

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 34/2013 OF 17TH SEPTEMBER, 2013

BETWEEN

MANCHESTER OUTFITTERS LTDAPPLICANT

AND

**KENYA AIRPORTS AUTHORITY.....PROCURING
ENTITY**

Review against the decision of the Tender Committee of Kenya Airports Authority dated 5thSeptember, 2013 in the matter of Tender No. KAA/HQS/183/2012-2013 for Provision of Staff Uniform

BOARD MEMBERS PRESENT

Mrs.Joshine W.Mongare	- Chairperson
Mrs.Rosemary K.Gituma	- Member
Eng Weche R. Okubo	- Member
Mr.Paul Ngotho	- Member
Mr.Hussein Were	- Member
Mr.Nelson Orgut	-Member
Mr.Peter B.Ondieki	-Member

IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat
Ms. Judith Maina - Secretariat

PRESENT BY INVITATION

Applicant, Manchester Outfitters Limited

Ernest Kaka - Advocate
Martin Ngatia - Sales Manager
Paul Galot - Managing Director

Procuring Entity - Kenya Airports Authority

George Kamau - Legal Officer
Meshack Odero - Advocate
Margaret Muraya - Manager Project
Janet Chemeli - Security
Charles Chetalam - Management Accountant
David Tomno - Procurement Officer
H.M.Orara - Ag.Gm Procurement &Logistics

Interested Parties

Mr Solomon Kivuva - Advocate, Epincian
Peter Ngige - Manager, Epincian
Sheena Sharma - MD, Epincian
Cleophas - Sales, Epincian
Collins Molonko - Sales, Bedi Inv. 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

The Applicant filed a Request for Review, on 17th September 2013, with respect to the decision contained in the Procuring Entity's letter of 11th September 2013 to the Applicant regarding Tender No. KAA/HQS/183/2012-2013.

This was an open tender for the supply of 3 lots of staff uniform to Kenya Airports Authority. Following advertisement in the local newspapers Tender documents were purchased by various institutions. A total number five firm including the Applicant, the interested party and three other firms participated in the Tender. Subsequently the Procuring Entity invited interested bidders to a pre-bidding meeting that was held on 19th July 2013 to clarify issues that were deemed unclear to the interested bidders. Thereafter an addendum was issued on 30th July 2013 clarifying issues addressed at the Pre-bidding meeting.

Out of the 8 firms which purchased the tender document, 5 firms returned the tender which was opened on 14th August 2013.

The Procuring Entity analysed the tenders as follows:

No	Name	Address	Tele phon e	Fax	Email	Contact Person	Amount Quoted
1	Pisu and Company Ltd	P.O. Box 18219- 00500, Nairobi - Kenya	+254 20 5548 36	+254 20 2446594	pisu@wananch i.com	Sudhir Shah	Kes 53,574,272.20
2	Epiniician Ltd	P.O. Box 11056- 00100, Nairobi - Kenya	+254 20 3744 506	-	info@epiniician -ltd.com	Sheena Sharma	Kes 48,333,441.60
3	Fiabilite Promotion s Ltd	P.O. Box 62622, Nairobi - Kenya	+254 20 2000 400	+254 20 3743238		Leonard Kironjo	Kes 52,065,676.64

4	Manchester Outfitters Ltd	P.O. Box 46515- 00100, Nairobi - Kenya	+254 20 2984 000-1	+254 20 6531554	admin@man- outt.com	Rajesh Galot	Kes 44,841,609.60
5	Bedi Investmen ts Ltd	P.O. Box 230, Nakuru - Kenya	+254 051 2212 320	+254 051 2216214	info@bedi.com	Satwind er Bedi	Kes 52,456,405.00

The evaluation carried was carried out by a committee of four members, chaired by Ms Carol Chibutsa other members being Janet Chemeli, Charles Chetalum and David Tomno in the presence of the Consultant, Ms. Sylvia Mwaura.

The Procuring Entity evaluated the tenders in three (3) stages: Preliminary, Technical and Financial.

The bids by M/s Pisu and Company Ltd, Fiabilite Promotions Ltd and Bedi Investments Ltd were found to be substantially non-responsive and were therefore not passed on to the next stage of evaluation.

