

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 36/2013 OF 8TH OCTOBER, 2013

BETWEEN

AUTOXPRESS LIMITED.....APPLICANT

AND

KENYA PORTS AUTHORITY.....PROCURING ENTITY

Review against the decision of the Tender Committee Kenya Ports Authority dated 24th September, 2013 in the matter of Tender No KPA/150/2012-13/PSM for Biennial Contract for Supply of Tyres, Tubes & Associated Products.

BOARD MEMBERS PRESENT

Mrs. Josephine W. Mongare	- Member (in the chair)
Eng. Weche R. Okubo	- Member
Mr. Peter Bitu Ondieki	- Member
Mr. Hussein Were	- Member
Mr. Nelson Orgut	- Member
Mr. Paul Gicheru	- Member
Mrs. Rosemary K. Gituma	- Member
Mr. Paul Ngotho	- Member

IN ATTENDANCE

Mr. Maurice Juma - Director-General, PPOA
Mr. Philemon Kiprop - Holding Brief for the Secretary

PRESENT BY INVITATION

Procuring Entity-Kenya Ports Authority

Mr. Stephen Kyandih - Advocate
Mr. Johnson Gachanja - Procurement officer
Mr. Antony K. Ndungu - Planning Engineer

Applicant – Auto Xpress

Mr. Richard Kumar - General Manager
Mr. Mathew Maina - Technical
Mr. Bharat Chanda - Branch Manager

Interested Party- Sameer Africa

Mr. Allan Walmsley - General Manager
Mr. Githinji Muteru - Technical
Mr. Peter Rotich - Sales Manager

THE BOARD'S DECISION

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

BACKGROUND OF AWARD

Invitation to Tender:

The Procuring Entity advertised the Tender No. KPA/150/2012-13/PSM Biennial Contract for Supply of Tyres, Tubes & Associated Products in the, Standard news paper of 19th June, 2013 and The Peoples Newspaper of Tuesday 18th June,2013.

Tender Closing/Opening:

The tender closed and opened on 18th July, 2013 at 10.00 am.

This was an open tender where seven (7) firms responded to the invitation as listed below: -

1. Sameer Africa Limited
2. Rockey Africa Ltd
3. Fairratte Tyres & Auto Mart
4. GT Investment Limited
5. Kingsways Tyres Limited
6. Silverstone Tyres Limited
7. Auto Xpress Limited

EVALUATION

Evaluation of bids was conducted in three stages namely preliminary evaluation, technical evaluation and financial evaluation.

Preliminary Evaluation:

The preliminary evaluation was carried out in line with clause 2.17 of the tender document that provided guidelines / criteria for undertaking preliminary examination and determining the responsiveness of the tender.

After carrying out the initial assessment of each bid, the following three firms (3) failed to proceed to the next stage of preliminary evaluation for not complying with various mandatory requirements:

1. Rockey Africa Limited
2. GT Investment Limited
3. Silverstone Tyres (K) Limited

The committee evaluated the remaining four bidders as per their respective offers.

The firms that were subjected to second stage of the preliminary evaluation were:

1. Kingsways tyres Limited
2. Sameer Africa Limited
3. Auto Xpress Limited
4. Fairratte Tyres and Auto Mart Limited

The following three (3) firms were considered to be responsive on the various specific brands of tyres, tubes and accessories and qualified to proceed to the technical evaluation stage.

1. Sameer Africa Limited
2. Kingsways Tyres Limited
3. Auto Xpress Limited

Technical Evaluation:

The Committee proceeded to carry out technical evaluation for the three firms based on the tyre brand, tubes and accessories.

The Committee after analyzing the technical compliance for the tyres, tubes and accessories offered apportioned marks per clause 2.23.2 of the tender document.

The committee evaluated each product offered independently based on the criteria set in the Tender Document.

Recommendation

Based on the outcome of the technical evaluation three firms namely; Sameer Africa Limited; Kingsway Tyres Limited; and Auto Xpress Limited proceeded to the financial stage of evaluation for specific brands that they had qualified for in the technical evaluation.

Financial Evaluation:

Financial bid opening for Tender No. KPA/150/2012-13/PSM was held on Wednesday 21st August, 2013.

