

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 12/ 2012 OF 21ST MARCH, 2012

BETWEEN

JACK WRIGHT LIMITED.....APPLICANT

AND

MINISTRY OF STATE FOR DEFENCEPROCURING ENTITY

Review against the decision of the Ministry of State for Defence in the matter of Tender No. MOSD/423(336) 2011/12 for Supply of Meat (Beef) on Bone to Isiolo based Units.

BOARD MEMBERS PRESENT:

Mr. P.M. Gachoka	-	Chairman
Mrs. Loise Ruhiu	-	Member
Ms. Judith A. Guserwa	-	Member
Mr. Joshua W. Wambua	-	Member

IN ATTENDANCE:

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

PRESENT BY INVITATION:

Applicant - Jack Wright Limited

- Mr. Fazal Butt - Managing Director
- Mr. Rashid Butt - Chairman
- Mr. Job Kariuki - Worker

Procuring Entity - Ministry of State for Defence

- Mr. Z. G. Ogendi - Assistant Director/SCMS

Interested Parties

- Mr. Arthur Ingutya - Advocate, Habibani Enterprises
- Mr. Abdi Abdullahi - Director, Habibani Enterprises
- Mr. Ahmed Abdullahi Mohamed* - Director, Garissa Green Supplies & Medabs Enterprises
- Mr. Michael Goa - Advocate, Garissa Green Supplies & Medabs Enterprises
- Alex Saa John - Clerk, Goa & Co. Advocates

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

Advertisement:

The Ministry of State for Defence in a Tender Notice advertised in the Daily Nation of 19th January, 2012 invited tenders for the Supply of Fresh Meat (Beef)

on Bone to Isiolo Units - Tender No. MOSD/423(336) 11/12, among other tenders.

Closing/Opening:

The date/time for closing/opening of tenders as stipulated in the advert was 9th February 2012 at 10.00 hours. There was an option for tenderers to witness the opening of the tenders if they so wished. The bids received in respect of Tender No. MOSD/423(336) 11/12 were recorded in a tender opening register as shown in table 1 hereafter.

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

S/N	Firm	Guarantee Amount	Bank/ Insurance Executing Guarantee	Valid Council Business Permit	Cert. of Incorp ./ Reg	Valid Public Health Cert.	Name/ Sign	ID No.	Remarks
1	Garissa Green Supplies	Kshs 300,000.00	AMACO	√	√	√			
2	Habibani Enterprises	Kshs 300	AMACO	√	√	√	Abdi Abdulahi	20191991	
3	Medabs Enterprises	Kshs 300	AMACO	√	√	√	Ahmed Abdullai	23802370	
4	Jarnet Green Grocers	Kshs 300	Tausi Assurance	√	√	√			
5	Jack Wright (1982) LTD	X	X	√	√	√	Job Kariuki	11694815	No Bid Bond
6	White House Butchery	Kshs 300,000.00	Tausi Assurance	√	√	√			

As at the date when the Request for Review was lodged with the Public Procurement Administrative Review Board, hereafter referred to as 'the Board', the Procuring Entity had not constituted a Tender Evaluation Committee for the tender in question.

THE REVIEW

The Applicant lodged this Request for Review on 21st March, 2012 against the Ministry of State for Defence in the matter of Tender No. MOSD/423(336) 2011/12 for Supply of Meat (Beef) on Bone to Isiolo based Units.

The Applicant was represented by Mr. Rashid Butt, Chairman while the Procuring Entity was represented by Mr. Z. G. Ogendi, Assistant Director of Supply Chain Management Services. Other interested parties present were Habibani Enterprises represented by Mr. Arthur Ingutya, advocate, Garissa Green Supplies and Medabs Enterprises represented by Mr. Michael Goa, advocate.

The Applicant requests the Board for orders that:

“The Applicant be allowed to participate in the procurement process in question”.

The Applicant has raised ten grounds of review which the Board deals with as follows;

Grounds 1, 2 3, 4, 5, 6 and 10

These grounds are general statements by the Applicant in which no specific breaches of the Public Procurement and Disposal Act, (hereafter referred to as The Act) or the Public Procurement and Disposal Regulations (hereafter referred to as the Regulations) have been cited.

Grounds 7 and 8 - Breach of Section 2 of the Act

These grounds have been consolidated as they raise similar issues relating to integrity in the handling of the tenders.

