

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 3 / 2012 OF 10TH FEBRUARY, 2012

BETWEEN

KENYA AIRPORTS PARKING SERVICES LIMITED.....APPLICANT

AND

KENYA AIRPORTS AUTHORITYPROCURING ENTITY

Review against the decision of the Tender Committee of Kenya Airports Authority dated 27th January 2012 in the matter of Tender No. KAA/112/2010-2011 for Installation, Operation and Management of Car Parking and Revenue Management System at Moi International Airport, Mombasa.

BOARD MEMBERS PRESENT:

Mr. P.M. Gachoka	-	Chairman
Mr. Akich Okola	-	Member
Ms. Natasha Mutai	-	Member
Ms. Judith A. Guserwa	-	Member

IN ATTENDANCE:

Mr. C. R. Amoth - Secretary
Ms. Pauline Opiyo - Secretariat
Ms. Maureen Kinyundo - Secretariat
Ms. Judy Maina - Secretariat

PRESENT BY INVITATION:

Applicant –Kenya Airport Parking Services Limited

Mr. Kiragu Kimani - Advocate
Mr. Thomas Abira - Advocate
Mr. Lawrence Madialo - Legal Officer
Ms. Barbara Gatumutia - Co-ops & Admin

Procuring Entity - Kenya Airports Authority

Mr. George K. Kamau - Legal Officer
Ms. Margaret Muraya - Manager, Projects
Mr. Allan Muturi - GM (Procurement & Logistics)
Mr. Martin Kamau - Accountant
Mr. Abraham Ngetich - Manager, Warehousing

Interested Parties

Mr. Steven Njoroge	-	Director, Mason Services Ltd
Mr. Edwin Thiongo	-	Lawyer, Mason Services Ltd
Mr. Sewak Grewal	-	C.E Africa & Asia, Amity Software Inc.
Mr. Henry K. Bett	-	Accountant, Docwide Business Centre (K) Ltd

BOARD'S DECISION

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

BACKGROUND OF AWARD

Advertisement:

The Kenya Airports Authority invited Tenders for the Installation, Operation and Management of a Car Parking and Revenue Management System at Moi International Airport, Mombasa through an open tender advertised in The Daily Nation and The Star of 16th and 24th November, 2011 respectively. Closing date/time as stated in the advert was 9th, December, 2011 at 11 a.m. but this was changed to 16th December 2011 via an addendum dated 6th December, 2011.

Closing/Opening:

The tender attracted eleven (11) prospective bidders out of which six (6) submitted tenders as at the time of tender closing/opening on 16th December, 2011. The list of tenderers who responded including their particulars is as shown in Table 1 hereunder.

Table1: Tender Response

S/No	Bidders	Postal Address	Tel./Mobile Nos.	Email
1	Dekings Traders Ltd.	Box 67156-00200 Nairobi	0722-513176/ 0722-415503	info@dekingstraders.com
2	Amity Software, Inc.	Box 19269-40123 Kisumu	057-2511221	ssg@aksamity.com
3	KAPS Ltd.	Box 3002-00506 Nairobi	020-2710917	kaps@kaps.co.ke
4	Mason Services Ltd.	Box 7044-00300 Nairobi	3752142/3	masonservices@wananchi.com
5	Seaside Commodities Ltd	Box 98583 Mombasa	041-2228815	seasidecommodities@gmail.com
6	Docwide Business Kenya	Box 3749-80100, Mombasa	041-2318806	info@docwide.co.ke

EVALUATION

Evaluation Criteria

The tenders were evaluated against the laid down criteria in the bid document which consisted of mandatory requirements and technical requirements.

The results of the evaluation against the Mandatory Requirements were as indicated in table 2 hereunder.

Table 2: Results of Evaluation against Mandatory Requirements

Requirement		Bidder S/No					
		1	2	3	4	5	6
i)	Form of Tender	Yes	Yes	Yes	Yes	Note 6	Yes
ii)	Validity of tender - 90 days	Yes	Yes	Yes	Yes	Note 7	Yes
iii)	Confidential Business Questionnaire	Yes	Yes	Yes	Yes	Yes	Yes
iv)	Bid security form (valid for 120 days) - Kshs. 100,000	Yes	Yes	Yes	Yes	Yes	Yes
v)	Declaration Form	Yes	Yes	Yes	Yes	Yes	Yes
vi)	Power of Attorney	Yes	Yes	Yes	Yes	Note 8	Note 13
vii)	Certificate of Incorporation / Registration.	Yes	Yes	Yes	Yes	Yes	Yes
viii)	Current KRA Tax compliance certificate.	Yes	Yes	Yes	Yes	Yes	Yes

