

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 15/ 2012 OF 18TH APRIL, 2012

BETWEEN

GOLICHA GANGE OMAR APPLICANT

AND

MINISTRY OF STATE FOR DEFENCEPROCURING ENTITY

Review against the decision of the Tender Committee of the Ministry of State for Defence in the matter of Tender No. MOSD/423(348) 2011/12 for Supply of Meat (Beef) on Bone to Eldoret Units.

BOARD MEMBERS PRESENT:

Mr. P.M. Gachoka	- Chairman
Mrs. Loise Ruhiu	- Member
Ms. Judith A. Guserwa	- Member
Mr. Sospeter Kioko	- Member
Mr. Akich Okola	- Member

IN ATTENDANCE:

Ms. Pauline Opiyo	- Holding brief for Secretary
Ms. Judy Maina	- Secretariat

PRESENT BY INVITATION:

Applicant - Golicha Gange Omar

Mr. Golicha Gange Omar	- Applicant
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Procuring Entity - Ministry of State for Defence

Mr. Z. G. Ogendi	- Assistant Director/SCMS
Maj. Odeny	- Legal Officer

Interested Parties

Mr. Innocent Muganda	- Advocate
Mr. Adan Osman	- Director
Mr. Abdi Omar	- Director
Mr. S.K. Aiyabei	- Proprietor, S.K. Aiyabei Butchery

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 THE TENDERING PROCESS

Invitation for Bids

The Ministry of State for Defence, after obtaining approval for use of Restricted Tender Method of Procurement from its Tender Committee, invited bids for Tender No. MOSD/423 (348) 2011/2012 for the Supply of Fresh Meat (Beef) on Bone to Eldoret Units. Bid Documents dated 30th January 2012 were issued from the same date to eight (8) bidders. The list of bidders invited in the Restricted Tender was composed of all the bidders who had participated in the preceding tender for the same item (Tender No. MOSD/423 (146)2011/2012) which had been annulled by the Public Procurement Administrative Review Board.

Closing/Opening

The date/time for closing/opening of tenders as stipulated in the Tender Document was 14th February 2012 at 10.00 hours. There was an option for tenderers to witness the opening of the tenders if they so wished. Tenders were received from seven out of the eight invited bidders and were recorded in a tender opening register as shown in the table below.

Table 1 –Tender Opening Register: Supply of Meat (Beef) on Bones to Isiolo Units

S/N	Firm	Valid Council Business Permit	Cert. of Incorp. / Reg	Valid Public Health Cert.	Name/ Sign	ID NO.	Remarks	Quote (Kshs)
1	Kenya Meat Commission	√	√				-	265
2	Quality Meat Packers Ltd	√	√		Jadrick Mboka & (signed)	7784357	Opening Tender was okay	284
3	Golicha Gange Omar	√	√		Golicha G. Omar & (signed)	1279934	No problem	210
4	Eldoret Standard Butchery	√	√		(signed)	9559090	Okay	220
5	Samuel K. Aiyabei	√	√				-	205
6	Samuel Mosonik Chepkwony	√	x		(signed)	0727546	Okay	280
7	Vicma Venture	√	√				-	225

Tenderers' representatives indicated their names / signatures, ID numbers and remarks in the Tender Opening Register as shown in table 1.

One firm namely Babolela Meat Supplies did not submit a bid.

EVALUATION

Evaluation/Examination of bids was conducted in five stages namely physical, documentation, price, commercial and combined evaluation (physical and commercial).

Physical Evaluation

The tender evaluation team carried out the above exercise from 28th February to 1st March 2012 at the bidders' business premises. The following firms were evaluated and awarded points based on three major parameters as tabulated below:

Table 2 – Physical Evaluation Results

S/N	Firms	Line of Business	Capacity	Transport	Total
1.	M/S Quality Meat Packers LTD	17.5	15	15	47.5
2.	M/S Eldoret Standard Butchery	17	13	15	45
3.	M/S Kenya Meat Commission	14	15	15	44
4.	M/S Golicha Gange Omar	13	13	15	41
5.	M/S Samuel K. Aiyabei Butchery	12	13	10	35
6.	M/S Vicma Venture	12	5	15	32
7.	M/S Samuel Mosonik Chepkwony	11	10	5	26

Recommendation

After a meticulous evaluation of all the firms, the physical evaluation team recommended Eldoret Standard Butchery for the tender due to the following:

- a. The firm is located in Eldoret town hence can economically sustain cost of supply due to its close proximity to Eldoret Units
- b. The firm has a reliable track record of supplying good quality beef promptly to Eldoret Units; they won the previous tender.
- c. The firm has capacity and is in strict compliance with public health standards of hygiene.