The Committee noted the comments advanced representatives of M/s Kingsway Tyres Limited and Auto Xpress Limited during the financial bid opening in regards to Apollo and Pirelli tyre brands. The Committee confirmed from the technical submissions that Apollo tyres were prequalified for Auto Xpress Tyres Limited and not Kingsways Tyres Limited as alleged. The Committee further confirmed that Pirelli tyres brand were found to be technically non-responsive.

Financial bids for the following firms were evaluated as per the guidelines given on the Tender Document under clause 2.17:

No.	Name of Bidder
1.	Sameer Africa Limited
2.	Kingsways Tyres Limited
3.	Auto Xpress Limited

The Evaluation Committee evaluated and compared the tender submissions of the above firms for the specific tyre brands, tubes and Accessories brands as earlier prequalified during the technical evaluation stage. The Committee analyzed the quoted prices and compared them against the three bidders where applicable.

The committee was guided by addendum number 2 of 27th June 2013 that accords 15 % preference to locally manufactured tyres. Subsequently, the following tyre sizes were recommended for award to M/s Sameer Africa Limited:

175/70 R14

315/80 R22.5

9.00-20

The Committee also evaluated the bidders total average annual tyre business for the reference period of 2012, 2011 and 2010. All the bidders annual average businesses exceeded their respective bid price by more than 10% as required.

Observations on Financial Evaluation

Sameer Africa Limited

The firm did not indicate the currency for their bid prices.

The firm's price schedule for goods page 1 of 4 item number one had some of its price and description details inscribed by hand whereas all the other details were printed.

Kingsways Tyres Limited

The firm did not indicate the currency for their bid price for:

- Terminal Engineering tyre shop tools, accessories and materials
- Conventional Cargo Equipment tyres and accessories.

The Committee proceeded to analyze the respective price submissions as guided by Section II of the instructions to tenderers Clause 2.11.1 of the Tender Document which states that "**Prices shall be quoted in**

Kenya Shillings unless otherwise specified in the Appendix to Instructions to Tenderers."

The Committee consolidated and tabulated the lowest evaluated tyres, tubes and accessories for each firm.

Recommendations

The Committee recommend award of each item in Tender No. KPA/150/2012-2013/PSM to the lowest evaluated bidder amongst the following firms:

1. Sameer Africa Limited
2. Kingsways Tyres Limited
3. Auto Xpress Limited

TENDER COMMITTEE DECISION

The Corporation Tender Committee (CTC) at its meeting No.006/2013-14 held on 20th September, 2013 awarded tender No. KPA/150/2012-13/PSM - Biennial Contracts for Supply of Tyres, Tubes & Associated Products to the following firms:

1. Sameer Africa Limited
2. Kingsways Tyres Limited
3. Auto Xpress Limited

Binders were notified of the outcome of the Tender vide letters dated 24th September, 2013.

THE REVIEW

The Request for Review was lodged by M/s Auto Xpress Limited on 8th October, 2013 in the matter of Tender No. . KPA/150/2012-13/PSM Biennial Contract for Supply of Tyres, Tubes & Associated Products.

The Applicant was represented by Mr. Mathew Maina, Technical Manager while the Procuring Entity was represented by Mr. Stephen Kyandih, Advocate. The Interested Party, M/s Sameer Africa Limited was represented by Mr. Allan Walmsley, General Manager.

Applicant requested the Board for orders to:

1. Nullify the award for the above tender.
2. Order a fresh evaluation of the tender from the beginning to make sure that evaluation is done in a fair and transparent manner.

PRELIMINARY OBJECTION

At the commencement of the hearing, the Board observed that the Procuring Entity had raised a preliminary objection as part of its response. It was agreed by consensus that since the Preliminary Objection touched on the Board's Jurisdiction, the preliminary issues had to be heard and determined first.

In its response the Procuring Entity submitted that it had an objection to the Request for Review being heard on merit on the ground that the Applicant has filed its request for review out of the statutory seven

days appeal window. It urged the Board to down its tools for lack of jurisdiction.

The Applicant did not submit a written response to the Procuring Entity's Preliminary Objection. However, in its oral submissions, the Applicant admitted that it received the letter of notification of award on 26th October, 2013 and that it filed its Request for Review on the 8th of October 2013.

