

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO.31/ 2013 OF 5<sup>TH</sup> SEPTEMBER, 2013**

**BETWEEN**

**BOC KENYA LIMITED LTD..... APPLICANT**

**AND**

**KENYATTA NATIONAL HOSPITAL.....PROCURING ENTITY**

Review against the decision of the Tender Committee of Kenyatta National Hospital dated 28<sup>th</sup> August, 2013 in the matter of Tender No. KNH/T/18/2013-2014 for the Supply and Delivery of Medical Gases

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	- Chairman
Mr. Akich Okola	- Member
Ms. Judith Guserwa	- Member
Amb. Charles Amira	- Member
Eng. Christine Ogut	- Member
Mr. Sospeter Kioko	- Member
Mrs. Loise Ruhui	- Member
Ms. Natasha Mutai	- Member

## **IN ATTENDANCE**

Ms. Pauline Opiyo - Secretary  
Ms. Shelmith Miano - Secretariat

## **PRESENT BY INVITATION:**

### **Applicant - M/s BOC Kenya Ltd**

Ms. Nazima Malik - Advocate  
Ms. Maria Msiska - Managing Director  
Mr. Arthur Kamau - Gen. Manager, F & A  
Ms. Nellie W. Mweu - Key Accounts Manager  
Mr. James Togara - Operations Manager  
Mr. James Njoroge - Operations Manager

### **Procuring Entity - Kenyatta National Hospital**

Mr. Mwenda Muriuki - Advocate  
Mr. Calem Nyachoti - Corporation Secretary  
Ms. Rose Mugambi - Supply Chain Manager  
Mr. Peter Masinde - Head of Department

### **Interested Party - Noble Gases International**

Ms. Naomi Atina - Advocate, Noble Gases International Ltd  
Mr. George Omamo - Sales & Marketing Manager,

## **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 AWARD**

### **Introduction**

The procurement of medical gases commenced on 18<sup>th</sup> April 2013 after the user department raised a requisition on the annual requirements of the medical gases. The Tender Notice was advertised in the Standard Newspaper of 18<sup>th</sup> April, 2013.

That in the initial bid, the bidders were given the statutory twenty-one (21) days to respond and the bids opened on 9<sup>th</sup> May 2013.

The Agenda was presented for cancellation to Tender Committee because there was an error on the tender document which the Applicant pointed out on the opening day where on the invitation newspaper advert it indicated that the tender would open on 9<sup>th</sup> May 2013 but the tender document on page 12 read 10<sup>th</sup> May 2013. This contradiction would have led to confusion thus the cancellation.

Since only two bidders deal with the product, the Tender Committee approved the restricted tendering method to the two known firms.

## **Invitation to Tender**

Since this was a restricted tender, bidders were informed on telephone to collect the bid documents. The Applicant collected a bid document on 16<sup>th</sup> May 2013 and this was recorded in the tenders register. The bidders were given fourteen (14) days to submit their bids.

## **Closing/Opening:**

The bids were opened on 29<sup>th</sup> May 2013 by an opening Committee and were evaluated accordingly. The agenda was presented to Tender Committee for deliberation on 24<sup>th</sup> June 2013.

The two bidders failed in preliminary evaluation due to the following reasons:

- i) Bidder 1 - Noble Gases International Limited failed because it did not submit audited accounts.
- ii) Bidder 2 - BOC Kenya Limited provided an insufficient bid bond where the tender value was **Kshs122,489,062.00** against the Applicant's bid bond of **Kshs.696,080.00**

The tender was therefore deemed non-responsive and fresh bids were called for from the two tenderers.

In addition, BOC Kenya Limited having been previous suppliers of various medical gases including medical liquid oxygen and for which it had usually charged a separate cost for rental of the tank and which charge the Hospital found unacceptable, the tender was thus cancelled to include a specific Clause to demand tenderers to charge for the contents only.

