

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 22/2012 OF 22nd MAY, 2012**

**BETWEEN**

**TIMBER TREATMENT INTERNATIONAL  
LTD.....APPLICANT**

**AND**

**KENYA BUREAU OF  
STANDARDS.....PROCURING ENTITY**

Review against the decision of the Tender Committee of Kenya Bureau of Standards in the matter of Tender No. KEBS/T 074/2011/2012 for proposal to offer testing facility for treated wooden poles.

**BOARD MEMBERS PRESENT**

Mr. P.M. Gachoka - Chairman

Mr. Sospeter Kioko - Member

Amb. Charles Amira - Member

**IN ATTENDANCE**

Mr. C.R Amoth - Secretary

Mr. L. Otieno - Secretariat

Ms. Judy Maina - Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Timber Treatment International**

Mr. A.I. Onyango - Advocate, A.I.Onyango Advocates

Mr. Shashiraj M - General Manager, T.T.I

### **Procuring Entity, Kenya Bureau of Standards**

Mr. Ashitiva .B. Mandale - Advocate, Nyachae & Ashitiva Advocates

Mr. George Kamami - Procurement Manager, KEBS

### **Interested Party, Equip Agencies Limited**

Mr. Kibet Wisdom - Advocate, Equip Agencies Limited

## **BACKGROUND OF AWARD**

The Kenya Bureau of Standards invited Proposals to Offer Testing Facility for Treated Wooden Poles in accordance with Ksh 516:2008, Kenya Standards Specifications for Wood Poles for Power and Telecommunication Lines. The invitation was advertised in the Daily Nation Newspaper of 6<sup>th</sup> March, 2012.

## **Closing/Opening**

As at the time of tender opening on 27<sup>th</sup> March, 2012 only two (2) firms had returned their bids for Tender No. KEBS/T 074/2011/2012 for proposal to offer facility for treated wooden poles in accordance with Ksh 516:2008.

The two(2) firm that returned their bids are as follows;

- a. Timber Treatment International Ltd
- b. Equip Agencies Ltd GTI Division.

## **EVALUATION**

The tenders were subjected to three (3) stages of evaluation using the criteria provided for in the tender documents. The three (3) stages of evaluation were;

- Preliminary Evaluation to ascertain whether bidders had conformed to the mandatory requirements;
- Technical Evaluation; and
- Financial Evaluation.

## **Preliminary Evaluation**

The two bidders who returned their bids were first subjected to a preliminary evaluation and the results of that evaluation tabulated as here below;

**TABLE A-Preliminary Evaluation**

NO	Requirements	Bidder No. 1	Bidder No. 2
1	A copy of the receipt for the purchase.	x	√
2	Certificate of Registration	√	√
3	Tax Compliance Certificate	√	√
4	VAT and PIN No. Certificate	√	√
5	Physical proof of title or lease agreement.	√	√
6	Tender Security	√	√
7	Completed confidential Business Questionnaire	√	√
8	Verifiable proof that the Company has the financial strength to perform the contract.	√	√
9	A sworn statement that the company has not had any contract with a government agent terminated by the latter	x	√
10	A sworn statement that except for client provider relationships the tenderer is not associated with any business that may lead to a conflict of interest or with another company proposing in this tender	x	√
11	A sworn statement that both the tenderer and its legal representatives are free of any impediment to contract with the client	x	√

**Key**

√- *Available*

X- *Not Available*

**REMARKS**

Bidder No.1 did not attach copy of receipt for purchase as per clause 2.33(viii) and attached self declaration form for items nos. 9, 10 and 11 instead of sworn statements as required and therefore could not proceed to technical evaluation.

Bidder No. 2 attached all the eligibility and qualifications documents required thus qualified for technical evaluation.