ix)	Joint ventures will only be accepted if legal proof of partnership is presented.	N/A	Yes	N/A	Yes	N/A	Note 14
x)	Audited books of Accounts for years ending 2008, 2009, and 2010, with an annual turnover of Ksh50 million	Note 1	Note 4	Yes	Yes	Note 9	Note 15
xi)	Access to liquid assets of Ksh10 million	Yes	Yes	Note 5	Yes	Note 10	Note 16
xii)	Company profile with 3 sites managing car parks with more than 100 vehicle capacity.	Note 2	Yes	Yes	Yes	Note 11	Note 17
xiii)	Letters of recommendation from the site owners	Note 3	Yes	Yes	Yes	Note 12	Note 18

NOTES:

Note 1: Bidder 1 - 2008 annual turnover is Kshs. 48,628,692 against the minimum requirement of Kshs 50 million.

Note 2: Bidder 1 - Vehicle capacity managed in the 3 sites not indicated

Note 3: Bidder 1 - Letters of recommendations not provided

Note 4: Bidder 2 - Provided books of accounts but there is no proof that they are audited

Note 5: Bidder 3 - Did not provide proof of access to liquid assets of Kshs. 10 million

Note 6: Bidder 5 - Did not fill the form of tender

Note 7: Bidder 5 - Tender validity was not indicated

Note 8: Bidder 5 - Did not provide power of attorney

Note 9: Bidder 5 - Provided audited accounts from a different company (Hunters Ship Chandlers and General Contractors)

Note 10: Bidder 5 - Did not provide proof of access to liquid assets of Kshs. 10 million

Note 11: Bidder 5 - Did not provide letters of recommendation as required

Note 12: Bidder 5 - Provided company profile but did not provide 3 sites managing car parks with more than 100 vehicle capacity

Note 13: Bidder 6 - Did not provide power of attorney

Note 14: Bidder 6 - There is no proof of joint venture

Note 15: Bidder 6 - Did not provide audited accounts of years 2008 and 2009

Note 16: Bidder 6 - Does not have access to liquid assets of Kshs. 10 million

Note 17: Bidder 6 - Provided company profile but did not provide 3 sites managing car parks with more than 100 vehicle capacity

Note 18: Bidder 6 - Did not provide letters of recommendation as required

From the foregoing, five bids were found to be none responsive. The only responsive bid that qualified for Technical Evaluation was from bidder No. 4 (M/s Mason Services Limited).

Technical Evaluation

The Technical Evaluation results are shown in table 3 hereunder.

Table 3: Results of Technical Evaluation

Bidder Name - M/s Mason Services Limited		
	Technical Requirement	Bidder Compliance
1.	<p>ENTRY:</p> <p>Integrated with the proposed software, the main entry (gate) point (gate) shall consist of:</p> <ul style="list-style-type: none"> • a card reader one (1) (for prepaid arrangements), 	Complied
2.	ticket dispenser (1) (issuer) and	Complied
3.	an automatic barrier (1).	Complied
4.	Motorists with electronic card should open barrier automatically using card / card reader.	Complied
5.	<p>All other motorists (except for exempted vehicles) shall be automatically issued a ticket by the ticket dispenser and then the barrier is lifted and the car is allowed to enter the airport parking lot.</p> <p>EXIT:</p> <ul style="list-style-type: none"> • Integrated with the proposed software, the exit side shall comprise of two (2) lanes. These shall have one (1) manual cashier station and two (2) card readers controlling two (2) automatic barriers. 	Complied

6.	Lane 1; shall consist of an automatic card reader and automatic barrier. It shall be unmanned and shall be the express lane for motorists with prepaid arrangements (those issued with sticker and card).	Complied
7.	Lane 2; Shall consist of an automatic card reader and a cashier for ad-hoc payments. After payment of parking fees barrier will open automatically and motorists will exit the airport.	Complied
8.	<p>PAYMENTS:</p> <ul style="list-style-type: none"> • Bidders shall install one (1) Automatic Payment Station within the car-parking. The motorists should use the receipt to exit through Express lane 1. • All other motorists not paying at the automatic payments station should pay on exit without any penalties 	Complied
9.	<p>TRANSACTION REPORTS:</p> <p><input type="checkbox"/> The system should be able to generate statistical reports on a;</p> <ul style="list-style-type: none"> • Daily, • Weekly, • Monthly and, • Annual basis. • Reports MUST be shared with the Authority, by interfacing with the KAA network. <p>Bidder MUST provide sample (<i>simulated</i>) reports demonstrating ALL the above transaction characteristics and details.</p>	Complied