The Applicant averred that the intended decision of the Procuring Entity to adjudge its tender as non-responsive pursuant to Section 64(1) of the Act, for its supposed failure to submit an original Bid Bond would be erroneous as:-

- i) The Applicant submitted its Bid Bond alongside other documents on 6th February, 2012.
- ii) The said Bid Bond could have been intentionally removed to lock out the Applicant from the tendering process.
- iii) The mysterious disappearance of the said Bid Bond smacks of sabotage and unfair play by the Procuring Entity in the tendering process.

The Applicant stated that on 6th of February 2012, it obtained a Bid-Bond from Tausi Assurance Company Ltd, and processed two sets of its bid documents; one original and the other duplicate at a bookshop at Hurlingham in Nairobi. It submitted that it paginated the said bid documents and after inserting them in envelopes, proceeded to the Department of Defence and inserted the two said documents in the Tender Box.

It stated that on the Tender opening day, it sent its representative, Mr. Job Kariuki, a member of staff, who witnessed the opening of the bids, recorded all the prices of the six bids that were returned, as they were loudly announced during the Tender Opening and also signed where all the details of the tender opening were entered. It stated that the representative later informed the Applicants Managing Director that the two bid documents were in order.

It further stated that, after a about one week, it got in touch with one Colonel Onyango at the Department of Defence (D.O.D.), to find out about the evaluation of their tenders, and learnt that its Bind Bond was missing from the original Tender Document.

It stated that, it then decided to speak to one Colonel Kariuki at the D.O.D. and asked him to confirm whether it was true that the Bid Bond was missing from its Tender Documents. It submitted that after Colonel Kariuki checked, it was found that the Bid Bond was actually missing from the original document and the said Colonel Kariuki informed him that an investigation would be conducted to find out what had happened to the Bid Bond.

The Applicant submitted that the said Colonel Kariuki in the company of other officers, opened and checked the Applicant's sealed duplicate Tender Document, and found that it had a copy of the Bid Bond, being page No. 1, while in the original bid document which had also been paginated, the page 1 document was missing.

The Applicant stated that, thereafter, its Managing Director was invited by the Military Police together with its representative, Mr. Job Kariuki and the bookshop owner at Hurlingham in Nairobi who did the binding of the documents and all of them recorded statements on the issue of the missing Bid Bond.

On his part, Mr. Job Kariuki, the Applicant's representative at the tender opening stated that the original Tender Document contained a Bid Bond issued by Tausi Insurance Company Ltd. He confirmed that, at the tender opening he signed the attendance register and alleged that there were no entries in the said register. On being shown by the Board the details appearing in the Tender Opening Register in question, he denied that those entries were in place at the time of signing.

The Applicant further stated that there were several possibilities surrounding the issue of the missing Bid Bond which he articulated as follows:-

(a) The possibility that the Bid Bond was never purchased.

(b) That the Bid Bond was bought but was probably not included in the original Bid Document.

(c) That the Bid Bond was purchased, put in the Bid Document and removed at the Department of Defence.

In this regard, it requested the Board to make a finding on the issue, considering that the original Bid Document was paginated from page 2 to 6 and hence the Bid Bond must have been plucked out after the tender opening.

In conclusion, the Applicant averred that having submitted its documents in the proper order in which they were supposed to be submitted, its Bid Bond could have been intentionally removed to lock it out of the procurement process and that this act is in clear contravention of the purpose of public procurement as set out in Section 2 of the Act. Particularly, the aforementioned acts of the Procuring Entity are an affront to the requirements of;

- i) Promotion of competition and fair treatment to all competitors;
- ii) Integrity and fairness of the procurement procedures
- iii) Transparency and accountability in procurement procedures
- iv) Increasing public confidence in the procurement procedures.

In response, the Procuring Entity stated that Tender No. MOSD/423(336)2011/2012 for the supply of meat (beef) on bone to Isiolo based units was advertised in the months of January/February, 2012 and closed/opened on 9th February, 2012, registering response from six (6) firms, including the Applicant.

The Procuring Entity argued that the Request for Review as filed was out of time. It submitted that Regulation 73 (2) (c) requires that a Request for Review be filed within 14 days from the date of the breach. It argued that the Applicant filed its Request for Review after 2 months had lapsed since the occurrence of

the alleged breach, and was therefore out of time. In this regard, it urged the Board to find that, the Request for Review having been filed out of time was not within the jurisdiction of the Board.

With regard to the issue of the Bid Bond, the Procuring Entity stated that at the tender opening meeting, the committee observed that, M/s Jack Wright (1982) Ltd, the Applicant, did not attach a Bid Bond from a reputable financial institution, as was required. It stated that the Applicant's representative at the tender opening appended his signature against this observation in agreement to that fact. It further stated that one of the Tender Opening Committee members countersigned on the erasure/overwriting appearing on the Tender Opening Register, as acknowledgement that it was done and noted during the tender opening exercise.