**Technical Evaluation**

Equip Agencies Limited qualified for the technical evaluation and the results of that evaluation are as shown in the table below;

**TABLE B-Technical Evaluation.**

NO.	DESCRIPTION	SCORE	BIDDER 2
<b>1</b>	<b>Installed infrastructure capable of testing all requirements of Ks 516:2008 in an efficient and effective manner</b>	<b>25</b>	<b>22</b>
<b>1.1</b>	<b>Installed inspection facility</b>	<b>10</b>	<b>10</b>
<b>1.2</b>	<b>Availability of calibrated testing facility</b>	<b>10</b>	<b>10</b>

1.3	Procedures/Work instructions/Manual	5	2
2	The Company's Experience	15	12
2.1	Current and former contracts	10	10
2.2	Records of tests/ inspections  over 10 years = 5marks  5-9 years = 3 marks  1-4 years = 2 marks	5	2
3	The Company Organization	5	3
3.1	organization structure	3	1
3.2	Evidence of lease/ title	2	2
4	The qualification, length and Experience of Company's key personnel and technical team assigned to carry out testing of poles	20	13
4.1	Declaration of key personnel	5	5
4.2	Technical personnel	5	3
4.3	Technical qualification of testing personnel	10	5
5	The information technology infrastructure	5	3
5.1	Data transmission infrastructure	3	1
5.2	Data Security	2	2
	<b>TOTAL</b>	<b>70</b>	<b>53</b>

## RECOMMENDATIONS

Bidder No 2 has met the minimum threshold of 50 points out of 70 points. The committee recommends that bidder No 2 proceeds to financial evaluation.

### Financial Evaluation

The results of the financial evaluation of Equip Agencies Ltd, the only bidder who qualified up to this stage of evaluation is as provided in the table below;

NO	DESCRIPTION	WEIGHT	BIDDER
1	Amount quoted by the tenderer as chargeable fees in Ksh per wood pole to be paid for inspection/verification services provide	15	15
2	The share of the inspection fee in (i) above that the tenderer proposes to remit to the KEBS on monthly basis for the programme.	15	15
	TOTAL	30	30

## Combined Technical and Financial Score

DESCRIPTION	BIDDER 2
Technical Score	53
Financial Score	30
<b>TOTAL</b>	<b>83</b>

### RECOMMENDATION

The Committee recommends bidder No. 2 to be awarded testing facility for treated wooded poles in accordance with KS 516:2008.

### TENDER COMMITTEE'S DECISION

The Tender Committee in its meeting of 8<sup>th</sup> May, 2012 deliberated upon the recommendations of the Evaluation Committee and decided to award Tender No. KEBS/T 074/2011/2012 for proposal to offer testing facility for treated wooden poles in accordance with KS 516:2008 to bidder No 2, Equip Agencies Limited.



## **THE REVIEW**

In its Request for Review, the Applicant has raised three grounds of review which the Board deals with as follows:-

### **GROUND 1 and 2- Breach of Sections 2 of the Act and award of tender to the successful bidder whose price was higher than the applicants' offer.**

These grounds have been consolidated as they raise similar issues on the evaluation and qualification method used by the Procuring Entity in awarding the subject tender.

The Applicant submitted that the Procuring entity, in awarding the tender to the Successful Bidder, acted in a biased manner against it contrary to the requirements of Section 2 of the Public Procurement and Disposal Act (hereinafter referred to as the Act). It stated that the requirements of the Request for Proposal at Clause 2.33 made it mandatory that bidders were to include a duly completed proposal form, among other documents in their technical proposal.

The Applicant submitted that this tender attracted only two bidders namely the Applicant and the Successful Bidder. It stated that during the tender opening where both bidders were represented, it had become apparent that the Successful Bidder had not included its duly completed proposal form in its technical. It further stated that at the tender opening it was alleged that the proposal form was included in the financial proposal. It submitted that the Procuring Entity, in its reply had admitted that fact.

The Applicant also admitted that its bid was rejected for reasons that it had not attached the receipt to proof that it had bought the tender documents. It however took issue with the claim by the Procuring Entity that it had not provided certain other declarations as claimed by the Procuring Entity as the reasons for the rejection of its bid. It contended that it had provided the required declarations in its own format since the Procuring Entity had not provided any format to be used in the declarations. It therefore argued that the provided declarations in its own format ought to have sufficed.

The Applicant submitted that the Procuring Entity's decision to allow the bid of the Successful Bidder to proceed with the technical evaluation in the absence of the proposal form amounted to dealing with a bidder who has not made an offer and that for the same reasons, the Procuring Entity, through that omission on its part, ended up with a bid which was too high leading to loss of public funds.