After deliberations on 24<sup>th</sup> June 2013 and 10<sup>th</sup> July 2013, the Tender Committee resolved that the tender should be re-advertised with clear terms on the storage tanks or alternatively for the Hospital to acquire its own tank. This decision was communicated to the firms on 3<sup>rd</sup> July 2013.

On 16<sup>th</sup> July 2013 the tender was re-advertised in the local dailies and given twenty-one (21) days for bidders to respond. Tender opening was done on 2<sup>nd</sup> August 2013 by a Tender Opening Committee and it attracted two bidders as follows:

1. Noble Gases International Limited.
2. BOC Kenya Limited

The bid prices as read out during the Tender Opening were as follows:

No.	Name of Bidder	Amount as read out (subject to Regulation 45)	Tender Security (Amount and form)
1	M/s Noble Gases International Ltd	125,187,860/=	2,000,000/= Occidental Insurance
2	M/s BOC Kenya Ltd	116,577,822/=	1,165,778/= Citi Bank

## EVALUATION

The Evaluation Committee conducted a preliminary, technical and financial report. Preliminary Evaluation Criteria was as follows:

1. Submission of two tender documents securely bound and clearly marked (Original and Copy).

2. Tender Form duly completed and signed.
3. Original Bid Bond provided and valid for 120 days from date of tender opening, value of Bid Bond is 1% of total bid amount inclusive of all the taxes and duties.
4. Business questionnaire duly completed.
5. Copy of Tax Compliance Certificate / exemption certificate.
6. Certificate of Incorporation / evidence of registration whichever is applicable.

Both bidders passed preliminary evaluation.

## **STAGE 2: TECHNICAL EVALUATION - OTHER CONDITIONS**

- I. The successful bidder for Liquid oxygen must provide a storage tank at no extra Charges
- II. Successful bidder should charge for contents **ONLY** for the product in cylinders with no rental fees for the cylinders.

The technical evaluation results were as follows:

### **1. M/s Noble Gases International Limited**

The company indicated that they will provide the following:

- A 20,000 Litres storage tank for liquid oxygen will be installed commissioned and continually serviced at absolute **ZERO** cost to Kenyatta National Hospital.

- The Storage Tank will attract absolute **ZERO** rental monthly charges
- The storage tank because of size will ensure only three refills every month to cater for all liquid oxygen requirements, and ensure absolute zero Losses of oxygen through venting.
- All gas cylinders supplied to Kenyatta National Hospital will not attract any monthly charges.

## 2. M/s BOC Kenya Limited

- The company did not indicate whether they will provide a storage tank at no extra charges and rental charges. They also did not indicate if the product supplied in cylinders will be charged fees for the cylinders.
- The company therefore **FAILED** to meet stage 2(i) section vii of the Tender Document which indicated that the successful bidder **MUST** meet the conditions stated therein.

At stage 2 of the evaluation, BOC Kenya Limited did not indicate whether they would provide storage at no extra charge therefore they failed because the Technical Evaluation Committee could not establish from any part of their documentation if they would charge rental fees or not considering they had previously indicated that they would charge rental costs. The other bidder clearly elaborated that their facility would be provided at no extra charge to the Hospital and even indicated the size of storage tank they would install if awarded the tender.

### STAGE 3 - Financial Evaluation

The Technical Evaluation Committee perused the bid documents and neither of them had arithmetic errors, both firms quoted in the same currency (Kshs) hence there was no need for conversion. There were no discounts offered on the tender.

### TENDER COMMITTEE DECISION

The KNH Tender at its meeting held on 21<sup>st</sup> August 2013 deliberated and approved award as tabulated hereafter.

