards of its products. The remaining three bidders proceeded to the technical evaluation stage.

b) Technical Evaluation

The three bids that were responsive at the preliminary stage were then evaluated for their technical responsiveness on the following:

- i. Detection Control
- ii. Transformer deluge system
- iii. Fire hydrants
- iv. Server room

All the three bidders were declared compliant to all the above stated parameters and qualified for the financial evaluation stage.

c) Financial Evaluation

The results were as tabulated below:

	Description	Uday Patel & Co. Ltd	Mather & Platt	Jolemec Fire Protection Ltd
1.	Fire detection, alarm and control	9,344,000.00	6,250,400.00	12,875,500.00
2.	Transformer Deluge System	2,400,000.00	2,972,160.00	3,490,900.00
3.	Fire Hydrant System	17,020,000.00	5,136,750.00	6,057,816.00
4.	Server room suppression system	682,500.00	839,570.00	593,000.00
5.	Miscellaneous items	100,000.00	186,720.00	75,000.00
6.	Spares	2,970,000.00	1,503,460.00	2,627,786.00
Total Price (Kshs)		32,516,500.00	16,889,060.00	25,720,002.00
16% VAT		5,202,640.00	2,702,249.60	4,115,200.32
GRAND TOTAL (Kshs)		37,719,140.00	19,591,309.60	29,835,202.32

The Evaluation Committee then recommended M/s Mather & Platt as the most financially and technically competitive tenderer at its tender price of Kshs. 19,591,309,310/=

THE TENDER COMMITTEE DECISION

The Company Tender Committee in its meeting held on 1st February, 2011 deliberated on the recommendation of the Evaluation Committee and awarded the tender for Design, Installation and Commissioning of a Fire Protection System for Sondu Miriu Power Station to M/s Mather & Platt Kenya Limited at their total quoted price of Kshs. 19, 591,310.00 inclusive of VAT.

The bidders were notified of the outcome of the tender vide letters dated 14th February, 2011.

PRELIMINARY OBJECTION

The Procuring Entity filed a Preliminary Objection on 8th March, 2011 on the grounds that the Public Procurement Administrative Review Board had no jurisdiction to entertain the application on the following grounds:

1. "The notification under Section 67 of the Public and Disposal Act, 2005 was issued on the 14th February 2011.
2. The Request for Review was filed on the 4th of March 2011.
3. The Request for review is made out of the statutory period of 14 days prescribed under the regulation 73(2) of the Public Procurement and Disposal Regulation, 2006."

At the commencement of the hearing, the Board requested the Procuring Entity to confirm the dates when it dispatched the letters of notification to the bidders as it formed the basis of the preliminary objection. The Procuring Entity stated that it had dispatched the letters of notification on 18th February, 2011 and admitted that the last day for filing the Request for Review was 4th March, 2011. The Board noted that the Applicant had lodged its Request For Review on 4th March, 2011 which was the last day of the fourteen days appeal window period.

The Preliminary Objection was then marked as withdrawn.

THE REVIEW

The Applicant, Building Fire Consultants Limited lodged the Request for Review on 4th March, 2011 against the decision of the Procuring Entity in the matter tender No. KGN SONDU 03 2010 for Design, Installation and Commissioning of a Fire Protection System at Sondu Miriu Power Station.

The Applicant request's the Board for the following orders:-

a) "Annul in whole the decision of the tender committee of the Procuring Entity.

b) Revise the unlawful decision of the tender committee of the Procuring Entity and award the applicant the tender.

c) The Procuring Entity be condemned to pay costs of this Review to the Applicant."

At the hearing, the Applicant was represented by Mr. Alex Masika, Advocate while the Procuring Entity was represented by Mr. Karanja Njenga, Advocate. The Interested Candidates present included Mather and Platt (K) Ltd represented by Mr. David Kiteri; Jolemac Enterprises represented by Mr. Charles Kangara; and Kenya Fire Appliances Ltd.

The Applicant raised five grounds of review which we deal with as follows:

Grounds 1, 2 &3- Breach of Section 66 (4) and 64 (1) of the Act and Regulations 50 (3) and 48 (1) of the Regulations

We combine these grounds as they raise similar issues on the evaluation of the bids. The Applicant submitted that the Procuring Entity breached the provisions of Regulation 50 (3) of the Public Procurement and Disposal Regulations, 2006 (herein after "the Regulations") and Section 66 (4) of the Public Procurement and Disposal Act, 2005 (herein after "the Act") by not awarding the tender to it yet it had fulfilled the technical requirements and submitted the lowest evaluated price. It added that the Procuring Entity's Evaluation Committee acted in breach of Section 64 (1) of the Act and

Regulation 48(1) by failing to award the bid to it having been the most competitive bid.

In response, the Procuring Entity submitted that it had fulfilled all the requirements of the Act and the Regulations. It stated that it had appointed an evaluation committee which evaluated all the five bids and the Applicant failed to pass the preliminary evaluation stage by not meeting the technical requirements. The Procuring Entity further stated that the Applicant had not provided a Manufacturers Authorization Form and the standards of the products it was to supply. The Procuring Entity added that only three firms complied with the criteria for responsiveness and that these firms were subjected to the technical and financial evaluation.

The Procuring Entity averred that the Applicant's bid was not the lowest evaluated price in terms of Section 50 (3) and 66 (4) of the Act and that the Evaluation Committee acted within the confines of Section 64(1) of the Act and Regulation 48 (1) of the Regulations. It further averred that the successful candidate, M/s Mather & Platt (K) Ltd was the most competitive and the lowest evaluated bidder.

