

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 13/ 2013 OF 18TH APRIL, 2013

BETWEEN

MAYRAK INVESTMENT..... 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(117) 2011/12 for Supply of Firewood to Mombasa based Units.

BOARD MEMBERS PRESENT

Mr. Joshua W. Wambua - Member (in the chair)
Amb. Charles Amira - Member
Ms Judith Guserwa - Member
Mrs. Loise Ruhiu - Member
Mr. Akich Okola - Member

IN ATTENDANCE

Ms. Pauline Opiyo - Ag. Secretary
Ms. Judy Maina - Secretariat

PRESENT BY INVITATION

Applicant – M/s Mayrak Investments

Mr. Alex Masika - Advocate

Mr. Nickson Akech - Advocate

Ms. May Muthembwa - Director

Ms. Dorothy Chebet - Director

Ms. Mary Mwema - Secretary

Procuring Entity – Ministry of State for Defence

Lt Col. D. Odeny - Legal Officer

Lt Col. Y. K. Kirui - Legal Officer

Mr. Z.G. Ogendi - Assist. Director, Supply Chain Mgt Services

Interested Parties

Ms. Juliet Karumba - Advocate, North Track Ltd

Mr. A. M. Jilo - Director, North Track Ltd

Mr. Hassan Dida - P. A., North Track Ltd

BOARD'S DECISION

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

BACKGROUND OF THE AWARD

Invitation for Bids

The Ministry of State for Defence, advertised Tender No. MOSD/423 /117/2012/2013 for the Supply of Firewood to Mombasa Units in the Standard Newspaper of July 23, 2012.

Closing/Opening

The date/time for closing/opening of tenders as stipulated in the Tender Notice and Tender Document was on 15th August, 2012 at 10.00 hours.

The opening of tenders was conducted in the presence of bidders' representatives. The three tenders that were received and opened were recorded as shown in table 1 hereafter.

Table 1 -Tender Opening Register: Supply of Firewood to Mombasa Units

S/N	Firm	Bid Bond Amount	Bank / Insurance Co. Executing Guarantee	Valid Council Business Permit	Cert. of Incorp. / Registration	Tax Compliance Certificate.	PIN VAT/ Certificate	Name/ Sign	ID No.	Remarks
1	Tsavo Trade Links	None	None	Yes	Yes	Yes	Yes	-	-	-
2	North Tract Co. Ltd	200,000	AMACO	Yes	Yes	Yes	Yes	Hassan Guyo	22623371	Good
3	Mayrak Investments	200,000	Kenya Orient	Yes	Yes	Yes	Yes	Mary	3701968	Good

There is no indication either in the tender opening register or the tender opening minutes of any prices read out during the tender opening.

Tenderers' representatives present acknowledged the information recorded about their firms by indicating their names / signatures, ID numbers and remarks in the Tender Opening Register as shown above.

EVALUATION

The tender evaluation was conducted on 1st November 2012 by a team of three senior officers. The following concepts were used to facilitate the evaluation:

- a. Documentation
- b. Line of Business
 - i) Existence of the Firm
 - ii) Storage Facilities
- c. Transport assets
- d. Capacity in tons

Two firms namely M/s North Tract Company Limited and M/s Mayrak Investments were evaluated on three major parameters on which weights were allocated as follows:

Table 2 - Evaluation Criteria

Parameter	Weight	
Line of business:		20 points
a. Existence	10 points	
b. Storage facilities	10 points	
Capacity:		15 points
500 -1000 tons	5 points	
1000 tons and over	15 points	
Transport Assets		15 points
a. 1 vehicle	5 points	
b. 2 vehicles	10 points	
c. 3 vehicles	15 points	
Total Points		50 points

The firms that bid were evaluated and awarded points as tabulated below:

Table 3 – Evaluation Results

Firms	Line of Business	Capacity	Transport	Total	Remarks
M/s North Tract Company Limited	20	15	10	45/50	Recommended
M/s Mayrak Investments	20	15	5	40/50	Not Recommended