Item No.	Item Description	Unit of Issue	Qty Required	Unit Price (Kshs)	Total Price	Supplier/ Remarks
1	Nitrous Oxide 16,560 Ltrs	Cylinders	840	16,800.00	14,120,000.00	M/s BOC Kenya Ltd 1 <sup>st</sup> Lowest Evaluated Bidder
2	Medical Oxygen	Cylinders	1920	450.00	864,000.00	M/s Noble Gases International Ltd. 1 <sup>st</sup> Lowest Evaluated Bidder
3	Medical Liquid Oxygen	Litre	800,000	137.00	109,600,000.00	M/s Noble Gases International Ltd. 2 <sup>nd</sup> Lowest Evaluated Bidder. 1 <sup>st</sup> Lowest Evaluated Bidder failed in the Technical Evaluation.
4	Dissolved Acetylene	Cylinders	20	6,000.00	120,000.00	M/s Noble Gases International Ltd. 1 <sup>st</sup> Lowest Evaluated Bidder
5	Industrial Oxygen	Cylinders	20	1,218.00	24,360.00	M/s Noble Gases International Ltd. 1 <sup>st</sup> Lowest Evaluated Bidder



6	Compressed Air	Cylinders	72	1,730.00	124,560.00	M/s BOC Kenya Ltd. 1 <sup>st</sup> Lowest Evaluated Bidder
7	Carbon Dioxide	Cylinders	48	2,000.00	96,000.00	M/s Noble Gases International Ltd. 1 <sup>st</sup> Lowest Evaluated Bidder
8	Carbon Dioxide	Cylinders	2	18,000.00	36,000.00	M/s Noble Gases International Ltd. 1 <sup>st</sup> Lowest Evaluated Bidder
9	Nitrous Oxide	Cylinders	14	1,500.00	21,000.00	M/s Noble Gases International Ltd. 1 <sup>st</sup> Lowest Evaluated Bidder
10	Medical Oxygen	Cylinders	14	300.00	4,200.00	M/s BOC Kenya Ltd 1 <sup>st</sup> Lowest Evaluated Bidder
11		Cylinders	6	2,000.00	12,000.00	M/s Noble Gases International Ltd 1 <sup>st</sup> Lowest Evaluated Bidder
	<b>TOTAL</b>				<b>125,014,120.00</b>	

The bidders were notified of the tender outcome by letters dated 22<sup>nd</sup> August 2013.

## THE REVIEW

The Applicant, M/s BOC Kenya Ltd lodged this Request for Review on 5<sup>th</sup> September, 2013 against the decision of the Tender Committee of Kenyatta National Hospital in the matter of Tender No. KNH/T/43/2013-2014 for the Supply and Delivery of Medical Gases.

The Applicant was represented by Ms. Nasima Malik, Advocate while the Procuring Entity was represented by Mr. Mwenda Muriuki, Advocate. The Interested Party M/s Noble Gases International Ltd was represented by Ms. Naomi Atina, Advocate.

The Applicant seeks for the following orders:

1. The procurement proceedings and the award in respect of the supply of medical liquid oxygen be annulled.
2. The Respondent be directed to re-evaluate the tenders in accordance with the Law.
3. Alternatively the Respondent's decision in respect of the award for the supply of medical liquid oxygen be substituted by the Review Board's decision that the Applicant qualified in the technical evaluation phase and therefore the Applicant's bid for the supply of medical liquid oxygen was successful.
4. The costs of this request for review be awarded to the Applicant.

The Applicant has raised thirteen (13) grounds of review which the Board deals with as follows:

**Grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 13.**

Grounds 1-10 and 13 are mere factual statements on the chronology of events and attachments to the Request for Review on the said tender. The same are not backed by any alleged breach of the Act and or the Regulations and therefore the Board need not make any findings on them.

**Grounds 11 and 12: - Breach of Sections 66 and 67 of the Public Procurement and Disposal Act, 2005 (hereafter referred to as "the Act")**

These grounds of Review have been consolidated as they raise related issues on the tender evaluation, the subsequent award and notification of award to the bidders.

The Applicant submitted that its Request for Review was premised on two issues namely:-

1. That the Procuring Entity breached the provisions of Section 66(1) and (2) by failing to evaluate its bid in accordance with the Criteria it had set out in its Tender Document, and
2. That the Procuring Entity breached the provisions of Section 67(2) of the Act by failing to notify it that it's tender for supply of Medical Liquid Oxygen was unsuccessful at the same time that it notified the person, if any, who was successful.