10.	The proposed parking management solution shall generate reports that identify usage of the system by clearly classifying users into;	Complied
11.	<ul style="list-style-type: none"> • Paying vs non-paying, • Ad-hoc vs gate pass holders etc. <p>Bidder MUST provide sample (<i>simulated</i>) reports demonstrating ALL the above transaction characteristics and details</p>	Complied
12.	<p>The reports should have details of transactions, including;</p> <ul style="list-style-type: none"> • Type of vehicle, • Time of entry/exit, • Date, • Applicable rate, • Total amount that the customer is required to pay as per the parked hours. <p>Bidder MUST provide sample (<i>simulated</i>) reports demonstrating ALL the above transaction characteristics and details.</p>	Complied
13.	<p>REVENUE MANAGEMENT SOLUTION:</p> <ul style="list-style-type: none"> • Bidders to state how the system will manage payment at exit points allowing for casual parking and seasonal parking. 	Complied

14.	Solution to enhance revenue collection by ensuring that all vehicles make payments, unless expressly exempted.	Complied
15.	Proposed system should generate report on the total revenue collections based on the following key fields: daily, weekly and monthly. <input type="checkbox"/> These reports should also capture seasonal payments. <input type="checkbox"/> The system should demonstrate compliance with VAT requirements.	Complied

Financial Evaluation

<p>Requirements:</p> <p>Firms will be expected to give a financial proposal comprising two parts;</p> <p>A - A fixed minimum annual guarantee of Kshs12million per annum, payable monthly, in arrears.</p> <p>Bidders to indicate compliance to payment terms above by signing below; <i>(incomplete proposals shall be considered as non-responsive).</i></p>	Complied
<p>B - A variable fee computed on percentage basis (Bidders proposal should NOT be less than 55% in favor of KAA), based on the annual gross business turnover.</p>	Complied (Offered 55%)

Recommendation

The evaluation committee recommended M/s Mason Services Limited to be awarded the tender for Installation, Operations and Management of Car Parking and Revenue Management System at Moi International Airport at the sum of Kshs. 12 million or the alternative 55% concession on gross annual turnover.

TENDER COMMITTEE DECISION

The Kenya Airports Authority Tender Committee in its 176th meeting (Paper No. 1807) held on 12th January 2012, discussed Tender No. KAA/112/2010-2011 for Installation, Operation and Management of Car Parking and Revenue Management System at Moi International Airport, Mombasa and approved the Technical Evaluation Committee's recommendation of M/s Mason Services Ltd for award of contract.

The Tender Committee's decision was communicated to the tenderers via letters dated 27th January, 2012.

THE REVIEW

The Applicant lodged this Request for Review on 10th February, 2012 against the decision of the Tender Committee of Kenya Airports Authority dated 27th January, 2012 in the matter of Tender No. KAA/112/2010-2011 for Installation, Operation and Management of Car Parking and Revenue Management System at Moi International Airport, Mombasa.

The Applicant was represented by Mr. Kiragu Kimani, Advocate while the Procuring Entity was represented by Mr. George Kamau, Legal Officer. The Successful Bidder, Mason Services Ltd, was represented by Mr. Steven Njoroge, Director. Other interested parties present included Docwide Business Centre (K) Ltd represented by Mr. Henry Bett, Accountant and Amity Software Inc. represented by Mr. Sewak Grewal.

The Applicant requests the Board for the following orders:-

- 1. That the decision of the Procuring Entity to award the tender to the Successful Bidder be nullified.**
- 2. That the Procuring Entity be ordered to re-tender for the project.**
- 3. That the costs of this review be awarded to the Applicant**
- 4. Any other order as applicable that this Board may make.**

The Applicant has raised fifteen grounds of review which the Board deals with as follows:

Grounds 1 and 2

These grounds are general statements by the Applicant in which no specific breaches of the Act or the Regulations by the Procuring Entity have been cited.

Grounds 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 16 - Breach of Regulation 47 and Sections 34, 62, 64(1), 64(2) and 66 of the Act

These grounds have been consolidated as they raise similar issues relating to evaluation and award of the tender.

The Applicant submitted that the Procuring Entity breached Regulation 47 by failing to conduct preliminary evaluation in accordance with the requirements set forth in the said Regulation. It averred that its bid met all the requirements specified under Regulation 47 and, therefore, the Procuring Entity breached Regulation 47 by rejecting the Applicant's bid at the preliminary evaluation stage without subjecting it to technical evaluation on the basis of a criterion that does not fall under the said Regulation.