The Procuring Entity stated that it was its practice to summon tenderers and institute investigations whenever a document was said to be missing from tender documents. It averred that in this case, the tenders were opened in the presence of the tenderers' representatives, Tender Opening Committee members and the Military Police, who guarded the Tender Boxes till the opening exercise was fully conducted and finalized. It submitted that when the Tender Box was emptied, tender documents were opened, firms' names, prices and the attached mandatory documents as specified in the Tender Document were read out loudly to all those present and recorded in the Tender Opening Register. It submitted that the tenderers' representatives present were then given the Tender Opening Register to sign.

The Procuring Entity averred that the Applicant's representative, Mr. Job Kariuki was given a chance to locate its missing Bid Bond when it was noted to be missing, but did not find the said Bid Bond, just like the Tender Opening Committee members. This was done in the presence of all the other

representatives who attended the tender opening meeting including the Military Police.

The Procuring Entity averred that the Tender Evaluation Team was yet to be constituted and thus the Applicant's allegation of an intended "decision" of the Procuring Entity to declare its tender non-responsive was not true. It stated that the Applicant was not coming out clearly to explain on the alleged stage of the mysterious disappearance of the Bid Bond since, at closure of the tender and in the presence of all. It further stated that the Tender Box was under tight security and escort of the Military Police, firms' representatives and Tender Opening Committee members to the conference room where they were opened in public and without a break until the last tender was opened and readout.

Finally, the Procuring Entity stated that the Applicant failed to demonstrate its competence and responsiveness by failing to submit the Bid Bond as required under Paragraph 3 of the Appendix to Instructions to Tenderers. It submitted that the grounds for review lacked merit and thus urged the Board to allow the tender process to continue.

On its part, an interested candidate M/s Habibani Enterprises, through its representative Mr. Abdi Abdulahi, stated that, it witnessed the Tender Opening process, during which the six firms that responded to the tender, had their names, prices and documents that were submitted, read out loudly. It stated that the Applicant's tender document did not have a Bid Bond attached, a fact that was noted and announced loudly, after which all the bidders' representatives were invited to sign the Tender Opening Register.

Another interested candidate, M/s Garissa Green Supplies through its representative Mr. Ahmed Abdulahi Mohammed, stated that it was present at the tender opening meeting. It submitted that at the tender opening, each firm's

name, price and the documents submitted were read loudly and at this point, it was announced that the Applicant did not submit a Bid bond. The Applicant's representative was asked to confirm and tried to look for the Bid bond but without success. It stated that all the bidders' representatives then signed the Tender Opening Register, with the record of all the details on the tender as loudly announced.

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

The issues for the Board to determine are as follows:-

- (a) Whether or not the Request for Review was filed within time, and
- (b) Whether or not the Applicant submitted a Bid Bond together with its tender documents.

With regard to the question of whether the Request for Review was filed, within time or not; the Board notes the following:-

- i) That as provided for under Regulation 73(2)(c)(i), the Request for Review ought to be made within 14 days of *the occurrence of the breach complained of where the request is made before the making of an award.*
- ii) That the Request for Review was filed on 21st March 2012 which is about one month after the expiry of the 14 days.
- iii) The Board notes that the Applicant alleged that it realized its Bid Bond was missing about a week after the tender opening on 9th February, 2012 upon calling one Colonel. Onyango of D.O.D. The Board notes that investigations were instituted and it was not until 12th March 2012 when the investigations were finalized.

iv) Noting that the investigations were concluded on or about 12th March, 2012 and that the Request for Review was filed on 21st March 2012, the Board finds that the request was filed within time.

With regard to the alleged missing Bid Bond, the Board has examined the Tender Documents and notes that at Paragraph 1.5 of the Invitation to Tender, Paragraphs 2.14.1 and 2.14.2 of the Instructions to Tenderers and Paragraphs 3 and 7 of the Appendix to Instructions to Tenderers it provide as follows;

Paragraph 1.5:-

“Tenders must be accompanied by a Security in the form and amount specified in the Tender Document,”

Paragraph 2.14.1:-

“The Tenderer shall furnish as part of its tender, a tender security for the amount specified in the Appendix to invitation to Tenderers.”

Paragraph 2.14.2:-

“The tender security shall be in the amount of 0.5 – 2 percent of the tender price.”

Paragraph 3:-

Pursuant to Paragraph 2.13.1 – The participating tenderers must provide copies of the following documents. The documents to be submitted along with the tender documents on or before the closing date.

