

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 37/2013 OF 8TH OCTOBER, 2013

BETWEEN

AUTOXPRESS LIMITED.....APPLICANT

AND

KENYA PORTS AUTHORITYPROCURING ENTITY

Review against the decision of the Tender Committee of Kenya Ports Authority dated 24th September, 2013 in the matter of Tender No. **KPA/008/2013-14/TE for Supply of 84 No. Tyres for Terminal Tractors.**

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. 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 Parties

Mr. Allan Walmsley - General Manager, Sameer Africa
Mr. Githinji Muteru - Technical, Sameer Africa
Mr. Peter Rotich - Accounts Manager, Sameer Africa
Mr. Joseph Wainaina - Sales representative, Silverstone Tyres

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 Tender No. **KPA/008/2013-14/TE Supply of 84 no. Tyres for Terminal Tractors** in The Peoples Newspaper of Tuesday 18th June, 2013 and Standard Newspaper of 19th June, 2013.

Closing/Opening:

The tender closed/opened on 18th July, 2013 at 10.00 am. Bids were received from three firms namely:

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

EVALUATION

Evaluation was conducted in two (2) stages namely preliminary evaluation and technical evaluation.

Stage 1 - Preliminary Evaluation

This was based on the mandatory requirements of the tender as provided under clause 2.17 (i to x) of the Tender Document. All the three firms passed the preliminary evaluation stage

Stage 2 - DETAILED MANDATORY TECHNICAL EVALUATION

The evaluation Committee conducted a detailed technical evaluation as provided in clause 2, 23.2 in the tender document. And the results is as shown on Table B below.

Table B – Technical Evaluation Results

Tender Technical Specifications Requirements and Names of Bidders		Sameer Africa	Auto Xpress Ltd	Kingsway Tyres
Bidders shall include in their submissions Tyre manufacturer Brochures, Catalogues and Data sheets to prove compliance to specification. (MANDATORY):				
Size	280/75R22.5 168A8	X	√	√
Construction	Radial steel cord tubeless	√	√	√
Maximum Speed	40KM/H SPEED INDEX - A8	√	√	√
Application	Industrial	√	X	√
Minimum Load Capacity Single	5600KG.	√	X	√
Pressure	140PSI.	√	X	√
Tread Pattern	RIB-LUG	X	X	√
Minimum Tread Depth (Mm)	30MM	√	√	√
<i>NB: Only Candidates who will be found to be compliant to the above will be considered for price comparison.</i>				
REMARKS		Non Responsive	Non Responsive	Responsive

Evaluation Committee Observation

During the technical evaluation the committee observed the following about the bidders:-

M/s Sameer Africa

1. They provided tyre size **300/80R 22.5** instead of **280/75 R22.5 168A8** as specified in the Tender Document.
2. They provided tread pattern of RIB instead of RIB-LUG, as specified in the Tender Document.

M/s Auto Xpress Ltd

1. Duly filled and completed Manufacturer's Authorization Form in the format provided herein where the bidder is not the Manufacturer of tyres and tubes , the authorization provided was for Tender No. **KPA/150/2012-13/PSM - Supply of Tyres , Tubes& Associated Products** and **NOT** Tender No. **KPA/008/2013-14/TE**
2. The tyre Application is Industrial but this was not mentioned in the Auto Xpress Ltd document.
3. Minimum single load capacity required is 5600KG, but this was not mentioned in the Auto Xpress Ltd document.
4. They did not mention the tyre tread pattern whereas the tender document specifies a RIB-LUG tread pattern,

M/s Kingsway Tyres Ltd

Ms. Kingsway complied with all the specified minimum mandatory technical specifications.

Evaluation Committee Recommendation

Based on the technical evaluation summaries in table B above, the committee recommended the award to **M/s. Kingsway Tyres Ltd** at their quoted price of **Kshs 10,164,000.00** being the most responsive bidder.

TENDER COMMITTEE DECISION

The Corporation Tender Committee (CTC) meeting No.006/2013-14 held on 20th September, 2013 awarded tender No. **KPA/008/2013-14/TE for Supply of 84 No. Tyres for Terminal Tractors** to **M/s Sameer Africa Limited** at their quoted price of **Kshs 7,840,000.00**.

The successful bidder and the unsuccessful bidders were notified vide letters dated 20th 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/008/2013-14/TE for Supply of 84 No. Tyres for Terminal Tractors.**

The Applicant was represented by Mr. Mathew Maina, Technical Manager while the Procuring Entity was represented by Mr. Stephen Kyandih, Advocate. The Interested Parties were; M/s Sameer Africa Limited represented by Mr. Allan Walmsley, General Manager, AND Silverstone Tyres Limited represented by Mr. Joseph Wainaina.