Regarding the first limb of the Application, the Applicant submitted that on 29<sup>th</sup> August, 2013, it received a letter from the Procuring Entity dated 28<sup>th</sup> August,

2013 which letter informed it that it was unsuccessful with regard to its bid for the supply of Medical Liquid Oxygen. It submitted that the said letter stated that its bid was unsuccessful at the technical evaluation stage for failure to indicate whether there were any rental charges for its storage tanks for the Medical Liquid Oxygen.

The Applicant submitted that the tender documents were clear on this requirement and that it had prepared its bid with the knowledge that its price did not include rental charges for storage tanks. It stated that there was no condition and or requirement in the tender document for bidders to expressly state that their prices did not include rental on storage tanks. It contented that its tender did not state that it would charge for the storage tank at all nor did it quote any rental charges and had therefore complied with the condition that it had to provide a storage tank at no charge.

The Applicant stated that, indeed, the Tender Document at page 27 was clear on that requirement and therefore bidders quoted clearly knowing that their prices ought to be free of extra charges/rental charges on storage tanks. Further, the Applicant referred the Board to the provisions of Clause 2.10.3 of the tender document which also clearly stated that prices quoted shall be fixed and not subject to any variation on any account. It stated that on this requirement alone, it was clear that once a bidder had quoted a price in accordance with the tender requirements, there was no chance to vary the price at all.

On the issue of notification, the Applicant submitted that the Procuring Entity acted in breach Section 67(2) of the Act by failure to notify it of the unsuccessfulness of its bid with regard to the supply of Medical Liquid Oxygen

at the same time it was informed about the other three items it was successful in. It submitted that it was not until it wrote to the Procuring Entity after getting the notification on the other three items that the Procuring Entity wrote back on 28<sup>th</sup> August 2013, advising it that it was unsuccessful in the supply of Medical Liquid Oxygen. It stated that its letter for the successful part of its bid is dated 22<sup>nd</sup> August while that of the unsuccessful item is dated 28<sup>th</sup> August 2013.

In conclusion, the Applicant submitted that it was wrongfully knocked out at stage 2 of the evaluation for reasons which were not justifiable.

It urged the Board to find merit in its review, annul the award in respect to supply of liquid oxygen gas and direct the Procuring Entity to re-evaluate the tenders in accordance with the law.

In its response the Procuring Entity denied breaching the Sections of the Act as cited by the Applicant. It stated that it had carried out the evaluation of the tender in line with Section 64 of the Act and Regulations 49(1) and (2) of the Regulations.

The Procuring Entity submitted that it did the invitation for bids 3 times just to ensure that it captured its requirements well without leaving room for ambiguity. It stated that it revised its Tender document specifically to introduce a clause removing charge on rental of tanks which charge the hospital had found it unacceptable.

The Procuring Entity submitted that, unlike in the past, it aimed to pay only for the gas contents and save by not paying rental on storage tanks. It submitted that it had awarded the Applicant three out of eleven items which the Applicant had applied for and that the complaint before the Board was only for one item.

The Procuring Entity submitted that it had rejected the Applicants bid in respect of the Medical Liquid Oxygen gas on account that the Applicant failed to expressly state that it would provide storage tank at no extra charge. It submitted that the Applicant was its previous supplier for the same item and that under the old Contract, it was charging extra costs for the storage tank. It stated that the Successful bidder had clearly indicated in its bid that it would provide the storage tank at no extra charge. It stated that it is for that reason that the Applicant failed at the 2<sup>nd</sup> stage of evaluation.

With regard to the alleged breach of Section 67 of the Act on notification, the Procuring Entity submitted that by its letter dated 22<sup>nd</sup> August 2013 in which letter the Applicant was notified of award for three items, it was presumed that it ought to have understood that it was unsuccessful in the other items it had bid for. Further, the Procuring Entity submitted that the Act and or the Regulation do not prescribe any format on notification and urged the Board to find that its letter of award to the Applicant dated 22<sup>nd</sup> August 2013 sufficed as proper notification. Equally, it urged the Board to also find that based on the notification of 22<sup>nd</sup> August 2013, the Request for Review as filed on 5<sup>th</sup> September 2013 was time barred.