The Applicant further submitted that it met the requirements of Clause 2.20 of the Instructions to Tenderers relating to financial capability as it submitted a letter dated 9th December 2011 from its Bankers which demonstrated its ability to undertake the contract it was bidding for. It stated that the letter from the bank confirmed that the Applicant had an on-going relationship with the bank; and further that the Applicant had financial capacity by virtue of the fact that the Applicant had undertaken large assignments. It further stated that, in any event, if there was any doubt about the Applicant's financial

capability, the bank had also opened a window for the Procuring Entity to seek further clarification by stating in the letter that, if there were any clarifications needed by the Procuring Entity the bank was willing to provide it.

The Applicant further submitted that it provided audited accounts for the years 2008, 2009 and 2010 as required by Clause 2.20 of Instructions to Bidders, which showed *inter alia* that the Applicant is a financially viable company with current assets in terms of cash and cash equivalents of over Kshs 20 million as at 31st December 2010. It argued that taking all the above matters into account, there could be no doubt that the Applicant had the financial capacity to perform the contract. It stated that in light of these facts, in its view it was wrong for the Procuring Entity to fail it at the preliminary evaluation stage.

The Applicant further argued that Clause 2.20 relating to financial capability of the bidders was not clear or objective as required by Section 34 as read with Section 66(3) of the Act in that:

- (a) It was not clear whether or not bidders were required to supply both bank statements and letters from bankers.
- (b) The requirement did not give a prescribed format for the letters from the bankers.
- (c) The clause did not specify the duration of the bank statements leaving room for manipulation by bidders.

It further submitted that, in the absence of clear, quantifiable and objective

criteria relating to financial capability of bidders, the Procuring Entity erred in applying a subjective test, and in failing to determine that whatever inadequacy it placed on the Applicant's bid relating to its financial capability was a non-material deviation within the meaning of Section 64(2) of the Act.

In support of its contention that the tender documents were not clear as required by Section 64(2) cited above, the Applicant referred the Board to **Application No. 3 of 2007 (MFI Office Solutions Vs Kenya Ports Authority)** and **Application No. 9 of 2004 (Roads into Africa Vs the Department of Defence)** in which the bid was annulled for failure by the Procuring Entity to give specific requirements in support of this contention. It argued that while lack of clarity might not be significant, however, looked at in totality, especially where there was only one bidder who moved to the technical evaluation stage, it becomes an important matter.

It further argued that in the absence of clear, quantifiable and objective criteria relating to financial capability of bidders and upon receipt from the Applicant of the letter from its bankers and its audited accounts, the Procuring Entity ought to have sought a clarification under Section 62 if it considered the Applicant's documents not clear on the issue. In its view failure by the Procuring Entity to exercise this discretion ought not to have been used to the detriment of the Applicant.

The Applicant averred that the Procuring Entity contravened the Section 64(1) of the Act as read with Regulation 28 which requires the Procuring Entity to evaluate responsive tenders.

The Applicant submitted that it had ample experience in managing car parks in Kenya and other African countries and has provided similar services to the Procuring Entity since 2001. In support of this claim it stated that currently it manages the following car parking facilities:

- | | | |
|--|---|--------------------|
| 1. Jomo Kenyatta International Airport | - | 7,000 cars per day |
| 2. Sarit Centre | - | 4,500 cars per day |
| 3. Yaya Centre | - | 4,000 cars per day |
| 4. Westgate | - | 4,000 cars per day |
| 5. The Junction | - | 4,500 cars per day |
| 6. Prestige Centre | - | 3,000 cars per day |
| 7. Entebbe International Airport | - | 4,000 cars per day |

It further stated that the Successful Bidder has no capacity to perform the contract and did not comply with the technical requirements under clause 2.22 of the Instructions to Bidders in that:

- a) It has no experience in the installation, operation and management of car park management system as required by clause 2.20 of the instructions to bidders which inter alia required bidders to:
 - i. Demonstrate ability to provide a car parking management solution by proof of relevant experience.
 - ii. Show three sites in which the bidder currently manages car parks with more than 100 vehicle capacity.
- b) The Successful Bidder has no capacity to install a card reader, ticket dispenser, automatic barrier and automatic payment station among other

technical requirements set out in clause 2.22 of the Instructions to Tenderers.