After the above evaluation the Chief of Logistics submitted key information about Tender No. MOSD/ 423/117/2012/2013 to the Tender Committee for adjudication as follows:

PRICE

Quoted and previous prices are as tabulated here below:

S/N	Firms	U/Acc	Quoted Price (Kshs)	Previous Contract Price (Kshs)
1.	M/s Tsavo Trade Links Ltd	Per Ton	3,000.00	3,500
2.	M/s North Tract Co. Ltd		3,200.00	
3.	M/s Mayrak Investments		3,500.00	

MARKET SURVEY

HQ KN conducted market survey as tabulated here below:

S/N	Firms	U/Acc	Price
1.	M/s Shakemahad Supplies	Per ton	3,500.00
2.	M/s Makupa Groceries		2,500.00
3.	M/s Zenani Suppliers		2,700.00
4.	M/s Ezemmi Enterprises		3,000.00
	Average Market Survey		2,925.00

DOCUMENTATION

Two (2) firms provided all the documents as specified in the Appendix to Instructions to Tenderers, namely:

- a. Bid Bond
- b. Certificate of Incorporation / Registration
- c. Valid Council Business permit
- d. Valid Tax Compliance Certificate
- e. VAT / PIN Certificate

M/s Tsavo Trade Links did not attach a bid bond as was required and therefore was not subjected to further evaluation.

PHYSICAL EVALUATION

To ascertain the firms' potential capabilities to service the contact, HQ KN conducted physical evaluation on predetermined parameters and awarded points as tabulated here below:

S/N	Firms	Line of Business	Capacity	Transport	Total	Rank	Remarks
1.	M/s North Tract Co. Ltd	20	15	10	45	1	Recommended
2.	M/s Mayrak Investments	20	15	5	40	2	Recommended

SUMMARY PERFORMANCE

The summary of performance for all responsive firms is as shown here under:

S/N	Firms	Physical Evaluation	Quoted Price	Remarks
1.	M/s North Tract Co. Ltd	45	3,200.00	Recommended
2.	M/s Mayrak Investments	40	3,500.00	Recommended

EXTENTION OF VALIDITY

Validity Period expired on 15th January 2913. The responsive firms were requested to confirm and extend their price validity. Only M/s North Tract Co. Ltd confirmed the price and extended the period upto 15th March, 2013.

M/s Mayrak Investments did not confirm nor extend the price validity.

BRANCH COMMENTS

Pursuant to section 66(4) of the Public Procurement and Disposal Act 2005, the branch is of the opinion that the bidder with the lowest evaluated price amongst the substantially responsive firms to be considered for the award.

Funds are available with the services.

The previous contract expired on 25th January, 2013.

BRANCH RECOMMENDATION

Based on physical evaluation quoted prices, previous contract and average market price, MTC was requested to award the contract for the Supply of Firewood to Mombasa based units as follows:

Item: Firewood
Firm: M/s North Tract Co. Ltd
Region/Price: At Kshs 3,200.00 per ton
Quantity: As and when required
Duration: One year w. e. f. date of award
Reason: Bidder with the lowest evaluated price and
Confirmed price validity

The Secretary, MTC was requested to table the matter before the MTC to allow for immediate communication.

TENDER COMMITTEE DECISION

The Tender Committee at its Meeting No. 33/12/13 of 14th March, 2013 discussed the submission from DHQ LOGS and approved award as follows:-

Item: Supply of Firewood to Mombasa based Units

Firm: **M/s North Tract Co. Ltd**

Region/Price: **At Kshs 3,200.00 per ton delivered**

Quantity: As and when required

Duration: From 14th March, 2013 to 13th March, 2014.

Specifications requirement:

- i) Firewood shall be dry
- ii) The wood shall not be rotten or destroyed by pests
- iii) The wood quality fire with minimum smoke
- iv) The wood dimension shall be proportional measuring 1-2meters long, if circular it shall have a diameter of 5-10" and if split in rectangular form it shall have a width of 6-12".