- a. Valid Council Business Permit*
- b.*
- c. Bid Bond (Original)*
- d.”*

Paragraph 7:-

“Pursuant to Paragraph 2.14 – Tender Security

To qualify as responsive, the tenderer MUST provide a Bid Bond of Kshs. 300,000.00 in form of bank guarantee issued by a reputable bank located in Kenya or abroad or guarantee issued by a reputable Insurance Company certified by IRA and approved by PPOA in the form provided in the Tender Documents and valid for 180 days from the closing date of the tender (The bid bond will be in the format as shown under the standard forms and MUST be Original prepared on the letter head of the Issuing Bank or Insurance Company.)”

The Board also takes note of Paragraph 1.7 of the Invitation to Tender and Sections 60(5) and 60(8) of the Act which provide as follows;

Paragraph 1.7:-

“Tenders will be opened immediately thereafter in the presence of candidates or their representatives who chose to attend at MOSD Headquarters KA Officers Mess”]

Section 60(5) of the Act

“As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register –

(a) The name of the person submitting the tender;

(b)

(c) If applicable, what has been given as tender security.”

Section 60(8)

“The Tender Opening Committee shall prepare tender opening minutes which shall set out –

(a) A record of the procedure followed in the opening of the tenders

(b) The particulars of those persons submitting tenders, or their representatives, who attended the opening of tenders."

After examining the Tender Documents provided by the Procuring Entity, the Board notes that bidders' representatives attended the tender opening meeting and appended their signatures in the Tender Opening Register after witnessing the tender opening process. The records indicate that the Applicant was represented at the Tender Opening by one Job Kariuki.

The Board notes that both the Tender Opening Register and the Tender Opening Minutes indicate that the Applicant's tender did not have a Bid Bond. The Board has perused the original bid documents of all the six bidders and notes that the original bid document for the Applicant did not have a Bid Bond whereas the bid documents for all the other five tenderers had Bid Bonds in the form and amounts specified in the Tender Documents.

The Board notes from the Report on the Investigation that all the bidders' representatives in the tender were interviewed and each made a statement.

In addition, all the members of the Tender Opening Committee were also interviewed and each made a statement. It is noted that both the bidders' representatives and the members of the Tender Opening Committee independently confirmed that, at the time of opening of the tenders, the bid bond in respect of the Applicant's tender was missing and the representative, one Job Kariuki, signed the Tender Opening Register. The Board further notes that, in the Investigation Report, it is stated that *"all the other participants agreed to the fact that Mr. Job Kariuki, was notified during the meeting about the missing Bid Bond."*

Upon examining the documents presented and the submissions of the parties, the Board is inclined to believe the evidence of the Procuring Entity based on the following grounds:

- (i) The Tender Opening Register is signed by the bidders' representatives including Mr. Job Kariuki on behalf of the Applicant. The said register has details of whether the bidder had provided the mandatory documents. The record shows that the Applicant did not provide a Bid Bond.
- (ii) The Tender Opening Register is also signed by two senior officers which include:
 1. Major W. K. Rutto
 2. Major J. O. Oigara

It is quite unlikely that the senior officers would collude with the interested parties to state that the Bid Bond was missing on the tender opening date.

The Board has examined the purported copy of the Bid Bond, which the Applicant submitted to the Board during the hearing and finds as follows:-

- a. That it is issued by Tausi Assurance Company Limited.
- b. That a copy of a Risk Note No. 44343 is attached, dated 9th February 2012, which was printed on 9th February 2012 at 11.21 am and bears a stamp of Dispatch Department, with the date 9th February 2012 at 2.12pm and a signature.

During the hearing, the Applicant was asked to explain the inconsistency of the date between the Tender Security Form and the Risk Note; It stated that the Risk Note was issued three days later after the Bid Bond had been issued, by its insurance broker.

Upon evaluation of the submissions, the Board finds that there is consistency in the submissions by the Procuring Entity and the other bidders who were represented in the Tender Opening. Further, the Board notes that the communication between the Applicant and the officials of the Procuring Entity, which purportedly led the Applicant to discover that its Bid Bond was missing is not in line with the requirement of the Law. The Board further notes that Section 38 of the Act provides as follows;

Section 38:-

“(1) After the deadline for the submission of tenders, proposals or quotations –

(a) no person who submitted a tender, proposal or quotation shall make any unsolicited communications to the procuring entity or any person involved in the procurement proceedings that might reasonably be construed as an attempt to influence the evaluation and comparison of tenders, proposals or quotations; and

(b) no person who is not officially involved in the evaluation and comparison of tenders, proposals or quotations shall attempt, in any way, to influence that evaluation and comparison.