The Applicant further argued that the Procuring Entity erred in failing to substantively evaluate the Applicant's tender and by awarding the tender to Masons Services Ltd in that:

- a) The Applicant had met the principal requirement of proving that it has the financial capacity to undertake the contract, the subject of the tender.
- b) The failure to set out clear, quantifiable and objective criteria relating to financial capability should not have been applied to the detriment of the Applicant.
- c) Masons Services Limited has no experience and capacity to carry out the project.
- d) The Applicant has a vast experience and impeccable capabilities in car park management.

The Applicant averred that the Procuring Entity acted contrary to the objectives of the Act as set out in Section 2 of the Act which includes: (

- i) To maximize economy and efficiency;
- ii) To promote integrity and fairness in procurement procedures; and
- iii) To promote competition and ensure competitors are treated fairly.

In response, the Procuring Entity denied the claim by the Applicant that it breached the Act and the Regulations. It argued that it had evaluated the submitted bids in accordance with the Public Procurement and Disposal Act and Regulations, and in line with the criteria set out in the Tender Documents. The Procuring Entity submitted that among other mandatory requirements under Clause 2.20, the tenderers were required to prove financial capability to undertake the contract by:

- i) Providing audited books of accounts for years ending 2008, 2009, and 2010, with an annual turnover of Kshs. 50 million; and
- ii) Providing banks statements and a letter from banker indicating access to Kshs. 10 million.

It argued that the Applicant submitted a letter from National Bank of Kenya Limited stating that; ***"... the Applicant has always undertaken huge contractual jobs in excess of Kshs. 20 million and are known to honour their contractual obligations..."*** The Procuring Entity averred that the Applicant failed to submit Bank Statements and a Letter from the Bank as proof of access to the requisite amounts and as such, its tender was found to be non responsive.

It argued that the submission of the above documents was a mandatory requirement of the tender and failure by the Applicant to satisfy this criterion led the Procuring Entity to reject the Applicant's bid in accordance with Section 64 of the Act and Regulation 47. It stated that this was the reason why the Applicant's bid was rejected at this stage and was not evaluated further.

The Procuring Entity submitted that bidders were required to demonstrate capability to undertake the contract by proving that they had access to liquid assets of Kshs. 10 million and the proof was to be in the form of banks statements and a letter from banker indicating access to the funds stated. It argued that the Applicant failed to submit any of the documents so required resulting in the rejection of its bid.

As to the claim by the Applicant that failure to submit the two documents should have been regarded as a minor deviation, the Procuring Entity averred that this was not a minor deviation as the provision of the documents was a mandatory requirement. It stated that this was necessary in order for the firms to demonstrate financial ability to undertake the contract and that the rejection of the Applicant's bid by the Procuring Entity upon failure to meet this mandatory requirement was not discretionary.

The Procuring Entity averred that it was open to the Applicant to make inquiry with regard to the submission of proof of financial capability, a step the Applicant never took.

The Procuring Entity submitted that it undertook preliminary evaluation of the bids in conformity to all mandatory requirements in the bid documents and non-responsive bids were duly rejected while the responsive bids were subjected to technical evaluation following the procedures and criteria that had been set out in the bid documents.

It concluded by urging the Board to dismiss the Application and to order that the procurement process should continue.

The Successful Bidder, Mason Services Ltd, submitted that contrary to the Applicant's claim that it had no capacity to perform the contract, the tender which it had submitted spoke for itself and it invited the Board to verify this fact by examining its tender documents. It argued that the role of the Board was not to evaluate tenders but to check for flaws in the procurement procedures. It stated that in any event the Applicant had not demonstrated how it came to the conclusion that the Successful Bidder had no capacity to perform the contract. It further stated that as evidence of its ability to perform the contract, it was already handling parking services for the Procuring Entity at the Kisumu International Airport.

In conclusion, it urged the Board to regard the Application as frivolous and accordingly dismiss it.

An Interested Party, Docwide Business Centre (K) Ltd, submitted that it had been unfairly disqualified by the Procuring Entity at the preliminary evaluation stage on the claim that it had failed to attach some mandatory documents when in fact it had done so. In particular it stated that it had attached the power of attorney, a Joint Venture Agreement to which were attached copies of a Memorandum of Understanding (MOU) with a strategic partner, audited accounts for the years 2009, and 2010, and evidence of three parking sites managed by the strategic partner.

Another Interested Party, namely Amity Software Inc, submitted that it is an international company with a branch in Kenya. It stated that they had operated in Kenya through a joint venture arrangement with a United States partner since 1999. It averred that it had submitted its tender together with all relevant documents and were surprised to be informed that they were not successful on the ground that they had not submitted audited accounts. It stated that according to United States Internal Revenue Service rules, there was no requirement for its accounts to be audited as it was a closed company. It stated that when it was informed that its bid was unsuccessful, it wrote to the Procuring Entity explaining why it did not have audited accounts and accordingly it would be unfair to request it to provide one in relation to this tender. It averred that it had so far received no response from the Procuring Entity regarding its appeal on this matter. It stated that it was not aware, until the hearing, that the tender had been awarded.