Reason: Bidder with the lowest evaluated price.

The bidders were notified of the Tender Committee decision via letters dated 27th March, 2013. A contract between the Procuring Entity and the Successful Bidder was signed on 15th April 2013.

THE REVIEW

The Applicant, Mayrak Investments, lodged this Request for Review on 18th April, 2013 against the decision of the Tender Committee of the Ministry of State for Defence in the matter of Tender No. MOSD/423(117) 2011/12 for Supply of Firewood to Mombasa based Units.

The Applicant was represented by Mr. Alex Masika, Advocate while the Procuring Entity was represented by Lt. Col. D. Odeny and Lt Col. Y. K. Kirui, Legal Officers. The interested party present was M/s North Tract Company Ltd represented by Ms. Juliet Karumba, Advocate.

The Applicant requests the Board for the following orders:

- (a) Annul in whole the decision of the tender committee of the Procuring Entity.**
- (b) Award the tender to the Applicant.**
- (c) The Procuring Entity be condemned to pay Costs of this Review to the Applicant.**

The matter first came before the Board on 9th May, 2013 during which time the Procuring Entity requested for an adjournment of the hearing on the ground that it needed more time to respond appropriately to the issues contained in an addendum to the initial Request for Review.

After considering the request by the Procuring Entity and the views of the other parties on the of issue the adjournment sought by the Procuring Entity, the Board granted the Procuring Entity's request and adjourned the hearing to Monday 13th May, 2013 at noon. Further the Board directed the Procuring Entity to consider and address the following issues at the next hearing.

- i. the issue on tender validity
- ii. whether a contract is signed

- iii. the original signed contract
- iv. Whether the letter of extension of tender validity was dispatched to the Applicant and give evidence in regards to this.
- v. The issue of notification of the award
- vi. The observation that some pages (31 & 32) are missing from the Successful Bidder's bid document.

The Board resumed the hearing on 13th May, 2013.

PRELIMINARY ISSUES

In relation to the issues raised above the Procuring Entity submitted that the tender validity was 150 days from the date of advertisement, but that due to some workload the matter was not adjudicated upon by the tender committee within the said 150 days. It submitted that the tenders were opened on the 15th of August 2012 and that therefore the tender validity was to run from that date to 15th January, 2013.

The Procuring Entity stated that on 18th January, 2013 it had notified both North Tract Co. Ltd and Mayrak Investments of the extension of the tender validity period up to 15th March, 2013 and that the letter of notification requested the bidders to respond to the same by 29th January, 2013. The Procuring Entity further stated that only one bidder, North Tract Co. Ltd responded with regard to the tender validity extension by its letter of 23rd Jan, 2013 wherein it confirmed the extension of its tender validity to 15th March 2013.

The Procuring Entity reiterated that although it had notified both Mayrak Investments and North Tract Co. Ltd, Mayrak Investments did not respond at all. The Procuring Entity however admitted that it was not able to trace the mail register that was used to dispatch the tender validity extension letters. The

Procuring Entity presented to the Board copies of the letter dated 18th January, 2013 requesting for extension of tender validity that it said had been sent to both the parties.

At the invitation of the Board, the Applicant examined the letter and confirmed that it was indeed correctly addressed to it but added that it never received the letter.

The Procuring Entity submitted that when the Applicant failed to respond with regard to tender validity extension, it had assumed that the Applicant had withdrawn from the race. It further submitted that having completed the evaluation, the only bidder still in the race was now North Tract and that the recommendation to award the tender to North Tract was presented to the Tender Committee on 14th March 2013. It stated that as per the Tender Committee Minutes dated 21st March 2013, the tender was awarded to North Tract Co. Ltd being the lowest evaluated bidder.