In conclusion, the Procuring Entity urged the Bard to find that the evaluation was procedurally done and dismiss the application for Request for Review.

On its part, the Interested Party M/s Noble Gases International Ltd, the Successful Bidder for the item in question, associated itself with the submissions of the Procuring Entity. It stated that it had expressly confirmed in its bid document that it was not charging extra costs for storage tanks and it had indeed offered to install bigger capacity tanks.

On the issue of notification, it submitted that the implied notification was the letter to the Applicant 22<sup>nd</sup> August, 2013. It urged the Board to find that the Request for Review is filed out of time and consequently, dismiss the same.

The Board has carefully listened to the parties and perused the documents presented before it.

The issues that arise for the Board's determination are:-

1. Was the criteria applied by the Procuring Entity at Stage 2 of the Technical Evaluation process clear, justifiable and objective?
2. Was the Applicant in any way prejudiced by the Application of the said Criteria?
3. Was any extraneous factor applied in the evaluation to the detriment of the Applicant? and finally,
4. Was the Applicant properly notified of the outcome of its Tender for Item No. 3 in the Price Schedule namely Medical Liquid Oxygen?

To be able to answer the above, it is important for the Board to revisit some factual information on the background of the tender, the relevant Sections of the Act and Tender Document.

The Board notes as follows:-

1. The Procuring Entity Invited bids for Supply of Medical Gases three times with the first two tenders being cancelled due to an error in the tender document and all bids being unresponsive respectively.
2. The third Tender, i.e. Tender No.KNH/T/43/2013-2014, which was advertised on 16<sup>th</sup> July, 2013 was processed to completion and the bids received were from two tenderers namely BOC Kenya Limited and Noble Gases International Ltd.
3. Evaluation of the Tender was conducted in three stages namely preliminary, technical and financial evaluation.
4. Both the Applicant and Noble Gases International Ltd passed the preliminary evaluation stage.
5. The Applicant was disqualified at stage two of the evaluation, i.e. technical evaluation stage, for failing to indicate whether they would charge rental fees or not.
6. The evaluation criteria as set out at page 27 of the Tender Document under **Stage 2 (i) other Conditions** stated as follows;
  1. *The successful bidder for liquid oxygen must provide a storage tank at no extra charges and no rental charges.*
  2. *Successful bidder should charge for contents only for the product in cylinders with no rental fees for the cylinders.*
7. M/s Noble Gases International Ltd had indicated the unit and total prices in the price schedule and also gave remarks to the extent that it will levy no



cylinder rental charges and will provide free 20,000 Litres Storage Tank for Medical Liquid Oxygen.

8. M/s BOC Kenya Ltd indicated the unit and total prices in the price schedule but without remarks as to whether it will levy rental charges or not.
9. The Applicant bid for a total of eleven items.
10. The Letter of Notification to the Applicant dated 22<sup>nd</sup> August 2013 stated that the Applicant had been awarded contract for item No's 1, 6, and 10. The Letter has no information about the other 8 items which the Applicant had tendered for.
11. By a letter dated 26<sup>th</sup> August 2013, the Applicant informed the Procuring Entity that its Letter of notification excluded the supply of Medical Liquid Oxygen and requested for a confirmation that it was not awarded a contract for that particular item.
12. By a letter dated 28<sup>th</sup> August 2013, the Procuring Entity responded to the Applicant's enquiry stating that the Applicant's bid for item No.3 (Medical Liquid Oxygen) was not successful in the technical evaluation stage because it failed to indicate whether there were any rental charges for its storage tank which was a requirement in the evaluation criteria in the Tender Document.

The Board further takes note of the following relevant Sections of the Act and the Tender Document.