At the technical stage the Board was told that the applicant failed to meet several criteria that was deemed Mandatory in that it failed to include Education certificates for its Key staff and personnel and also several items of the samples provided did not meet the standards set by the Procuring Entity. The Procuring Entity did indeed indicate that all bidders were provided with an approved sample that had been provided by a consultant procured by the Procuring Entity. The Interested Party the Successful bidder met the Procuring Entity's sample design for Lots 1 and 3 but its samples for Lot 2 did not match the sample. However, the Board was informed that this was considered to be minor differences as it regarded yarn type and slight colour variation and the Procuring Entity felt the same could be cured during full production and that would not materially affect the tender, hence the evaluation committee recommended the award to the Interested Party for the sum to Kshs. 48,333,441.60 inclusive of VAT in all the three Lots.

All bidders were notified of the results of the tender through letters from the Procuring Entity dated 11th September 2013 .The Board noted that letters to the other three unsuccessful bidders did not provide reasons as to why they were not successful but indicated that the tender had been awarded and the value of the award therein. However the Applicant's letter included reasons as to why its bid was unsuccessful. The reasons therein were as follows:-

1. *That the Applicant had not supplied copies of certificates "for technical person" as required.*

2. *That the Applicant did not provide samples for the following items as quoted:*
 - *Skirt Long -Muslim faith*
 - *Veil*
 - *Maternity dress*
 - *Maternity blouse*
 - *Maternity pants*
3. *That the Applicants fifteen (15) of the samples provided by the Applicant did not meet the Procuring Entity's approved samples*

The Applicant being dissatisfied with the reasons adduced by the Procuring Entity as to why its tender was not successful, filed a Request for Review against the Procuring Entity's decision pursuant to the provisions of The Public Procurement and Disposal Act of 2005 ("The Act") and Regulation 73 of the **Public Procurement and Disposal Regulations, 2006** ("The Regulations") as amended in 2013 for the following orders:

1. *The Applicant be awarded the Tender*
2. *Alternatively, the Board do annul this tender and order for a fresh tendering of the same*

As part of the supporting documents the Applicant also filed Grounds of Appeal which were neither signed nor dated.

The Procuring Entity in its reply to the Request for Review has denied all the Applicant's Claims and presented the following prayers;

- a. *That the Applicant's Request for Review be dismissed.*
- b. *That the Procuring entity be awarded costs against the Applicant*
- c. *That In the alternative and without prejudice of the two prayers above the Board do order for the Procuring Entity to re-evaluate the bids afresh.*

The Board held a hearing of this matter on 14th October 2013.

Mr Kivuva, Advocate for the Successful Bidder and therefore Interested Party made an oral application at the commencement of the hearing to be allowed time within a few days to make written submissions to the Board on behalf of his client. He informed the Board that he had been engaged by the Interested Party only two days prior to the hearing and hence did not have sufficient time to file his papers before the hearing date. The Board being alive to the the timelines set by the Act, and taking into considerations that this matter was filed on 17th September 2013, and guided by Section 97 of the Public Procurements and Disposal Act, 2005, which sets the timelines for the hearing and disposal of an appeal within 30 days from the date of the filing of a review, declined to allow the application by the interested party. However, the Board directed that the interested party would be granted time to respond to any submissions or issues raised by both the Applicant and the Procuring Entity which may touch on it during the hearing.

At the commencement of the hearing the Board observed that the Applicant's "Memorandum of Appeal" was neither dated nor signed by the applicant as is required by Regulation 73(2)(b) of the Public Procurement Regulations 2006, which provides *that a request for review shall be accompanied by a statement signed by the Applicant*. Mr. Kaka Kamau for the Applicant persuaded the Board to admit the document since it was filed by his client in person prior to his appointment.

○ **CONSIDERATION OF THE GROUNDS OF APPEAL**

At the hearing of the review the Applicant presented the following as grounds of appeal upon which its Review was based;

Ground No. 1 - Whether the Applicant's Failure to Attach Certificates was a minor deviation and whether it did not materially affect the tender.

○ The Applicant in its submissions admitted that it had not presented the certificates of its key staff and personnel but argued that that was a minor deviation from the requirements since information on the staff was already captured CVs it supplied. Its opined that production of certificates was not a mandatory requirement. It further argued that the omission was curable under Section 62 and 64 of the Act. It attached evidence that it had supplied uniforms to the Procuring Entity for twenty years, a fact that it considered was sufficient proof of its capacity and capability.