The Applicant requests 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 stated in its response that it would raise a preliminary objection during the hearing on a point of Law. It argued that the Applicant was in breach of the provisions of Regulation 73(2)(c) (ii) of the Public Procurement Regulations, 2006, as read together with Paragraph 20 of Legal Notice No. 106 of 18th June, 2013 regarding the period for filing a request for review. The Procuring Entity urged the Board to down its tools as it lacks Jurisdiction to hear the matter in view of the mandatory requirement of the law on the period for filing a request for review.

On its part the Applicant did not dispute the fact that it received the letter of notification on 26th September 2013 and that it filed its Request for Review on 8th October, 2013.

The Board takes note of the following undisputed facts about the subject Tender:

1. That the Procuring Entity invited bidders through restricted tendering following approval by Corporation Tender Committee (CTC) meeting No.025/2012-13 held on 13th June,2013 after the CTC declined to approve direct procurement from M/s Kingsway Tyres Limited.
2. That participation in the Tender was restricted to tyre dealers for brands e.g. Michelin, Good Year and Pirelli.
3. The tenders closed/opened on 22nd July, 2013.
4. That M/s Sameer Africa, Auto Xpress and Kingsway Tyres Limited submitted bids.
5. That the Corporation Tender Committee, at its meeting held on 20th September, 2013 adjudicated the tender and approved the award to Sameer Africa.
6. That both the successful and unsuccessful bidders were notified on 24th September, 2013.
7. That the Applicant received its notification of award on 26th September, 2013.
8. That the instant Request for Review was filed on 8th October, 2013.

The Board further notes that Section 73 (2) (c) (ii) as amended by Paragraph 20 of legal Notice No. 106 of 18th June, 2013 which provides that

"a Request for Review shall be made within seven-days of the notification under sections 67 or 83 of Act."

From the foregoing, the Board notes that the results of the Tender were communicated to bidders on 24th September, 2013 and received by the Applicant on 26th September, 2013. This fact was admitted by the Applicant in its oral submissions. The Board further notes that the Law has set the period within which a request for review must be filed. It follows therefore that the time for filing a request for review in this matter lapsed on 3rd October, 2013.

The Request for Review before the Board was filed on 8th October, 2013, which is five days after the period set by law had lapsed.

The Board notes that the reason why the Law has set strict and clear timelines on matters of procurement is so that the Public Entities may be in a position to utilize resources allocated to them within the budget cycle and hence the need to complete the procurement process in the shortest period possible.

The Board is alive to the Decisions made by it in previous matters before it on Jurisdiction and also Court decisions touching on the issue of Jurisdiction. In the Case of **Owners of the Motor Vessel "Lillians" v. Caltex Oil (K) Ltd (C. A. No.50 of 1989)** Justice Nyarangi ruled 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 said case, the Judge held as follows:-

“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”.

This Board has also been forced to down its tools in various matters for want of Jurisdiction where such matters were filed outside the window period allowed by Law.

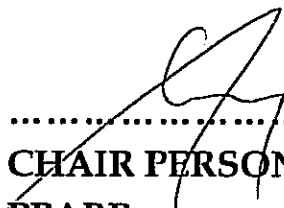
In the case of **Airport Research Centre Vs Kenya Airports Authority (PARB Application No. 3 of 2008)**, the Board held that it lacked Jurisdiction to hear a matter that had been filed one day outside the window period. Similarly, in the matter **“Voith Hydro GMBH & Co. Vs Kenya Electricity Generating Co. Ltd (PPARB Application No. 55 of 2009)”** the Board held that it lacked Jurisdiction to hear a matter where the Request for Review was filed outside the period set by Law.

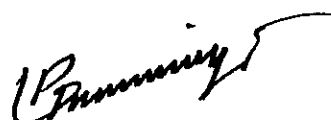
From the foregoing, the Board holds that it lacks Jurisdiction to hear the instant Request for Review on merit as the same was filed in violation of Regulation 73(2) (c) (ii) as amended by paragraph 20 of Legal Notice No. 20 of 18th June, 2013.

The Board therefore orders that the Request for Review is hereby dismissed for want of Jurisdiction with no orders as to costs.

The Board further orders that the procurement process may proceed.

Dated at Nairobi on this 25th day of October, 2013.


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CHAIR PERSON
PPARB


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SECRETARY
PPARB

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