Sections 66 and 67 of the Act which provide as follows;

Section 66:-

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

*(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.*

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

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

*(b) each criterion must be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality and service for the purpose of evaluation.*

*(4) The successful tender shall be the tender with the lowest evaluated price.*

*.....”*

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.*

*(2) At the same time as the person submitting the successful tender is notified, the procuring entity shall notify all other persons submitting tenders that their tenders were not successful.*

*.....”*

Clause 2.10.3 of the Tender Document provided as follows:

*"Prices quoted by the Tenderer shall be fixed during the Tenderer's performance of the contract and not subject to variation on any account. A tender submitted with an adjustable price quotation will be treated as non responsive and will be rejected, pursuant to paragraph 2.22."*

Section VII- EVALUATION CRITERIA Stage 2(i) - Other Conditions, provided as follows;

- "1. The successful bidder for liquid oxygen must provide a storage tank at no extra charges and no rental charges.*
- 2. Successful bidder should charge for contents only for the products in cylinders with no rental fees for the cylinders."*

From the foregoing, it is clear to the Board that:-

1. There was no requirement in the Tender Document that Bidders were to expressly state in their bids that they would not charge for storage tanks. To the contrary, it was presumed that all quoted prices were exclusive of extra charges as the same was clearly stated as a condition in the Tender Document.
2. Further, Clause 2.10.3 clearly protected the Procuring Entity from possible extra charges since it clearly stated that quoted prices would not be subject to variation during the contract period.

3. Further, it is not in dispute that the Applicant had attached a duly signed form of tender in its bid document supporting its bid price. This therefore meant that it was bound by its price which could not be varied given the requirement of Clause 2 stated above.

The Board therefore finds that the Procuring Entity, in breach of Section 66(2) of the Act, erred in invoking an extraneous criteria which subsequently led to improper disqualification of the Applicant at stage 2 of the evaluation.

Turning to the issue of whether the Applicant was properly notified of the outcome of its Tender for Item No. 3 in the Price Schedule namely Medical Liquid Oxygen, the Board finds that the letter sent to the Applicant informing it of the success of its bid in relation to the three items cannot suffice as a letter of notification for all the items.

Consequently, the Board finds that the Applicant was not notified of the outcome of its tender for item No. 3 until 28<sup>th</sup> August, 2013 when the Procuring Entity responded to its enquiry on this item. The said letter was received by the Applicant on the 29<sup>th</sup> August, 2013. This is in contravention of the provisions of Section 67(2) of the Act which require bidders to be notified of the outcome of tenders simultaneously.

It therefore follows that the Applicant only got the proper notification of the award of item No. 3 (Medical Liquid Oxygen) on 29<sup>th</sup> August 2013. Therefore, for the Applicant, the Appeal window opened on 30<sup>th</sup> August, 2013 and closed on 5<sup>th</sup> September, 2013.


The Board finds that the instant Request for Review, having been filed on 5<sup>th</sup> September 2013, was filed within time and hence was properly before the Board.

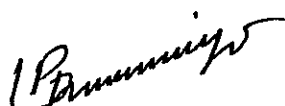
Taking all the foregoing into consideration, the Request for Review succeeds. The Board orders, pursuant to Section 98 of the Act, that:-

1. The award of the tender to the Successful Bidder in respect to Medical Liquid Oxygen be and is hereby annulled.
2. That the Procuring Entity re-evaluates all the bids in respect with Item No. 3 (Medical Liquid Oxygen) in accordance with the Act, the Regulations and the Tender Document.
3. The Board further directs Procuring Entity to ensure that the process is completed within the next fifteen days in accordance with Legal Notice No. 106 of 18<sup>th</sup> June 2013 and within the tender validity period.

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. Subsequently, each party shall bear its own costs.

**Dated at Nairobi on this 16<sup>th</sup> day of September, 2013.**

  
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JA **CHAIRMAN**  
**PPARB**

  
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**SECRETARY**  
**PPARB**