In its response the Procuring Entity pointed out that the requirement to provide certificates of key personnel and staff of the bidder was mandatory provision in the Evaluation Criteria, which the parties had prior to the presentation of the tenders, that it was a **minimum requirement** for the parties to "submit CVs and copies of certificates". The Procuring Entity insisted that the certificates were a mandatory requirement and that it was irrelevant how long the Applicant had supplied uniforms to the Procuring Entity previously. The Procuring Entity submitted that this being an open tender previous relationship between the tenderers and the Procuring Entity was immaterial to this tender.

Indeed, the Procuring Entity had given the Applicant and other tenderers advance notice in Clause 2.3.2 of the Tender Document that *"The Tenderer is expected to examine all instructions, forms, terms, and specifications in the tender documents. Failure to furnish all information required by the tender documents or to submit a tender not substantially responsive to the tender documents in every respect will be at the tenderers risk and may result in the rejection of its tender." (emphases added)*

The Board finds that the production of the certificates was a mandatory requirement and that the Applicant, having not produced them, should have been disqualified at the preliminary stage of evaluation and his bid not allowed to proceed to technical evaluation.

As to whether the omission was curable or not, the Board further opines that the non-submission of certificates is not a "minor deviation" capable of being corrected under Section 64(2) (a) as pleaded by the Applicant.

Ground No. 2 - Compliance of the Applicant's Samples to the Procuring Entity's Samples

The Applicant submitted that the rejection of its tender on the basis that its samples did not meet the Procuring Entity's specifications as "*insufficient and arrived at in great error*".

The Applicant accepts the Procuring Entity's assertion that it did not supply the five samples listed in the Notification Letter of 11th September 2013 but claims that the procuring Entity did not allow the tenderers enough time to prepare samples, some of which had to be imported.

The Board notes that the interested party submitted all the required samples and did not seem constrained by the time. In response the Procuring Entity submitted that not only did the Applicant not provide same samples but also 15(fifteen) of the samples submitted did not meet the specifications of the samples given to tenderers by the Procuring Entity prior to the submission of the bids. The Procuring Entity exhibited before the board, during the hearing, some of the Applicants samples and compared them with its own sample. The Board observed the material differences as pointed by the Procuring Entity.

The Procuring Entity, in addition to giving tenderers' the advance notice cited above, emphasised to the tenderers during the pre-bidding meeting that "*All bidders must supply a full set of uniforms...*" It is on record that the bidders were given opportunity to view all the samples during that pre-bidding meeting.

The Applicant also submitted that the Procuring Entity's approved samples did not comply with its own criteria as provided in the Tender Document in respect of the pantone colours numbers as specified. No evidence was adduced by the Applicant to support these allegations or to show that it suffered any prejudice considering that its samples were rejected due to non-compliance with the approved samples and not for failing to meet the pantone colour specification.

Ground No. 3 – Whether the Procuring Entity was obligated to carry out a Site Visit to the Applicant's Premises

The applicant also submitted that failure to visit its premises was a material deviation of the evaluation criteria as contained in the tender document.

The Applicant argues that such a site visit was a **mandatory requirement** of this tender. Taken to its logical conclusion, the Applicant's argument would suggest that the Procuring Entity was required to visit the sites of all the tenderer's.

The Procuring Entity argued in its response that criteria was only applicable to the *possible winner* which the applicant having failed at the

Technical Evaluation stage was not and therefore cannot claim discrimination on that aspect alone. The Board notes that the site inspection comes under the "Technical Evaluation" section of the Tender Document, and not under the "mandatory requirements" section. The section referred to states *"As part of technical evaluation and due diligence, Kenya Airports Authority will require ... visit to the factory/manufacturing plant/site of the possible winner to establish their capacity before award"*

○ Counsel for the Interested Party submitted that his client was the only possible winner having passed all the three stages of evaluation and hence was visited before the award was issued since all the other bidders had already been knocked out, and that the Tender Document did not obligate the Procuring Entity to visit the Applicant or any other bidder.

○ The Board notes that "possible winner" is in singular, not plural. The Procuring Entity commits itself to visit the premises of only one tenderer, the possible winner. The Interested Party submitted that the Applicant, having been knocked out of the race, was not a "possible winner" to whom a site visit was due. The Board concurs with the submissions of the Procuring Entity and the interested party in this respect.