(2) A person who contravenes subsection (1) is guilty of an offence and is liable on conviction –

(a) if the person is an individual, to a fine not exceeding four million shillings or to imprisonment for a term not exceeding three years or to both; or

(b) if the person is a corporation, to a fine not exceeding ten million shillings.”

The Board finds that the Applicant’s act of calling officers at the D.O.D. after the opening of the tenders is irregular and a contravention of Section 38. The Board notes that at the time the Applicant was calling, there had been no

communication to it on the issue of the Bid Bond. Therefore it begs the question how the Applicant came to know of the missing Bid Bond without official communication from the Procuring Entity. This puts the Applicants integrity into question.

Further, the Board has perused the copy of the Applicant's Tender Document that it submitted to the Procuring Entity. The Board finds that, the said copy which was sealed had been opened by Military Officers who investigated the complaint by the Applicant about the missing Bid Bond.

The Board notes that although there is a copy of the Bid Bond in the copy of the Tender Document, it is difficult for the Board to find with certainty that the original had been included in the original Tender Document. The Board further notes that the copy of the Applicant's Tender Document was opened by military officers in the absence of the members who had opened the tenders.

From the foregoing, the Board notes that the Applicant has not given any evidence on acts committed by the Procuring Entity that would constitute a breach of the provisions of Section 2 of the Act as cited herein. Consequently, the Board finds that the allegation is unsustainable.

Taking into account all the above, these Grounds of Review fail.

Ground 9 – Breach of Section 31(1) of the Act

The Applicant averred that the unexplained disappearance of its Bid Bond is an affront to Section 31(1) of the Public Procurement and Disposal Act.

The Procuring Entity responded that its investigations conducted immediately by the Military Police, revealed that the allegations were not founded. It also submitted that it is not in its interest that decisions made on tender awards are subjected to complaints by tenderers. It argued that competition amongst

merchants takes cut-throat dimensions and as Procuring Entity suffers the cost from business duels. The Procuring Entity contended that as a Ministry, it would not allow itself to be used as such and as recourse, it had always acted within the Act and the Regulations.

The Board takes note of Section 31(1) of the Act which provides as follows;

“31(1) A person is qualified to be awarded a contract for a procurement only if the person satisfies the following criteria –

(a) the person has the necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured;

(b) the person has the legal capacity to enter into a contract for the procurement;

(c) the person is not insolvent, in receivership, bankrupt or in the process of being wound up and is not the subject of legal proceedings relating to the foregoing;

(d) the procuring entity is not precluded from entering into the contract with the person under Section 33;

(e) the person is not debarred from participating in procurement proceedings under Part IX.”

The Board notes that the provisions of Section 31(1) as cited herein deal with the qualifications for award of contract which are considered during the substantive evaluation of tenders. The Board further notes that at the time when this Request for Review was launched, the Procuring Entity had not conducted any evaluation of the tenders which are the subject to this Request for Review. Subsequently, the Board finds that it would be inappropriate to deduce that the Procuring Entity has breached Section 31(1) of the Act even before it conducts an evaluation of the tenders.

In the circumstances, the Board finds no merit on this ground.

Other Allegations by the Applicant

In a letter addressed to the Board Secretary dated 3rd April 2012, the Applicant alleged that some of the companies that participated in the tender namely; Medabs Enterprises, Habibani Enterprises and Garissa Green Grocers, are not registered in accordance within the law and were therefore not fit to participate in any tendering.

In its response, the Procuring Entity stated that, all the tenderers were competent to bid for the tender and as such, the allegation by the Applicant did not hold.

On their part, the interested parties stated that they were bonafide tenderers in the eyes of the Law and therefore, the allegations by the Applicant were baseless.

With regard to this allegation, the Board has perused all the original bid documents and has established that all the bidders, including the three named by the Applicant had attached copies of Business Registration Certificates or Certificate of Incorporation, as required under Paragraph 3 of the Tender Documents. However, the Board notes that the Certificates of Registration for Garissa Green Supplies and Medabs Enterprises bear similar names and urges the Procuring Entity to look into the issue.

Taking into considerations all the above matters, the Request for Review fails and is hereby dismissed. The Board orders, therefore, pursuant to Section 98 of the Act that the procuring process may proceed.

Dated at Nairobi on this 16th Day of April 2012.


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CHAIRMAN
PPARB


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SECRETARY
PPARB