Documentation

Six (6) firms provided all the documents as specified in the Appendix to instructions to Tenderers. Documents provided included:

- a. Bid Bond
- b. Valid Council Permit
- c. Certificate of Incorporation / Registration
- d. Public Health Certificate

M/S Samuel Mosonik Chepkwony of Eldoret, did not provide Certificate of Registration / Incorporation.

Price

Quoted prices and previous contract price for the supply of Fresh Meat (Beef) on Bone to Eldoret Units were compared and the results are as tabulated hereafter:

Table 3 – Price Comparison

S/N	Firms	U/ Acc	Quoted Price (Kshs)	Previous Contract Price (Kshs)
1.	M/S Kenya Meat Commission	Kg	265.00	190.00
2.	M/S Quality Meat Packers LTD		284.50	
3.	M/S Golicha Gange Omar		210.00	
4.	M/S Eldoret Standard Butchery		220.00	
5.	M/S Samuel Mosonik Chepkwony		280.00	
6.	M/S Samuel K. Aiyabei Butchery		205.00	
7.	M/S Vicma Venture		225.00	

A market survey was also conducted in eight (8) firms within Eldoret town and the average market price of fresh meat on bone was found to be Kshs 340.00 per kilogram.

Commercial Evaluation

The following formula was used to determine the score of each firm:

Lowest Price x 50

Quoted Price

The commercial evaluation results are as tabulated below:

Table 4 – Commercial Evaluation Results

S/N	Firms	Points
1.	M/S Samuel K. Aiyabei Butchery	50.0
2.	M/S Golicha Gange Omar	48.8
3.	M/S Eldoret Standard Butchery	46.6
4.	M/S Vicma Venture	45.6
5.	M/S Kenya Meat Commission	38.7
6.	M/S Samuel Mosonik Chepkwony	36.6
7.	M/S Quality Meat Packers LTD	36.02

Commercial and Physical Evaluation (Combined)

The summary of the commercial and physical evaluation are as tabulated below:

Table 5 - Combined Commercial and Physical Evaluation Results

S/N	Firms	Commercial	Physical	Total	Rank
1.	M/S Eldoret Standard Butchery	46.6	45	91.6	1
2.	M/S Golicha Gange Omar	48.8	41	89.0	2
3.	M/S Samuel K. Aiyabei Butchery	50.0	35	85.0	3
4.	M/S Quality Meat Packers LTD	36.02	47.5	83.5	4
5.	M/S Kenya Meat Commission	38.7	44	82.7	5
6.	M/S Vicma Venture	45.6	32	77.6	6
7.	M/S SamuelMosonik Chepkwony	36.6	26	62.6	7

Branch Comments

M/S Samuel Aiyabei Butchery and M/S Golicha Gange Omar quoted the lowest and second lowest price offers, but were not recommended by the physical evaluation team.

M/S Eldoret Standard Butchery was the third lowest in price and was also recommended by the physical evaluation team.

Branch Recommendation

Based on physical and commercial evaluation, the quoted, previous and current market prices, the MTC was requested to award the tender for supply of Fresh Meat (Beef) on Bone to Eldoret Units as follows:

Firm - Eldoret Standard Butchery
Item - Fresh Meat (Beef) on Bone
Price - At Kshs 220.00 per Kg delivered

- Quantity - As and when required
- Duration - One year w.e.f. the date of award
- Reason - Lowest evaluated Bidder and recommended by the evaluation team.

TENDER COMMITTEE DECISION

The Tender Committee at its Meeting No. 32/11/12 of 23rd March, 2012 discussed the submission from DHQ Logistics department and adopted the recommendations of the evaluation committee and approved award of the tender for the Supply of Fresh Meat (Beef) on Bone to M/S Eldoret Standard Butchery at Kshs 220 per Kg delivered, on as and when required basis for the period 23rd March 2012 to 22nd March 2013. The Tender Committee gave the reasons for the award as follows:

- i) Lowest evaluated bidder and recommended by evaluation team
- ii) Firm has a reliable track record
- iii) Firm is located in Eldoret hence can economically sustain the cost of supply due to its close proximity
- iv) Firm has the capacity to supply and in strict compliance with public health standards of hygiene.

The bidders were notified of the Tender Committee decision via letters dated 4th April, 2012. A contract between the Procuring Entity and the Successful Bidder was signed on 17th April 2012.