Ground No. 4 - Whether the Applicant's Right to Fair Administrative Action was breached.

The Applicant claims that it was the "*lowest evaluated bidder*" and that, therefore, the rejection of its bid amounted to unfair treatment and violation of its constitutional right to fair administrative action.

From the tender documents enumerated by the Procuring Entity the Applicant's bid was for Ksh.44, 841,609.60 and was the lowest bid financially submitted. However, the Applicant having not been successful at the technical stage its tender was not financially evaluated and hence its tender was not the "lowest evaluated bid". It is therefore not correct that its bid was the lowest evaluated bid.

The Applicant has not demonstrated to the Board how the rejection of a non-compliant bid can possibly amount to unfair action or to a violation of its constitutional right to fair administrative action.

Grounds 5, 6 & 7 - Whether the Interested Party's had capacity to comply or carry out the award or otherwise, whether it had complied with the mandatory conditions in the Tender Document with respect to presentation of 3 years audited accounts, manufacturing and staff capacity and demonstration of experience in supplying Customised Uniforms and whether or not it was a broker.

The Applicant in its ground 5, 6 & 7 has submitted that the Successful Bidder M/S Epnician Limited lacked capacity to carry out the tender. It alleges that the said company failed to provide mandatory requirements of three year audited accounts and that it had , according to a website

associated with it ,been in operation for a lesser period. The Applicant argues that indeed the successful bidder is a broker and lacks facilities for production of the goods being procured. The Board noted that other than citing of an internet address no material evidence was produced to prove or substantiate these allegations. Indeed in its response the Procuring Entity submitted that all successful bidders was evaluated and met the criteria set down by it in the Tender Document hence the award.

The Interested party in its response submitted that it met the criteria set down by the Procuring Entity and that the allegations that it was a broker were malicious and meant to destroy its credibility before the Board. The interested further submitted that it participated in the tender as a joint ventures with another company, M/S Fine Spinners limited and that it presented to the Procuring Entity more than 3 years audited accounts of the said Fine Spinners Ltd. The Board noted that the admission by the Interested Party that its bid was Joint Venture was a matter that was of material concern since the Tender Document did not outrightly provide for it and that despite the Procuring Entity having awarded the tender to a consortium there was no criteria for its evaluation provided in the documents presented before the Board. The Board further noted that nothing in the Tender Document stopped an agent or broker from bidding on its own or in a consortium. However, the Board is of the view that such an arrangement must be disclosed upfront and must clearly captured in the tender documents as it will allow smaller companies to combine and compete against established firms. It was also observed even the award was given to the Interested Party singularly and not in a joint venture. This,

the board feels is a material factor that the procuring entity ought to have disclosed but chose not to do.

In a surprising turn of events and despite vehement defence and opposition by the Procuring Entity to the Request for Review, The Procuring Entity admits that the procedure followed in this procurement had some shortfalls, and hence it wished that in the *alternative* the Board does order it to re-evaluate the bids. In response to this prayer the Interested Party submitted that such a request was an attempt to cancel its award and that by doing so the Procuring Entity was allowing for collusion and hence the application should be viewed as being mischievous and geared to assist unsuccessful tenderers to win the award through the back door.

GENERAL OBSERVATIONS

After hearing the arguments by all parties represented in the Request for review the Board notes with that the following issues arise for determination:

1. *Was the Procuring entity justified in disqualifying the Applicant on grounds that mandatory documents were not supplied? Was the requirement a preliminary issue or technical?* From the totality of the arguments made before it the Board finds that this requirement was mandatory and that it was a preliminary issue. The Board is of the view that the Applicant's bid should have been found non responsive at the

preliminary stage and should not have been allowed to proceed to the Technical stage of evaluation.

2. *Once the Procuring Entity allowed the Applicant's bid to reach the technical stage of evaluation, was it justified in disqualifying it on account that (a) of failure to provide all Samples and (b) that samples provided did not its set criteria both in quality and colour?* The Board observed from the evaluation document that even the successful bidder (Interested Party) did not supply all samples requested and some lots deviated materially from the specimens of the Procuring Entity. The Board therefore holds that the Procuring Entity applied this criteria in a discriminatory manner and that even at this stage the tender for the Interested Party was non responsive and should have been disqualified.
3. *Was the Applicant the Lowest evaluated Bidder?* The Board finds that the applicant having been disqualified at the technical stage was not the lowest evaluated bidder.
4. *Did the Successful bidder lack capacity to carry out the tender once awarded?* The Board finds that by its own admission the Interested Party Lacked capacity as it was bidding as a joint venture, a criteria not contained in the Tender Document and not availed to all the other parties.