The Board has perused the documents submitted before it and notes the following facts on record:

- i. That the Procuring Entity invited bidders through open tender through advertisement notice in The People newspaper of Tuesday 18th June, 2013 and the Standard newspaper of 19th June, 2013.
- ii. That the validity period for this tender was 150 days from the date of tender opening.
- iii. That the tenders closed/opened on 18th July, 2013, thus the 150 days tender validity period started running a day after opening and will lapse in 16th December, 2013.
- iv. That the evaluation of the tenders was conducted in August, 2013 and the Corporation Tender Committee meeting to adjudicate on the tender was held on 20th September, 2013 and approved the award.
- v. That both the successful and unsuccessful bidders were notified on 24th September, 2013.
- vi. That the Applicant being one of the Successful Bidders received its letter of notification of award on 26th September, 2013.

vii. That the instant Request for Review was filed on 8th October, 2013.

From the foregoing, the Board notes that the notifications letters to the successful and unsuccessful bidders were dated 24th September, 2013 and the Applicant received its notification letter on 26th September, 2013. This fact has been admitted by the Applicant. Counting from 26th September, 2013, the seven days appeal window, as provided Regulation 73 (2) (c)(ii) as read together with paragraph 20 of Legal Notice No. 106 of 18th June, 2013, therefore started running from 27th September, 2013 to 3rd October, 2013. The Board further notes that the Request for Review was lodged on 8th October, 2013.

The Board further notes that in its bundle of documents, the Procuring Entity submitted a copy of a letter of notification of award to the Applicant showing self collection / receipt by one Bharat Chanda on 26th September, 2013, a fact also admitted by the Applicant.

In light of the above, the Board holds that the notification to the bidders was done in accordance with Section 67 of the Act. This being the case, it follows that the seven days appeal window for the Applicant lapsed on 3rd October, 2013 as already noted above.

Going by the notification date of 26th September, 2013 therefore, the Board observes that the instant Request for Review was filed out of time and did not comply with the requirements of Regulation 73(2) (c)

(ii) as amended by paragraph 20 of Legal Notice No.106 of 18th June, 2013.

The Board is guided by The High Court Ruling in **Misc. Appn. No. 1160 of 2004 (D. Chandulal K. Vora Company Ltd v. Public Procurement Administrative Review Board)** in which the judge observed that the first thing that a court or a quasi judicial body must determine before hearing an Application is whether it has jurisdiction to hear a matter brought before it. In the cited case, the Honourable Judge quoted Justice Nyarangi in the case of **Owners of the Motor Vessel "Lillians" v. Caltex Oil (K) Ltd C.A. No.50 of 1989** in which it was ruled that:-

"Jurisdiction is everything and without it the court has no juris power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence A court of law downs its tools in respect to the matter before it the moment it holds the opinion that it is without jurisdiction".

The Board has also in several of its decisions held that it lacked jurisdiction where the Request for Review was filed out of time. In **PPARB Review No. 55/2009 (North Hydro GMBH & Co -vs- Kenya Electricity Generating Company Ltd)**, the Board held that it had no jurisdiction to hear a matter that was filed out of time.

In **PPARB Review No.3/2008 (Airport Research Centre vs. Kenya Airports Authority)** where a Request for Review was filed 1 day out of time, the Board held that it lacked jurisdiction to hear the Request for

Review. In view of the foregoing and guided by the stated authorities of the Courts and the Board cited here above, the Board finds that this matter was filed five days out of time in contravention of Regulation 73(2) (c) (ii) of the PPD Regulations, 2006 as amended by paragraph 20 of the Legal Notice 106 of 18th June, 2013. The Board therefore holds that it has no Jurisdiction to hear this Request for Review on merit.

Taking into consideration all the above, the Request for Review is hereby dismissed. The Board orders, pursuant to Section 98 of the Act that the procurement process may proceed.

The Board further direct that the Procuring Entity pay the requisite fee for filing a Preliminary Objection which it ought to have been paid at the time of filing the response containing the Preliminary Objection.

On the assumption by the Applicant that the receipt of its Application by the Secretariat was an indication that its papers were properly before the Board, the Board hold that it is not correct since it is only the Board which can pronounce itself on the issue of validity of filed documents and on its seizure of jurisdiction.

There are no orders as to costs.

Dated at Nairobi on this 24th day of October, 2013.

.....
CHAIR PERSON
PPARB

.....
SECRETARY
PPARB