The Procuring Entity further stated that the two bidders were simultaneously notified of the outcome of the tender vide letters dated 27th March 2013 but which were posted on 28th March 2013. The Procuring Entity produced before the Board a mailing register which showed that the letters had indeed been posted on 28th March, 2013. The Procuring Entity added that the Applicant had on the 2nd of April, 2013, sent its representative, one madam Mary, to the Procuring Entity's offices and that the said Mary was given a copy of the notification letter and that this was evidenced by her signature on the Procuring Entity's delivery book which was produced before the Board.

The Procuring Entity further added that on the 15th of April, 2013 its Accounting Officer did conclude the contract with North Tract Co. Ltd in accordance with the Defence Tender Committee decision. The Procuring Entity then produced before the Board four copies of the said contract.

On the Board's enquiry, the Procuring Entity admitted that though the Successful Bidder in this case was North Tract Co. Ltd the contract was signed by Baretu General Construction Co. Ltd. It argued that this was not a major issue since the directorship of the two companies was the same. It further argued that this would not in any way disadvantage the Procuring Entity since an acceptance letter was to be signed by North Tract Co. Ltd and subsequently procurement would be on the basis of Local Purchase Orders which would be issued in the name of North Tract Co Ltd.

On further enquiry by the Board, the Procuring Entity admitted that both the form of tender and confidential business questionnaire, being pages 31 & 32 respectively, were missing from the successful bidder's tender document. The Procuring Entity submitted that the Tender Opening Committee had looked at the tender documents at the time of tender opening and had not found any document to be missing. The Procuring Entity added that the moment it drafted the contract it had de-classified the documents and had consequently transferred the entire documents to the archives where other people have access to them.

In conclusion, the Procuring Entity averred that the review was filed out of time. It argued that even if the Applicant did not receive the letter of Notification sent to it on 28th of April, 2013 there was no denying that the Applicant had received the notification on 2nd of April, 2013 as already explained above and that therefore the fourteen days appeals window would end on the 16th of April, 2013. It therefore argued that the Board had no jurisdiction to consider the merits of the case since the application had been filed on 18th April, 2013 which was outside the appeals period.

On its part, the Successful Bidder, North Tract Co. Ltd stated that the price quoted by it was Kshs 3,200/= per ton and that it could not understand how the

Applicant had come up with the figure of Kshs 2,000/=. It further stated that it had completed all the pages of the tender document and had presented it intact at the time of tender closing / opening. It argued that had the pages been missing at that point, the Tender Opening Committee would have highlighted it and further that, its bid would have been found to be non responsive at that stage.

Upon enquiry by the Board, the Successful Bidder stated that it had not retained a copy of the bid document that it had submitted to the Procuring Entity.

In response, the Applicant submitted that the Application for Review was properly before the Board. It conceded that it had collected a letter from the Procuring Entity on the 2nd of April 2013 through its representative as stated by the Procuring Entity. It averred that the letter which it collected was an original rather than a copy and therefore asserted that it was obvious that the Procuring Entity was misleading the Board into believing that a letter had been sent to it on 28th of March, 2013.

The Applicant further submitted that although the representative collected the letter and sent it to Mombasa that very same day, it was only received by the Applicant on the 3rd of April, after 5.00 p.m. It argued therefore, that in all reasonableness, the effective date of receipt of notification could only be the 4th of April, 2013 which meant that the appeals window closed on 18th April and that therefore the application for Review was filed within time.

On the issue of the tender validity, the Applicant submitted that the validity period had expired on 15th January, 2013 and that the said request for extension dated 18th January, 2013 was made after the Tender Validity period has lapsed on 15th January, 2013. It argued that once a tender had expired it ceased to exist and could therefore not be extended. The Applicant referred the Board to Application No. 2/2007 (Lantech Africa Ltd vs. Ministry of Finance) where the

Board held that once a tender had expired, it could not subsequently be brought back to life. It therefore urged the Board to find that the contract that had been signed was invalid since it arose out of a tender that was already dead.