Finally, the Applicant submitted that the Procuring Entity should have treated its omission to attach the receipt and the other declarations in the same way as they treated the omission of the Successful Bidder with regard to the requirement to include a proposal form in the technical bid. It urged the Board to nullify the tender process as same was flawed and to order for a re-tender.

In its response, the Procuring Entity submitted that it relied entirely on its filed memorandum of response dated 31<sup>st</sup> May 2012 together with the

supporting documents.

The Procuring Entity denied breaching Section 2 of the Act stating that both bidders were treated equally in the entire process which was devoid of any discrimination. It stated that the Applicant was disqualified for reasons that it had not attached, to its bid, a copy of the receipt used to purchase the tender documents and other sworn declarations namely;

1. A sworn statement that the company has not had any contract with a government agent terminated by the latter;
2. A sworn statement that except for client provider relationships the tenderer is not associated with any business that may lead to a conflict of interest or with another company proposing in this tender; and
3. A sworn statement that both the tenderer and its legal representatives are free of any impediment to contract with the client, as required by the tender documents.

The Procuring Entity submitted that, although there was no format given for the declarations, the Applicant had simply attached statements which were not sworn and therefore could not meet the requirements of sworn declaration as required by the tender documents.

With regard to the issue of the Successful Bidder having failed to include a proposal form in its technical proposal, the Procuring Entity submitted that the Successful Bidder had indicated, in the presence of a representative of the Applicant, that its proposal form was included in its financial proposal

in the bid envelope marked B. It stated that there was full disclosure, well before commencement of the evaluation process that indeed the successful bidders' proposal form was to be found in the financial envelope and that there was no objection whatsoever recorded on the issue. In any case, the Procuring Entity argued that there were no marks awarded for the proposal form and therefore there was no discrimination to any of the bidders during the evaluation process.

Finally, Procuring Entity argued that the Applicant, having failed at the initial stages, it did not proceed to the financial evaluation and therefore there was nothing for it to compare the financial bid in terms of pricing. It stated that the entire tender process was fair and that there was no breach of a duty imposed on it by the Act or Regulations. It urged the Board to find no merit in the Application and allow it to proceed with the procurement process.

On its part, the Interested Party associated itself with the submissions of the Procuring entity. It submitted that the entire process was done above board and met the threshold of a fair process.

The Board has considered the submissions of the parties and carefully perused the documents presented before it.

The issues for determination is firstly whether or not , the bid by the Successful Bidder was responsive given that it had included its proposal

form in its financial bid and not in the technical proposal as required under Clause 2.33.

Secondly, whether the Applicant was unfairly disqualified from the tender process.

The Board notes from the tender opening minutes dated 27<sup>th</sup> March 2012, Observation number ( ii) stated as follows:-

**Observations:**

- i. ....
- ii. ***Bidder No.2 for KEBS/T074/2011/2012 representative informed the opening committee that they have attached form of tender in their financial bid (envelope B).***
- iii. ....

The Board further notes from the attendance list that both bidders were represented at the tender opening meeting of the 27<sup>th</sup> March 2012. Indeed the Applicant was represented by a one SHASHIRAJ M who signed on the register. There is no evidence at all recorded or submitted during the hearing that the Applicant raised any objection or concern on the issue during the said meeting.

From the documents submitted to the Board, the Board notes that the Procuring Entity carried out a Preliminary Evaluation whose results were as hereunder:-

**TABLE A-Preliminary Evaluation**

NO	Requirements	Bidder No. 1	Bidder No. 2
		TTI	EQUIP
1	<i>A copy of the receipt for the purchase.</i>	x	√
2	<i>Certificate of Registration</i>	√	√
3	<i>Tax Compliance Certificate</i>	√	√
4	<i>VAT and PIN No. Certificate</i>	√	√
5	<i>Physical proof of title or lease agreement.</i>	√	√
6	<i>Tender Security</i>	√	√
7	<i>Completed confidential Business Questionnaire</i>	√	√
8	<i>Verifiable proof that the Company has the financial strength to perform the contract.</i>	√	√
9	<i>A sworn statement that the company has not had any contract with a government agent terminated by the latter</i>	x	√
10	<i>A sworn statement that except for client provider relationships the tenderer is not associated with any business that may lead to a conflict of interest or with another company proposing in this tender</i>	x	√
11	<i>A sworn statement that both the tenderer and its legal representatives are free of any impediment to contract with the client</i>	x	√