THE REVIEW

The Applicant, Golicha Gange Omar lodged this Request for Review on 18th April, 2012 against the decision of the Tender Committee of the Ministry of State for Defence in the matter of Tender No. MOSD/423(348) 2011/12 for Supply of Meat (Beef) on Bone to Eldoret Units.

The Applicant was represented by Mr. Golicha Gange Omar, Proprietor while the Procuring Entity was represented by Major Odeny, Legal Officer. The Interested parties present were Mr. S.K. Aiyabei and M/S Eldoret Standard Butchery represented by Mr. Innocent Muganda, Advocate.

The Applicant requests the Board for orders that:

- a. The decision to award the tender No. MOSD/423 (348) 2011/2012 to Eldoret Standard Butchery be annulled and or revoked.**
- b. The tendering and evaluation process NOT to be repeated since the Applicant has fulfilled all the tendering requirements and repeat of the same will be an exercise in futility given past conducts of the tendering entity and Eldoret Standard Butchery.**
- c. The Applicant Messrs Golicha Gange Omar be declared the successful winner of tender NO. MOSD/423(348) 2011/2012.**
- d. The Applicant Messrs Golicha Gange Omar be awarded tender NO. MOSD/423(348) 2011/2012.**
- e. No supply of meat (beef) on bone should be supplied to Eldoret based units until such time that the review is resolved.**
- f. No tender contract should be written or given out until the review is sorted out.**
- g. Eldoret Standard Butchery be debarred and / or banned from further tendering participation to supply meat (beef) on bone to Eldoret Based Units.**

The Applicant has raised 1 ground of review subdivided into 31 parts which we comment on as follows;

Grounds 1(d), 1(e), 1(ee)

These grounds have been consolidated since they are generalized factual statements by the Applicant in which no specific breaches of the provisions of the Public Procurement and Disposal Act hereafter referred to as 'the Act' or the Regulations, hereafter referred to as 'the Regulations', by the Procuring Entity have been cited. The Board therefore need not make any findings on them.

Grounds 1(a), 1(b),1(m), 1(n),1(p),1(r),1(s),1(u),1(x) and (y) - Breach of Section 66 of the Act, Regulations 48 and 49, 51 & 52 and Clause 8 of the Appendix to Instructions to Bidders

These grounds have been consolidated as they all raised similar issues relating to the Evaluation of the Tenders.

The Applicant stated that there was no equal, open and fair comparison of all responsive bidders contrary to Section 66 of the Act. The Applicant further stated that it was aware that it was recommended for the award of the tender for the supply of meat (beef) on bone to Eldoret Base Units at Kshs. 210/= per kilogram yet the Procuring Entity awarded the tender to Eldoret Standard Butchery who had quoted the price of Kshs. 220 per kilogram. He added that the Successful Bidder had not met the requirements of Section 66(4) of the Act and that its previous award had been annulled or revoked by the Board on the 4th November, 2011.

The Applicant further stated that the Procuring Entity did not meet the requisite strict procurement evaluation procedure requirements contrary to Section 66 of the Act.

The Applicant added that its price was the lowest evaluated price in terms of Section 66(4) of the Act.

The Applicant argued that the Procuring Entity failed to scrutinize pre-qualifications of the Successful Bidder prior to the award of the tender

The Applicant added that the Procuring Entity failed to and/or neglected to reject non-responsive tenders in terms of Regulations 48 and 49 and proceeded to award the tender to a bidder that was not responsive.

The Applicant stated that the Procuring Entity failed and / or neglected to prepare an evaluation report and award the tender contract to the lowest evaluated bidder in terms of Regulations 51 and 52.

The Applicant further stated that the Procuring Entity failed and or neglected to confirm the qualifications, capacity and experience of the Successful Bidder to determine whether the firm was qualified to be awarded the contract in accordance with Regulation 52.

The Applicant argued that the Procuring Entity failed and / or neglected to inspect the business premises of the Successful Bidder.

In response, the Procuring Entity submitted that, contrary to the statement by the Applicant that there was no equal, open and fair comparison of all responsive bids, all the tender documents were evaluated by an independent team from the

Ministry of State for Defence Procurement Unit and further evaluated by an independent Evaluation Committee. It further argued that the Evaluation Committee strictly relied on the criteria provided for in the Tender documents.