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

The Board notes as follows:-

- That the Procuring Entity advertised Tender No. MOSD/423/117/2012/2013 for the Supply of Firewood to Mombasa Units in the Standard Newspaper of July 23, 2012, among other tenders.
- That at the time of tender closing / opening on 15th August, 2012, three firms namely Tsavo Trade Links, North Tract Co. Ltd and Mayrak Investments had submitted their bids.
- That the unit prices quoted by the respective bidders were not recorded in either the tender opening register or the tender opening minutes.
- That the representatives of North Tract Co. Ltd and Mayrak Investments were present during the tender opening and signed the tender opening register.
- That whereas M/s Tsavo Trade Links Ltd and M/s Mayrak Investments indicated their prices in their respective Tender Forms as well as the Price Schedules, the price quoted by M/s North Tract Co. Ltd is only indicated on the Price Schedule. Further, the Tender Form and the Confidential Business Questionnaire are missing in respect of the Successful Bidder, M/s North Tract Co. Ltd.
- That M/s Tsavo Trade Links' tender was not accompanied by a Bid Bond and was therefore disqualified at preliminary evaluation stage.
- That the Applicant and M/s North Tract Co. Ltd are the only two tenderers that were subjected to physical / technical evaluation.

- That the tender validity period was 150 days running from 15th August 2012 upto and including 12th January, 2013.
- That the Procuring Entity on 18th January 2013 requested the two responsive bidders to extend the tender validity to 15th March 2013.
- That only one bidder, North Tract Co. Ltd, responded with regard to the tender validity extension by its letter of 23rd January, 2013 wherein it confirmed the extension of tender validity to 15th March 2013.
- That the Applicant claims that it never received the above cited letter.
- That the Procuring Entity produced copies of letters dated 18th January, 2013 addressed to the two responsive bidders informing them of the expiry of the tender validity period and requesting them to confirm that their prices would still be valid and further, to extend the validity period upto 15th March 2013.
- That the Procuring Entity has not adduced evidence as to whether the said letter was delivered / dispatched to the Applicant.
- That the recommendation to award the tender to North Tract was presented to the Tender Committee on 14th March 2013.
- That the Tender Committee as per its minutes dated 21st March 2013, awarded the tender to North Tract being the lowest evaluated bidder.
- That, according to the Procuring Entity, the two bidders were simultaneously notified of the outcome of the tender vide letters dated 27th March 2013 but which were posted on 28th March 2013 and that therefore the appeal was time barred.
- That the Procuring Entity produced before the Board a mailing register which showed that the letters had indeed been sent to the two bidders on 28th March, 2013.
- That the Applicant had on the 2nd of April, 2013, sent its representative, a madam Mary, to the Procuring Entity's offices and that the said Mary was

given a copy of the notification letter and that this was evidenced by her signature on the Procuring Entity's delivery book which was adduced before the Board. A fact not disputed by the Applicant.

- That the Applicant claims that it only received the above letter in its Mombasa office after 5p.m. on 3rd April 2013 and that therefore the effective date of receipt was 4th April, 2013 premised upon which the appeals window would close on 18th April, 2013
- That the Procuring Entity submitted a signed contract purportedly arising from the tender that is the subject of appeal, signed on 15th April, 2013.
- That however, the said contract is signed between the Procuring Entity and M/s Baretu General Construction Ltd and not the Successful Bidder M/s North Tract Co. Ltd

The Board further takes note of Sections 61(1) & (2) and 67(1) of the Act which provide as follows:-

Section 61

"(1) Before the expiry of the period during which tenders must remain valid the procuring entity may extend that period.

(2) The procuring entity shall give notice of an extension under subsection (1) to each person who submitted a tender."

Section 67(1)

"Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted."

On the issue of tender validity, the Board finds that the tender first expired on 12th of January, 2013 and that it was presumably extended up to 15th of March

2013 on the 18th of January 2013. The Board notes that, the tender had expired prior to extension and therefore the purported extension of the tender was invalid. This extension was clearly in breach of Section 61(1) as cited above.

Secondly, to the extent that the Procuring Entity did not notify the Applicant of its intention to extend the validity period, it is in breach of Section 61(2).