The Board has carefully listened to the submissions by the parties and considered the documents before it and makes the following decision.

The issue for determination by the Board is whether or not the Procuring Entity evaluated the bids, including that of the Applicant, in accordance with the Act, the Regulations and the tender documents.

In this regard, the Board notes the provisions of Regulation 47(1), which provides that;

“Upon opening of the tenders under section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether-

- a. the tender has been submitted in the required format;*
- b. any tender security submitted is in the required form, amount and validity period;*
- c. the tender has been signed by the person lawfully authorized to do so;*
- d. the required number of copies of the tender have been submitted;*
- e. the tender is valid for the period required;*
- f. all required documents and information have been submitted; and*
- g. any required samples have been submitted.*

The Board further notes the provisions of Regulation 47(2) which states that:

“(2) The evaluation committee shall reject tenders, which do not satisfy the requirements set out in paragraph (1).”

The Board also notes Clause 2.20 in Appendix to Instructions to Bidders in the Tender Document which provides as follows;

“The firm shall prove that they have the financial ability to undertake the contract:

- Bidders to provide Audited books of Accounts for the years ending 2008, 2009 and 2010, with an annual turnover of Kshs 50 million.*
- Firms must have access to liquid assets of Kshs 10 million, proof by way of banks statements, letter from banker indicating access to the funds stated.*

The Board further notes the provisions of Section 66:-

“66(1) The procuring entity shall evaluate and compare the responsive tenders other than tenders rejected under section 63(3).

(2) 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.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2) –

(a) the criteria must, to the extent possible, be objective and quantifiable; and

(b).....”

(4).....”

Upon perusal of documents submitted to it, the Board finds that:

- i) The Applicant’s bid contained audited accounts for the years 2008, 2009 and 2010 each of which had current assets valued at over Kshs 50 million.
- ii) The Applicant’s bid did not have any bank statements attached to it.
- iii) The Applicant’s bid contained a letter from the National Bank of Kenya the contents of which read as follows:

“RE: KENYA AIRPORT PARKING SERVICES

This is to confirm that the above referenced company operates a satisfactory current account in our books for over 10 years.

According to our records, they have always undertaken huge contractual jobs in excess of Kshs.20,000,000=00 (Kshs 20 million) and are known to honour their contractual obligations as required.

This information is given in strict confidence and without any responsibility on our part. Should you have any further questions, please feel free to contact us on the address or telephone numbers shown above.

Any assistance given to the Company would be highly appreciated.

....."

It is clear from Regulation 47(1) cited above that a Procuring Entity is required by law to carry out a preliminary evaluation of bids as the first stage in the evaluation process. This requirement is intended to enable a Procuring Entity to weed out bidders who have submitted bids which do not comply with the mandatory requirements set forth by the Procuring Entity in the tender documents. In this particular case, the Tender Documents issued by the Procuring Entity required bidders to show their financial capability to perform the subject contract by providing proof thereof through production of three different, but related, pieces of documentary evidence as set out in Clause 2.20 of the tender documents. The production of these three documents was mandatory.

As stated above, the Applicant's bid contained audited accounts for the years 2008, 2009 and 2010 each of which had current assets valued at over Kshs 50 million, and accordingly its bid complied with one of the three mandatory financial requirements set forth in the tender documents.

However, as regards the second mandatory financial requirement, as stated above, the Applicant's bid did not have any bank statements attached.

As regards the third mandatory financial requirement, as stated above, the Applicant's bid contained a letter from the National Bank of Kenya the contents of which are as already stated herein.

The Applicant's supporting document as to financial capability on the issue of liquid assets of Kshs 10 million, and proof thereof by bank statements, and a letter from the Bank confirming that the bidder had access to the funds so stated, is to be contrasted with that of the Successful Bidder's, whose bank stated that:

"This is to confirm that the above named, is a customer of this Bank and the above account is held in our books and has been conducted to our satisfaction.

Judging purely from the running of the account we consider them good for credit facilities up to Kshs 10million (Kenya Shillings Ten Million) upon meeting the Bank's lending terms and conditions. We consider them good for their normal business transactions.