The Procuring Entity stated that at the tender opening, all the tenderers except M/S. Samuel Musonik Chepkwony had submitted the necessary documentation in accordance with Paragraph 2 of the Appendix to instructions to tenderers and the Successful Bidder was responsive in all material aspects.

It further stated that the Evaluation committee visited the premises of all the bidders (including the Applicant's) between 28th February and 1st March 2012 while conducting the evaluation. It stated that the physical visits confirmed the capacity and qualifications of each bidder and eliminated any possibility of an award based on false information.

The Procuring Entity stated that the tender in question was not subject to pre-qualification in accordance with Regulation 24. It added that the qualification, experience and capacity of a bidder were part of the evaluation criteria under the line of business and that the Successful Bidder scored a total of 17 points against the Applicant's 14 points.

The Procuring Entity added that the Successful Bidder had complied with all the tender requirements and was the lowest evaluated bidder.

The Board has considered the submissions by the parties and all the documents placed before it.

The Board notes that this tender was the subject of review in Application No. 36 of 2011 - Golicha Gange Omar and Ministry of State for Defence. The Board

further notes that the case involved both parties and the award had been made to Eldoret Standard Butchery which is also the Successful Bidder herein. Upon hearing that Request for Review, the Board annulled the award and ordered a retender through Restricted Tendering Method.

The Board also notes from the documents submitted before it, that the tender was evaluated in two stages namely physical evaluation and commercial evaluation.

The Board notes that the evaluation was done as follows:

1. Physical
 - physical visit
 - Documentation
2. Commercial
 - Price
 - Commercial
 - Combined Physical & Commercial.

The Board notes that the physical evaluation was carried out between 28th February and 1st March 2012 and the Evaluation Committee visited the bidders' business premises. The Board further notes that seven bidders were evaluated and the four highest ranked bidders were as follows:

Bidder	Score
1. Quality Meat Packers	47.5
2. Eldoret Standard Butchery	45
3. Kenya Meat Commission	44
4. Golicha Gange Omar	41

The Board further notes that at this stage, the Evaluation Committee Recommended the award of the tender to Eldoret Standard Butchery on the following three grounds:

- a. The firm is located in Eldoret town hence can economically sustain cost of supply due to its close proximity to Eldoret Units

- b. The firm has a reliable track record of supplying good quality beef promptly to Eldoret Units; they won the previous tender.
- c. The firm has capacity and is in strict compliance with public health standards of hygiene.

At this stage, the Board observes that this recommendation is flawed because the Successful Bidder was not the bidder with the highest score and therefore the basis of this recommendation is questionable.

The Board further notes that, thereafter, the Procuring Entity did an evaluation on documentation, price and commercial evaluation. The Board observes that the Tender Documents had an evaluation formula as follows:

$$\frac{\textit{Lowest Price X 50}}{\textit{Quoted Price}}$$

The Board observes that this formula is not applicable for a tender like this one which involves straight supply of goods. The Procuring Entity ought to have determined the bidders who are technically qualified to supply the meat and at the financial evaluation stage, the only consideration should have been the price.

The Board notes the Applicant had quoted a price of Kshs 210 per kilogram while the Successful Bidder's had quoted a price of Kshs 220 per kilogram. Looking at the Technical Evaluation scores, there is no doubt that the Applicant and the Successful Bidder were both technically qualified and therefore there was no justifiable reason why the Applicant was not awarded the tender based on its price.

The Board notes that the purpose of the physical visit by the Evaluation Committee was to confirm whether the bidders had complied with the criteria

for evaluation. The Board further observes that the Tender Document did not require the bidders to provide proof of ownership of motor vehicles.

~~The Board also notes that all the bidders except the Successful Bidder had attached copies of log book(s) to their bid documents as required by Clause 8(c) of the Appendix to Instructions to Tenderers. The Board further notes that although the Evaluation Report states that the Successful Bidder had provided copies of the log books, the same were not available in its bid document although the they were given the full score under this criterion.~~

In view of the foregoing, the Board finds that the assertion by the Evaluation Committee that the Successful Bidder had provided evidence of ownership of motor vehicle(s) is not backed by any documents. In view of the foregoing, these grounds for review succeed.

Grounds 1(c),1(f),1(g),1(h),1(i), 1(j),1(k) 1(l), 1(o),1(q),1(t),1(v),1(w),1(z) and 1(aa) - Breach of Regulations 11, 24, 31; Sections 30(3), 31, & 34, 38,41, 42 & 43 of the Act and Clauses 14 & 15 of the Appendix to instructions to Tenderers and Clause 3.12.5 of the Conditions of Contract.