Even assuming that the extension had been effected within time, the extension would still be invalid on the part of the Procuring Entity to failing to notify the Applicant. Thirdly even assuming that the extension was valid, the Board finds that the extension itself had also lapsed by the time the notifications of the award done, in breach of Section 67(1) of the Act.

The Board dealt with the issue of expiry of the Tender Validity in *Application No. 2/2007 between Lantech Africa Ltd and Ministry of Finance* where the Board extensively relied on its findings in *Application No. 45/ 2004 between Vulcan Limited and Ministry of Health*. In this latter case the bid validity expired on 21st October, 2004 and on 10th November, 2004 the Procuring Entity purported to extend the tender validity period of one hundred and twenty days. In that case, the Board held as follows;

"... .. the Board considers that with regards to its validity, a tender must be valid on the date it is opened, and thereafter for the requisite duration indicated by the tender conditions. As such, the duration of the validity of a tender should be counted commencing from, and including the date of tender opening and expiring on the last day indicated in the tender conditions...."

The Board further notes as follows;

"That the proper procedure for the procuring entity to follow is to extend the tender validity before it expires and before making an award, and also

to ensure that a bid bond must be valid at the time the award is being made by the tender committee..."

It is clear from the above decision that where there is power to extend validity, such power ought to be invoked before expiry of the instrument whose life is being extended.

Accordingly, a tender whose validity has already expired cannot be resuscitated by a purported extension.

The other point that the Board deals with is the validity of the contract signed by the Procuring Entity's Accounting Officer, with M/s Baretu General Construction Ltd. Even assuming that there was a valid tender to award, the contract would still be a nullity because it has been signed by a third party, an entity that is different from the bidder to whom the tender was awarded. Further, it is not clear as to what the award has been premised upon, noting that the Tender Form for the Successful Bidder is missing from its tender document and that the Procuring Entity did not have an acceptable explanation for it.

The Board notes that the whole process is highly flawed and that the tender could have been annulled on the basis of any of the above breaches. In any event the tender had lapsed on 12th of January, 2013 and effectively, there was no tender to award.

As the Board has already noted, this tender has serious flaws. The Board is also bound by the law to consider the issue of jurisdiction in regard to the filing of the Request for Review. The Board notes that Regulation 73(2) (c) (ii) imposes an obligation on the Applicant to file the Request for Review within 14 days from the date of notification. If an Applicant files a Request for Review outside the 14 days appeals window, this would amount to closing the stable after the horse

has bolted. In this regard, the Board notes as follows with respect to the filing of this Request for Review:

- 1) That the Applicant was notified of the tender outcome on 3rd April, 2013, when it received the letter of notification collected by its agent, one Mary, from the Procuring Entity's offices on 2nd April 2013.
- 2) That the 14 days appeals window started running on 4th April, 2013 and therefore closed on 17th April, 2013.
- 3) That the Applicant filed its Request for Review on 18th April, 2013 after the appeals window had closed one day before.

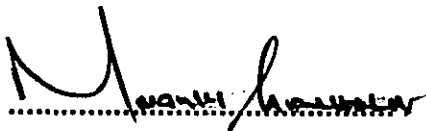
To the above end, the Board finds that it has no jurisdiction, pursuant to Regulation 73(2) (c) (ii), to entertain this Request for Review taking into account the fact that the Request for Review was filed on the 18th of April, 2013 whereas the appeals window had closed on the 17th of April, 2013.

Accordingly, this request for Review fails and the Application is hereby dismissed.

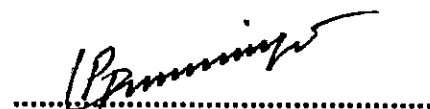
Statement of loss

With regard to costs, the Board has held severally, that tendering costs are commercial business risks taken by the parties in the course of doing business and as such, each party should bear its own costs.

Dated at Nairobi on this 16th day of May, 2013.


.....

CHAIRMAN
PPARB


.....

Ag. SECRETARY
PPARB