**Key**

√- *Available*

X-*Not Available*

**REMARKS**

*Bidder No.1 did not attach copy of receipt for purchase as per clause 2.33(viii) and attached self declaration form for items nos. 9, 10 and 11 instead of sworn statements as required and therefore could not proceed to technical evaluation.*

*Bidder No. 2 attached all the eligibility and qualifications documents required thus qualified for technical evaluation.*

It is therefore clear that the Procuring Entity disqualified the Applicant's bid for reasons shown above. The Applicant's bid did not proceed to the technical and financial evaluation stages. The Board therefore finds that although the Procuring Entity could have considered waiving the requirements of the receipt since it had issued the same and could find copies within itself, the Applicant submitted statements with regard to requirement nos. 9, 10 and 11 could not suffice the requirements of a sworn statement as required by law.

As to whether the Procuring Entity should have accepted that omission by the Applicant, the Board notes that the issue that is significant is whether there was loss of public funds as a result of the award of the tender to the Successful Bidder. The Applicant stated that it offered a price of Kshs. 539,

880,000/= i.e Ksh 4, 499/= per pole whereas the Successful Bidder offered a price of Ksh. 1,169, 280,000/= i.e Ksh. 9, 744 per pole. The Board will revert to this issue shortly.

With regard to the alleged omission on the part of the Successful Bidder, the Board finds that:-

1. It was recorded in the opening minutes that the Successful Bidder's proposal form was in the financial envelope and
2. That the Applicant's representative was present during the tender opening and financial opening meetings.

Although the Successful Bidder's proposal was not in the technical proposal, the Board is concerned with the issue of substantive justice considering the nature of this tender and if the applicant was prejudiced in any way.

The Board notes that this was a tender for offering testing facility for poles for power and telecommunication lines. In the Proposal Form, the bidder was to include its projected Revenue and the proposed fee it was to pay to the Procuring Entity. Therefore, the Proposal Form did not have details of a technical nature that required evaluation. Indeed, the Board notes that no marks were being given for this requirement. There was a disclosure that was recorded that that proposal form was included in the Financial Proposal. Indeed, the Board notes that when the Financial Proposals were opened, the proposal form was included therein. Therefore, apart from the



issue of technicality as to which envelope the proposal form was included, there was no benefit that the Successful Bidder attained or prejudice that the Applicant suffered as a result of that omission.

The Board therefore finds that there was no prejudice suffered by the Applicant and that indeed, having failed at the preliminary stage, the Applicant cannot claim that its bid was lower than that of the successful bidder since its bid was not considered at the financial evaluation stage.

The Board has had a keen look at the nature of procurement in question. Although none of the parties submitted on this subject, The Board has noted that the subject procurement is in the nature of agency whereby the Procuring Entity was procuring a service to be conducted on its behalf and in turn, it would earn an annual accreditation fee at Ksh. 2,500,000.00 (Two million five hundred thousands) and loyalty fees expressed as a percentage of the quoted sum on monthly basis. Therefore, the nature of this tender is that the Procuring Entity would earn more from the higher rate offered by the Successful Bidder as opposed to the quote by the applicant. This means that the argument by the Applicant that the tender by the Successful Bidder would lead to loss of public funds has no merit.

Accordingly, these grounds of review fail.

### **Ground 3:- Statement of Loss**

This ground is on the loss, damage and suffering that the Applicant is likely to suffer in the event that it's Request for Review does not succeed.

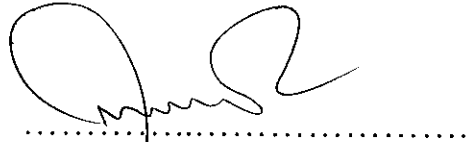
The Board has severally held that such losses are normal commercial risks borne by bidders in the course of doing business.

Taking all the above into consideration, the Request for Review fails and is hereby dismissed. The Board orders, pursuant to Section 98 of the Act that the procurement process may proceed. There are no orders as to costs.

**Dated at Nairobi on this 21<sup>st</sup> Day of June, 2012.**



**CHAIRMAN  
PPARB**



**SECRETARY  
PPARB**