Overall the Board notes that tendering process did not meet the objectives of the act as set out in section 2 of the Public Procurement and disposal Act,

2005. Section of the Public Procurement and Disposal Act, 2005 sets out the following objectives;

Section 2 The purpose of this Act is to establish procedures for procurement and disposal of unserviceable , obsolete or surplus stores and equipment by public entities to achieve the following objective-

- a. To maximise economy and efficiency;*
- b. To promote competition and ensure that competitors are treated fairly;*
- c. To promote the integrity and fairness of those procedures;*
- d. To increase transparency and accountability in those procedures; and*
- e. To increase public confidence in those procedures.*

The Board notes that these objectives were flouted in the by the Procuring Entity and makes the following observation of the entire tendering process as mounted by the procuring entity;

- a) From the Tender Document there was no condition either allowing a joint venture or not. The Procuring Entity's failure to interrogate the documents it received from the bidders, for example, it accepted the then unexplained submission by the Interested Party of another company's

audited accounts. Such a lapse cannot be deemed to “increase public confidence” in the procurement process.

- b) The letter sent by the Procuring Entity to the Applicant on 11th September 2013 states the reasons why the Applicant was not successful. The letters sent to the other unsuccessful bidders do not contain reasons. While those bidders have not, to the best of our knowledge lodged a complaint, the Board believes that they were entitled to the reasons. This was selective disclosure of material facts to the tender.
- c) According to the evaluation documents availed to the Board the Procuring Entity's evaluation criteria was subjective as it did not allow objective scoring of points.
- d) Despite it being a mandatory requirement in the tender document the Procuring Entity did not insist on the submission of tested samples by the bidders.
- e) The Tender Document refers to non-existent Clauses 22.9 and 2.30 of the Tender Document. Such flaws do not “promote integrity” of the procurement or “increase public confidence” in the process.

- f) The Interested Party Ltd was evaluated and awarded the tender despite the fact that it did not all the criteria set out in Lot 3 in that some or none of its samples for that particular lot complied with the approved sample with respect to yarn type and colour variation. The Procuring Entity's Tender Evaluation Committee recommendation was that the variation should be corrected before the production of the full uniform, even though there is no record of any assurance or commitment that the Interested Party was capable or even willing to make such correction or consideration of any effect on price.
- g) Only one of the three members of staff of the Procuring Entity who attended the Tender Opening meeting on 14th August 2013 signed the minutes. This is curious as it raises issues of ownership of the process by officers authorised by the Procuring Entity to carry out the evaluation.
- h) The Board views those shortfalls seriously and finds that the procurement procedure in this tender was flawed from the beginning.
- i) The Procuring Entity's response to the Applicant's allegations on the Interested Party's capacity was not very assuring. It did not, for example, disclose the date on the

Interested Party's certificate of incorporation which it claims to have received. The Board would have appreciated a more robust reaction from the Procuring Entity.

- j) The absence in the Tender Document, of an express provision for joint ventures or consortia to take part in the bid and the lack of evaluation criteria for such joint bids does not promote competition.

BOARD'S DECISION

Taking into consideration the totality of the submissions filed and made before the Board and for the reasons discussed above, the Public Procurement Administrative Review Boards' decision is that:


1. The Application for review is hereby allowed and the Board orders the Procurement Entity to cancel this tender and stop the process forthwith.
2. The Board directs that the Procuring Entity to does restart the entire procurement process afresh from redrawing and clarifying the Tender Document, re-advertising for and inviting and as well as receiving fresh bids from the public, taking care

to address the areas of concern pointed out by the Board, in this decision.

3. The Board makes no orders as to costs.

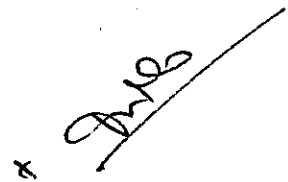
It is so ordered.

Delivered at Nairobi on this 15th day of October, 2013.



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BOARD CHAIRMAN



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BOARD SECRETARY