Please note that the above information is communicated to you in strict confidence"

It is further to be contrasted with that of another bidder, namely, Amity Software Inc, whose bank stated in part that:

“With reference to your tender KAA/112/2011-2012 we wish to confirm that M/s Amity Software Inc. P. O. Box 19269-4012356, Megacity, Kisumu, Kenya is banking with family Bank Limited.

They have access to back-up liquid assets equivalent of Kshs 10 million which can be made available to the company as per securities and funds that the company has at its command to lodge with the Bank, which has been confirmed by them.

This letter is issued on their request.”

The Board finds that the contents of the letter from the Applicant’s Bank, as compared to the letters submitted by the two other bidders as quoted above, does not expressly confirm that the Applicant has access to liquid assets of Kshs 10 million. It instead confirms that the Applicant has always undertaken huge contractual jobs in excess of Kshs 20 million and is known to honour its contractual obligations as required.

The Board further finds that the Applicant did not submit any bank statements. Accordingly, it is evident that the Applicant did not meet the mandatory requirement specified in the Appendix to Instructions to bidders Clause 2.20 with respect to proof of access to liquid assets.

In the view of the Board these financial requirements were mandatory and therefore, failure to comply with them was fatal to the success of any bid. In light of the fact that the Applicant failed to produce documentary evidence to attest to the fact that it had access to liquid assets of Kshs 10 million, by way of banks statements, or a letter from banker indicating access to the funds

stated, the Procuring Entity was justified in failing the Applicant's bid at the preliminary evaluation stage pursuant to Regulation 47(2).

With regard to the allegation that the Procuring Entity breached Section 64(1) of the Act, as read with Regulation 28, the Board notes the provision of Section 64(1) which provides as follows;

“A tender is responsive if it conforms to all the mandatory requirements in the tender documents.”

As already observed herein, the Applicant's bid did not have the documents/information needed as evidence of financial capacity as specified under Clause 2.20 in the Appendix to Instructions to Bidders. Consequently, the Applicant's averment that its bid was responsive and therefore deserved further evaluation by the Procuring Entity is not sustainable.

With regard to the allegation that Clause 2.20 relating to financial capability was not clear or objective as required by Section 34 of the Act as read with Section 66(3) of the Act, the Board notes that the contentious requirement in the clause stated above reads as follows;

“Firms must have access to liquid assets of Kshs 10 million, proof by way of banks statements, letter from banker indicating access to the funds stated.”

The issue for determination by the Board on this claim is whether these requirements lack clarity so as to create a doubt as to whether it meant that both documents were required or that either of the two could suffice. In the view of the Board the statement is clear that since it does not have the

conjunctive "or" which is used to join two alternatives, it implies that both documents were required and as such the issue of non clarity should not arise.

With respect to the statement that no prescribed format for the letters from the bankers was provided, the Board is of the view that since the information required in the letter was specified by stating that "*.... letter from banker indicating access to the funds stated*", the statement was clear and the information could have been provided by the bidders in any format of their choice in the absence of a prescribed format.

As to the claim that the clause did not specify the duration of the bank statements thus leaving room for manipulation by the bidders, the Board observes that in as much as the Procuring Entity did not specify the duration of the bank statement in the clause, the Applicant and all the other bidders had the leeway of submitting bank statements for periods of their choice rather than not submitting at all, as this was a mandatory requirement. Furthermore, the Applicant could have sought clarification about the clause at least two (2) days prior to the pre-bid meeting as provided for under Clause 2.6 of the Instructions to Bidders contained in the Bid Document which provides that; "*The prospective bidding firm requiring any clarification of the bid document may notify to the General Manager (Procurement and Logistics) in writing by post, courier or by facsimile at the address given below.*

....."

In light of the foregoing, the Board finds that the Procuring Entity did not breach Section 34 of the Act as read with Section 66(3) as it was up to the bidders to seek clarification on any aspects of the bid documents that were not clear to them, an option that was not exercised by the Applicant.

With regard to the allegation that the Procuring Entity contravened Section 64(2) and Section 62 of the Act by failing to consider the non submission of the bank statements and the submission of an inadequate letter from banker as a minor deviations, and not requesting the Applicant for clarification, the Board notes the provisions of Section 64(2) and Section 62 of the Act which provide as follows;

Section 64(2):-

“The following do not affect whether a tender is responsive –

(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

(b) errors or oversights that can be corrected without affecting the substance of the tender.”

Section 62:-

“(1) The Procuring Entity may request a clarification of a tender to assist in the evaluation and comparison of tenders.

(2) A clarification may not change the substance of the tender.”