On further inquiry by the Board, the Procuring Entity stated that the Evaluation Committee was based in Sondu, hence it evaluated the bids based on the copies of the tender documents. The Procuring Entity stated that the original bid documents remained at the headquarters in Nairobi. It stated that the copy of the Applicant's bid document that was evaluated did not contain the Manufacturer's Authorization Form and the details on the standards of the equipments it was to supply. The Procuring Entity admitted that it realised

after the filing of the Request for Review that the Applicant's original tender document contained the alleged missing documents.

The Successful Candidate, Mather & Platt, stated that the standards required for the Fire Suppression System included the British Standards, American Standard, LPE and NFPA as specified in the Tender Document. It added that for any tender, the copies should be similar to the original bid document and that the evaluation should be based on the original bid document.

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

There two issues for the Board to determine are as follows:-

Firstly, the issue of the alleged failure by the Applicant to submit a Manufacturer's Authority Form. The Board notes that the Procuring Entity disqualified the Applicant at Preliminary Evaluation stage for failure to attach a Manufacturer Authorisation Form. However, it admitted that the original Tender Document contained the Manufacturer Authorization Form but that the two copies on which the evaluation was carried out by the Evaluation Committee did not include the Manufacturer's Authorization Form.

The Board finds that although it may be true that the copies did not include the Manufacturer's Authorization Form, it nevertheless finds that the Evaluation Committee should have looked at the original tender document which contained the Manufacturer's Authorization Form. Failure by the Procuring Entity to look at the original tender document resulted in the evaluation being carried out un-procedurally. The Board notes that Clause

16.1 of the tender document indicated that a tenderer shall prepare three copies of the tender, clearly marking each Original tender and Copy of Tender as appropriate. It added that in the event of any discrepancy between them, the original shall govern.

On examination of the Successful Candidate's bid document the Board finds that the Manufacturer's Authorization Form from National Pump Company, LLC introduced conditions that were not in the template issued by the Procuring Entity. The Board further finds that M/s Jolemac Fire Protection Ltd one of the bidders who was found to be responsive at both the Preliminary and Technical Evaluation stages had not included a Manufacturer's Authorization Form but an expired letter from Hochiki Europe (UK) Ltd authorizing it as a distributor of Hochiki products in Kenya. Another letter from Pri-Safety Fire Fighting Equipment Co. Ltd authorized Jolemac Fire Protection Ltd to be its agent from 1st November, 2009 to 31st October, 2010. Further, the Form of Tender of the same bidder was blank. In view of the foregoing the Board holds that the Applicant provided the Manufacturer's Authorization and should not have been disqualified on this ground.

Secondly, on the alleged failure by the Applicant to submit evidence of the standards of the products to be supplied under the contract, the Board notes that Clause 1.3 of Section F in the Standard Tender Document states as follows:

"....All equipments proposed and planned for use in this project must be formally approved by at least two of the following internationally recognized laboratories:

UL	-	Underwriters Laboratories	-	USA
FM	-	Factory Mutual Insurance Co.	-	USA
BS	-	British Standards Institution	-	UK
LPC	-	Loss Prevention Council	-	UK

Equipment and materials not complying with the required standards shall not be acceptable and shall result in rejection of the tender.

Tenderers are required to submit a Certificate of Inspection together with their bids as documentary evidence that the equipment and controls to be used in this contract complies with the mentioned standards."

The Board notes that the Applicant had included in its tender a City Council of Nairobi Fire Brigade Section Annual Inspection Certificate which indicated that the Chief Fire Officer was satisfied that the equipment being supplied are of acceptable standards based on the Kenya Bureau of Standards or the British Standards Specifications. In addition, the Applicant included Fike's Cheetah Intelligent Suppression Control System documents which indicated that they had approvals from UL - S 2203 and FM -3029134 which are United States of America Standards and not British Standards as indicated in the City Council Inspection Certificate. The Board observes that the Successful Candidate had included an extract from the National Pump Company indicating the parameters of the pump and motor performance characteristics on testing.

The Board further observes that none of the bidders submitted with their bids, Certificates of Inspection; instead they submitted the Manufacturer's Data

Sheets which stated that the mentioned equipment met the standards mentioned in Clause 1.3.

In view of the Board, this did not amount to the Certificate of Inspection required but were mere brochures. Accordingly, their authenticity could not be ascertained.

The Board therefore finds that these brochures did not satisfy the requirements set out in the tender document. The Procuring Entity thus failed to carry out the evaluation in accordance with the criteria set out in the tender document.

Accordingly, these grounds of appeal succeed.

Ground 4

This is not a ground of review but the Applicant's statement that it was unfairly evaluated by the Procuring Entity's Tender Committee.

Ground 5

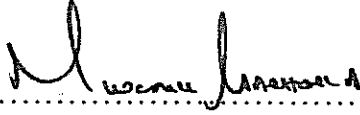
This is the Applicant's statement of loss.

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

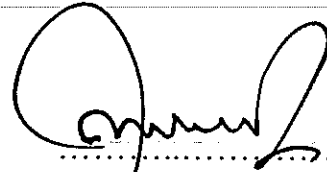
Taking all the above matters into consideration, the Request for Review succeeds and the Board orders pursuant to Section 98 of the Act, that the decision of the Procuring Entity to award the tender to the Successful Bidder,

Mather & Platt (K) Ltd is hereby annulled. The Procuring Entity may re-tender.

Dated at Nairobi on this 22nd day of March, 2011



CHAIRMAN
PPARB



SECRETARY
PPARB

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