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

The Applicant stated that the Evaluation Committee recommended the Applicant Messrs Golicha Gange Omar to be considered as the Successful Bidder yet the Procuring Entity reversed that decision contrary to Regulation 11.

The Applicant further stated that the Procuring Entity awarded the contract to a bidder who did not meet the basic qualifications as set out in Section 31 of the Act.

The Applicant also alleged that the Procuring Entity awarded the contract to a tenderer who had engaged in fraudulent practices and collusion.

In response, the Procuring Entity stated that the evaluation team did not recommend the Applicant for the award of the subject tender as alleged. It further submitted that the Successful Bidder was the most responsive and highest evaluated bidder who was recommended for the award. The Procuring Entity also denied the claims of fraudulent practices by its staff with the Successful Bidder. It finally submitted that it had evaluated the bids in accordance with the criteria set out in the Tender Document.

The Board has considered the submissions of all the parties and the documents placed before it, and make the following findings:

The Board notes that all the bidders were subjected to the same criteria as set out in the aforementioned grounds and scored respectively.

The Board has already made a finding that the evaluation as carried out by the Procuring Entity's Evaluation Committee was flawed in so far as the application of the set criteria was not sufficient as per the requirements of the Instructions to Tenderers. Therefore these grounds of review also succeed.

Ground 1(1)(bb),1(cc),1(dd)- Other allegations by the Applicant

The Applicant stated that the Procuring Entity had ignored the express order of the Board issued on the 4th of November 2011 in Review. Application No. 36 of 2011 by continuing to receive supplies from the Successful Bidder for the 95 days contrary to the decision of the Board.

In response the Procuring Entity stated that it had complied with the orders and directions of the Board in Application No. 36 of 2011 as it received supplies for the Eldoret Units through other adjacent units. It denied that it had not acted in defiance of the Board's orders

On its part the Successful Bidder associated itself with the submissions of the Procuring Entity and also relied on its grounds of opposition filed on the 9th of May, 2012. It submitted that the Successful Bidder was properly evaluated and found to be the most responsive bidder as required by Section 33 of the Act. It further argued that no evidence had been placed before the Board to prove that the Procuring Entity had engaged in inappropriate influence or fraudulent practices during that tendering process. It submitted that its bid was the most responsive and that it had already signed a contract with the Procuring Entity on 17th of April 2012.

The Board has considered the submissions of the parties and the documents placed before it and makes the following findings.

The Board notes that there is no material evidence placed before it to prove that the Successful Bidder and the Procuring Entity are engaged in any inappropriate or fraudulent dealings, undue influence or collusion as alleged by the Applicant. The Board further notes that the notification letter to bidders were dispatched on the 4th of April 2012 and the 14 days appeal window closed on 18th April 2012 during which time the contract should not have been signed. In these premises, the Board finds that the allegations of collusion and/or fraudulent activities by the Applicant lack merit as they are not supported by any evidence and the same are dismissed.

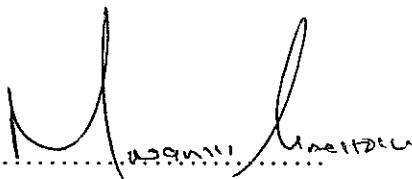
With regards to the signed contract, the Board notes that the contract between the Successful Bidder and the Procuring Entity was signed on the 17th of April 2012 before the lapse of the 14 mandatory days as required by Section 68(2) of the Act.

The Board therefore finds that the contract was not signed in accordance with the Section 68(2) of the Act of the Act and the same is null and void.

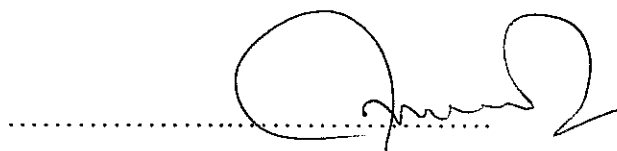
Taking all the above into consideration the Board finds that the tender process was flawed and therefore the Request for Review succeeds and the Board pursuant to the Provisions of Section 98 of the Act directs as follows:-

1. The award of the tender to the Successful Bidder is hereby annulled.
2. The Board, pursuant to Section 98(c) of the Act, substitutes the decision of the Procuring Entity by ordering the Procuring Entity to award the tender to Golicha Gange Omar at its quoted price.
3. There will be no order as costs.

Dated at Nairobi on this 11th Day of May 2012.



CHAIRMAN
PPARB



SECRETARY
PPARB