In light of the foregoing, and as the Board has already found herein before, the bank statements, and a letter from the bank containing the required information were mandatory requirements. Accordingly, non compliance

with them cannot be taken as minor deviation since they were crucial in determining the responsiveness of the tender. Consequently, the allegation that the Procuring Entity breached Sections 64(2) and 62 of the Act does not hold water.

Turning to the allegation that the Successful Bidder has no relevant experience and no capacity to perform the contract as required under Clause 2.20, the Board takes note of the Appendix to Instructions to Bidders under Clause 2.20 which provides as follows in respect to Experience;

“Firms will be expected to demonstrate ability to provide a car parking management solution. Only firms with relevant experience in parking management will be considered for further evaluation.

- ***Firms to provide detailed company profile and show examples of 3 sites where the firm is currently managing car parks with more than 100 vehicle capacity***
- ***Firms to provide letters of recommendation from the site owners.”***

Upon perusal of the documents submitted by the Successful Bidder the Board has established that the Successful Bidder submitted a company profile as well as a list of four customers namely; Mbagi Ltd, The Upper Hill Springs Restaurant Ltd, Nairobi Safari Club and Kenya Airports Authority, to which it is currently offering similar services covering over 100 vehicles. It also provided letters of recommendation from three of the customers mentioned above.

In view of the above, the allegation by the Applicant that the Successful Bidder has no relevant experience and capacity to perform the contract is unsustainable.

On the allegation that the Successful Bidder did not comply with technical requirements in that it has no capacity to install a card reader, ticket dispenser, automatic barriers and automatic paying station among other technical requirements set out the Tender Documents, the Board notes the Technical Requirements under Clause 2.22 in the Appendix to Instructions to Tenderers, which in part provide as follows:

“

ENTRY:

Integrated with the proposed software, the main entry point (gate) shall consist of:

- *A card reader one (1) (for prepaid arrangements)*
- *Ticket dispenser (1) (issuer), and*
- *An automatic barrier (1).*

.....

EXIT:

Integrated with the proposed software, the exit side shall consist of two lanes. These shall have one (1) manual cashier station and two (2) card readers controlling two automatic barriers.

.....”

After perusing the bid document submitted by the Successful Bidder the Board finds that the proposal submitted by the Successful Bidder offers a solution that cater for a card reader, a ticket dispenser (issuer), and an automatic barrier at the entry and exit points as required under Clause 2.22 quoted above. Consequently, the Applicant's allegation is unsustainable.

As to the claim that the Procuring Entity acted contrary to the objectives of the Act as set out in Section 2 namely; maximizing economy and efficiency; promoting integrity and fairness in procurement procedures; promoting competition and ensuring competitors are treated fairly; as the Board has stated on numerous occasions before, breach of Section 2 must be anchored on breaches of specific sections of the Act. In the absence of such breaches, the allegation cannot be sustained.

Concerning the allegations by the two Interested Parties, namely, Docwide Business Centre (K) Ltd and Amity Software Inc, the Board makes the following findings;

There was no evidence provided by Docwide to substantiate the claim that it had attached the documents it alleged to have submitted with its tender document. In the circumstance, therefore, the Procuring Entity was entitled to disqualify its bid at the preliminary evaluation stage.

As to the claim by Amity Software Inc that it has been unfairly treated, it is clear that it failed to understand the procurement law of Kenya and, as a result, directed its complaint to the wrong party, namely the Procuring Entity,

when it received the letter of notification advising it of the fate of its bid. Furthermore it is clear on its own admission that it did not attach some of the required mandatory documents to its bid. In the circumstances, the Procuring Entity was justified in rejecting its bid at the preliminary evaluation stage.

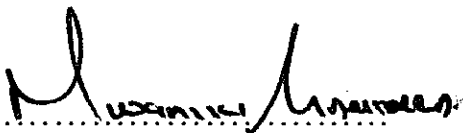
Ground 15 – Breach of Sections 44(3) of the Act

The Applicant informed the Board at the beginning of the hearing that following receipt of a summary of the evaluation report, it was not going to argue this ground. Since the ground was abandoned, the Board makes no finding on it.

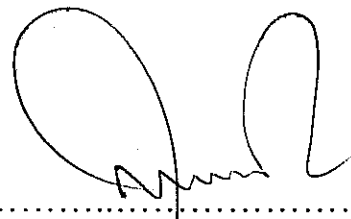
Taking all the above matters into account, this Request for Review fails. Accordingly, the procurement process may continue.

There are no orders as to costs.

Dated at Nairobi on this 5th Day of March 2012.



CHAIRMAN
PPARB



SECRETARY
PPARB